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The Multilateral Trade Regime and Dispute Settlement

- Aspects of the WTO Dispute Settlement System -

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Summary

In the mid-1980s, the temporary framework surrounding the General Agreement on Tariffs and Trade had, to a large extent, out-lived itself. There was a need to regulate new areas of trade and to create a new dispute settlement procedure. From these trade negotiations, the World Trade Organization was created, although there was no mandate to negotiate a new institution. The WTO is a permanent international organization with an inter-governmental character wherein the Ministerial Conference is the highest decision-making body. Every-day-work is conducted by the General Council, which also convenes as the Dispute Settlement Body and the Trade Policy Review Mechanism.

The key elements of the new dispute settlement procedure include legalization, predictability, shorter time constraints, confidentiality, and the possibility to appeal. WTO members must first resort to consultation before requesting the formation of a panel. Panels consist of 3 to 5 panelists and are chosen from a list of suitable candidates. The *ad hoc* character of the panels is a weakness in the system that could be improved with a more permanent structure. The General Council, meeting as the Dispute Settlement Body, adopts panel reports unless there is a consensus *not* to adopt them. The Standing Appellate Body consists of 7 permanent members and each appeal is heard by a division consisting of 3 members. One of the major weaknesses in the appellate review is the fact that there is no remand power. A plaintiff thus loses the opportunity for a true appeal of a dispute that ought to be remanded.

The different problem areas of the dispute settlement system include the total confidentiality of the proceedings, and above all, the lack of transparency regarding the behavior of panelists and Appellate Body members. In addition, the WTO lacks enforcement powers and therefore has to rely on the good faith of members to comply. Another problem is the notion of non-violation complaints and situation complaints. In these types of complaints no explicit provision of a covered agreement has been violated yet a WTO member feels that benefits accruing to it directly or indirectly under the GATT 1947 has been nullified or impaired, or, that the attainment of any objective of the GATT has been impeded. This is in conflict with the obligations included in Articles 3:2 and 3:5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. These provisions state that a ruling or recommendation of the Dispute Settlement Body cannot add to or diminish the rights and obligations provided in the covered agreements nor can they nullify or impair benefits accruing to members under these agreements or impede the attainment of any objective of them. Rulings and recommendations based on non-violation or situation complaints are not binding.

There is no *stare decisis* in international public law and decisions by WTO dispute settlement bodies are therefore only binding to the dispute in question. These decisions cannot expand the scope of the covered agreements according to Articles 3:2 and 3:5 DSU. Other decisions by WTO organs, e.g. the Ministerial meeting, do not seem to impose more obligations on the WTO members than they themselves have already agreed upon. This is a result of the inter-governmental character, and the lack of enforcement power of the WTO.

Transparency forms an important part of the multilateral trade regime. Although requirements of publicity are included in many of the covered agreements, there is a predominance of confidentiality and secrecy within the dispute settlement system. This confidentiality is necessary to some extent, but also hurts the confidence in the system, especially concerning the impartiality of panelists and Appellate Body members. A way to increase transparency would be to create a monitoring body or an ombudsman to hear complaints about alleged abuse of power or impropriety in dispute settlement proceedings.

After the creation of the WTO dispute settlement system, an increasing amount of initiated disputes has been seen as a sign of greater confidence in the new system. In opposition, Eric Reinhardt presented a quantified analysis of dispute initiation under both the GATT and the WTO claiming that the increasing number of initiated disputes instead represents a challenge to the system. He based his claim on different aspects of the increased number of initiated disputes. Although many of his conclusions are valid, there are also other explanations for these aspects that might cast doubt over his thesis. First, increasing dispute initiation may be used as a “threat” for promoting settling “out of court” thus being more cost-efficient. Second, transaction costs in the new system are *de jure* lower although they might not be *de facto* lower. Third, and finally, due to the fact that the new procedure is more foreseeable this should mean that there would be less disputes initiated since WTO members would be able to estimate the cost and benefits of initiating a dispute more accurately. The increasing number of initiated disputes indicates that the cost of a dispute is lower than the benefit, thus promoting confidence in the system.

Abbreviations

AB	Standing Appellate Body
DFA	Draft Final Act
DSB	Dispute Settlement Body (of the WTO)
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECJ	European Court of Justice
EEC	European Economic Community
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GATT 1947	GATT concluded in 1947
GATT 1994	GATT incorporated into the 1994 Agreement on the WTO
GDP	Gross Domestic Product
GSP	Generalized System of Preferences
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICITO	Interim Commission for the International Trade Organization
IMF	International Monetary Fund
ITO	International Trade Organization
MFN	Most-favored-nation rule
MTO	Multilateral Trade Organization
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NIO	Nullification, impairment or, impediment of the attainment of an objective
OEEC	Organization for European Economic Cooperation
OECD	Organization for Economic Cooperation and Development
RC	Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes
TPRM	Trade Policy Review Mechanism
TRIPs	WTO Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	UN Conference on Trade and Development
US	United States of America
WIPO	World Intellectual Property Organization
WP	Working Procedure for Appellate Review
WTO	World Trade Organization

1 Introduction

With the protectionism of the 1930s in fresh memory, a new global economic regime was created after World War II in the shape of the General Agreement on Tariffs and Trade (GATT). The main purpose was to lower barriers to trade among the contracting parties, mainly in the form of tariffs, and to create a forum for further trade liberalization and trade dispute settlement. This dispute settlement procedure evolved through practice over the years. With a growing number of contracting parties to GATT 1947, an increase in global trade, and the problems inherent in the existing dispute settlement procedure, voices were raised to launch negotiations in not yet covered trade areas and to replace the dispute settlement procedure with a more workable procedure. The negotiations of the Uruguay Round were completed in April 1994 in Marrakesh, Morocco. Important institutional agreements and agreements regarding services and intellectual property rights were reached. The World Trade Organization (WTO) replaced GATT as the central institution for international trade cooperation in the world. Today the organization has 135 members¹. A more important result of the Uruguay Round, for the sake of this paper, was the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). With the implementation of this new procedure trade analysts predicted an increasing reliance on the WTO system as a tool (threat) in bilateral and multilateral trade negotiation. Since 1995, a growing number of cases have been filed indicating to some scholars a greater confidence in the new system. A recent statistical analysis of dispute initiation under the WTO by Eric Reinhardt reached the opposite conclusion claiming that the increase in dispute initiation was not due to confidence in the system, but rather represented a challenge to the system.

1.1 Introduction of the Paper, Thesis and Structure

With the growing globalization of the world economy, countries today experience a loss of sovereignty in favor of international organizations. Decisions made by policy-makers in these organizations will in some cases have a large impact on domestic policy among the member countries. This is very clear within the European Union (EU), but also within the framework of the WTO. Despite this, most people lack a working knowledge of the WTO beyond the fact that it is related to trade. Therefore, this paper purports to present the WTO and part of its policy-making from a dispute settlement perspective in order to promote further research about the legal framework of the organization. This presentation is concentrated on conditions applying to the United States of America (US) and the EU.

¹ Jackson, John, "Designing and implementing Effective Dispute Settlement Procedures", pp.161-162 from Krueger, Anne O. (ed.), "The WTO as an International Organization", (Chicago: University of Chicago Press, 1998).

The first part of this paper presents the development of the WTO through the International Trade Organization (ITO) and GATT. This presentation is made primarily from a political science perspective putting the development into a historical-political light. I feel that this is necessary in order to have an understanding for the direction that the development of the organization has taken and for the conflicts arising today within the organization, *inter alia*, the debate over linking social policy, environmental and labor issues with trade. It also includes an overview of the institutional legal framework and the legal principles guiding the different trade agreements. This is also important in order to realize how certain principles affect the entire system. The second, and major, part of this paper describes the procedural rules surrounding dispute settlement. This is intended as a handbook for identifying rules governing the procedure, and also to point out problem areas. The final part argues that the higher number of disputes initiated under the WTO, as compared to the GATT, stems from a greater confidence in the new system. This part evaluates Eric Reinhardt's claim that the greater number of initiated disputes is, in fact, a challenge to the system.

1.2 Means, Method and Sources

In the first part of this paper, articles, books and documents published by the Swedish government, research institutions, different academic scholars and the WTO were used. The vast majority of these sources were written from a political science or economic perspective and they were available in considerable numbers. At best, they can be considered to be secondary sources. It turned out to be harder to find literature discussing the material rules governing the WTO dispute settlement procedure. The main reason for this is probably the fact that it has only been working since the beginning of 1995. Instead, the presentation and analysis are based almost entirely on primary legal documents. I have also discussed aspects of this paper with assistant professor Michael J. Hiscox at the University of California, San Diego Department of Political Science, US, and Jean Monnet professor Carl Michael Quitzow at the University of Lund Faculty of Law, Sweden.

My comments are indicated by the fact that no reference exists to literature or other sources. The paper's format follows the template provided by the University of Lund Faculty of Law. Abbreviations and references to legal documents are made in accordance with standards applicable to the issue in question.

1.3 Limitation

The material presented and the interpretations made in this paper are entirely my own views and does not necessarily represent the opinion of the Faculty of Law at the University of Lund, Sweden, or the opinion of the sources quoted or cited. I wish to apologize for any accidental misinterpretation or misrepresentation of sources.

Areas of interest that fall outside the scope of this paper are only discussed briefly in order to bring the problem to the attention of the reader or to indicate that they represent an interesting area for further research. In most cases, a reference for a more elaborate discussion of the issue is provided. These areas include, *inter alia*, the material rules in WTO trade agreements, the future development of the WTO, the domestic aspect of decisions made by the WTO, the WTO's position in public international law, the treaty-making power of the US and the EU, and economic aspects of the dispute settlement procedure.

2 The Development of the ITO, GATT and the WTO

2.1 The Agenda for the ITO

The US and Great Britain both played leading roles in building an international trading system suitable for the post-World War II world.² During the 1920s and the 1930s, protectionist policies made the economic depression worse and also led to conflicts between countries. It was urgent to create rules for international economic cooperation, and to have powerful organizations for enforcement and surveillance.³ Separate trade negotiations between the two countries began in 1943 but an agreement was never reached due to disagreement over vital issues.⁴ Instead, in July 1944, representatives from the US, Great Britain and 42 other countries met in Bretton Woods, New Hampshire, US, to plan for the postwar economy. A consensus was reached to promote free trade, nondiscrimination and stable exchange rates.⁵ The Bretton Woods system was based on the intention to set up three separate organizations. The International Bank for Reconstruction and Development (IBRD) was supposed to finance reconstruction after World War II while the International Monetary Fund (IMF) was in charge of an improved global currency cooperation. The ITO was going to be a special agency of the United Nations (UN) at the center of the new liberalized post-war trading system.⁶ In the end of 1945, well after the completion of the Bretton Woods Agreement, a document was released in Washington D.C. including a draft Charter for the ITO and the General Agreement on Tariffs and Trade (GATT 1947).⁷

The draft Charter for the ITO was finally presented and agreed upon at a UN Conference on Trade and Employment in Havana in March 1948 but ratification on the domestic level proved hard.⁸ The Charter compromises had already been negotiated during the preparatory process and the Charter provided rules relating to employment, development, antitrust, agriculture, commodity agreements, restrictive business practices, international investment and services, but above all world trade disciplines.⁹ No country

² Ostry, Sylvia, "Reinforcing the WTO", (Group of Thirty, Occasional Paper 56, 1998), p.3.

³ Sjöstedt, Gunnar, "IMF, WTO, Världsbanken", (Stockholm: Utrikespolitiska Institutet, Organisationer i fickformat, 1995), p.3 (Sjöstedt I). Alvin, Lennart, "GATT inför Uruguay-rundans slutförhandlingar, (Utrikesdepartementet informerar 1992:4), p.7.

⁴ Ostry, pp. 4-5.

⁵ McCormick, John, "The European Union – Politics and Policies", (Westview Press, 1996), p.33.

⁶ Sjöstedt, Gunnar, "GATT i omvandling: mot förstärkning eller sammanbrott?", (Utrikespolitiska Institutet, Världspolitikens dagsfrågor, 1993:6), pp.6-7 (Sjöstedt II).

⁷ Ostry, p.5.

⁸ Trading into the future: WTO, p.8, (WTO Information and Media Relations Division, 1995).

⁹ Sjöstedt I, p.7. Ostry, p.5.

took action to ratify the ITO charter after the Havana meeting. Instead, they waited for the US to ratify it first. In 1949, President Truman would need an extension of his negotiation authority and therefore decided not to send the ITO to the Congress in 1948 due to lack of support and strong opposition.¹⁰ The ITO represented too much government intervention for free traders and too much free trade for protectionists. With the start of the Korean War, US interest in global cooperation waned and the government announced in 1950 that it would not seek congressional ratification of the Havana Charter.¹¹ The ITO was therefore dead.

2.2 GATT

2.2.1 Development

Tariff negotiations were opened among the 23 founding GATT¹² contracting parties in 1946. These concessions were protected by an early and provisional acceptance of some of the trade rules in the ITO Charter.¹³ The provisional agreement included parts of the ITO Charter acceptable to the US and was never even put through the US Congress for approval.¹⁴ The General Agreement on Tariffs and Trade (GATT 1947) was signed in Geneva October 30th 1947 by 23 states, but formation of the ITO failed, leaving the GATT without an institutional frame. Over time though, the GATT was given an institutional structure through practice. Starting in January 1948, GATT members negotiated terms of trade in different so-called rounds, removing barriers to trade through reciprocal concessions.¹⁵

GATT was an expanding “organization” and the de-colonization process added more members. For the most part this was accomplished without problems.¹⁶ Even outside the GATT system, GATT rules still spread due to the fact that countries by and large followed the GATT practice.¹⁷ During the 1960s and 1970s, the development of international trade liberalization was plagued by the Cold War conflict. In addition, GATT was perceived as an organ for industrialized countries. As a result, cooperation between the eastern bloc and certain Southern countries led to the creation of the UN Conference on Trade and Development (UNCTAD) in 1964. That same year, during the Kennedy Round negotiations, Part IV of the GATT 1947 was introduced containing the alleviation of trade policy obligations for

¹⁰ The US Congress has the exclusive power to regulate commerce with foreign nations according to Article 1 Section 8:3 of the US Constitution. Part of this power can be delegated to the executive branch (the president).

¹¹ Ostry, p.6.

¹² GATT refers to the institutional structure while GATT 1947 and GATT 1994 refer to the trade agreements concluded the same years.

¹³ Trading into the future: WTO, p.8.

¹⁴ Ostry, p.7.

¹⁵ McCormick, pp.33-34.

¹⁶ In 1956 during the Geneva Round negotiations, however, the adoption of Japan into the GATT system proved to be a matter for dispute.

¹⁷ Sjöstedt II, pp.9-10.

developing countries and the creation of the Committee on Trade and Development to deal with trade issues related to developing countries.¹⁸ The oil-crisis in the beginning of the 1970s saw growing protectionism and trade policy moving inside domestic borders again. The 1973-1979 Tokyo Round negotiations therefore included trade impeding barriers arising from domestic policies such as subsidies, government procurement and regulation, regulation of product standards, and strengthening of anti-dumping rules. A more fundamental change triggered by the Tokyo Round was the legalization of the trading system.¹⁹ Once again in the 1980s, world trade policy saw a movement away from political issues towards de-regulation and a belief in market economy. The Uruguay Round negotiations were launched in 1986.²⁰

2.2.2 Organization, Structure and Tasks

The institutional framework surrounding GATT was never formalized. By comparison, the other Bretton Woods institutions had financial and staff resources with a clear mission and the capacity to carry it out.²¹ In GATT, a standing administrative body dealt with the management of the agreement, dispute settlement and the development of an international trading system. There was also a non-permanent, but re-occurring body used for multilateral trade negotiations in order to develop and change GATT 1947 in accordance with the agreement.²²

GATT was not a real multilateral organization and could therefore not have members. Instead, members were referred to as the contracting parties.²³ In order to become a member, a country had to be able to provide extensive and accurate information on domestic economic development and maintain a convertible currency or otherwise maintain a reasonable balance between exports and imports.²⁴

The highest decision-making body consisted of the Contracting Parties' Conference. The contracting parties met once a year for a session in November or December, represented by a high ranking civil servant or the head of their permanent delegation to GATT in Geneva, the "ambassador".²⁵ In between sessions, the Council of Representatives normally met once every month making necessary every-day decisions. Members were generally represented by their respective ambassadors. Subordinate to the Council, a number of committees each dealt with a special problem or policy area. There were also a number of special committees dealing with the internal GATT finances and administration. The decision-making committees and

¹⁸ Sjöstedt II, pp.11-12.

¹⁹ Ostry, p.8.

²⁰ Sjöstedt I, p.11.

²¹ Ostry, p.1.

²² Sjöstedt II, p.15.

²³ For the sake of this paper the contracting parties will be referred to as members. Sjöstedt II, p.8.

²⁴ Sjöstedt II, p.9.

²⁵ Sjöstedt II, p.15.

institutions were supported by a Secretariat.²⁶ The Secretariat did not have the same amount of power as the UN Secretariat and was subordinate to the Interim Commission for the International Trade Organization (ICITO), although it was also subordinate to the contracting parties. A Director-General appointed by the contracting parties led the GATT Secretariat supported by some minor administrative bodies. The Secretariat was divided into two Departments each lead by a Deputy Director-General. Each department, in turn consisted of six divisions.²⁷

2.2.3 Multilateral Trade Negotiations²⁸

Some changes in the GATT system could take place in the every day administration of the system by the permanent bodies.²⁹ More widespread changes had to be discussed in multilateral trade negotiation rounds. The negotiation rounds were not administered by a permanent body. Instead, a special institution was created for each separate round. The highest decision-making body was the Ministerial Meeting, normally consisting of the members' trade or financial ministers. Each round generally started and ended with a Ministerial Meeting. During the negotiation work, the Trade Negotiations Committee was the highest decision-making body where members were normally represented by the head of each respective delegation. Their task was to have overall control and an overview of the negotiations. The Trade Negotiations Committee had few meetings and the main work with the negotiations took place in different Negotiation Groups. Each Negotiation Group was responsible for a certain interest area and the number of groups depended on the agenda. Sub-groups could be set up on demand. The corresponding unit in the GATT Secretariat supported the Negotiation Groups. The Secretariat's involvement in the negotiations was separated from the every day administration of the GATT. Negotiations were conducted according to certain principles. The rule of principal supplier meant that negotiations were concentrated on large countries. An agreement would then incorporate other countries through the "most-favored-nation" rule (MFN). The disadvantage with this procedure was the fact that the larger members represented a small part of the total members.³⁰ Another principle was that bargaining with bids and demands would be limited to the Negotiation Group in question. Package deals were normally negotiated in the end phase of a round or as bilateral agreements between two key members.³¹

²⁶ The Secretariat was a relatively small administrative body. Late 1991 and early 1992, the Secretariat had a staff of 440 people out of which 195 were in management positions. The GATT budget at the same time was US \$107 million. Sjöstedt II, p.17.

²⁷ Sjöstedt II, pp.8, 16-17.

²⁸ So far, there has been no negotiation rounds under the WTO but it is reasonable to assume that the GATT negotiation system will persist.

²⁹ The Contracting Parties' Conference could e.g. elect new members.

³⁰ Compare this to the group system used in UNCTAD where developing countries can participate actively.

³¹ Sjöstedt II, pp.18-20, 21-22.

The first negotiation rounds in Annecy, France 1949, Torquay, Great Britain 1951, and Geneva, Switzerland 1956, mainly dealt with tariffs and the practical side of GATT, e.g. membership issues and the provisional status of the agreement. The Dillon Round 1960-1961 in Geneva, Switzerland, did not lead to any major results despite an ambitious plan.³² It was not until the Kennedy Round of 1964-1967 that any new ground was broken, in this case regarding a new Anti-Dumping Agreement. Later on, during the Tokyo Round negotiations in 1973-1979, the GATT system was improved and extended through, *inter alia*, tariff reductions, an extensive legalization and an improved dispute settlement mechanism.³³ Although no agreements were reached regarding farm trade and “safeguards”, a number of codes of conduct³⁴ dealing with non-tariff barriers emerged.³⁵

2.3 WTO

2.3.1 Development

With the changing world trade environment and a growing globalization, the GATT 1947 no longer was sufficient to regulate world trade. New areas of business were exploding such as international investment and trade in services. In addition, the institutional structure of GATT and its dispute settlement system called for reform.³⁶ Since the early 1980s, the US had tried to launch a new negotiation round due to growing dissatisfaction with the Tokyo Round’s results in conjunction with rising protectionism in the American Congress and an overvalued dollar. The Uruguay Round was finally launched in Punta del Este, Uruguay September 1986, but the agreement to negotiate did not contain any authorization for the establishment of a new trade organization.³⁷

During the Uruguay Round negotiations, no new barriers to trade could be erected (standstill) and measures in conflict with GATT 1947 had to be removed (rollback).³⁸ At the time of the “Mid-term Review” taking place in Montreal, Canada in 1989, the Ministerial Meeting agreed on the mandate for the second stage of the round and also some early results from the negotiations. These agreements included concessions on market access for tropical products, an improved dispute settlement procedure, agricultural aid, and the establishment of the Trade Policy Review Mechanism (TPRM). A proposal by Canada for the establishment of a new multilateral organization

³² Sjöstedt II, p.19.

³³ Trading into the future: WTO, p.9.

³⁴ These codes included Subsidies and Countervailing Measures, Technical Barriers to Trade, Import Licensing Procedures, Government Procurement, Customs Valuation, Anti-dumping, Bovine Meat Arrangement, International Dairy Arrangement, and Trade in Civil Aircraft.

³⁵ Alvin, p.13. Trading into the future: WTO, p.9.

³⁶ Trading into the future: WTO, p.10.

³⁷ Ostry, p.11. Utrikesdepartementet, “Uruguayrundan – från GATT till WTO”, p.9, (Utrikesdepartementet informerar 1994:2).

³⁸ Utrikesdepartementet, p.14.

was put forward in April 1990. This proposal was supported by the European Economic Communities (EEC). The preliminary name was the Multilateral Trade Organization (MTO), which was changed in the end by a proposal from the US.³⁹ Negotiations were to be concluded in Brussels in December 1990 but failed due to problems reaching an agreement on the nature of commitments to future agricultural trade reform.⁴⁰ In December 1991 a Draft Final Act (DFA) was presented and members purported to finish the Round by Easter the following year.⁴¹ But, differences between the US and the EEC made the negotiations last until December 15th 1993. On April 15th 1994, the Agreement Establishing the World Trade Organization (WTO Agreement) was signed in Marrakesh, Morocco by 123 participating governments.⁴² The WTO Agreement also contained the establishment of an interim committee responsible for the management of the organization until the WTO formally existed.⁴³ Observers saw the WTO as something close to the initial idea of a sister organization to the Bretton-Woods institutions.⁴⁴ The WTO functioned parallel to the GATT from January 1st 1995 until the WTO superseded GATT in January 1996.⁴⁵

The biggest problems in the Uruguay Round primarily concerned the previously unfinished business of reaching an agreement on agriculture and trade in services between the US and the EEC.⁴⁶ Another important aspect was the US demand to include new agenda items into the GATT structure such as trade in services, intellectual property rights and international investments.⁴⁷ This demand was also one of the catalysts in starting the negotiations in the first place. But some members of GATT were unwilling to incorporate new agreements such as the General Agreement on Trade in Services (GATS) in GATT 1947. Instead, a new umbrella organization was created in order to maintain uniformity.⁴⁸ At the end of the negotiations, certain issues remained unsettled. These areas included telecommunications, movement of people performing services, maritime transports and financial services. In order to finish these negotiations, four negotiation groups were created and incorporated under the WTO.⁴⁹

Today the WTO is preparing to launch a new negotiation round. On the forefront of the agenda are environmental and social policy issues. Industrialized countries, led by the US, want to use the WTO structure in

³⁹ Ostry, p.19. Utrikesdepartementet, p.9.

⁴⁰ Alvin, p.14. Trading into the future: WTO, p.11.

⁴¹ Alvin, p.14.

⁴² McCormick, pp.33-34.

⁴³ Utrikesdepartementet, p.9.

⁴⁴ Utrikesdepartementet, p.8.

⁴⁵ McCormick, pp.33-34

⁴⁶ Sjöstedt II, p.4, Ostry, p.11, Utrikesdepartementet, p.8.

⁴⁷ Trade in services had grown since GATT 1947 and the US was the leading exporter in services, investments and technology at the time. Intellectual property is also covered by the World Intellectual Property Organization (WIPO). Ostry, p.12.

⁴⁸ Sjöstedt II, p.30.

⁴⁹ Sjöstedt I, p.33.

order to link trade negotiations with labor policy or environmental issues.⁵⁰ Other issues include the lack of transparency in the organization and whether or not China is to become a member.^{51 52} Trade policy officials hoped to settle some of these issues in the first negotiation round of the new millennium starting with the 3rd Ministerial Conference in December 1999 in Seattle, US.⁵³ In Seattle, negotiations came under a Committee of the Whole with specific subjects handled by Working Groups on: agriculture; implementation and rule; market access; Singapore agenda and other issues; and systemic issues.⁵⁴ For the first time, a new Working Group on Trade and Labor Standards also met in order to discuss a proposal for creating either such a Working Group within the WTO or a body operated jointly by a number of international organizations. A number of developing countries opposed the creation of such a body.⁵⁵ Another novelty was the first assembly of legislators and parliamentaries held in parallel with the Ministerial Conference.⁵⁶ Unfortunately, the Seattle conference was not the success hoped for in terms of results achieved. Agreements proved hard to reach and left behind an indication of a split between developing and developed WTO members as to what direction the WTO is to take in the future. The General Council met in mid-December to discuss how to proceed with issues outstanding from Seattle but decided to postpone such a decision until early 2000.⁵⁷

2.3.2 Organization, Structure and Tasks

Unlike GATT, the WTO is a true international organization with a structure and legal framework agreed upon in a multilateral document.⁵⁸ The WTO is

⁵⁰ Such a linkage might deprive developing countries of their comparative advantage and could be seen as a sign of growing protectionism rather than a concern for workers or the environment. For a discussion on comparative advantage, see Krugman, Paul R. & Obstfeld, Maurice, "International Economics Theory and Policy", 4th ed., (Addison-Wesley, 1997), pp.13-37, Cohen, Stephen et. al., "Economic Theories of international Trade", in Fundamentals of US Foreign Trade Policy, (Boulder: Westview Press, 1996) pp.55-82. For a discussion on linkage, see Goldstein, Judith, pp. 133-52 and Anderson, Kym, pp. 231-55 in Krueger.

⁵¹ This is similar to the debate about the democratic deficit within the European Union. See Steiner, Josephine & Woods, Lorna, "Textbook on EC Law", 5th ed., (Blackstone Press Limited, 1997), pp. 20, 31, and Pålsson, Sten & Quitzow, Carl Michael, "EG-rätten – ny rättskälla i Sverige", (Stockholm: Publica, 1993), p.83.

⁵² China applied for "membership" in GATT in 1986 but so far has not been considered as having fulfilled the requirements for becoming a member. One of the major problems has been China's political relations with the world, and in particular the most powerful WTO members, e.g. the US and the EU. On November 15th 1999, an agreement on tariff alleviation for American products on the Chinese market was reached between the US and China. If similar agreements can be reached between China and key members of the WTO, China is likely to be able to become a member. Ystads Allehanda, 11/16/99, p.28.

⁵³ The conference took place November 30th to December 3rd 1999. The official homepage can be found at http://www.wto.org/wto/seattle/mindex_e.htm accessed 01/03/00.

⁵⁴ http://www.wto.org/wto/seattle/english/press_e/press160.htm accessed 01/03/00.

⁵⁵ http://www.wto.org/wto/seattle/english/about_e/summary_02.htm accessed 01/03/00.

⁵⁶ http://www.wto.org/wto/seattle/english/press_e/press160.htm accessed 01/03/00.

⁵⁷ <http://www.wto.org> accessed 01/03/00.

⁵⁸ For an overview of the WTO structure, see Appendix 1.

lead by a Ministerial Conference required to meet at least every two years. The Ministerial Conference can decide on all matters under any of the covered multilateral agreements, Article IV (1) WTO Agreement.⁵⁹ In comparison, the highest decision-making body of GATT normally consisted of civil servants while ministers only met during negotiation rounds.⁶⁰ This increased use of representatives from the members' governments may be seen as an indication of the importance of global trade issues in domestic policy.⁶¹ The General Council, consisting of all the WTO members manages day-to-day business. In general, members are represented by staff from their diplomatic mission to the WTO in Geneva, sometimes headed by a special Ambassador. The General Council also convenes as the Dispute Settlement Body and the Trade Policy Review Body, Article IV (2-4). Subordinate to the General Council are three other councils: the Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights, Article IV (5). GATT had only one council in total and the four council organization of the WTO is the result of a compromise between members due to the introduction of new areas of trade into the multilateral system. Several members opposed introducing these new areas under the authority of the General Council. Similar to GATT, there is a system of permanent committees under each council dealing with surveillance of the covered agreements. Special work groups can also be organized when needed.⁶²

Three other bodies report directly to the General Council. First, the Committee on Trade and Development deals with issues relating to developing countries. Second, the Committee on Balance of Payments is responsible for consultation between members and countries that undertake trade-restrictive measures under Articles XII and XVIII GATT 1994. Finally, the Committee on Budget, Finance and Administration deals with WTO's financing and budget⁶³, Article IV (7). In addition, each of the four plurilateral agreements of the WTO have their own management bodies reporting directly to the General Council, Article IV (8).

The WTO Secretariat has around 450 staff members and is based in Geneva, Switzerland. It is led by a Director-General and four Deputy Directors-General. The Secretariat's main task is to service WTO delegate bodies with respect to negotiations and the implementation of agreements. Other tasks include technical support to developing countries and questions relating to the accession of new members.⁶⁴

⁵⁹ All Articles in this section refer to the WTO Agreement if nothing else is noted.

⁶⁰ Sjöstedt I, p.18.

⁶¹ Utrikesdepartementet, pp.10-11.

⁶² Sjöstedt I, p.19.

⁶³ Mandatory fees from the members finance the WTO budget. Each country contribution is determined by an index in proportion to the country's part of world trade. 1995, the budget was around US \$83 million. Sjöstedt I, p.23, Trading into the future: WTO, p.14, and Article VII.

⁶⁴ Trading into the future: WTO, p.14.

Decision-making in the WTO, as in GATT, is done by consensus.⁶⁵ In cases where consensus is not possible, the WTO Agreement allows for voting. In such a case, decisions are made by a simple majority wherein each member has one vote, Article IX (1). The WTO Agreement allows for four different voting situations. First, interpretation of any covered multilateral agreement can be adopted by a three-quarters majority of WTO members, Article IX (2). Second, the Ministerial Conference may waive an obligation imposed on a member by a multilateral agreement by the same majority, Article IX (3). Third, amendments to covered multilateral agreements can be adopted by consensus or a two-thirds majority depending on the issue, Article X.⁶⁶ Finally, new members can be admitted by a two-thirds majority of the Ministerial Conference, Article XII. When voting, some groups of members act together with a single spokesperson, e.g. the EU. Both the EU and its members are all WTO members in their own right, Article IX (1).

A country can become a member of the WTO if it has full autonomy in conducting its trade policies. An applicant government must provide the WTO with a report regarding all aspects of its trade and economic policies concerning issues relating to WTO agreements. A working party will examine the applicant's trade regime while the applicant engages in bilateral trade negotiations with interested member governments to establish concessions and commitments under covered agreements. The result of the negotiations and the examination is presented to the General Council or the Ministerial Conference for adoption. New members can be accepted with a two-thirds majority of WTO members, Article XII.⁶⁷

As for GATT, the WTO's three main tasks are to administer and implement covered agreements, to act as a multilateral trade negotiation forum, and to solve trade disputes, Article III (1-3).⁶⁸ The WTO is also responsible for surveillance of national trade policy through the Trade Policy Review Mechanism (TPRM), Article III (4). Reviews are conducted by the General Council, meeting as the Trade Policy Review Body. The objectives are to increase transparency, improve the quality of public and intergovernmental debate, and to enable a multilateral assessment of the effects of policies on the world trading system. This is a way to encourage members to follow WTO rules and to fulfill their commitments under the covered agreements. Another important task is to cooperate with other international institutions involved in global policy-making. A Ministerial Declaration was adopted at the Ministerial Meeting in Marrakesh in 1994 in order to achieve greater coherence in global economic policy-making. The WTO is therefore under an

⁶⁵ Consensus is defined as when no present member formally objects to a proposed decision.

⁶⁶ Such amendments only apply to WTO members who accept them.

⁶⁷ Trading into the future: WTO, p.14.

⁶⁸ Director-General Mike Moore stated in December 1999 that although the 3rd Ministerial Conference in Seattle was a temporary setback, the objectives of the WTO were still the same; liberalizing trade through negotiations rounds; using trade more effectively for economic development and poverty alleviation; confirming the central role of a rule-based trading system; and, recognizing that the WTO truly represents the needs of its members. http://www.wto.org/wto/seattle/english/press_e/press160.htm accessed 01/03/00.

obligation to cooperate with the International Monetary Fund, the World Bank and other multilateral institutions, Article III(5).⁶⁹

In order to support developing nations, the International Trade Center was established by GATT in 1964 and is operated jointly by the WTO and the UN (through UNCTAD). Its main task is to help developing countries promote their exports.⁷⁰

According to Sylvia Ostry, one of the major weaknesses of the WTO is that it lacks a significant knowledge infrastructure. It does not have a secretariat of highly qualified experts able to undertake serious policy research, as in the Organization for Economic Cooperation and Development (OECD), IMF and the IBRD.⁷¹

2.3.3 Overview of Legal Principles and Covered Agreements

There are many differences between GATT and the WTO. As opposed to GATT, the WTO is a permanent organization with an institutional structure. It covers not only trade in merchandise goods, but also trade in services and trade-related aspects of intellectual property. The covered agreements under the WTO are mainly multilateral and do not allow for the old GATT “à la carte” system. In addition, the dispute settlement system is faster, more automatic and without any possibility to block a decision.⁷²

The WTO Agreement contains some 29 individual legal texts. Added to these are more than 25 ministerial declarations, decisions and understandings.⁷³ There are two major parts of the WTO Agreement. The first part contains structural rules dealing with things like the budget, voting, membership issues and so on. The second part contains the establishment of an “umbrella organization”, responsible for the management of the results from the Uruguay Round negotiations. In order to become a member of the WTO, a country has to accept the entire result of the Uruguay Round, Article XVI (5) WTO Agreement. This approach is known as “one single undertaking”. There are certain exceptions to the package deal approach concerning e.g. the plurilateral agreements that have limited membership and are administered in an annex to the WTO Agreement. The “one single undertaking” approach is strengthening the principle of a joint and global trading system and is a response to the existing “GATT à la carte”.⁷⁴

GATT 1994 is not a totally new agreement but basically just incorporates GATT 1947 and agreements concluded under it. Negotiations were

⁶⁹ Trading into the future: WTO, pp.4, 17. An agreement concluded in November 1996 regulates who can attend which meetings and what information can be exchanged. There is also the possibility of consultation between secretariats on trade related issues. Ostry, p.20.

⁷⁰ Trading into the future: WTO, p.16.

⁷¹ Ostry, p.23.

⁷² Trading into the future: WTO, p.11.

⁷³ Trading into the future: WTO, p.5.

⁷⁴ Utrikesdepartementet, pp.10-11.

conducted on the basis of suggestions from members that certain GATT 1947 articles be inspected and overhauled. Changes made consist mainly of interpretations and definitions of existing articles.⁷⁵ In the agreement there are guiding principles and rules in the opening paragraphs that are later used throughout the entire text. Roughly half the articles formulate rules while the other half formulates exceptions to the rules. When new trade areas are negotiated and included they are also subject to the old rules and principles.⁷⁶

GATT 1994 works with mutually beneficiary arrangements removing existing barriers to trade and preventing discrimination in international exchange of trade.⁷⁷ The principle of non-discrimination is embodied in Articles I and III GATT 1994. The first article contains the MFN clause stating that a concession made by a member towards another member also applies to all the other WTO members. The second article involves “national treatment”, requiring equal treatment of imported goods and domestically-produced goods. Another key provision is the duty-principle in Articles XI-XIII GATT 1994. The principle entails a general prohibition of quantitative restrictions on imports and exports. Instead, members can only resort to the use of duties to protect their domestic industries. Such duties are to be fixed and not subject to arbitrary raises. In general, the WTO system is more dedicated to open, fair and undistorted competition than to free trade since tariffs are allowed.⁷⁸ Another idea behind the multilateral trading system is stable and predictable markets. This will provide investors, employers and consumers with a business environment that encourages trade, investment and job creation as well as choice and low prices. This is achieved through transparency of domestic laws, regulations and practices. Several WTO agreements contain transparency provisions requiring disclosure at the national or the multilateral level. The TPRM provides a further means of encouraging transparency.⁷⁹

Other important issues on the WTO agenda involve economic development and reform, mainly in developing countries. At the Uruguay Round, developing countries were granted a transition period to adjust to the more unfamiliar and difficult WTO provisions. Part IV of GATT 1994 contains three articles introduced in 1965 encouraging industrial countries to assist developing countries in their trading conditions and not to expect reciprocity for concessions made to developing countries in negotiations. During the Tokyo Round in 1979 the “enabling clause” was introduced establishing the

⁷⁵ Utrikesdepartementet, p.24.

⁷⁶ Sjöstedt II, pp.13-14.

⁷⁷ For a discussion on the efficiency of the WTO trade negotiations see Bagwell, Kyle & Staiger, Robert, “An Economic Theory of GATT”, (National Bureau of Economic Research, Inc., Working Paper 6049, 1997), abstract (Bagwell & Staiger I). They argue that countries can implement efficient trade agreements through reciprocity if and only if they also abide by the principle of non-discrimination. Preferential agreements undermine the WTO’s ability to deliver efficient multilateral outcomes through the principle of reciprocity, unless these agreements take the form of custom unions among partners that are sufficiently similar.

⁷⁸ Trading into the future: WTO, p.6.

⁷⁹ Trading into the future: WTO, pp.5-6.

Generalized System of Preferences (GSP).⁸⁰ Industrialized countries granting benefits to developing countries within the framework of a GSP do not need to extend these concessions to other members. In addition, developing countries may use infant industry protection, Article XVIII GATT 1994.⁸¹

Other exceptions to the general rules and principles include Articles XX and XXI GATT 1994 containing, respectively, general and security exceptions e.g. to protect public health, animal or plant life or to protect public morals. Article XIV GATT 1994 contains safeguards permitting temporary restrictions on trade under certain circumstances, e.g. during severe imbalance in trade and payment flows.⁸² Anti-dumping and countervailing duties may be used if domestic industry is severely injured, or at risk of such injury, through the use of dumping imports, Article VI GATT 1994. Article XVI GATT 1994 prohibits export subsidies and state aid recognizing that state aid can injure other countries' economic interests. Article XXIV GATT 1994 includes one of the most important exceptions allowing the creation of regional trade agreements. This exception is in reality in conflict with the non-discrimination principle of Articles I and III. Regional trading arrangements may take the form of a custom union or free-trade area.

GATT 1994 covers mainly manufactured goods. But the WTO framework also regulates trade in civilian airplanes, bovine meat, dairy products, and government procurement through plurilateral agreements, Annex 4 WTO Agreement. In addition, non-tariff barriers to trade e.g. anti-dumping, subsidies, penalty duties, technical barriers to trade, custom valuation, import licensing procedures, and other issues are also covered through different codes and agreements, Annex 1A WTO Agreement. Other big, multilateral agreements are GATS and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), Annex 1B, 1C WTO Agreement.^{83 84}

Environmental issues, social policy, child labor, labor standards and unions were not incorporated into the Uruguay agreements, but a special environmental committee was set up to analyze environmental issues relating to trade. Today, industrialized countries are pushing for a linkage between these issues and multilateral trade negotiations. Developing countries see this as a sign of growing protectionism in the industrialized world.⁸⁵

⁸⁰ Trading into the future: WTO, p.7.

⁸¹ Alvin, p.11.

⁸² It is still debated whether or not safeguards are to be used selectively or globally, i.e. if safeguards only can be used against a country supplying the damaging import, or, if safeguards can be used against all import of that product.

⁸³ While GATS in general copies the rules of GATT 1947, there are three interesting aspects of TRIPs. First, the agreement is built on minimum norms negotiated under the WIPO. Second, there is a requirement for members to have domestic sanctions for efficient enforcement. Third, the agreement contains explicit dispute settlement rules that the WIPO conventions lack. In addition, there are rules on application and granting of intellectual property rights and interim rules for developing countries

⁸⁴ Utrikesdepartementet, p.32.

⁸⁵ Sjöstedt I, p.34. See also footnote 50.

3 Dispute Settlement under GATT

The GATT dispute settlement procedure evolved from practice and was only gradually codified. Disputes were initially examined by “working parties”, but a move from negotiations to a more judicial procedure occurred after the Tokyo Round in 1979 with the creation of “panels of experts”.⁸⁶ Procedural rules for the settlement of disputes were set out mainly in Articles XXII and XXIII GATT 1947, but also in a few special provisions such as Articles XVIII:12 and XXIV:7 GATT 1947.⁸⁷ The procedure was characterized, first, by the possibility of a settlement at all times, second, by the possibility of a unilateral veto of decisions to form a panel, select a panel, and adopt panel reports, and third, that the plaintiff could retaliate at any time.

A member could bring a complaint when it considered that either a benefit accruing to it directly or indirectly under the GATT 1947 was being nullified or impaired, or, that the attainment of any objective of the GATT 1947 was impeded (see Table 1).⁸⁸ Such NIO had to be the result of a failure of another member to carry out its obligation under the agreement (violation complaints), the application by another contracting party of any measure whether or not it conflicted with the provisions of the agreement (non-violation complaints), or the existence of any other situation that might give rise to a NIO (situation complaints), Article XXIII:1 GATT 1947.⁸⁹

Article XXIII:1:	“If any contracting party should consider that	
Two causes of action:	any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or	the attainment of any objective of the Agreement is being impeded
	as the result of	
“violation complaints”:	(a) the failure of another contracting party to carry out its obligations under this Agreement, or	
“non-violation complaints”:	(b) the application by another contracting party of any measure, whether or not in conflict with the provisions of this Agreement, or	
“situation complaints”:	(c) the existence of any other situation”...	

A complaining member started out by requesting consultation with the allegedly offending member, Article XXII GATT 1947. If this consultation was unproductive, a plaintiff could request that the Council selected and

⁸⁶ Jackson, p.166.

⁸⁷ Petersmann, Ernst-Ulrich (ed.), “International Trade Law and the GATT/WTO Dispute Settlement System”, (Bodmin: Kluwer Law International, 1997), (Petersmann I), p.36.

⁸⁸ I will refer to nullification, impairment and impediment of an objective as NIO.

⁸⁹ Petersmann, Ernst-Ulrich, “The GATT/WTO Dispute Settlement System – International Law, International Organizations and Dispute Settlement”, (Kluwer Law, 1997), (Petersmann II), pp.74-75.

⁹⁰ Petersmann I, p.37.

appointed a panel, which would investigate and report its findings back to the Council. During the investigation, the responding member had the burden of proof that there was no violation. The panel report had to be adopted by the Council by consensus leaving the possibility for a losing party to veto. An adopted report was binding and the Council had the power to make appropriate recommendations and rulings. More important was the possibility for the Council to authorize the complaining member to suspend concessions or obligations for the defendant, Article XXIII:2 GATT 1947 (see Table 2).⁹¹ The maximum normal length of a dispute was set at fifteen months.⁹²

Article XXIII:2	“...the matter may be referred to the Contracting Parties. The Contracting Parties shall promptly investigate any matter so referred to them and
recommendations:	shall make appropriate recommendations to the contracting parties which they consider to be concerned or
rulings:	give a ruling on the matter, as appropriate”.
authorization to suspend obligations:	“...they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances”.

⁹¹ Petersmann II, pp.74-75. Jackson, pp.166-167.

⁹² Nanto, Dick K., “Dispute settlement under the WTO and trade problems with Japan”, CRS Reports for Congress, Dec. 23, 1994 (read on microfiche, no page reference available).

⁹³ Petersmann I, p.38

4 Dispute Settlement under the WTO

4.1 Introduction and Overview of Changes in the Dispute Settlement Procedure⁹⁴

Dispute settlement procedures have always been an important part of the GATT system. The Uruguay Round created a new institutional framework, the WTO, and adopted a new Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSU established, *inter alia*, a unified procedure applying to a number of agreements listed in Appendix 1 and 2 DSU (see Appendix 3 this paper).⁹⁵ Under the GATT there were up to ten different dispute settlement procedures to follow depending upon under which agreement a dispute arose.⁹⁶ In the WTO, members are under an obligation to solve disputes over privileges and obligations under covered agreements within the framework of the WTO dispute settlement procedure and to follow the procedure and rules applicable.⁹⁷ The key attribute of this procedure is automatization. A WTO member can no longer block the result of a procedure with a veto. It is a rule-oriented system, Article 3:2 DSU, giving guidance in the way of predictable and generally stable rules to firms around the world. This stability is important for, *inter alia*, investment decisions.⁹⁸ In addition, affirming that the operation of the DSU would be strengthened by certain behavioral rules, the WTO members signed an agreement on Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (RC) in 1996. This agreement sets up rules of conduct for the behavior of people serving on a panel, in the Standing Appellate Body (AB), as an arbitrator, or as an expert participating in the dispute settlement procedure according to certain provisions, Rule IV: 1 RC.

With the DSU, many improvements were made to the dispute settlement procedure. The highest judiciary is the Dispute Settlement Body (DSB) consisting of the General Council of the WTO. A panel report is adopted unless there is consensus not to adopt it. The US supported dropping the consensus since it hindered effective dispute settlement, insisting instead that an AB would be established to hear appeals.⁹⁹ In addition, there is a possibility for arbitration if the AB decision is not accepted voluntarily.

⁹⁴ For an overview of the entire procedure, see Appendix 2.

⁹⁵ OECD Working Papers Vol. III No. 96, "Dispute Settlement in the WTO", p.4

⁹⁶ Some agreements still have dispute settlement provisions which are regarded as *lex specialis*, Article 1:2 DSU. See also section 4.2.

⁹⁷ Utrikesdepartementet, p.33.

⁹⁸ Jackson, pp. 162-163.

⁹⁹ Jackson, p.167. Reinhardt, Eric, "Efficiency and Distribution in GATT Dispute Outcomes: A Statistical Study", 1995, (Reinhardt I), p.19. Nanto.

Arbitration can also be used when there is a disagreement on the level of compensation.¹⁰⁰ Time frames for completion of a dispute have also become shorter. Under the DSU, a case should not exceed 9 months from the establishment of a panel (12 months with appeal) compared to 15 months under the GATT. The DSU also tightened the implementation and compensation aspect of dispute settlement. If reports, recommendations or rulings are not implemented within a reasonable time, the responding party must enter into negotiations over a mutually agreeable compensation scheme, if requested. If no compensation can be agreed upon, the complaining member has a right to request authorization to retaliate in the same trade sector.

The DSU was built on the principles encompassed in Articles XXII and XXIII of GATT 1947, Article 3:1 DSU.¹⁰¹ GATT policies and decisions guide the WTO and the jurisprudence of GATT is thus a part of the WTO, Article XVI:1 WTO Agreement. But since there is no *stare decisis* in international law, adopted reports are not strict precedent (see also section 4.10).¹⁰² The principles guiding the WTO members and the Dispute Settlement Body (DSB) include, *inter alia*:

- prompt settlement of disputes, Article 3:3,
- outcomes under the DSU have to conform with covered agreements and shall not nullify or impair benefits accruing to members under those agreements, Article 3:5,
- mutually agreed solutions to formally raised matters have to be notified to the WTO, and all members may raise any point relating thereto, Article 3:6,
- the first objective of the dispute settlement procedure is to stop the action found to be inconsistent with a covered agreement. Compensation can be granted pending a withdrawal, or if withdrawal is impracticable. DSB can as a last resort suspend the application of concessions or other obligations under the covered agreements on a discriminatory basis against the violating member, Article 3:7,
- a breach of an obligation under a covered agreement is presumed to have an adverse impact on other members unless infringing member can prove otherwise, Article 3:8, and,
- the DSU does not apply retroactively, Article 3:11.

4.2 Jurisdiction and Covered agreements - *lex specialis v. lex generalis*¹⁰³

The DSU applies to disputes brought under consultation and dispute settlement provisions of agreements listed in Appendix 1 DSU, Article 1:1. It also applies subject to special and additional rules and procedures on dispute

¹⁰⁰ Utrikesdepartementet, p.33.

¹⁰¹ Unless otherwise noted, all articles in Chapter 4 refer to the DSU.

¹⁰² Jackson, pp.164, 178.

¹⁰³ The concept is similar to the maxim *lex posterior derogat priori*.

settlement contained in agreements listed in Appendix 2 DSU. If there is a discrepancy between the general rules in DSU and the special or additional rules, the rules and procedures in Appendix 2 DSU prevails as *lex specialis*. The chairman of the DSB can be requested to decide which rules or procedures apply if there is a conflict between several special or additional rules and procedures, Article 1:2. The DSU does not preclude members from seeking interpretation of a covered agreement under the general provisions of the WTO Agreement or another covered agreement that is a Plurilateral Trade Agreement, Article 3:9. For an overview of covered agreements see Appendix 3 of this paper.

4.3 Initiating a dispute

The DSU explicitly prefers mutually agreed solutions to a dispute and a WTO member also has an obligation to evaluate the possibility of a fruitful action before bringing a case, Article 3:7. Dispute are initiated following the rules of Article XXIII:1 GATT 1994 (see section 3). Violation claims are those where a measure causing a NIO is in conflict with an explicit provision of a covered agreement. Non-violation claims are more complex. The basis is reciprocal concessions negotiated between two trading parties where a subsequent action by one party, that could not have been reasonably anticipated at the time of the negotiations, although consistent with covered agreements, adversely affected the market access afforded to its trading party.¹⁰⁴ Situation complaints are any other situation where a NIO occurs. The two latter types of claims could be interpreted as a general clause indicating that there might be measures not violating covered agreements that are in conflict with some general principle of fairness. According to John Jackson, Article 3:2 indicates an adherence to judicial restraint. But there is an inherent conflict between this and the ambiguity in non-violation cases. When a WTO member moves for a non-violation case there will automatically be a conflict with Article 3:2 since recommendations and rulings of the DSB cannot add to or diminish rights and obligations provided in the covered agreement.¹⁰⁵

4.3.1 Consultation, Good Offices, Conciliation and Mediation

A plaintiff has a duty to use consultation in good faith before bringing a dispute before a panel by requesting consultation with the defendant, Article 4:2, 5.¹⁰⁶ The plaintiff can directly request the establishment of a panel if consultation has not been able to start after a certain time limit, Article 4:3.¹⁰⁷

¹⁰⁴ Bagwell, Kyle & Staiger, Robert W., "Multilateral Trade Negotiations, Bilateral Opportunism and the rules of GATT, (National Bureau of Economic Research, inc., Working Paper 70/71, 1999), p.3 (Bagwell & Staiger II).

¹⁰⁵ Jackson, pp.172-173

¹⁰⁶ I will let plaintiff denote the member bringing a complaint, and defendant the allegedly infringing member. This denotation does not reflect any assignment of guilt on my behalf.

¹⁰⁷ Defendant has to reply to a request within 10 days of receiving it and shall enter into consultation within 30 days of that same date. If defendant fails to do so, the plaintiff can request the formation of a panel, Article 4:3. See Appendix 2.

Consultation is confidential and without prejudice to the rights of any member in any further proceedings, Article 4:6. This provision, commonly used throughout the DSU, makes sure that consultation is not seen as just an obligatory obstacle on the way to panel proceedings. Instead, parties to a dispute can negotiate in good faith in order to reach a mutually acceptable solution in the spirit of Article 3:7 at the same time as they know that if the negotiations fail, the result will not affect their rights in subsequent panel proceedings. If consultation fails to settle the matter within 60 days after the receipt of the request for consultation, the plaintiff may request the establishment of a panel, Article 4:7.¹⁰⁸ Under certain circumstances, other WTO members can join the consultation if they have a “substantial trade interest” related to the consultation in progress, Article 4:11.¹⁰⁹

Members may also request good offices, conciliation and mediation at any time during a dispute, Article 4:3. While consultation is mandatory and is the first step in resolving a dispute, these other measures are voluntary and can be used during any stage of the dispute settlement proceedings. This is well in line with the spirit of the DSU to promote mutually acceptable solutions, Article 3:7. These voluntary proceedings are confidential and without prejudice to the rights of any party in any further proceedings (see also consultation, above), Article 4:1-2.

4.4 The Panel and Panel Proceedings

Formation of a panel must be requested in writing to the DSB by a party to a dispute, Article 6:1, 2. A panel normally consists of three panelists, but parties to a dispute can also agree upon using a five-panelist panel, Article 8:5.¹¹⁰ The panelists are nominated by the WTO Secretariat from a list of well-qualified governmental and/or non-governmental individuals, Article 8:1, 4, 6.¹¹¹ Parties to a dispute can only oppose a nomination of a panelist for compelling reasons, Article 8:6.¹¹² If there is no agreement on the panelists within 20 days of the date of the establishment of a panel, the Director-General determines the composition of the panel, Article 8:7.¹¹³ Panelists should have a sufficiently diverse background and a wide spectrum of

¹⁰⁸ Regarding perishable goods the members have to enter into consultation within 10 days, and have settled within 20 days. Parties have a duty to accelerate the process in such cases, Article 4:8-9.

¹⁰⁹ What constitutes a “substantial trade interest” is unclear.

¹¹⁰ The reasons for this might be highly strategic. Theories about decision making in groups have been debated by the Supreme Court of the United States of America concerning the appropriate number of jurors, see *Williams v. Florida*, 399 U.S. 78 (1970). This would be an interesting question for future research.

¹¹¹ An individual is qualified if he, for example, has served on or presented a case to a panel, has teaching experience in international trade law or policy, or has been a senior trade policy official for a WTO member.

¹¹² Unfortunately, I have not been able to find any indications on what such compelling reasons might be. It may entail some important government interest. Further research is needed.

¹¹³ This occurs only upon request of either party and in consultation with the Chairman of DSB and the Chairman of the relevant Council or Committee.

experience. Their independence is important and panelists serve independently from their governments, Article 8:2, 9 (see section 4.8 for rules of conduct). Therefore, citizens of parties to a dispute can only serve on that panel if there is an agreement between the parties involved, Article 8:3.

A panel should make an objective assessment of the issue brought before it. This includes an evaluation of the facts, the applicability of and conformity with the relevant covered agreements, and any other finding that may facilitate a decision by the DSB. Throughout its investigation, the panel should consult with the parties in order to reach a mutually acceptable solution, Article 11. The idea to promote mutually acceptable solutions throughout the DSU is most likely meant to facilitate enforcement and to make sure that members adhere to the covered agreements. Each panel has a right to seek expert information and technical advice from any individual or body. There is also a possibility to establish certain expert review groups in order to compile an advisory report, Article 13, Appendix 4 DSU.

The panel has to work according to principles similar to an ordinary court hearing broadly defined in a special Working Procedure, Article 12:1, Appendix 3 DSU. Meetings are closed sessions and parties, and others, can only be present when invited by the panel. Panel deliberations and documents submitted are confidential. Before the first meeting, the parties submit their presentation of the facts and arguments in writing. During the first meeting, the plaintiff presents his case followed by the defendant. Formal rebuttals are made during the second meeting in the reverse order. All oral statements are to be submitted in writing as well, and the panel may question the parties at any time. Parties are to be present during hearing of the opposing party to the dispute, Appendix 3:2-5, 6-10 DSU.

The panel's final report is "constructed" in stages, providing ample time for review by the parties. First, the descriptive section (facts and arguments presented by the parties) is issued to the parties directly after the proceedings before the panel. After considering comments by the parties, the panel circulates a complete interim report, including findings and conclusions. Parties can once again submit written comments and even request an extra meeting to discuss specific issues. In the final report to the DSB, the panel also includes a presentation of the review proceeding, Article 15. The report includes factual findings, the legal rules applicable, and the rationale for its findings and recommendations. A short report has to be written even if the parties to a dispute reach a mutually acceptable solution, Article 12:7. Panel deliberations are confidential and the parties to a dispute cannot be present during the drafting of the report. Like in the European Court of Justice (ECJ) but unlike in the US Supreme Court, such reports are anonymous, Article 14. A likely reason for this is that panelists serve as representatives of the WTO and not in their individual capacity. As such, they must create an image of outward unity in order to avoid "retaliation" on them or their country of

origin. In addition, panelists have tenure limited to the dispute in question.¹¹⁴ It seems unlikely that the fact that a panelists in the past have been part of panels that have issued, in some WTO members eyes, unfavorable reports would constitute compelling reasons for opposing the nomination of that same panelist for a future panel in the sense of Article 8:6. This might instead be a reason for initiating the procedure prescribed by the RC for questioning the impartiality of a panelist (see section 4.8).

Panel proceedings are generally not to be longer than six months from the date a panel is successfully constructed to the date a panel report is issued to the parties to the dispute. In a dispute concerning perishable goods the time limit is three months, Article 12:8. Even if these time constraints cannot be honored, a procedure can normally not be longer than nine months, Article 12:9. But proceedings before a panel can be suspended at the request of the complaining party for up till twelve months, Article 12:12.

4.5 The Dispute Settlement Body

The DSB has the authority to establish panels, adopt panel and AB reports, maintain surveillance of implementation of rulings and recommendation, and authorize suspension of concessions and other obligations under the covered agreements, Article 2:1. Recommendations and rulings cannot add to or diminish rights and obligations provided in the covered agreements, Article 3:2. Decisions are made by consensus meaning that an agreement is reached unless a member present at the meeting of the DSB formally objects to it, Article 2:4.

A panel report should not be considered for adoption until 20 days after its circulation to the WTO members. Written objections by WTO members must be circulated at least 10 days prior to the relevant DSB meeting. The parties to the dispute have a right to participate fully in DSB meetings. The report should be adopted within 60 days of the date of circulation unless the decision of the panel will be appealed or the DSB decides *not* to adopt it. An appealed report will be considered again after the completion of the appellate procedure, Article 16.¹¹⁵ Note that panel reports were adopted by consensus under GATT while reports under the DSU are considered adopted unless the DSB by consensus decides *not* to adopt it.

¹¹⁴ The Justices of the ECJ have a limited tenure while the US Supreme Court Justices serve for life.

¹¹⁵ For a statistical analysis of dispute length depending on case type, see Reinhardt, Eric, "Aggressive Multilateralism: The Determinants of GATT/WTO Dispute Initiation 1948-1999" (Reinhardt II).

4.6 Joint Rules for Panels and the Appellate Body

4.6.1 Procedural Rules

Several disputes related to each other can be examined cumulatively by a single panel. Even if several panels are established in such a case, the individuals serving as panelists should, if possible, be the same on the different panels, Article 9:1, 3. The DSU protects the interest of “third party WTO members” during a panel process. Such members with a “substantial interest” in a dispute have the possibility to be heard by the panel and make written submissions to it. If an ongoing panel process leads to a NIO for a “third party WTO member” (see Article 3.2), they can initiate new dispute settlement proceedings under the DSU. The related dispute shall if possible be heard by the same panel, Article 10:1-2, 4. The entire dispute settlement procedure should normally not exceed nine months from the establishment of a panel to the adoption of the report by the DSB. If a panel report is appealed, the time limit is twelve months.¹¹⁶ There is also a possibility for granting both panels and the AB more time if they request so in writing to the DSB, Article 20. Written submissions to the panel or the AB are confidential. Members have an obligation to respect the confidentiality of information disclosed by other members. In order to prevent abuse of confidentiality, and in the interest of the public, a member can request a party to the dispute to provide a non-confidential summary of its submissions, Article 18:2.¹¹⁷ In the report, a panel or the AB should recommend members to bring disputed measures in conformity with covered agreements and may also make suggestions on how to implement a recommendation. The panel and the AB can never add or diminish the rights or obligations provided in the covered agreements, Article 3:2, 19. Interpretation of covered agreements is made in accordance with customary rules of interpretation of public international law, Article 3:2.¹¹⁸

4.6.2 Rules of Conduct for Panelists, Appellate Body members, Arbitrators and Experts

The Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (RC) was adopted in December

¹¹⁶ Parties to a dispute can always agree upon extending the time limits. Shorter time limits may apply in disputes regarding perishable goods.

¹¹⁷ The interest of the public is in conflict with the interest of the state to conceal its strategies from its “competitors”. This problem is common in most inter-governmental organizations. The debate is especially strong within the EU where Nordic countries, among others, are demanding more transparency in order to gain the public’s trust. The lack of publicity may otherwise make the citizens suspicious of what is going on in the organization at the same time as it is harder to “check” that organization. See also section 4.11.

¹¹⁸ Jackson, p.168. Petersmann II, pp.111-112. This was stated in the first AB report “US Standards for Reformulated and Conventional Gasoline”, WT/DS2/1, 1996. GATT and WTO are thus subject to Article 31:3(b) of the Vienna Convention on the Law of Treaties (1969).

1996.¹¹⁹ It consists mainly of provisions to ensure the “integrity, impartiality and confidentiality of proceedings under the DSU thereby enhancing confidence in the new dispute settlement mechanism”, Rule I RC. The RC does not modify the rights and obligations of members under the DSU nor the rules and procedures in it, Rule II RC. It is interesting to note, however, the total confidentiality surrounding the proceedings in dispute settlement, and above all, the proceedings involving possible violation of the RC. This total lack of transparency is somewhat necessary but also very alarming.

The RC applies to individuals serving on panels, on the AB¹²⁰, as an arbitrator, as an expert, and also as a member of the WTO Secretariat (the latter three pursuant to certain provisions in covered agreements), Rule IV:1 RC. These covered individuals have to be independent and impartial. They shall also avoid direct and indirect conflicts of interest and respect the confidentiality of proceedings, Rules II-III RC. In addition, each covered individual shall consider only issues “raised in, and necessary to fulfill their responsibilities” within the proceedings.¹²¹ There is no possibility to delegate this responsibility to another person. In the same provision there is a prohibition on accepting benefits or incurring obligations that may jeopardize, or “give rise to justifiable doubts” as to that person’s proper performance, Rule III:2 RC.

Covered individuals are under obligation to disclose any information that they can “reasonably be expected to know” “that is likely to affect, or give rise to justifiable doubts” about their own independence or impartiality, Rules III:1, VI:1-2 RC. Examples of such information are listed in the Illustrative List of Information to be Disclosed. This list includes information about a covered individual’s financial interests, professional interests, interests in organizations relevant to the dispute in question, personal opinions, and employment or family interests, Annex 2 RC. A covered individual is obligated to disclose information only at the time when it is likely to have any effect, or may give rise to doubts, as to their independence or impartiality. But, during a dispute, new relevant information is to be disclosed at the earliest time that a covered individual becomes aware of it, Rule VI:2, 5 RC. In order to live up to these obligations, covered individuals (with some exceptions) have to sign a disclosure statement, Rule VI:4, Annex 3 RC. All information revealed through the disclosure process is confidential, Rules VI:6, VIII:20 RC. The references to “reasonably expected to know” and “likely to affect, or give rise to justifiable doubts” seem to give ample room for discretion about whether or not to disclose relevant information. Since

¹¹⁹ <http://www.wto.org/wto/dispute/rc.htm> accessed 04/15/99.

¹²⁰ Special rules of conduct exist in the Working Procedures for Appellate Review (WP). See section 4.7.3.

¹²¹ This seems to mean that AB members can only base the outcome on facts presented by the parties to a dispute. Disputes under the WTO should be compared to civil litigation in domestic countries. Most legal traditions accept that civil litigation is the responsibility of the litigants, not the judges. Compare this to the possibility (and in some cases obligation) of judicial intervention in criminal proceedings, *sua sponte*. In Sweden, the latter is represented by the “officialprincipen” encompassed in, *inter alia*, The Code of Judicial Procedure 1942:740 (Rättegångsbalk), 30:3§, 46:4§ and 35:6§.

only information that could have a possible effect on the proceedings is interesting, the latter expression is the most important. The first problem is the word “likely”. How likely does this effect have to be? Does it have to be evident, or is it enough with a suspicion? The second problem involves the expression “justifiable doubts”. It seems to indicate that the doubts cast on an individual’s impartiality must be justified by some objective standard. Theoretically it is clear that a person could remain totally independent and impartial although he is dealing with something concerning his own interests. With a combination of a structural and teleological interpretation of the provision it is possible to reach a suitable solution. First, the purpose of the entire RC is to make sure that covered individuals are independent and impartial. Second, a covered individual has to disclose of relevant information for this purpose. Third, it is then up to the AB to examine the disclosed information and take appropriate steps. This leads me to conclude that covered individuals are under a heavy obligation to disclose all information that might be relevant. It thus seems to be better to disclose too much rather than too little. There is, however, a built in limitation in the RC stating that only information significant to the issues considered in the proceedings are relevant. The AB also has to respect the need for personal privacy and make sure that the rules are not so administratively burdensome as to make it impracticable for otherwise qualified individuals to serve on a dispute, Rule VI:3 RC.

Any party to a dispute that knows of evidence of a material violation of the obligations under the RC must at the earliest possible time submit them to the Chair of the DSB, the Director-General or the Standing Appellate Body in a written statement specifying the relevant facts and circumstances. Other WTO members who have such information may provide the information to the parties to the dispute, Rule VIII:1 RC. It is interesting to note that parties with an interest in the dispute are under an obligation to act while other WTO members are not. Of course, a party that may benefit from *e.g.* an impartial panelist may not want to submit such evidence. But, under this provision they will have to do so. Perhaps a better solution would be to have all WTO members under an obligation to submit such information in the interest of securing the integrity of the dispute settlement system.

Evidence presented based on an alleged failure of a covered individual to disclose relevant information will *only* lead to a disqualification if there also is evidence of a material violation of the obligation of independence, impartiality, confidentiality, or the avoidance of conflicts of interest, *and* that the dispute settlement mechanism would be impaired by it, Rule VIII:2. For such a challenge to be successful, it is necessary to present evidence of three types: first, a failure to disclose relevant information, second, a material violation of the impartiality obligations, and third, that the dispute settlement procedure would be impaired by these first two breaches. This provision seems to be somewhat lacking in logic. It is, of course, a safeguard to make sure that not all failures to disclose relevant information disqualify a covered individual. But, it is at the same time odd to note that when a covered individual has failed to disclose relevant information making him partial, he

can only be disqualified if his impartiality would also impair the dispute settlement mechanism. The mere fact that a covered individual has violated the obligations of impartiality would raise serious doubts over that person's capacity to serve in a dispute settlement body. But how this would effect the dispute settlement mechanism is hard to estimate. A covered individual's partiality might of course not impair the proceedings, but at the same time, it might. How evident must this impairment be, and when does it have to be evident? A better solution would have been to automatically disqualify all covered individuals who violate the obligation of impartiality.

A specified investigation process shall be completed within fifteen working days after evidence has been submitted. Matters involving the possible material violation of the RC should be resolved as expeditiously as possible in order not to delay the proceedings under the DSU. This process works somewhat differently depending on who the person subject to the allegation is. If the "suspect" is a panelist, an arbitrator or an expert, evidence is submitted to the Chair of the DSB. This evidence is also communicated to the "suspect". If the matter is not resolved after consultation with the "suspect", all evidence and information is to be provided to the parties to the dispute. The Chair of the DSB in consultation with the Director-General creates a disciplinary "court" consisting of a sufficient number of Chairs of the relevant Council or Councils to provide an odd number. The "suspect" and parties to the dispute then have a reasonable opportunity to be heard before the "court" can decide whether a material violation of the RC has occurred. The person in question will continue to participate in the dispute proceedings unless a material violation has occurred. The Chair of the DSB shall thereafter take the necessary steps to revoke the appointment of that individual, or excuse him from the dispute, Rule VIII:4-10, 19 RC. If the "suspect" is a member of the WTO Secretariat, evidence is provided to the Director-General. He will inform the "suspect" and other relevant individuals. The Director-General then takes appropriate measures in accordance with the Staff Regulations. This includes consultation with the person in question and, if applicable, appropriate disciplinary action. A decision is communicated to parties to the dispute, the panel and the Chair of the DSB, Rule VIII:11-13 RC. If the person in question is a member of the AB, or its staff, a party to the dispute has to provide the other party with the evidence, and then the AB. The AB then provides the "suspect" with the evidence and can take any appropriate action after giving the "suspect" a chance to be heard. The AB decision shall be communicated to the parties to the dispute and to the chair of the DSB, Rule VIII:14-17 RC. Replacements for vacancies, other than in the AB, occurring after completion of the procedure in Rules VIII:5-17 RC, are appointed through the procedure for initial appointment specified in the DSU, *e.g.* Article 8.¹²² For the AB, using the rotation system, the next AB member in line will automatically be assigned to the appeal. Working procedures for the panel, the AB or the arbitrator examining the dispute, can be modified after consultation with the parties to the dispute, Rule VIII:18 RC.

¹²² The time constraints for this are half the specified time periods in the DSU.

All information concerning possible or actual violations of the RC shall be kept confidential except to the extent necessary to carry out a decision made under the RC, Rule VIII:20 RC. Dispute settlement deliberations and proceedings, as well as any other information identified by a party to a dispute as confidential, are confidential. Covered individuals are obligated to respect this confidentiality and not to use information acquired during proceedings or deliberations to gain personal advantage or give an advantage to others, Rule VII:1 RC. During proceedings, covered individuals are prohibited from having *ex parte* contacts concerning matters under consideration. Participating covered individuals are also prohibited from commenting on proceedings or issues in dispute before a report has been derestricted, Rule VII:2 RC.

Obviously, the integrity of proceedings and the work within panels and the AB is well protected. One of the reasons for this is to promote the disclosure of relevant information by the parties. Especially since the panelists and AB members are prohibited from taking initiatives outside the framework created by the litigants according to Rule III:2. Disputes almost always involve domestic trade policy clashes between two or more members. Information disclosed may well include sensitive details of domestic interest and information concerning private businesses in a specific country. Another reason for this secrecy is the concern for the impartiality of individuals serving in an “adjudicating position”. It is worth recalling that members of, *e.g.*, panels are chosen from a list maintained by the WTO Secretariat, Article 8 DSU. The list consist of well-qualified governmental and non-governmental individuals and, in the interest of impartiality, citizens of WTO members that are parties to the dispute cannot serve on the panel unless agreed upon by the parties to the dispute, Article 8:3. There is, however, a risk for future “retaliation” against a panelist (*e.g.*), or even against the country that he is from (although members of dispute settlement bodies serve in their individual capacity). On the other hand, this confidentiality is part of the transparency problem identified within the WTO (see section 4.11). The prohibition in Rule VII:1, on the other hand, concerning use of acquired information for personal, or other’s gain, is well in line with the general idea of preserving integrity. The question is how far this prohibition stretches. There has been similar concern within the Commission of the European Union. In the wake of scandals of alleged nepotism, corruption and misconduct among commissioners and civil servants attached to the Commission, a Code of Conduct for Commissioners¹²³ was adopted in the spring of 1999.¹²⁴

¹²³ http://europa.eu.int/comm/reform/formation/commis_en.pdf accessed 10/28/99.

¹²⁴ Among other things, a commissioner was prohibited from publishing a diary that criticized certain commissioners and the work of the Commission.
<http://sydsvenskan.se/red./v9/03eu.html> accessed 10/28/99.

4.7 The Appellate Body and Appellate Review

4.7.1 Organization

The Standing Appellate Body (AB) is mainly regulated by the DSU and the Working Procedures for Appellate Review (WP).¹²⁵ The latter may be amended by the AB in consultation with the Chairman of the DSB and the Director-General, Rule 32(2) WP. If amendments are made to the DSU or other covered agreements, the AB shall examine whether amendment to the WP is also necessary, Rule 32(3) WP.

The DSB is responsible for establishing and appointing the seven-member AB. Each member is appointed for a four-year term with one optional renewal term. Together, they shall be representative of the membership in the WTO. Like in the panels, AB members must possess demonstrated expertise in law, international trade and the covered agreements in general, Article 17:2-3. They must act independently and cannot take instructions from any international, governmental, or non-governmental organization or any private source. In addition, members of the AB are prohibited from employment or professional activity inconsistent with their duties and responsibilities, Article 17.3 DSU, Rule 2:2-3 WP. This requirement is somewhat different from the one regulating conflicts of interests in the RC. The latter seemingly only applies to conflict of interests related to the dispute in question while the provisions in the DSU and the WP deal with such conflicts in a more general way. One reason for this difference may be that the AB consists of permanent members always under an obligation to avoid conflicts of interest while a panel, for instance, is a temporary body and its members thus only subject to this restriction while they serve on the panel in question. AB members have to be available at all times and on short notice and must therefore keep the WTO Secretariat informed of their whereabouts at all times, Article 17.3 DSU, Rule 2:4 WP.

4.7.2 Working Procedures for the Appellate Body

The Chairman of the AB is elected for one year by the other AB members. No member can serve for more than one year consecutively. The Chairman is in charge of the “overall direction” of the AB, including in particular supervision of the internal functioning of the AB and any other duties that the other AB members may entrust him with. Temporary absence or incapacity of the elected Chairman is filled by an interim Chairman with full capability authorized by the AB. In case of a permanent vacancy, the AB members elect a new chairman for a full term, Rule 5 WP.

Appeals are heard and decided by a division of the AB consisting of three out of the seven members in accordance with Article 17:3. A division is selected

¹²⁵ <http://www.wto.org/wto/dispute/ab3.htm> accessed 04/15/99

based on rotation, Rule 6(1-2) WP. The AB members of the division choose a Presiding Member responsible for coordinating the overall conduct of the proceedings, chairing all oral hearings and meetings related to the appeal, and coordinating the drafting of the appellate report, Rule 7 WP.

Decisions concerning an appeal are made by the division of the AB assigned to it. Other decisions are made by the entire AB. The AB and its divisions shall “make every effort” to make their decisions by consensus. When consensus cannot be reached, the matter is decided by a majority vote, Rule 3 WP.

A member selected to serve on a division can be excused if there is justifiable doubts over the impartiality or independence of that individual, or evidence of a material violation of the obligations in Rule VIII RC has been presented, Rule 6(3)(i) WP (see also 4.8 and 4.6.3). A member can also be excused due to illness or other serious reasons after notifying the Chairman of the AB and the Presiding Member, Rule 6(3)(ii) WP. Such information is also communicated to the AB, Rule 12 WP. Finally, a member can also be excused if he is resigning from the AB (see below), Rule 6(3)(iii) WP. Replacements are selected through rotation, Rule 13 WP.

Resignations are notified in writing to the Chairman of the AB who then informs the Chairman of the DSB, the Director-General and the other AB members. A resignation takes effect 90 days after the notification unless the DSB in consultation with the AB decides otherwise, Rule 14 WP. This provision must mean that it is possible for the resignation to have effect both sooner or later depending on mutually acceptable solutions. However, it seems highly unlikely that a resigning AB member can be forced to stay longer than the 90 days prescribed by the WP. The resigning member can still complete any appeal in which he took part with the authorization of the AB and upon notification to the DSB. The resigning member is then considered being a member of the AB for that purpose only, Rule 15 WP.

The members of the AB are under an obligation to convene on a regular basis in order to discuss matters of policy, practice and procedure. They also have to be well informed on dispute settlement and other activities of the WTO. Each member shall receive all documents filed in an appeal. Before an appellate report is finalized and circulated to the WTO member, the division hearing the appeal has to exchange views with the other AB members.¹²⁶ But this obligation does not interfere with that division’s authority to hear and decide appeals under Article 17 DSU, Rule 4 WP. These rules seem to express a will to establish WTO precedent and conformity (see section 4.10).

¹²⁶ A member who has been excused from a division for some reason cannot take part in the exchange of views, Rule 11.

4.7.3 Special Rules of Conduct for the Appellate Body

When a Notice of Appeal is filed, each member of the division handling the proceedings has to review the factual portion of the panel report and then disclose of any information that might be a reason for them not to participate pursuant to Rule VI:4(b)(i) RC and Rule 9(1) WP. Each member must respect the obligations of independence, impartiality or confidentiality of the proceedings and avoid direct or indirect conflicts of interest, which may impair the impartiality, or confidentiality of the dispute settlement mechanism, Rule VIII RC. It is then up to the AB to consider whether the information disclosed excuses the member from being part of the division hearing the appeal, Rules 6(3)(i), 9(4) WP.

Evidence of a material violation of the obligations laid down in Rule VIII RC has to be filed after the party to the dispute knew or reasonably could have known of the facts supporting it. In no case shall such evidence be filed after the appellate report is circulated to the WTO members, Rule 10(2) WP. If evidence is not submitted at the earliest practicable time, a written explanation of why a delay occurred has to be submitted. It is then up to the discretion of the AB to decide whether or not to consider the evidence, Rule 10(3) WP. Such evidence is confidential and must be supported by affidavits by individuals having actual knowledge or a reasonable belief as to the truth of the facts stated, Rule 10(1). When evidence of a material violation is submitted, the appeal is suspended for fifteen days or until the AB's investigation of the matter pursuant to Rule VIII:14-16 RC is concluded, or whichever is earlier, Rule 10(4). Actions available to the AB during an investigation under the RC include to dismiss the allegations, to excuse the member in question from a division, or make any other orders it deems necessary, Rule 10(5). AB members submitting information under the self-disclosure provisions of the RC and WP can, of course, not take part in the evaluation of such information. Excused members of a division, and members that would have been excused from a division had they been selected, can not take part in the exchange of views conducted according to Rule 4:3 WP, Rule 11 WP.

4.7.4 The appeal

Panel cases can only be appealed by parties to the dispute, although third parties with a "substantial interest" in the dispute under Article 10:2 DSU may make written submissions to the AB. Such third parties can also be heard, Article 17:4 DSU. Appeals are limited to issues of law covered in the panel report and interpretations developed by the panel, Article 17:6 DSU. In the report, the AB must address each of the issues raised in the appeal, Article 17:12 DSU.¹²⁷

¹²⁷ There is thus no possibility for the AB to avoid answering legal problems. A similar concept is encompassed in Article 66 of the French Constitution prohibiting arbitrary denial of justice. Compare this to the debate surrounding the ECJ regarding case C-189/95 *Franzén* where it appeared that the ECJ did not answer the legal question posted.

The rules governing the appellate procedure start out with an interesting reference to equity and fairness. Procedural questions not regulated by the WP can be dealt with in an *ad hoc* fashion by the division handling the appeal. Such a decision is only valid for the proceedings in question and must be consistent with the covered agreements. Also, there is a possibility for exceptions concerning time limits¹²⁸ in “exceptional circumstances” when strict adherence to the rules would result in a “manifest unfairness”. In both of these cases a decision must be communicated to the people involved in the appeal as well as the other members of the AB, Rule 16(1-2) WP. It is worth noting that the *ad hoc* solution only applies to procedural matters. This is important since the DSB cannot issue recommendations and rulings that add to or diminish the rights and obligations provided in covered agreements, Article 3:2 DSU. At the same time, solutions to formally raised dispute matters shall not nullify or impair benefits accruing to any WTO member under covered agreements, nor impede the attainment of any objective of those agreements, Article 3:5 DSU. The same rules apply to time limits. But while it is hard to see that procedural rules may cause damage in the sense of Article 3:2 and 5 DSU, it is more likely that time limits may infringe upon these rules. But is such an infringement allowable? The question is whether the “exceptional circumstances” and “manifest unfairness” is judged from one party’s view, or from a total cost-benefit analysis for all involved in the dispute. This is so since something might be “manifestly unfair” for one party but by correcting this unfairness, the other party is subject to the same “manifest unfairness”. In conclusion, exception or *ad hoc* procedural rule cannot violate Articles 3:2 and 3:5 DSU. It is worth keeping in mind that there are already rules allowing for accelerated proceedings in cases of urgency, including those concerning perishable goods, rule 26(3) WP, Article 4:9 DSU.

Documents are considered filed when received by the AB Secretariat within specified time limits. They are automatically served on other people¹²⁹ involved in the appeal by the most expeditious means of delivery or communication available. Clerical errors in submissions may be corrected within three days of the original filing upon authorization by the division in question. A revised copy has to be filed with the AB Secretariat and served on the other involved people, Rule 18 WP. All documentation is automatically served on all members of the division hearing the dispute, Rule 4(2) WP.

An appeal is considered commenced when a party to a dispute formally notifies the DSB of its decision to appeal and simultaneously files a Notice of Appeal with the AB Secretariat, Rule 20(1) WP, Article 16:4 DSU. The Director-general of the WTO then transmits the complete record of the panel proceedings to the AB, Rule 25 WP. The Notice of Appeal consists mainly of

¹²⁸ Special rules apply to the calculation of time limits, Rule 17 WP.

¹²⁹ “People involved in the appeal” refers to parties to the dispute, participants, third parties and third participants. For a definition see Rule 1 WP.

administrative information where the most important part is a brief statement of the nature of the appeal including the “allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel”, Rule 20(2) WP. Within ten days of filing a Notice of Appeal, the appellant has to file a written submission with the AB Secretariat containing a precise statement of the grounds of the appeal stated in the Notice of Appeal, legal arguments and sources in support of this, and the ruling sought, Rule 21 WP. An appellee may file a response to an appellant’s submissions with the AB Secretariat within 25 days of the filing of the Notice of Appeal. The appellee’s submission must contain reasons, and legal support, for opposing the appellant’s arguments, an acceptance or opposition to each ground set out in the appellant’s submission, and the ruling sought, Rule 22 WP. There is also a possibility for other parties to the dispute to join an appeal, or appeal on other grounds than the original appellant. A multiple appeal must be filed in the format required by Rule 21 WP within 15 days after the filing of the Notice of Appeal, Rule 23(1-2) WP. The response to a multiple appeal must be filed in the format required by Rule 22 WP within 25 days of the filing of the Notice of Appeal, Rule 23(3). The time limit of the multiple appeals rule does not preclude a party to a dispute to appeal pursuant Article 16:4 DSU, Article 23(4) WP. This provision seems to expand the possibilities for appeals in cases where time limits for multiple appeals have expired. According to Article 16:4 DSU a panel report shall be adopted by the DSB within 60 days of circulation to the members unless it is appealed (or not adopted). In a case where a party does appeal, by notifying the DSB in writing and submitting a Notice of Appeal with the AB Secretariat, the adoption process in the DSB is halted in anticipation of the AB report. The appellant then make submissions in accordance with Rule 21(2) WP. If another party to the dispute decides to appeal he can still do so according to Rule 23(4) WP, even though he is not following the multiple appeals procedure in Rule 23(1) WP. This must mean that a party to a dispute who wants to appeal a panel report after an appeal has already been started can do so even though the time limit for multiple appeals in Rule 23(1) WP has expired. Such an appeal must then conform to Article 16:4 DSU which requires an individual Notice of Appeal for each appellant using Article 16:4 DSU. All related appeals will be examined by the same division, Rule 23 WP. A third party who wishes to take part in the appeal must file a written submission stating the grounds and legal arguments in support of its position within 25 days of the filing of the Notice of Appeal, Rule 24 WP. Such third participants may also make oral arguments or presentations at the oral hearing of the appeal, Rule 27(3) WP.

The division handling the dispute draws up a working schedule after the commencement of an appeal. The schedule contains dates for filing documents and a timetable for the division’s work, including dates for oral hearing if possible. In appeals of urgency, for example dealing with perishable goods, the AB shall “make every effort” to accelerate the proceedings, Rule 26 WP. Oral hearings are normally held 30 days after the filing of a Notice of Appeal. The AB Secretariat notifies the people involved

of the date of the oral hearings. Oral arguments and presentations may be time-limited by the Presiding Member, Rule 27(1-2,4) WP.

The division can address questions orally or in writing at any time during the proceedings. They can also request additional memoranda from any participant or third participant and specify the time period by which written responses or memoranda shall be received. Questions, responses and memoranda are available to other people in the appeal who also have a right to respond, Rule 28 WP. A division and its members can only meet with or contact participants and third participants in the presence of the other participants and third participants. Members of a division are also prohibited from discussing aspects of the appeal with participants and third participants in the absence of the other members of the division. Members of the AB not serving on the division are prohibited from discussing the appeal with any participant or third participant, Rule 19 WP.

If a submission is not filed within the required time periods or a participant fails to appear at the oral hearing, the division shall issue appropriate orders, including dismissal of the appeal, after hearing the views of the participants, Rule 29 WP. The appellant may withdraw the appeal at any time by notifying the AB, who in turn notifies the DSB. Mutually agreed solutions under Article 3:6 DSU are reported to the DSB, who notifies the AB, Rule 30 WP.

The proceedings before the AB are confidential. The report is anonymous and drafted without the presence of the parties, Article 17:10-11 DSU. An appellate report should normally be circulated to the WTO members before 60 days, and never later than 90 days, after an appeal, Article 17:5. The report should be adopted by the DSB within thirty days of circulation unless the DSB decides by consensus not to adopt it, Article 17:14 DSU. The AB may uphold, modify or reverse the legal findings and conclusions of the panel, Article 17:13 DSU, but it may not remand a dispute back to the panel in question. Remand power is otherwise generally used in domestic court systems and within the EU. From a law and economics point of view, remand power is necessary to keep costs down and to prevent overloading higher courts with improperly made decisions. From a jurisprudence point of view, remand power is a way of making sure that the appellate system is truly working. Without remand power, an appellate court will in essence have to act as a primary court in cases where a lower court's decision should have been remanded. The appellant will thus in reality lose an opportunity to appeal since he normally would have been entitled to a re-examination of the case by the lower court, and then a new appeal to the AB. This lack of remand power is thus a serious flaw of the WTO dispute settlement system. A possible explanation for this might be the *ad hoc* character of the WTO panels. Panels are dissolved after issuing their reports and would therefore require some administrative effort to be recreated for remand proceedings, even if a totally new panel was created. Another possible explanation is that the WTO dispute settlement system is a "private" system within an international organization. The speedy settlement of disputes is of utmost importance and remand power would therefore slow down the system.

Finally, even though the AB lacks remand power, it still represents a possibility for a re-examination of a panel report. This must still be seen as an improvement compared to the GATT system.

4.8 Enforcement of Rulings and Recommendations

When a measure violating an agreement has been found, there is a legal obligation to not merely compensate the WTO member experiencing the NIO but to stop the measure in question. There is no obligation to withdraw a measure in non-violation cases, Article 22:8.¹³⁰ A “losing” WTO member has to report its plan of compliance with recommendations and rulings at a DSB meeting 30 days after the adoption of the report in question. If it is not possible to implement recommendations and rulings immediately, a WTO member can be granted a reasonable time limit to comply. A reasonable time limit can be determined either by a proposal by the WTO member concerned, that is approved by the DSB, by an agreement between the parties to the dispute 45 days after the adoption of the report, or, by arbitration within 90 days. In case of arbitration, a reasonable time is normally less than 15 months after adoption of a report, Article 21:3. A time limit to comply should normally be agreed upon before 15 months from the date of the establishment of the panel. If the panel or the AB have been granted more time, the total time should not exceed 18 months. Parties can agree upon other time limits, Article 21:4.

Disputes arising over implementation measures and their compliance with covered agreements shall be settled by the dispute settlement procedure. The original panel is to be used whenever possible and a report should be circulated within ninety days, Article 21:5.¹³¹

The DSB is responsible for the surveillance of implementation of adopted recommendations and rulings. Implementation-compliance will be on the agenda of a DSB meeting 6 months after establishment of a reasonable time period, and until the issue is resolved. Ten days before that initial meeting, the WTO member in question must provide a written status report on implementation. But any WTO member may raise the issue of implementation at the DSB meeting after the adoption of the report, Article 21:6. If a recommendation and ruling are not implemented within a reasonable time, a plaintiff can request negotiations for deciding a mutually acceptable compensation. Compensation is voluntary but there is an obligation to negotiate in good faith. If these negotiations do not succeed within 20 days after the reasonable period of time has ended, a plaintiff may request authorization from the DSB to suspend concessions or other obligations under the covered agreement to the WTO member concerned, if

¹³⁰ Jackson, p. 168. DSU art. 3.2, 3.7, 7.1, 11, 15.2, 17.13, 21.1, 21.3, 22.1, 22.6, 26.1b.

¹³¹ Such disputes have occurred under the WTO. For more information see Reinhardt II. For the sake of this paper, time did not allow a further investigation of the matter.

that agreement allows such action. Concessions should first be suspended within the sector related to the dispute, or if that is not deemed efficient, in other sectors of the same agreement, or in sectors under other agreements. The level of suspension should be equivalent to the level of the NIO. Compensation and suspension of concessions are considered temporary measures before full implementation can be achieved. Suspension of concessions will only be applied until the violation of a covered agreement has ceased or a mutually acceptable solution has been reached, Article 22:1-5, 8. DSB should grant authorization to suspend concessions or other obligations within 30 days of the expiration of the reasonable time unless the DSB decides by consensus to reject the request, Article 22:6. The defendant can request that the matter be referred to arbitration if a suspension of a concession or other obligation does not conform to the procedure in the DSU, or is higher than the NIO in question. The original panel should, when possible, carry out the arbitration, otherwise it should be done by an arbitrator appointed by the Director-General. Arbitration should be completed within 60 days after the expiration of the reasonable time period. Concessions can not be suspended during arbitration, Article 22:6. The arbitrator has only the authority to examine whether the level of suspension is equivalent to the level of NIO, and that it is allowed under the covered agreement. An arbitrator can also examine claims of procedural breaches. The arbitrator's decision is final, Article 22:7.

If a violation of an agreement is found in a non-violation or a situation dispute, normal disputes settlement rules apply (see also sections 3 and 4.3). But when the NIO was due to a measure that did not violate an agreement, special rules apply to the procedure and there is no obligation to withdraw that measure on behalf of the infringing WTO member. The panel or the AB will, however, recommend to the WTO member to reach a mutually satisfactory agreement. Other than that, the biggest difference from the normal procedure is that decisions lack binding force, Article 26:1-2.

The biggest problem with implementation and enforcement is that the WTO has no means of forcing WTO members to comply. If a member decides not to follow a ruling, there is little the WTO can do except for the cancellation of concessions. Instead, it is in reality up to the "losing" WTO member to comply out of free will. A possible solution to this problem is to use game theory and to assume that WTO members indulge in an infinite number of games with each other in a perfect world.¹³² If a member cheats, then no one will want to play a game with him next time. The problem with this theory is that a very powerful WTO member, maybe a hegemon,¹³³ might be in a

¹³² For further reading on the prisoner's dilemma and game theory, see Gowa, Joanne, "Allies, Adversaries, and International Trade", (Princeton: Princeton University Press, 1994), pp.11-78.

¹³³ For a discussion of Hegemonic Stability Theory, see Krasner, Stephen, "State, Power and the Structure of International Trade", *World Politics*, 28(3), 1976, Kindleberger, Charles, "International Public Goods without International Government", *American Economic Review*, 76(1), 1986:1-13, and Mansfield, Edward, "The Concentration of Capabilities and International Trade", *International Organization*, 46(3), 1992:731-64.

position to dictate its terms of trade without complying with WTO decision since WTO member would still want to trade with him due to his powerful position.

4.9 Arbitration as an Alternative Means of Settling Disputes

Bilateral arbitration follows procedural rules agreed upon between the parties and is a rarely used practice within the WTO. Although arbitration is an autonomous procedure, it is still limited by its integration into the multilateral WTO dispute settlement system. Arbitration is supposed to be used only when the issues in a dispute are clearly defined by both parties and there is a mutual agreement on the procedure to be followed.¹³⁴ All WTO members must be notified of an agreement to enter into arbitration in order to give other members a chance to become parties to the arbitration. Other WTO members can only be part of arbitration upon agreement with the initiating parties. The result of an arbitration should be notified to the DSB, and the Council or Committee of any relevant agreement. Any other WTO member may raise any point relating to the arbitration award. The reason for this is that an arbitration award, although binding for the parties, cannot affect rights and obligations of third members or the power of the DSB to interpret WTO rules differently. Most of the same rules apply to the implementation of an arbitration award as to the implementation of the recommendation and rulings of a panel, Article 25.¹³⁵

4.10 WTO Precedent and International Law

Ernst-Ulrich Petersmann argues that the adoption of a dispute settlement report could constitute "consequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" in terms of Article 31 of the 1969 Vienna Convention on the Law of Treaties. This would mean that such a report had to be taken into account when interpreting GATT law. But, although GATT dispute settlement practice often referred to interpretations in previous reports, it also confirmed that judicial and other dispute settlement decisions do not have legally binding "precedent effect" for future disputes, in accordance with general international law. This was further emphasized in the 1996 Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*.¹³⁶ The AB stated that panel reports were an important part of the GATT *aquis* and that they also created legal expectations among WTO members. They should therefore be taken into account when they were relevant to a dispute. But, a panel report was only binding to the particular dispute it was designed to resolve. Petersmann

¹³⁴ This might include cases where the facts are not disputed. An agreement on procedural rules includes selection of arbitrators.

¹³⁵ Petersmann II, p.193. Petersmann I, pp.71-72.

¹³⁶ WT/DS8/AB/R of 4 October 1996.

continues to indicate that earlier adopted panel reports do not make the subsequent dispute *res judicata*.¹³⁷

According to international public law there is no *stare decisis*. This is indicated in statements of scholars such as Petersmann and Wallace,¹³⁸ and in Article 59 of the 1945 Statute of the International Court of Justice. But at the same time there are clear indications in both the DSU and the WP that WTO rules are to be applied uniformly and in accordance with prior interpretations, Rule 4 WP (see also section 4.7.2). This concept is not unfamiliar and in reality explains that the WTO panels and the AB can only interpret the WTO rules, and not make new ones. But, to some extent this is merely an illusion as in most national court systems. Inevitably, any provision being interpreted does to some extent move into unknown territory and may thus be compared to law making. After all, if a provision were totally clear and unambiguous, there would be no need for interpretation. So, the lack of *stare decisis* in the WTO puts the system on basically the same level as most national courts systems that allow *stare decisis* and the overruling of it at the same time. This is, of course, not a bad system since it provides the opportunity to correct improper judgments or develop rules as time passes.

4.11 Inter-governmentalism, Supranationality, Transparency and International Law

Inter-governmental organizations are normally created for a number of reasons.¹³⁹ By closer cooperation members are supposed to mutually benefit from the arrangement, whatever field is regulated. In history, the most frequent inter-governmental arrangements have been related to war and peace with the notion that peacetime cooperation will create bonds that are not easily broken in times of war and low-intensity conflict. One of the best examples of such an organization is, of course, the EU. At the same time as members enter organizations by their own free will, the organization will in most cases also impose obligations on them. This obligation may involve surrendering part of a member's sovereignty within the regulated field. The EU is probably the most integrated inter-governmental organization existing in the world today and its character as inter-governmental or supranational is debated vividly among scholars today. A very important aspect of this surrender of sovereignty is the degree of transparency existing within the system. Transparency is regarded as a safeguard against arbitrary administrative decisions and a form of checks and balances used to ensure that decision-making is done in accordance with rules acceptable to a "democratic" organization and society.

¹³⁷ Petersmann I, p.39.

¹³⁸ Petersmann I, p.39, Wallace, Rebecca M.M., "International Law", 3rd ed., (London: Sweet & Maxwell, 1997), p.25.

¹³⁹ For the sake of this paper, the WTO is considered to be an inter-governmental organization.

One of the most important aspects of being a member of an inter-governmental organization is to what degree members are bound by decisions made by the organization. While it ought to be clear that decisions that were foreseeable for prospective members before ratifying an international agreement are binding on the members, the problem is instead the further development of obligations under covered agreements by amendments or interpretations.¹⁴⁰ Realist scholars in international relations have emphasized the lack of enforcement powers among international organizations claiming that nation states are the only true actors on the international arena and that they do only what they please. Others argue that these organizations can raise the cost of non-compliance by creating a web of bargains that a nation will put at risk if it acts "opportunistically". This might be a workable alternative to enforcement.¹⁴¹

The dispute settlement system can be seen as a supranational encroachment of sovereign matters since the binding nature of the WTO arrangement can force decisions by organization bodies into domestic politics according to Sylvia Ostry.¹⁴² This might impose new obligations on members. If such a development is the effect of a ruling or a recommendation of the DSB, there will be a conflict with the obligations included in Article 3:2 and 3:5 DSU. These provisions state that a ruling or recommendation of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements at the same time as they cannot nullify or impair benefits accruing to WTO members under these agreements, nor impede the attainment of any objective of them. Therefore, WTO members should not be bound by this development. In addition, the WTO Agreement is an inter-governmental agreement controlled by international public law and should therefore be governed by the 1969 Vienna Convention on the Law of Treaties.¹⁴³ There is no obligation for countries to ratify the agreement unless they choose to of their own free will.¹⁴⁴ According to Article 40 of the Vienna Convention, an amendment does not bind a state, which fail to become a party to the amending agreement, although being a party to the original treaty. Also, concerning interpretations, the more limited interpretation and the one that will restrict a state's sovereignty the least is preferred.¹⁴⁵ If new obligations are unacceptable to a member, they can either choose not to become a part of that agreement, or withdraw from the WTO in accordance with Article X and XV of the WTO Agreement. A withdrawal applies both to the WTO Agreement and the Multilateral Trade Agreements. It takes effect six months

¹⁴⁰ Interpretation of any covered multilateral agreement can be adopted by a three-quarters majority of the WTO members, Article IX WTO Agreement. Amendments can be adopted through consensus or by a two-thirds majority depending on the issue, Article X WTO Agreement.

¹⁴¹ Comment by assistant professor Michael Hiscox, Department of Political Science, University of California, San Diego, US.

¹⁴² Ostry, p.21.

¹⁴³ The treaty was signed May 23, 1969 and entered into force January 1980. It will be referred to as the Vienna Convention in this paper.

¹⁴⁴ At the same time, it is obvious that most countries would consider it impossible to stand outside the WTO framework without jeopardizing important trade benefits.

¹⁴⁵ Wallace, p.235.

from the date a written notice of withdrawal is received by the Director-General of the WTO. Withdrawal from a Plurilateral Trade Agreement is governed by the provisions of that specific agreement. One important thing to remember, however, is that the “single undertaking approach” of the WTO Agreement was created as a response to the growing fragmentation of the GATT system and the so-called “GATT à la carte”.¹⁴⁶ This approach is of course in conflict with the idea to have interpretations and amendments only binding to WTO members who have accepted them.

How, then will treaties, amendments and interpretations be received in the WTO member’s domestic arena? The following account will provide some brief outlines of the treaty-making power of the US and the EU.¹⁴⁷

Treaty law in the US are made by the President but can only be ratified after approval by the Senate.¹⁴⁸ Such treaties are the “supreme law of the lands”,¹⁴⁹ but this only places them on an equal footing with federal statutes. If a treaty is in conflict with an already existing statutes, the treaty is treated as *lex posterior*¹⁵⁰ only if the two “are absolutely incompatible and the Statute cannot be enforced without antagonizing the treaty”. In case of a conflict with a subsequent statute, the latter prevails. A treaty is not repealed or modified by a subsequent statute unless that is the clear expressed intention of Congress.¹⁵¹ From this, it is evident that an amendment or interpretation expanding the covered agreements beyond what was originally approved of may have a serious effect on domestic policy. But, a subsequent statute can easily repeal this effect.

The EU has exclusive competence to regulate policy pertaining to agriculture, transport, foreign trade and competition within the union. This internal competence also covers some areas where the community and member states have shared competence, *inter alia* environmental issues. According to the *ERTA*-case,¹⁵² the Union’s external competence is a mirror image of its internal competence. Article 300 Amsterdam¹⁵³ permits the Community to conclude international agreements (in general) with one or more states or international organizations. International trade agreements are regulated by Article 133 Amsterdam and are negotiated by the Commission after authorization by the Council of the European Union.¹⁵⁴ The Council makes a decision by qualified majority without hearing the European Parliament,

¹⁴⁶ Utrikesdepartementet, p.11.

¹⁴⁷ This falls outside the scope of this paper but represents an important issue.

¹⁴⁸ Article II (2) of the Constitution of the United States of America.

¹⁴⁹ Article IV of the Constitution of the United States of America.

¹⁵⁰ The complete maxim *lex posterior derogat priori*.

¹⁵¹ Wallace pp.49-50 and U.S. Supreme Court cases *Johnson v. Browne* 205 U.S. 309 at 321 (1907), *Edye v. Robertson* 112 U.S. 580 at 599 (1884), and *Cooke v. The United States* 288 U.S. 102 at 119-120 (1933).

¹⁵² 22/70 *Commission v Council (Re European Road Transport Agreement)* [1971] ECR 263.

¹⁵³ This refers to the consolidated version of the Treaty Establishing the European Community (the Treaty of Rome’s wording after the Treaty of Amsterdam).

¹⁵⁴ The scope of Article 133 is wide according to *Opinion 1/75 Local Cost Standard* [1975] ECR 2871.

Article 133.4 and 300.3 Amsterdam. The Council, the Commission or a member state can submit a proposed agreement to the ECJ for examination whether it conforms to Community law or not, Article 300.6 Amsterdam. International agreements concluded according to Article 300 Amsterdam are binding on the Community and the member states, Article 300.7 Amsterdam. A concluded agreement can later be tried by the ECJ since it is part of Community law. The ECJ, however, cannot with binding force determine the international public law aspects of an international agreement that the Community or a member state is part of. The agreement's effect within the Community, though, falls under general Community law. In the *International Fruit-case*¹⁵⁵ the ECJ dealt with the effects of GATT 1947. The Court concluded that the interpretation of GATT 1947 fell under their jurisdiction. The Community was bound by GATT 1947, but the rules were not clear and unconditional enough to create direct effect within the Community. According to Pålsson & Quitzow, an *e contrario* conclusion would be that international agreements binding on the Community might in some cases have priority to secondary Community law.¹⁵⁶

A democratic nation surrendering part of its national sovereignty to an international organization will in return want insurance that this power is used in accordance with democratic values and principles. Transparency is today regarded as a pillar of the multilateral trading system requiring publication of laws and regulations and the mode of administration in services or investment regimes. Administrative law is procedural rather than substantive. It establishes norms to control what government bureaucrats do and how they do it. Article X GATT 1994 establishes rules for publication and administration of trade regulation with an emphasis on independent tribunals and judicial review. It is based on US administrative law with diffusion of power and checks and balances. The trend towards more openness has been apparent as the world trading system has grown more judicial over time, limiting the room for administrative discretion. The Tokyo Round increased transparency when it introduced the "Understanding regarding notification, consultation, dispute settlement and surveillance". Surveillance was also expanded during the Uruguay Round with the creation of the Trade Policy Review Mechanism (TRPM). A way of increasing transparency would be to create a monitoring body or an ombudsman to hear complaints about abusive use of power or impropriety in dispute settlement proceedings. This might supplement the use of the DSB, panels and the AB in these cases. Implementation of transparency requirements can, however, be difficult for countries with systems different from western countries.¹⁵⁷ In the future, dispute body decisions and the WTO decision-making process may

¹⁵⁵ 21, 24/72 *International Fruit Co. NV v Produktschap voor Groenten en Fruit* [1972] ECR 1219.

¹⁵⁶ For more instruction see Pålsson & Quitzow pp. 253-264, Steiner & Woods pp.60-61 and 22/70 *ERTA* [1971] ECR 263, 8/73 *Massey Ferguson* [1973] ECR 897, Opinion 1/75 *Local Cost Standard* [1975] ECR 1355, Opinion 1/76 *Inland Waterway Vessels* [1971] ECR 741, Opinion 1/78 *Natural Rubber* [1979] ECR 2871, Opinion 1/94 *Re the WTO Agreement* [1995] ECR I-5267

¹⁵⁷ E.g. former Eastern block countries and China.

increase the demand for more transparency.¹⁵⁸ This debate can be compared to the existing debate over the democratic deficit within the EU.

¹⁵⁸ Ostry, pp.14-17.

5 The Dispute Settlement Procedure & Efficiency

5.1 Introduction

A new, improved dispute settlement procedure was one of the major issues on the agenda for the Uruguay Round. For several countries, *inter alia* Japan and the US, it was one of the key issues. After the creation of the WTO and the new dispute settlement procedure, several observers indicated that US trade policy would shift to a greater reliance on the new mechanism in trade negotiations.¹⁵⁹ One of the reasons for this was that it would now be easier to get a dispute settled under the WTO since the possibility of a unilateral veto had disappeared. Another reason was that the estimated time to settle a dispute under the DSU (nine to twelve months) was expected to become shorter than the time required for successful bilateral negotiations.

John Jackson indicated that two to three times the normal amount of cases were brought under the WTO in its initial years, compared to the later years of GATT. Developing countries were also said to use it among themselves which was rare under GATT. This increasing use of the dispute settlement procedure indicated a greater confidence in the new system due to the greater predictability and reliability, therefore reducing the risk premium of international trade. The DSU could work as a fallback to facilitate negotiations and might be used as a threat.¹⁶⁰

While some scholars seem to agree on the fact that the new dispute settlement procedure facilitates negotiations and that the growing number of cases brought under it indicates a confidence in the system, Eric Reinhardt takes the opposite position. In a dissertation presented in 1999, Reinhardt claimed that the change in the new procedure had little impact on the increasing amount of cases initiated.¹⁶¹ In support of his findings it is necessary to note that his dissertation is the first, significant quantitative statistical analysis of dispute initiation under the WTO.

5.2 Dispute initiation of the US, the EU and Japan 1948-1999

The purpose of this analysis is to show that the US has made increasing use of the dispute settlement procedure over time by initiating more disputes. The analysis will be limited to initiated disputes from 1948 to 1998 and will only cover disputes initiated by the USA, the EU and Japan. The EU and Japan

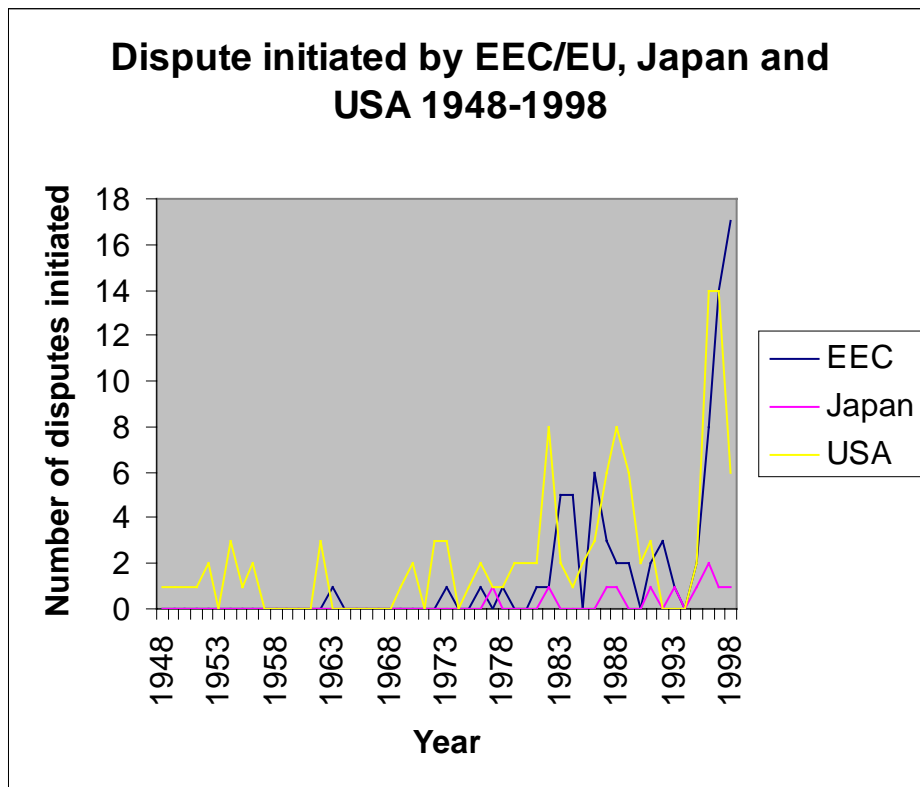
¹⁵⁹ Nanto

¹⁶⁰ Jackson, pp.166, 175.

¹⁶¹ Reinhardt II.

were added as a comparison since they both represent large trading “nations” that would be likely to be involved in trade and disputes over trade. The data examined was collected from three different sources. Eric Reinhardt compiled a useful database for the GATT period 1948-1993 that was located on his web-site.¹⁶² This was a second-hand source at best. The WTO data was compiled from a combination of the official web page of the WTO and Ernst-Ulrich Petersmann’s tables over disputes in an analysis over the GATT/WTO dispute settlement system.¹⁶³ That data is a combination of first-hand and at best, second-hand data.

A dispute was considered initiated when a request for consultation was made or another measure undertaken on behalf of the plaintiff in question. This means that a few disputes will be represented as initiated by more than one of the “nations” in question although the dispute may concern the same matter. For a detailed table of the initiated disputes, see Appendix 5.



It is necessary to note that the US has been a member since 1948, Japan since 1955 and the EU (EEC) since 1958. According to the data collected, no disputes were initiated during 1994. The reason for this might be the anticipation of the DSU coming into effect in 1995. Clearly, there has been a more intense activity on behalf of the US and the EU in later years, with a peak in 1998. For Japan, however, it is hard to say that there is any real pattern to follow. Japan has kept a very low profile throughout the existence of the GATT/WTO. Many of the reasons for this increase in dispute initiation on behalf of the US have been indicated in previous paragraphs. The popular explanation is a growing confidence in the new procedure and its ability to

¹⁶² <http://userwww.service.emory.edu/~erein/data>, accessed 04/15/99.

¹⁶³ <http://www.wto.org/dispute/bulletin.htm>, accessed 11/16/99. Petersmann II, pp.248-290.

swiftly settle a dispute quicker and cheaper than traditional trade negotiations. Under the GATT system, NIOs had to be handled by bilateral trade negotiations whenever countries estimated it to be quicker than the GATT dispute settlement procedure. This analysis will now move on to examine Eric Reinhardt's contradictory thesis on this subject.

5.3 Alternative Explanations by Eric Reinhardt

In February 1999, Eric Reinhardt presented a statistical analysis of dispute initiation under GATT/WTO. The paper covered the years 1948-1998 and quantified a large number of data concerning disputes. His key point was that disputes represent *prima facie* conflicts of interest and that they are therefore not a signal of success, but a potential challenge to the system. He concluded that the overall probability of initiation had not risen under the WTO. The growth in the number of disputes initiated was just a function of the rise in GATT/WTO membership and increasing trade dependence. Democracies were more likely to initiate disputes and to be targeted as well. In general, dispute initiation was also more likely in retaliation for a prior dispute, against a state previously targeted by others, between allies, and, between recent opponents in militarized disputes.¹⁶⁴

He added that just because more cases were filed did not mean that the system in itself was trusted. This was so because:

- Increasing litigation in civil courts are considered inefficient and costly as opposed to settling outside of court.
- Most disputes involved a measure in conflict with the GATT 1947 and thus represented a *prima facie* conflict of interest where the plaintiff opposed an outcome preferred by the defendant. Dispute initiation was therefore an indication of cheating, and not of cooperation.
- The majority of rulings end with no or only partial concessions even after rulings against the defendant since the WTO lacks enforcement powers.
- Filing of a dispute has inherent costs such as negative trade effect and transaction costs in litigation.¹⁶⁵
- Finally, he stated that the assumption that WTO lowers transaction costs was problematic because although the veto in the General Council/DSB had been abolished, new barriers had been erected. These new barriers included third party addition and negotiations if defendant refused to comply, which could add up to 29 months before retaliation for non-compliance was possible.¹⁶⁶

¹⁶⁴ Reinhardt II, pp.1-3.

¹⁶⁵ Reinhardt II, pp.5-6.

¹⁶⁶ Reinhardt II, pp.13-15.

5.4 Analysis of Reinhardt's arguments

The discussion of Reinhardt's conclusions will start out with findings I agree with, moving along to conclusions I do not agree with. In both cases, I will provide possible alternative reasons for his results. It was not possible to check Reinhardt's data for disputes initiated after 1993 since he still has not released it.¹⁶⁷ Due to time constraints, the analysis below cannot offer any statistical evidence for its standpoints and should therefore only be used as a source of inspiration for further work in this area.

5.4.1 Democracies are More Likely to Initiate Disputes and to be Targeted

Eric Reinhardt argued that democracies were more likely to initiate disputes because they were more responsive to domestic pressure from producers. Democracies were also more often targeted since they were more likely to maintain objectionable trade policy due to their disproportionate representation of producers over consumers.¹⁶⁸

It is easy to agree with the notion that democracies would initiate more disputes and also be targeted more often. But although Reinhardt's explanation for this seems very reasonable there might be other additional reasons for this. First, per definition a democracy is supposed to follow rules and regulations in general. So, whenever in conflict, a democracy would use the system at hand. Reinhardt refuted this argument by stating that democracies were not at all more willing to follow multilateral rules than non-democracies since they in a larger extent refused to abide to the outcome of the dispute.¹⁶⁹ But although Reinhardt's findings regarding the outcomes might be true, it still does not refute the idea that democracies "believe" in use of the system. Just because democracies refuse to follow negative outcomes, does not mean that they do not believe in the judicial system. Second, depending on the definition of a democracy, it seems fairly clear that a larger percentage of the WTO's 135 members should be democracies as opposed to non-democracies. Out of every initiated dispute, there would thus be a larger possibility that a democracy either initiated it, or was targeted by it. Reinhardt did not explain how he determined the democracy index and there is no way of finding out how many of the WTO disputes were initiated by democracies in his paper since he has not released the data. Third, the largest trading "nations" of the world are democracies. They are therefore more likely to both initiate and be targeted since they maintain more trade relations than smaller WTO members. The US and the EU, for example, have been responsible for a large share of all disputes under the GATT/WTO.

¹⁶⁷ Professor Reinhardt said, via email, that the data would be released after a presentation of some related work of his.

¹⁶⁸ Reinhardt II, pp. 3, 10, 11.

¹⁶⁹ Reinhardt II, pp. 29.

5.4.2 Dispute Initiation as Retaliation

The use of dispute initiation in retaliation for prior disputes is a concept easily understood. It is also a practice widely used in civil proceedings. There might be several reasons for this strategy. When a plaintiff initiates a dispute, the defendant may file a counter suit, *e.g.* in order to reach a better position for negotiation. Another reason might be that disputes might arise in a circular fashion: a violating measure inflicted on a WTO member might cause that member to impose a violating measure of his own on the member responsible for the first violation.

5.4.3 Dispute Initiation against States Previously Targeted by Others

Reinhardt stated that an initiated dispute encouraged initiation of more related disputes out of fear of trade diversion.¹⁷⁰ Excluded WTO members would fear to be left out of a more favorable agreement reached between the original parties to the dispute.¹⁷¹

This is also a reasonable conclusion. First, it is possible that when there is one violation, there might often be more. Second, as Reinhardt stated, when a member brings a successful dispute, other members might be more likely to also initiate a dispute against the losing WTO member in hope of also winning some benefit for themselves. Third, when a member loses a dispute and has to abandon a measure it feels brings them some benefit, the same member might be likely to try to impose another barrier in the same or another sector in order to still reach the benefit it had from the first measure, thus keeping the sum of gains and losses at zero. These benefits could be anything from tariff income, political support from protectionist forces or maybe even credibility on the world political field.

5.4.4 Allies, Opponents and Large Trading Nations

Reinhardt concluded that allies were more likely to be involved in a dispute. One of the reasons for this was that allies tended to trade more with each other. He did not present any other reasons for the result.¹⁷² Opponents in militarized conflict were also more likely to get into a dispute for obvious reasons. Reinhardt did not elaborate that finding either. When it came to large nations, Reinhardt could not find any connection between relative size of WTO members and probability to initiate disputes. To examine this issue, he used a variable for GDP ratio for the parties to the disputes. The result could be explained by an inherent contradiction regarding the strategic behavior of larger and smaller WTO members. On the one hand, large members may be

¹⁷⁰ For a discussion of trade creation and trade diversion, see Krugman & Obstfeldt, pp.242-245.

¹⁷¹ Reinhardt II, p.17.

¹⁷² Reinhardt II, p.20.

more desirable targets from the standpoint of market opportunities. But, on the other hand, large members are less likely to concede, at least to a smaller member. Another size issue was that members running global trade surpluses were more likely to be targeted. These members were also more likely to initiate disputes which does not mix well with the common view that trade deficits increase political pressure for fair trade.¹⁷³

All of these findings are easy to agree with. Allies would seem more likely to succeed in bilateral negotiations. Why then would they instead use the dispute settlement procedure? It is first necessary to understand the definition used to determine who is considered an ally to whom. Reinhardt seemed to use a loose definition examining if the parties to a dispute were at all involved in some sort of cooperation or alliance (either they were, or they were not). Since that data could not be examined, this analysis will have to use a common sense type of definition thinking about blocks like the EU, the North Atlantic Treaty Organization (NATO) and the North American Free Trade Agreement (NAFTA). If that definition is true, a likely explanation might be that allies believe that it is cheaper to settle a dispute within the framework of the WTO than in bilateral negotiation. If in turn that is true, it would be an evidence for the thesis of this analysis; that increasing number of dispute initiation is due to a confidence in the system. But, there are of course alternative explanations. Since a large number of all WTO members are allied with other members, it is highly likely that allies will end up in a dispute. Earlier in this analysis it was shown that a large number of disputes were started by large trading “nations” like the US and the EU. These “nations” have several allies. Although Reinhardt could not find any connection between GDP ratios and probability of disputes, he reported an interesting finding about trade surpluses. A member running a global trade surplus should be expected to be targeted more, just as Reinhardt concluded. One reason for this is that other members might try to open up the home market of such a member. But why then, would they also initiate more disputes? Well, as was discussed previously, a targeted member is likely to initiate a counter suit. Furthermore, big members running trade surpluses would be more likely to be involved in a large amount of trade and thus be exposed to conflict situations. This would make them likely to use the strategy of targeting previously targeted members. Finally, if a member running a trade surplus is targeted by other members to open up his home market, he might be subject to aggressive unilateralism,¹⁷⁴ as in the case of the US and *e.g.* Japan.¹⁷⁵ Perhaps a more true measurement of a WTO member’s size in trade is the amount of trade it is in fact involved in. A large GDP does not necessarily mean that a country is a large trading nation (in theory). Therefore, a more useful piece of statistics would be some sort of comparison between imports, exports and GDP. Reinhardt does control for trade levels for part of his

¹⁷³ Reinhardt II, pp. 21, 27.

¹⁷⁴ For a discussion on aggressive unilateralism, see Bayard, Thomas & Elliot, Kimberley Ann, “Reciprocity and Retaliation in US Trade Policy”, (Washington DC.: Institute for International Economics, 1994), pp. 9-22, 51-97.

¹⁷⁵ Bayard & Elliot, p.19.

statistics, but how he does that, and the exact statistics used, are not available for this analysis.

5.4.5 Increasing Amount of Cases as a Sign of Confidence in the System

Reinhardt argued that just because more cases are filed with the WTO does not mean that the members have confidence in the system. This is the most controversial of Reinhardt's findings.

His first argument that increasing litigation in civil courts is considered inefficient and costly as opposed to settling outside of court is both correct and erroneous. The statement in itself is of course correct but dispute initiation can also be considered efficient since it promotes settlement out of court. Only a small fraction of all civil law suits and disputes initiated under the WTO ever go to "court". The use of dispute initiation as a threat in order to reach a mutually acceptable solution must be efficient. This conclusion also strengthens the case for my analysis, while weakening Reinhardt's conclusion that the WTO has not had any significant impact on dispute initiation and the members' confidence in the system.

Reinhardt's second argument concerned disputes as *prima facie* conflicts of interest. This is an argument that seems hard to understand. The dispute settlement system was constructed in order to deal with disputes. And a dispute is per definition a conflict of interest. Why then would this indicate a lack of confidence in the system? Why would dispute initiation be a challenge of the dispute settlement system? This analysis can provide no explanation for Reinhardt's position, and can offer no contradictory explanation.

One of Reinhardt's more valid argument is the fact that the WTO lacks enforcement power and therefore does not promote confidence in the system. Evidence for this was that the majority of rulings end with no or only partial concessions even after rulings against the defendant. This is an argument that on the surface seems hard to refute. The only possible way to contradict Reinhardt's conclusion is to introduce game theory and an infinite amount of games. A WTO member who does not follow rulings and recommendations would thus find it more costly to play new games in the future. A reputation of non-compliance would not only make future games more costly, but would also make it harder for that same member to force compliance in cases initiated by itself.¹⁷⁶ But a logical counter argument to this would be the fact that with greater trade dependency, most nations would still be forced to play with their important trade partners even though they suspect defection.

Reinhardt last argument was that although the new dispute settlement procedure lowered several barriers and therefore decreased transaction costs, several new barriers had been erected creating new transaction costs. In order

¹⁷⁶ This angle was suggested by Michael Hiscox.

to use this argument in support of his conclusion it is necessary to find that the net effect is at least zero but maybe even positive. But the weight of this particular argument depends on how the value of the transaction costs is measured. A true value for this is, of course, impossible to find and an analysis must instead look at Reinhardt's argument that WTO members now face longer time limits before retaliation can be used. Even if this in fact might be true, it is also worth thinking about the fact that the purpose of the dispute settlement procedure is not retaliation, but conformity with the aims and goals of the WTO. This might lead some to conclude that there is a higher transaction cost *de facto*, but maybe not *de jure*. Since this analysis mainly is dealing with the judicial system, an examination of eventual transaction costs is outside the scope.

Finally, another important point in support of the thesis of this analysis is the fact that the new WTO system as a whole presents a more stringent and more foreseeable set of rules in general. This should mean that there would be fewer disputes under the WTO than before since members now more easily can determine whether or not a measure is in conflict with a covered agreement at the same time as it would be easier to determine success or failure in the case of a initiated dispute.¹⁷⁷ But instead we have seen an increasing amount of disputes. Why is this? Normally, an increasing amount of information should make strategic decisions about costs and benefits more accurate. This would lead to the conclusion that members consider the costs of disputes less than the costs of bilateral trade negotiations, therefore making it a rational choice to initiate a dispute.

¹⁷⁷ This idea was also suggested by Michael Hiscox. Keep in mind that interpretation of covered agreements may not necessarily have become more foreseeable than before just because the dispute settlement procedure has.

6 Conclusion

The future development of the WTO rests on the will of its members to continue cooperating and believing that the benefits will be larger than the costs. But, with increasing trade dependence, new actors on the international trade policy scene will also influence the direction the WTO takes. Today, trade policy is influenced not only by governments, but also by multinational corporations and international non-governmental organizations. Another factor is the existence, or non-existence, of an economic and political hegemon within the global trade regime.¹⁷⁸

On the political side of WTO's future there are several potential problem areas.

- Some scholars believe there is an external threat against the WTO involving, *inter alia*, regional trade blocks and the power struggle between the US and the EU.¹⁷⁹ Regional trade agreements are allowed under Article XXIV GATT 1994 but are in fact in conflict with the non-discrimination principle of Articles I and III GATT 1994.
- With the creation of the Ministerial Conference, representatives from the members' governments got a permanent voice in the highest decision-making body of the WTO. This was a necessary improvement of the GATT system because it acknowledged the importance of global trade in domestic politics. The problem with these representatives is that they are dependent on domestic political support and thus subject to the influence of voters and lobbying.
- Inter-governmental organizations normally involve some supranational elements. At this point in time, the most natural ways of developing the WTO would necessarily include loss of sovereignty on behalf of the WTO members. This development would need to be approved in domestic fora and thus be subject to scrutiny by the citizens of the WTO members. The image of the WTO in the public eyes must therefore be positive.
- With the loss of sovereignty transparency becomes vital. The TPRM has helped in this area encouraging members to follow WTO rules and to fulfill their commitments under the covered agreements. A further way of increasing transparency would be to create a monitoring body or an ombudsman to hear complaints about abusive use of power or impropriety in dispute settlement proceedings. This might supplement the use of the DSB, panels and the AB in these cases, especially since these proceedings to a large extent are confidential and thus do not promote transparency.

¹⁷⁸ For a discussion on Hegemonic Stability Theory, see Krasner, Stephen, "State, Power and the Structure of International Trade", *World Politics*, 28(3), 1976; Kindleberger, Charles, "International Public Goods without International Government", *American Economic Review*, 76(1), 1986:1-13; and Mansfield, Edward, "The Concentration of Capabilities and International Trade", *International Organization*, 46(3), 1992:731-64.

¹⁷⁹ Sjöstedt II, pp.31-32.

- The “one single undertaking” approach in Article XVI (5) WTO Agreement is threatened by, *inter alia*, disagreement over how to deal with new areas of trade. This threat is very clear in the conflict between developing and developed countries regarding linking, *e.g.*, labor standards and environmental issues with trade. If an agreement cannot be reached, there is a risk of creating a multi-tier “WTO à la carte” where the continued liberalization of global trade would be hampered.

The WTO dispute settlement system also includes several problem areas.

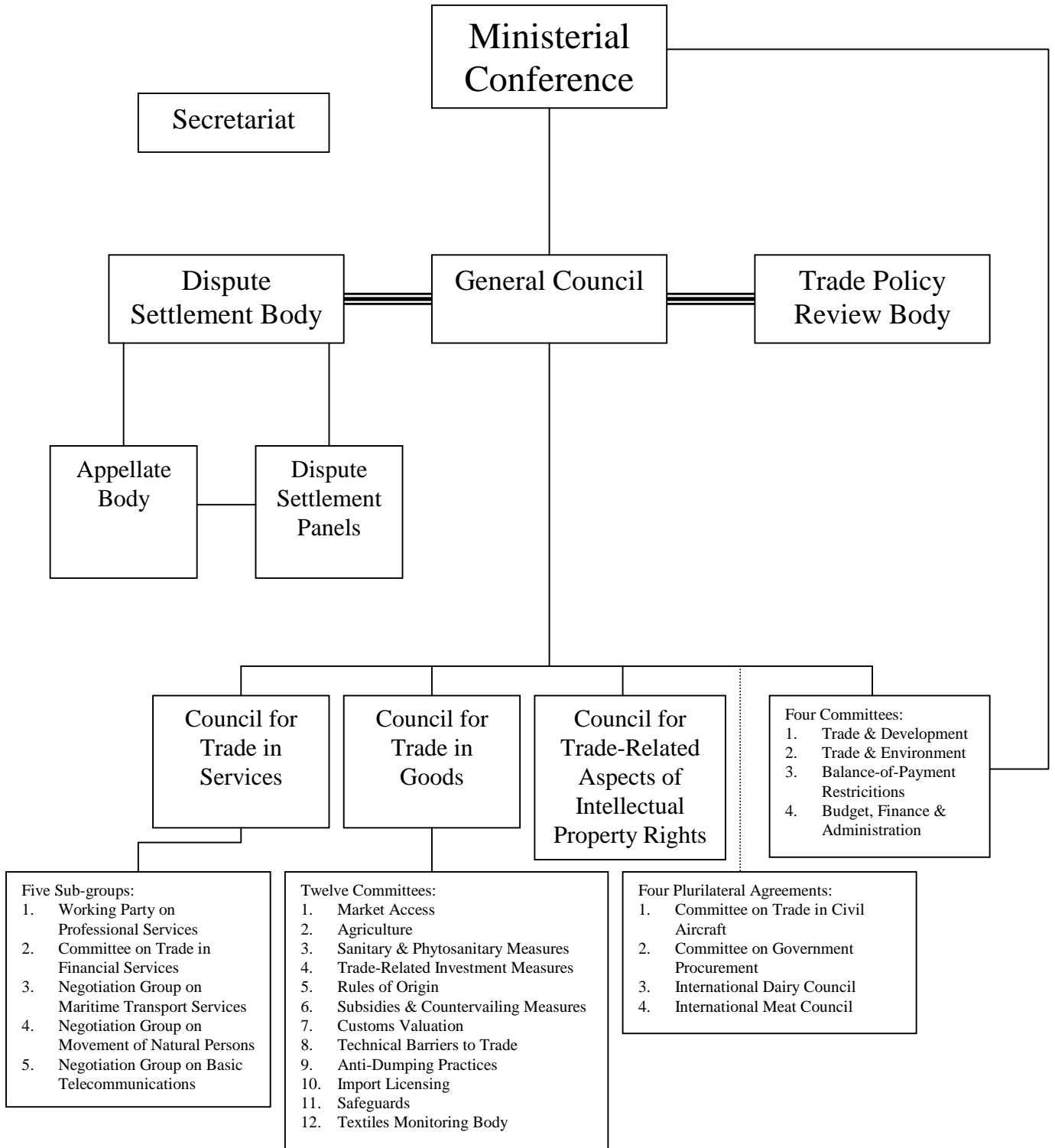
- The possibility to initiate non-violation and situation complaints under Article XXIII:1 GATT 1994 is in conflict with Article 3:2 DSU. But, rulings and recommendations based on these types of complaints are not binding. Therefore, a conflict arising under these circumstances is in fact a signal to the WTO as an organization to execute its legislative rather than its judiciary power. Only by altering, or amending, existing agreements can measures leading to non-violation or situation complaints be prevented from occurring, or at least be justiciable.
- The *ad hoc* character of panels is a major weakness that may promote distrust in the system. A more permanent system would increase the experience of panelists and may also make it possible to remand appealed disputes from the AB.
- The AB’s lack of remand power curtails an appellant’s right to a panel proceeding by functioning, in essence, as a court of first instance.
- The total confidentiality surrounding the proceedings involving possible violation of the RC does not promote confidence in the dispute settlement system. Only by assuring the total impartiality of individuals serving in adjudicating positions can the integrity of the system be guaranteed. It would instead be better to have some public control of such matters.
- The references to notions of fairness in some dispute settlement provisions may be in conflict with Articles 3:2 and 3:5 DSU. This includes non-violation and situation complaints in Article XXIII:1 GATT 1994, and Rule 16(1-2) WP.
- It is necessary to give the WTO the possibility to enforce dispute settlement rulings. This could mean a surrender of sovereignty on behalf of the WTO members and may therefore be practically impossible.
- In accordance with public international law, there is no *stare decisis* in the WTO. But this is merely an “illusion” as in domestic court systems that allow *stare decisis* and the overruling of it at the same time. There is also indications of a desire to create WTO precedent in Rule 4 WP. It is possible, however, that as the legal framework of the WTO grows more and more judicial the character may change as the judicial system of the EEC/EU did.
- Interpretations of covered agreements by, *inter alia*, dispute settlement bodies may seem to impose new obligations on the WTO members. But they are only bound by the concessions already made during their membership negotiations. Future development in multilateral trade negotiations or dispute settlement rulings cannot impose new obligations on existing members according to Articles 3:2 and 3:5 DSU.

The increasing amount of initiated disputes under the WTO has been seen as a sign of greater confidence in the new system. Eric Reinhardt has presented an impressive quantified analysis of dispute initiation under both the GATT and the WTO reaching the opposite conclusion. It is easy to agree with many of his conclusions although this analysis has suggested that there might be alternative explanations for some of his findings. But when it comes to Reinhardt's main point about increasing number of disputes initiated representing a challenge to the system, I am compelled to disagree. My analysis has presented reasons for why the growing number of disputes initiated is a sign of confidence in the system. Some of the ideas presented by both Reinhardt and myself depend upon accurate definitions and statistics that in some cases cannot be assessed, *e.g.* transaction costs. It is therefore, quite possible that there is too little statistical information about dispute initiation under the WTO to make any clear statements of the development or the future confidence in the system.

Finally, it is necessary to remember that the WTO is a membership organization and therefore somewhat at the mercy of its members. The individual WTO members are in turn subject to the democratic pressure from voters. In order to continue the liberalization of global trade it is therefore important to have the support of voters all over the world. The 3rd Ministerial Conference in Seattle, US, was supposed to be the launchpad for a new multilateral negotiation round starting sometime in the new millenium. At the site of the conference, demonstrators gathered to protest against, *inter alia*, the WTO's undemocratic structure and its alleged role in hampering the economic progress of developing countries. The extensive protests may to some extent have damaged the WTO meeting in Seattle, but the more serious damage was done to the image of the WTO in the eyes of the average citizen associating the organization with teargas, riot-police and arrests as opposed to liberalized trade and economic development.

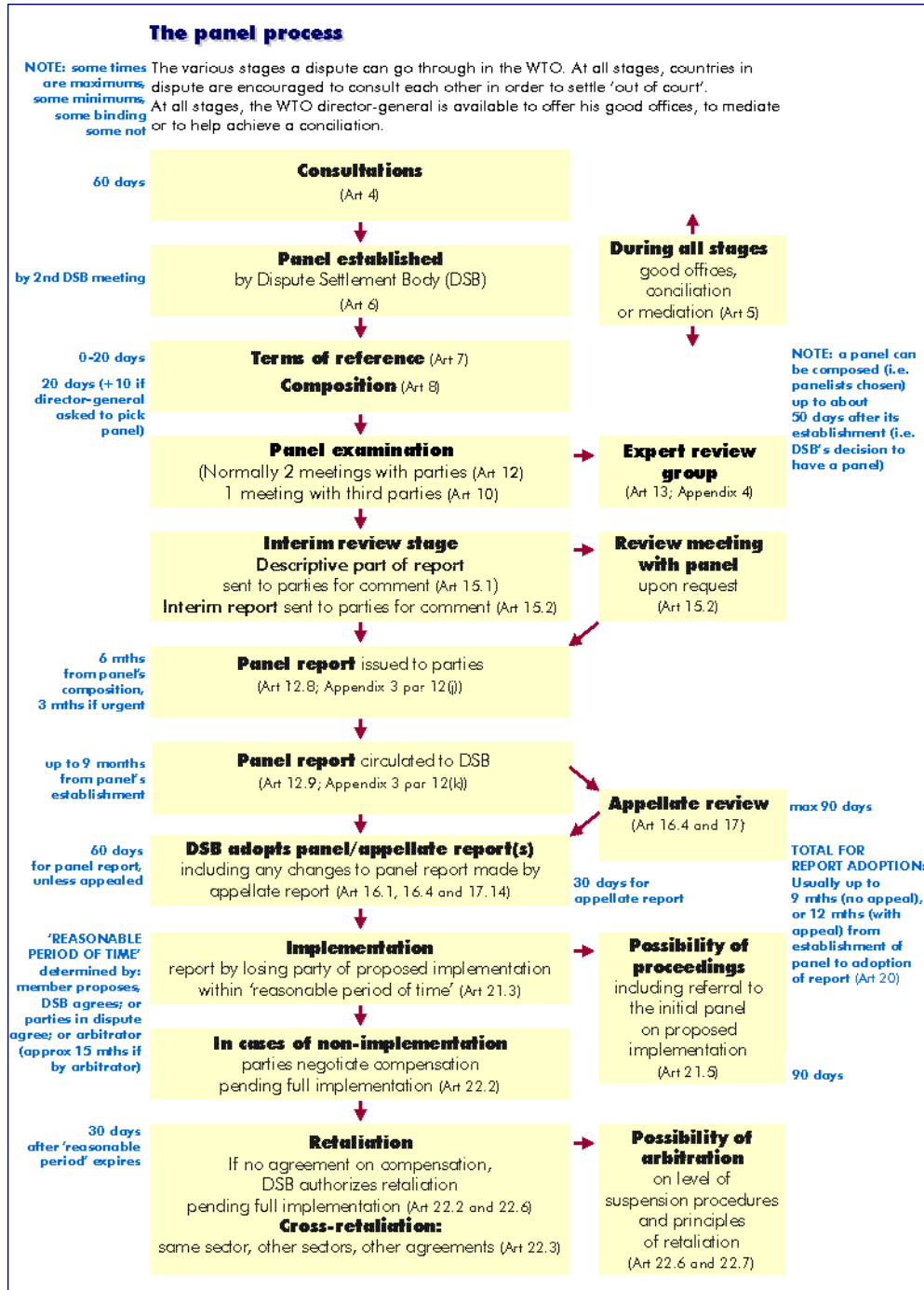
Appendix 1

Structure of the WTO.



Appendix 2

Overview of the WTO dispute settlement procedure.¹⁸⁰



¹⁸⁰ <http://www.wto.org/wto/about/dispute2.htm> accessed 04/15/99.

Appendix 3

Appendix 1 to DSU

Agreements covered by the Understanding
Agreement Establishing the World Trade Organization (WTO
Agreement)

(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods (GATT 1994)

Annex 1B: General Agreement on Trade in Services (GATS)

Annex 1C: Agreement on Trade-Related Aspects of Intellectual
Property Rights (TRIPs)

Annex 2: Understanding on Rules and Procedures Governing the
Settlement of Disputes (DSU)

(C) Plurilateral Trade Agreements

Annex 4: Agreement on Trade in Civil Aircraft

Agreement on Government Procurement

International Dairy Agreement

International Bovine Meat Agreement

The applicability of the DSU to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the DSU to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB.

Appendix 2 to DSU

Special or additional rules and procedures contained in the covered agreements

Agreement Rules and Procedures

Agreement on the Application of Sanitary and Phytosanitary Measures 11.2

Agreement on Textiles and Clothing 2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 through 8.12

Agreement on Technical Barriers to Trade 14.2 through 14.4, Annex 2

Agreement on Implementation of Article VI of GATT 1994 17.4 through 17.7

Agreement on Implementation of Article VII of GATT 1994 19.3 through 19.5,
Annex II.2(f), 3, 9, 21

Agreement on Subsidies and Countervailing Measures 4.2 through 4.12, 6.6, 7.2 through 7.10, 8.5, footnote 35, 24.4, 27.7, Annex V

General Agreement on Trade in Services XXII:3, XXIII:3

Annex on Financial Services 4

Annex on Air Transport Services 4

Decision on Certain Dispute Settlement Procedures for the GATS 1 through 5

The list of rules and procedures in this Appendix includes provisions where only a part of the provision may be relevant in this context. Any special or additional rules or procedures in the plurilateral trade agreements as determined by the competent bodies of each agreement and as notified to the DSB.

Appendix 4

Timetables for consultation and appellate review. Timetable for panel proceedings is in Appendix 2.

Table 3. Time-table for consultation from Day 0	
Request for consultation	0
Defendant's reply	0-10
Defendant enter into consultation	0-30
Earliest possible time to request formation of a panel if defendant does not enter into consultation	31
Result has to be achieved within	0-60
Request panel	61

Table 4. Timetable for appellate review from Day 0	
Notice of Appeal	0
Appellant's submission	0-10
Multiple appellant's submission	0-15
Response to multiple appellant's submissions	0-25
Appellee's submission	0-25
Third participants submissions	0-25
Oral hearing	30
Circulation of appellate report	30-60, but no longer than 90
DSB meeting for adoption	+30 days = 60-120

Appendix 5

Table of cases initiated by the EU, Japan and the US 1948 to 1998.

Year	EU	Japan	USA	Year	EU	Japan	USA
1948	0	0	1	1980	0	0	2
1949	0	0	1	1981	1	0	2
1950	0	0	1	1982	1	1	8
1951	0	0	1	1983	5	0	2
1952	0	0	2	1984	5	0	1
1954	0	0	3	1985	0	0	2
1955	0	0	1	1986	6	0	3
1956	0	0	2	1987	3	1	6
1962	0	0	3	1988	2	1	8
1963	1	0	0	1989	2	0	6
1969	0	0	1	1990	0	0	2
1970	0	0	2	1991	2	1	3
1972	0	0	3	1992	3	0	0
1973	1	0	3	1993	1	1	0
1975	0	0	1	1995	2	1	2
1976	1	0	2	1996	8	2	14
1977	0	1	1	1997	14	1	14
1978	1	0	1	1998	17	1	6
1979	0	0	2				

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General Agreement on Tariffs and Trade (GATT 1994)¹⁸⁶
Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes¹⁸⁷
State of Play¹⁸⁸
Understanding on Rules and Procedures Governing the Settlement of Disputes¹⁸⁹
Working Procedure for Appellate Review¹⁹⁰

EU

Code of conduct for Commissioners¹⁹¹
The consolidated version of the Treaty Establishing the European Community¹⁹²
Opinion 1/75 Local Cost Standard [1975] ECR 1355
Opinion 1/76 Inland Waterway Vessels [1971] ECR 741
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