Quick Guide to the World Trade Organization Dispute Settlement Jurisprudence By Felix Maonera

Abstract

At the beginning of their tours of duty in Geneva, many African WTO negotiators find it difficult to understand the terms and concepts used and developed by the WTO Panels and the Appellate Body. The Panel/Appellate Body Reports are usually bulky and delegates hardly find the time to read them. Yet, the principles that are being developed in these reports, and the ensuing WTO jurisprudence, are crucial to the negotiators' understanding of the WTO landscape in which they have to make and defend proposals, and negotiate proposals put forward by other negotiating partners. The motivation behind putting this guide together is therefore to assist the negotiators in attaining a simple understanding of WTO Jurisprudence. The officials in the relevant Ministries in the capitals, who instruct their negotiators in Geneva, will also find the guide useful, as should trade law students.

The approach in putting together the guide is not to comment or provide a value judgment on what the Panel/Appellate Body has stated on the relevant terms or concepts. Instead, under each term or concept, presented in alphabetical order, the rulings of the Panels/Appellate Body are simply set out, followed by what negotiators can expect if they ever were to find themselves representing their countries in a dispute before these bodies. The detailed case citing footnoted in the Quick Guide will assist those wishing to do more detailed research on the cases.

The present Guide has been put together by a former representative of an African government in Geneva and is based on his experience. It is not a comprehensive compendium of technical trade terms but can serve a useful purpose in disseminating more information about the multilateral trade dispensation.

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Terms and Abbreviations

Contracting parties  Parties to GATT 1947 (WTO Members)

CONTRACTING PARTIES  Designates contracting parties acting jointly (GATT
Article XXV), deemed also to be reference to the WTO

Covered Agreements  The Agreements listed in Appendix 1 to the DSU

DSB  Dispute Settlement Body

DSU  Dispute Settlement Understanding

Enabling Clause  The Decision of the CONTRACTING PARTIES of 28
November 1979, entitled 'Differential and More Favourable Treatment, Reciprocity and
<table>
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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GATT 1947</td>
<td>General Agreement on Tariffs and Trade 1947</td>
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<tr>
<td>GATT 1994</td>
<td>General Agreement on Tariffs and Trade 1994 (Includes GATT 1947, legal instruments that entered into force under the GATT 1947 before the entry into force of the WTO Agreement, the Understandings, and the Marrakesh Protocol to GATT 1994)</td>
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<tr>
<td>General Agreement</td>
<td>General Agreement on Tariffs and Trade 1994</td>
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<td>GSP</td>
<td>Generalised System of Preferences</td>
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<td>MFN</td>
<td>Most-favoured-nation</td>
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<td>SCM Agreement</td>
<td>Subsidies and Countervailing Measures Agreement</td>
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<td>SPS Agreement</td>
<td>Agreement on Sanitary and Phytosanitary Measures</td>
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<td>Agreement on Trade-related Investment Measures</td>
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<td>Vienna Convention</td>
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<td>WTO</td>
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General Note

An attempt has been made to make this Guide ‘reader-friendly’ by capturing the principles in the simplest way possible, without diluting the gist and content of the findings. However, in instances that involve very technical rulings, the original wording in the Panel/Appellate Body Report is used as closely as is possible so that the technical aspects are not lost to the reader. It should be borne in mind that this Guide deals in most cases with matters of law, which though simplified, may still come through as technical to the non-lawyers. It is hoped, however, that a sufficiently big part of this Guide remains accessible to all. It is hoped also that those readers trained in law do not find it oversimplified. As can be imagined, striking the right balance is not always easy.

In this revised version commentary is provided on certain matters from a principally developing country perspective, with the aim of putting across what can be legitimately expected when and where these terms and principles present themselves for interpretation and application in the WTO. Effort has been made to capture the principles as applied generally, and as applied in specific circumstances as well.

Cases have been cited depending on their relevance to a principle or term and on whether or not they add to, or vary the principle. An attempt has been made to select those cases in which the principle or term was originally developed, applied or varied. Although some of the cases may appear dated, it will be realised that such being the nature of jurisprudence, there is little or no variance in the manner in which a principle or term is applied over the years. If anything, the very early Panel/Appellate Body findings and rulings are cited wholesale as authority by a later Panel/Appellate Body.

This Guide is by no means exhaustive in its identification of, and dealing with, the principles/terms. For a more detailed discussion of the principle/term, reference should always be made to the cases cited. Since it is the principles/terms rather than the cases or WTO Agreements that determine the structure of the Guide, not all cases or WTO Agreements are dealt with in equal measure. For example, little reference in the Guide is made to TRIPs and GATS for the reason that not many cases have been brought before the Panels/Appellate Body in this area.

It is hoped that this Guide, limited in scope as it is, will add to the sum total of knowledge in the area of WTO jurisprudence by making the cases ‘accessible’ and thereby making things a little simpler and easier for the reader.

1 Arbitrary or unjustifiable discrimination[1]

In terms of the chapeau of Article XX of GATT, an importing Member may not treat its trading partners in a manner that would constitute ‘arbitrary or unjustifiable discrimination’. In order for a measure to be applied in a manner that would constitute ‘arbitrary or unjustifiable discrimination’ between countries three elements must exist. First, the application of the measure must result in discrimination. Second, the discrimination must be arbitrary or unjustifiable in character. Third, this discrimination must occur between countries where the same conditions prevail.[2]

Discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.[3] While a given measure should be designed in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in any exporting Member, there is no need for specific provisions in the given measure aimed at specifically addressing the particular conditions prevailing in every individual exporting Member.[4]

‘Arbitrary discrimination’ will be assumed to exist where there is little or no flexibility in how officials are to make determinations pursuant to the relevant provisions.[5]

In other words, countries cannot establish a rigid and unbending standard by which to determine whether or not other countries will be granted or refused the right to export products to those countries. This is especially significant in the trading relationship of between rich and poor countries since rich countries are more likely to demand that strict standards, even those that are costly to put in place, be met by even poor countries.

It has been made clear that it is not acceptable, in international trade relations, for one WTO Member to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members.[6]

A measure whose application is more concerned with effectively influencing WTO Members to adopt essentially the same
comprehensive regulatory regime as that applied by the country introducing the measure even though many of those Members may be differently situated, will be considered discriminatory. The discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.

Unjustifiable discrimination is more likely to be found to exist where the Member introducing the measure fails to engage the countries against whom the measure is introduced in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements before enforcing the import prohibition against exports from those other Members.

This is especially so if the measures sought by the Member prohibiting imports is of the type that would normally require international cooperation, such as environmental protection.

2. *Amicus curiae briefs*[7]

The dispute settlement system of the World Trade Organization (WTO) envisages participation in Panel or Appellate Body proceedings as a matter of legal right only by parties and third parties[8] to a dispute. And, under the *Dispute Settlement Understanding* (DSU), only Members of the WTO have a legal right to participate as parties or third parties in a particular dispute. There is a distinction between, on the one hand, parties and third parties to a dispute, which have a legal right to participate in Panel and Appellate Body proceedings, and, on the other hand, private individuals and organizations, which are not Members of the WTO, and which, therefore, do not have the legal right to participate in dispute settlement proceedings.

Article 13 of the DSU reads:

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

A Panel or Appellate Body has a legal duty to accept and consider only submissions from WTO Members that are parties or third parties in a particular dispute. Individuals and organizations that are not Members of the WTO, have no legal right to make submissions to, or to be heard by, a Panel or the Appellate Body. A Panel or Appellate Body, therefore, has no legal duty to accept or consider unsolicited *amicus curiae*[9] briefs submitted by individuals or organizations that are not Members of the WTO. The participation by private individuals and organizations is dependent upon the Panel and Appellate Body permitting such participation if it finds it useful to do so.

What is clear is that Article 13 empowers panels to "seek information" and gives it the flexibility and the discretionary authority to seek that information and technical advice from any individual or body it deems appropriate. What is not supported by the text of Article 13 is the receipt of unsolicited *amicus curiae* briefs. Some developed country members of the WTO have proposed that the Panel or the Appellate Body be allowed to permit unsolicited *amicus curiae* submissions, provided that the panel or the Appellate Body has determined that they are directly relevant to the factual and legal issues under consideration by the Panel or the Appellate Body and that they comply with the rules of the Article [10] Developing countries have argued against this proposal, indicating that their concern is that only those Members that have well developed social resources such as think tanks, academic institutions and non-governmental agencies are likely to be called upon for information and technical advice.

Developing countries appear to have a point in arguing that to allow unsolicited *amicus curiae* submissions, and to systematize this in the DSU, would create a situation where those Members with the least resources could be put at a disadvantage. It seems rather appropriate that unsolicited *amicus curiae* briefs be directed to the parties in the dispute and not to the Panel or the Appellate Body.

Although Article 13 of the DSU gives only the Panels the authority to receive *amicus curiae* briefs, the Appellate Body has stated that it has the authority to accept them as well, on the reasoning that although nothing in the DSU or the *Working Procedures for Appellate Review* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants or third participants in an appeal, neither the DSU nor the *Working Procedures for Appellate Review* explicitly prohibits acceptance or consideration of such briefs. [11] Since Article 17.9 [12] makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements, the Appellate Body has read this to mean that as long as it acts consistently with the provisions of the DSU and the covered agreements, it has the legal authority to decide whether or not to accept and consider any information that it believes is pertinent and useful in an appeal. [13]

The right to seek information as set out in Article 13 is limited to Panels and there is nothing in the text of that Article to support the view expressed by the Appellate Body. By arguing that since nothing in the DSU or the *Working Procedures for Appellate Review* explicitly prohibits acceptance or consideration of such briefs, then the Appellate Body may accept them, the
Appellate Body may have set a problematic precedent in that it could continuously be argued that all that is not explicitly prohibited by the DSU is permitted. This goes against what is the normal approach to legal text which is that the text guides what is permissible and the parameters within which that is permissible. This normal approach is sensible in that it is clear to all that if one does that which the text does not allow, then one will suffer certain specified penalties. The problem with the approach adopted by the Appellate Body is that nobody knows what is not prohibited. The approach cannot therefore be that what is not prohibited, is acceptable.

It is clear from the language of Article 13 that the discretionary authority of a Panel may be exercised to request and obtain information, not just from any individual or body within the jurisdiction of a Member of the WTO, but also from any Member, including, a fortiori, a Member who is a party to a dispute before a Panel. This is made clear by the third sentence of Article 13.1, which states that a Member should respond promptly and fully to any request by a Panel for such information as the Panel considers necessary and appropriate. It is equally important to stress that this discretionary authority to seek and obtain information is not made conditional by this, or any other provision, of the DSU upon the other party to the dispute having previously established, on a prima facie basis, such other party’s claim or defence. Indeed, Article 13.1 imposes no conditions on the exercise of this discretionary authority.

3 Article XIX of GATT and the Agreement on Safeguards – relationship[14]

The Agreement on Safeguards stipulates that a member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. Any such measure in effect at the time of entry into force of the agreement would be brought into conformity with the agreement, or would have to be phased out within four years after the entry into force of the agreement establishing the WTO. On the other hand, Article XIX of the General Agreement allows a GATT member to take a ‘safeguard’ action to protect a specific domestic industry from an unforeseen increase of imports of any product which is causing, or which is likely to cause, serious injury to the industry. All existing safeguard measures taken under Article XIX of the General Agreement 1947 shall be terminated not later than eight years after the date on which they were first applied or five years after the date of entry into force of the agreement establishing the WTO, whichever comes later.

The object and purpose of Article XIX is to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with unexpected and, thus, unforeseen circumstances which lead to the product being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products, while the object and purpose of the Agreement on Safeguards is to clarify and reinforce the disciplines of GATT 1994, and specifically those of Article XIX, to re-establish multilateral control over safeguards and eliminate measures that escape such control.

The precise nature of the relationship between Article XIX of the GATT 1944 and the Agreement on Safeguards within the WTO Agreement is described in Articles 1 and 11.1(a) of the Agreement on Safeguards. Article 1 states that the Agreement on Safeguards establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1944. Article 11.1(a) provides, on its part, that a Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1944 unless such action conforms to the provisions of that Article applied in accordance with the Agreement on Safeguards. It should not be assumed that the requirements of Article XIX of the GATT 1944 were subsumed within the Agreement on Safeguards, thus rendering these requirements inapplicable. Nowhere is it stated that any safeguard action taken after the entry into force of the WTO Agreement need only conform to the provisions of the Agreement on Safeguards.

Together, Article XIX and the Agreement on Safeguards confirm the right of WTO Members to apply safeguard measures when, as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. The GATT 1994 and the Agreement on Safeguards are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the WTO Agreement, and, as such, are both integral parts of the same treaty, the WTO Agreement, that are binding on all Members. Therefore, the provisions of Article XIX of the GATT 1944 and the provisions of the Agreement on Safeguards are all provisions of one treaty, the WTO Agreement. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members. And, as these provisions relate to the same thing, namely the application by Members of safeguard measures, they must be read as representing an inseparable package of rights and disciplines which have to be considered in conjunction. An appropriate reading of this ‘inseparable package of rights and disciplines’ must, accordingly, be one that gives meaning to all the relevant provisions of these two equally binding agreements.

4 Article 3.1 of the Safeguards Agreement[20]

Panels in WTO disputes will assess whether a competent authority has complied with its obligation under Article 3.1 of the Agreement on Safeguards to ‘set forth’ ‘findings and reasoned conclusions’ for its determinations in applying safeguard measures when, as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious
injury to the domestic industry that produces like or directly competitive products. Since Panels could not fulfill this responsibility if they were left to deduce for themselves from the report of that competent authority the rationale for the determinations, a competent authority is required, in Article 3, to provide a reasoned conclusion in a published report.

Article 4.2(c) of the Agreement on Safeguards requires the competent authorities to publish promptly a detailed analysis of the case under investigation, as well as a demonstration of the relevance of the factors examined.

5 Article XX of GATT[21]

Article XX of the General Agreement contains provisions designed to accommodate important state interests – such as the protection of human health, as well as the conservation of exhaustible natural resources. WTO Members have, for example, a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.

Article XX, entitled General Exceptions contains an introductory provision, or chapeau, and paragraphs (a) – (j) that provide for limited and conditional exceptions from obligations under other provisions. The existence of certain conditions relating to the application of an exception provision signifies that the exception is ‘limited’, not absolute, and that the authorisation of derogation is tied to the fulfilment of those conditions.

In order for the justification of Article XX to be extended to a given measure, it must not only come under one or another of the particular exceptions–paragraphs (a) to (j)–listed under Article XX; it must also satisfy the requirements imposed by the opening clause, or chapeau, of Article XX. Panels can either first consider the specific paragraphs of Article XX before reviewing the applicability of the conditions contained in the chapeau, or they can equally analyse first the chapeau of Article XX before reviewing the specific paragraph in a given case.[22]

The chapeau, by its express terms, addresses not so much the questioned measure or its specific contents, but rather the manner in which that measure is applied. The purpose and object of the chapeau of Article XX is generally the prevention of abuse of the exceptions. Hence, the chapeau determines to a large extent the context of the specific exceptions contained in the paragraphs of Article XX.[23]

When considering a measure under Article XX, Panels determine not only whether the measure on its own undermines the WTO multilateral trading system, but also whether such type of measure, if it were to be adopted by other Members as well, would threaten the security and predictability of the multilateral trading system.[24] A type of measure adopted by a Member, which, on its own, may appear to have a relatively minor impact on the multilateral trading system, may nonetheless raise a serious threat to that system if similar measures are adopted by the same or other Members. Thus, by allowing such type of measures, even though their individual impact may not appear to be such as to threaten the multilateral trading system, would affect the security and predictability of the multilateral trading system.

While the exceptions of Article XX may be invoked as a matter of legal right, they are not to be so applied as to frustrate or defeat the legal obligations of a Member. The exceptions in Article XX are not to be abused or misused. In other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.[25]

The long-standing practice of Panels has been to interpret Article XX narrowly, in a manner designed to preserve the basic objectives and principles of the General Agreement. Article XX will not be interpreted as permitting Members to take trade measures so as to force other Members to change their policies within their jurisdiction, such as their conservation policies. The party invoking any of the paragraphs setting out the exceptions under Article XX bears the burden of proof[26] in demonstrating that the inconsistent measures come within its scope. As a general rule, in order to justify the application of any particular paragraph, all the elements of that paragraph have to be satisfied.

Following is what can be expected under some of the exceptions.

5.1 Paragraph (b) - necessary to protect human, animal or plant life or health

The following elements must be established: [27]

(a) that the policy in respect of the measures for which the provision was invoked falls within the range of policies designed to protect human, animal or plant life or health;

(b) that the inconsistent measures for which the exception is being invoked were necessary to fulfil the policy objective; and
(c) that the measures were applied in conformity with the requirements of the chapeau of Article XX.

A measure will be considered to be ‘necessary’ only if there are no alternative measures consistent with the General Agreement, or less inconsistent with it, which a Member could reasonably be expected to employ to achieve its health policy objectives. Tariff preferences should not be lightly assumed to be an appropriate means to achieve health objectives under Article XX (b), as any tariff preferences deviating from obligations assumed in the multilateral framework are considered to necessarily have a direct and negative impact on the multilateral system.

5.2 Paragraph (d) – necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement

The following elements must be established:

(a) that the measures for which the exception is being invoked—that is, the particular trade measures inconsistent with the General Agreement—secure compliance with laws or regulations themselves not inconsistent with the General Agreement;

(b) that the inconsistent measures for which the exception is being invoked were necessary to secure compliance with those laws or regulations; and

(c) that the measures are applied in conformity with the requirements of the introductory clause of Article XX.

The design of the measure must contribute sufficiently to the achievement of its objective. The level of necessity of a measure is linked to its effectiveness in achieving its objectives. For a measure to be considered ‘necessary’ it should at least provide for a mechanism monitoring its effectiveness.

5.3 Paragraph (g) – relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

The following elements must be established:

(a) that the policy in respect of the measures for which the provision was invoked fell within the range of policies related to the conservation of exhaustible natural resources;

(b) that the measures for which the exception was being invoked—that is the particular trade measures inconsistent with the General Agreement—were related to the conservation of exhaustible natural resources;

(c) that the measures for which the exception was being invoked were made effective in conjunction with restrictions on domestic production or consumption; and

(d) that the measures were applied in conformity with the requirements of the introductory clause of Article XX.

The purpose of Article XX:(g), however, is not to widen the scope of measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustible natural resources. While a trade measure does not have to be necessary or essential for the conservation of an exhaustible natural resource, it has to be primarily aimed at the conservation of an exhaustible natural resource to be considered as ‘relating to’ conservation within the meaning of Article XX:(g). For the same reasons, a trade measure can only be considered to be made effective ‘in conjunction with’ production restrictions if it is primarily aimed at rendering effective these restrictions.

Panels will identify alternative measures that are reasonably available and fully consistent with the General Agreement that a Member could take, or might have taken, and can also identify alternative measures considered ‘less inconsistent’ with the General Agreement.

6 Burden of proof [34]
The onus is always on the party asserting a fact to prove it. Various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. This is also the generally accepted canon of evidence in civil and common law jurisdictions. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

Put simply, it is for the complaining party to establish the violation it alleges and it is for the party invoking an exception or an affirmative defence to prove that the conditions contained therein are met. The initial burden lies on the complaining party, which must establish a prima facie case of inconsistency with a particular provision of a covered Agreement on the part of the defending party. When that prima facie case is made, the burden of proof shifts to the defending party, which must in turn counter or refute the claimed inconsistency.

7 Completion of the legal analysis[35]

In cases where the Appellate Body has reversed the finding of a Panel, it usually attempts to complete the Panel’s legal analysis to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record, with a view to facilitating the prompt settlement of the dispute, pursuant to Article 3.3 of the DSU. Where there are no sufficient undisputed facts in the Panel record that would enable the Appellate Body to examine the issue for itself, it becomes impossible for it to make its own assessment, making it thus unable to complete the legal analysis. In the absence of any factual findings by the Panel or undisputed facts in the Panel record, the Appellate Body will not be in a position, within the scope of its mandate set forth in Article 17 of the DSU, to complete the analysis.[36]

In certain appeals, when the Appellate Body reverses a Panel’s finding on a legal issue, it may examine and decide an issue that was not specifically addressed by the Panel, in order to complete the legal analysis and resolve the dispute between the parties.[37]

8 Conflict between two agreements[38]

The General Interpretative Note to annex 1A of the Agreement Establishing the WTO (‘General Interpretative Note’) reads, in part:

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the WTO ... the provision of the other agreement shall prevail to the extent of the conflict.

The notion of conflict is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time; and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.[39] The concept of ‘conflict’ as embodied in the General Interpretative Note does not relate to situations where rules contained in one of the Agreements listed in Annex 1A provide for different or complementary obligations in addition to those contained in GATT 1994. In such a case, the obligations arising from the former, and GATT 1994, can both be complied with at the same time without the need to renounce explicit rights or authorisations. There is no reason to assume that a Member is not capable of, or not required to, meet the obligations of both GATT 1994 and the relevant Annex 1A Agreement.

These principles were developed in the Periodicals[40] and Bananas III[41], cases concerning the relationship between two WTO agreements at the same level within the structure of WTO agreements. It is clear that, for example, while the same measure could be scrutinised both under GATT and under GATS, the specific aspects of that measure to be examined under each agreement would be different. In Periodicals and in Bananas III, the defending parties argued that since a set of rules on services exists in GATS, the provisions of Article III:4 of GATT on distribution and transportation had ceased to apply. Twice the Appellate Body ruled that the scope of Article III:4 was not reduced by the fact that rules on trade in services are found in GATS. The entry into force of the GATS, as Annex 1B of the WTO Agreement, does not diminish the scope of application of the GATT 1994.[42]

The Panel in European Communities - Regime for the Importation, Sale and Distribution of Bananas, (Bananas III)[43] addressed the question whether the provisions of the Licensing Agreement and the TRIMs Agreement contain any conflicting obligations which are contrary to those stipulated by Articles I, II, X, or XIII of GATT 1994, in the sense that Members could not comply with the obligations resulting from both Agreements at the same time or that WTO Members are authorised to act in a manner that would be inconsistent with the requirements of GATT rules. The Panel took the approach that wherever the answer to this question was in the affirmative, the obligation or authorisation contained in the Licensing or TRIMs Agreement would, in accordance with the General Interpretative Note, prevail over the provisions of the relevant article of GATT 1994. Where the answer was negative, both provisions would apply equally.[44]

Based on its examination of the provisions of the Licensing Agreement, Article 2 of the TRIMs Agreement as well as GATT 1994, the Panel found that no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the three Agreements that the parties to the dispute had put before it. The Panel noted in particular that the first substantive provision of the
The Appellate Body in Canada - Certain Measures Concerning Periodicals (Periodicals)[46] said that the entry into force of the GATS, as Annex 1B of the WTO Agreement, did not diminish the scope of application of the GATT 1994. The ordinary meaning of the texts of GATT 1994 and GATS, as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that neither Agreement overrides the other.

For example, the fact that, as a result of the Uruguay Round, the SCM Agreement to some extent covers subject matters that were already covered by other GATT disciplines is not unique. This situation is similar to the relationship between GATT 1994 and GATS. In answering the question of whether there is a general conflict between the SCM Agreement and Article III of GATT, the Panel in Indonesia - Certain Measures Affecting the Automobile Industry[47] (in which Indonesia had argued that the SCM Agreement was the only applicable law in the dispute and that the SCM Agreement in its entirety conflicts with Article III), recalled that for a conflict to exist between two agreements or two provisions thereof, they must cover the same substantive matter. Otherwise there is no conflict if the two provisions have different purposes. The Panel also recalled that Article III, which prohibits discrimination between imported and domestic products, and Article XVI, which regulates subsidies to producers, had been part of GATT 1947 since its inception. That implies that the drafters of GATT 1947 intended these two sets of provisions to be complementary.[48]

With particular reference to the SCM Agreement and GATT, Article XVI of GATT 1947 did provide for a comprehensive framework regulating the provision of subsidies, as does the SCM Agreement. The mere fact that in the SCM Agreement the remedies against subsidies have been strengthened, is not a sufficient reason to conclude that in the WTO Agreement the structural relationship between the rules on national treatment on products and the rules on subsidies to producers have been altered. Moreover, the fact that the SCM Agreement, unlike Article XVI of GATT 1947, contains a definition of ‘subsidy’ does not suggest a different conclusion. The absence of a definition of ‘subsidy’ in GATT 1947 does not make Article XVI of GATT 1947 inapplicable.

As was the case under GATT 1947, Article III of GATT 1994 and the WTO rules on subsidies remain focused on different problems. Article III continues to prohibit discrimination between domestic and imported products in respect of internal taxes and other domestic regulations, including local content requirements. It does not ‘proscribe’ nor does it ‘prohibit’ the provision of any subsidy per se. By contrast, the SCM Agreement prohibits subsidies which are conditional on export performance and on meeting local content requirements, provides remedies with respect to certain subsidies where they cause adverse effects on the interests of another Member, and exempts certain subsidies from accountability under the SCM Agreement. In short, Article III prohibits discrimination between domestic and imported products while the SCM Agreement regulates the provision of subsidies to enterprises[49]. The Panel concluded that accordingly, Article III and the SCM Agreement have, generally, different coverage and do not impose the same type of obligations.[50] Thus, there is no general conflict between these two sets of provisions.[51]

In considering the same issue in respect of whether a measure covered by the SCM Agreement can also be subject to the obligations contained in the TRIMs Agreement, the Panel noted that the interpretive note to Annex IA of the WTO Agreement is not applicable to the relationship between the SCM Agreement and the TRIMs Agreement. The issue of whether there might be a conflict between the SCM Agreement and the TRIMs Agreement would therefore need to be examined in light of the general international law presumption against conflicts and the fact that, under public international law, a conflict exists in the narrow situation of mutually exclusive obligations for provisions that cover the same type of subject matter.[52]

A finding of inconsistency with Article 3.1(b)[53] of the SCM Agreement can be remedied by removal of the subsidy, even if the local content requirement remains applicable. On the other hand, a finding of inconsistency with the TRIMs Agreement can be remedied by a removal of the TRM that is a local content requirement even if the subsidy continues to be granted. Conversely, for instance, if a Member were to apply a TRM (in the form of a local content requirement), as a condition for the receipt of a subsidy, the measure would continue to be a violation of the TRIMs Agreement if the subsidy element were replaced with some other form of incentive. By contrast, if the local content requirements were dropped, the subsidy would continue to be subject to the SCM Agreement, although the nature of the relevant discipline under the SCM Agreement might be affected, making it clear that the two agreements prohibit different measures. There is no provision contained in the SCM Agreement that obliges a Member to violate the TRIMs Agreement, or vice versa.[54]

The SCM and TRIMs Agreements cannot be in conflict, as they cover different subject matters and do not impose mutually exclusive obligations. They may have overlapping coverage in that they may both apply to a single legislative act, but they have different foci, and they impose different types of obligations.

Developing countries must understand that the interpretation that no conflict exists between a provision that allows a member to adopt certain measures (confers a right) and another that prohibits the adoption of those measures (prohibits in effect the exercise of that right) may present problems. The result of this approach is that a Member should not exercise its right, for that would entail a breach of the provision that prohibits the exercise of that right. Members could therefore be put in a situation where they do not exercise their rights due to the interpretation that exercising a right should not result in breaching WTO rules, and that such breach would not be considered as relating to a conflict between provisions of the agreements.[55]

When it was decided that no conflict exists between the TRIMs and Subsidies Agreement in the Indonesia - Certain Measures Affecting the Automobile Industry[56], the result was that Indonesia had to terminate its car scheme for breach of the TRIMs Agreement, though the sort of subsidies involved could have been permissible under the Subsidies Agreement. It is not without interest to note that many developing countries’ development programmes involve the spending of public resources, including through disbursements to the private sector, and the foregoing of government revenue. However, the
Consultations under Article 4 of the DSU are normally required as the first step in the WTO dispute settlement process. Article 4.2 of the DSU requires a Member to accord sympathetic consideration to, and afford adequate opportunity for, consultation, regarding any representations made by another Member. Article 4.5 of the DSU specifies that in the course of the consultations, and before resorting to further action, Members should attempt to obtain satisfactory adjustment of the matter. However, if consultations fail to settle a dispute within 60 days of the request for consultations, Article 4.7 of the DSU authorises the complaining party to request the DSB to establish a Panel.

Consultations play a critical role in the WTO dispute settlement process. Indeed, experience under the DSU has shown that consultations frequently enable disputes between Members to be resolved without resort to the dispute settlement Panel process. Since the DSU provides in Article 3.7 that a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred, disputing parties are expected to consult in good faith and attempt to reach such a solution.

One aspect that appears to be in the interest of developing and least-developed countries is the taking into account during consultations of the particular problems and interests of developing country Members, especially those of least-developed country Members. To ensure that this is observed it would be useful, if the complaining party is a developed Member and if it decides to seek establishment of a panel, to make it mandatory for the developed country to explain in the panel request as well as in its submissions to the panel as to how it had taken or paid special attention to the particular problems and interests of the responding developing country.

Taking into account the cost factor, where an LDC is involved in the consultations, due consideration should be given to the possibility of holding such consultations and other meetings in the capitals of LDCs.

Consultations are a matter reserved for the parties. The DSB is not involved; no Panel is involved; and the consultations are held in the absence of the WTO Secretariat. In these circumstances, a Panel is not in a position to evaluate the consultation process in order to determine if it functioned in a particular way. While a mutually agreed solution is to be preferred, in some cases it is not possible for parties to agree upon one. In those cases, the function of a Panel is only to ascertain that consultations, if required, were in fact held or, at least, requested.

It is not even a requirement that consultations must lead to an adequate explanation of the complainant's case. While one function of the consultations may be to clarify what the case is about, there is nothing in the DSU that provides that a complainant cannot request the establishment of a Panel unless its case is adequately explained in the consultations. The argument has been that the fulfillment of such a requirement would be difficult, if not impossible, since it would be difficult for a complainant to demonstrate that a respondent chose to claim a lack of understanding of the case, a result which would undermine the automatic nature of Panel establishment under the DSU. The only prerequisite for requesting a Panel is that the consultations have "fail[ed] to settle a dispute within 60 days of receipt of the request for consultations ..."

Articles 4 and 6 of the DSU do not require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a Panel. Since the purpose of consultations is to clarify the facts of the situation, it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a Panel.

One of the obligations under Article 6.2 on a Member requesting the establishment of a Panel is that it must indicate in its request whether consultations were held. This requirement will be satisfied by the inclusion, in the request for establishment of a Panel, of a statement as to whether consultations occurred or not. The purpose of the requirement seems to be primarily informational – to inform the DSB and Members as to whether consultations took place. The DSU expressly contemplates that, in certain circumstances, a Panel can deal with and dispose of the matter referred to it even if no consultations took place. Against that background, the authority of the Panel cannot be invalidated by the absence, in the request for establishment of the Panel, of an indication whether consultations were held. In other words, the requirement in Article 6.2 to inform the DSB whether consultations were held cannot be accorded more importance in the dispute settlement process than the requirement to actually hold those consultations.

10 Dictionary meanings

Article 31.1 of the Vienna Convention on the Law of Treaties (Vienna Convention) provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. On this basis, Panels and the Appellate Body routinely start their interpretive task by resorting to dictionaries to find the ordinary meaning of words in the text of the WTO covered Agreements. It has been observed, however,
that dictionary meanings leave many interpretive questions open. Although they are important guides to, they are not conclusive statements of definitions of words appearing in agreements and legal documents. As a result, every text, however clear on its face, requires to be scrutinised in its context and in the light of the object and purpose that it is designed to serve. So, the normal usage is to start the interpretation from the ordinary meaning of the ‘raw’ text of the relevant treaty provisions and then to construe it in its context and in the light of the treaty’s object and purpose.

Although the shortcoming of dictionary meanings has been pointed out, it is in practice difficult to see how this has worked, for dictionary meanings have routinely been definitively used to interpret terms. Indeed, context and object-and-purpose may often appear simply to confirm an interpretation seemingly derived from the ‘raw’ text; and the conclusion reached after such a scrutiny is usually that the clear, dictionary meaning which originally presented itself, is the correct one. This approach to interpretation, though having some basis on the Vienna Convention, is not appropriate in cases where the objectives and purpose of the entire treaty, and not just the specific provision, include the according of special and differential treatment to developing and particularly least developed countries. It is instructive that until the case on the Enabling Clause, the dispute settlement system had not had a serious occasion to address issues of special and differential treatment, though special and differential treatment is included in the core objectives of the WTO Agreement as a whole and in practically every individual agreement in the family of WTO agreements.

11 ‘Discrimination’ – meaning of

Various claims of discrimination have been the subject of legal rulings under GATT or the WTO. These rulings have addressed the question whether measures were in conflict with those GATT or WTO provisions prohibiting variously defined forms of discrimination. Each of these rulings has necessarily been based on the precise legal text at issue, so that it is not possible to treat them as applications of a general concept of discrimination, given the very broad range of issues that might be involved in defining the word ‘discrimination’.

The primary provisions that deal with discrimination, such as the national treatment and most-favoured-nation provisions do not use the term ‘discrimination’. They speak in more precise terms. The ordinary meaning of the word ‘discriminate’ is potentially broader than these more specific definitions. It certainly extends beyond the concept of differential treatment. It is a normative term, usually pejorative in connotation, referring to results of the unjustified imposition of differentially disadvantageous treatment. Discrimination may arise from explicitly different treatment, sometimes called de jure discrimination, but it may also arise from ostensibly identical treatment which, due to differences in circumstances, produces differentially disadvantageous effects, sometimes called de facto discrimination. De facto discrimination is a general term describing the legal conclusion that an ostensibly neutral measure transgresses a non-discrimination norm because its actual effect is to impose differentially disadvantageous consequences on certain parties, and because those differential effects are found to be wrong or unjustifiable.

The ordinary meaning of the term ‘discriminate’ is ‘to make or constitute a difference in or between’; ‘distinguish’ and ‘to make a distinction in the treatment of different categories of peoples or things’. The word can also mean ‘to make a distinction in the treatment of different categories of people or things, especially unjustly or prejudicially against people on grounds of race, colour, sex, social status, age, etc’. The principal distinction between these definitions is that the first conveys a neutral meaning of making a distinction, whereas the second conveys a negative meaning carrying the connotation of a distinction that is unjust or prejudicial.

Two main issues figure in the application of the general concept of discrimination in most legal systems. One is the question of de facto discriminatory effect—whether the actual effect of the measure is to impose differentially disadvantageous consequences on certain parties. The other, related to the justification for the disadvantageous effects, is the issue of purpose—not an inquiry into the subjective purposes of the officials responsible for the measure, but an inquiry into the objective characteristics of the measure from which one can infer the existence or non-existence of discriminatory objectives.

Not all differential treatment is ‘discrimination’. This was made clear in the Appellate Body ruling in European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries in which it was found that by requiring developed countries to respond positively to the needs of developing countries, which are varied and not homogeneous, Paragraph 3(c) of the Enabling Clause indicates that a GSP scheme may be ‘non-discriminatory’ even if identical tariff treatment is not accorded to all GSP beneficiaries. (For a more detailed discussion of discrimination in favour of developing countries in this case see section entitled under Enabling Clause in this Guide) The standards by which the justification for differential treatment is measured are a subject of infinite complexity. When employed, the term ‘discrimination’ is a term to be interpreted with caution and with care to add no more precision than the concept contains.

Careful differentiation between de jure and de facto discrimination as well as the possibility of according differentiated treatment in order to ensure non-discriminatory consequences, could constitute a development friendly approach if one overriding consideration is to promote and support the development needs of developing countries.
12 ‘Domestic industry’ – meaning of[81]

Article 6.2 of the Agreement on Safeguards, permits a safeguard action to be taken in order to protect a domestic industry from serious damage (or actual threat thereof) caused by a surge in imports, provided the domestic industry is identified as the industry producing ‘like and/or directly competitive products’ in comparison with the imported product. The definition of ‘domestic industry’ in this provision refers to two elements. First, the industry consists of ‘producers’: those who grow or manufacture an article, those who bring a thing into existence. The term ‘domestic industry’ extends solely to the producers of the like or directly competitive products. The definition therefore focuses exclusively on the producers of a very specific group of products. Producers of products that are not like (or directly competitive) products do not form part of the domestic industry.[82] Accordingly, the first step in determining the scope of the domestic industry is the identification of the products which are ‘like or directly competitive’ with the imported product. Only when those products have been identified, is it possible to identify the ‘producers’ of those products.

Defining a ‘domestic industry’ is a matter of infinite complexity that developing countries have to master since there are consequences that flow therefrom. Developing countries rely largely on agriculture an area in which there is usually a close relationship between a crop, such as grapes, and the final product, such as wine. Does it mean, for example, that in countervailing duty cases involving imported wine and grape products, the domestic producers of the principal raw agricultural product (i.e., grapes) are to be included as part of the industry producing wine and grape products if they alleged injury or threat thereof caused by imports of those products? The principle is that irrespective of ownership, where a separate identification of production of wine-grapes from wine is possible, then in fact two separate industries exist.[83] It is possible, therefore to separate wine-grape growers on the one hand and an industry comprising wineries on the other. Once such a separate identification is possible (e.g., because of the structure of production), economic interdependence between industries producing raw material or components and industries producing the final product is not relevant for a like product determination.[84] There is no basis in the text of the Safeguards Agreement that would permit the consideration of economic interdependence or coincidence of economic interest to be taken into account in defining the domestic industry.

To further illustrate the difficulties associated with defining a domestic industry, the question may be asked whether producers and feeders of live cattle are to be treated as part of the domestic industry producing manufactured beef? In this case the like product is manufactured beef, and live cattle produced by ranchers and feedlots constitutes a product different from the like product.[85]

As can be seen, the determination of a domestic industry involves two criteria. First, there must be a determination of which product or range of products constitutes the ‘like product’. If the production process for that ‘like product’ happens to be subdivided into two or more separate stages, that fact will not mean that each stage must be considered a separate ‘domestic industry’; as long as the products at the various stages are enough ‘like’ each other to be considered different forms of the same ‘like product’, the separate production stages will all be part of the same ‘domestic industry’. Second, if the process of production for one ‘like product’ can be separately identified, it will be treated as a separate industry whether or not it is owned in common with parallel, earlier or subsequent production lines. The only case in which the fact of common ownership will affect the definition of industry will be the case in which common ownership results in such a complete integration of production processes that it is impossible to analyze each one separately.[86] It must be determined (i) whether the products at various stages of production are different forms of a single like product or have become different products; and (ii) whether it is possible to separately identify the production process for the like product at issue, or whether instead common ownership results in such complete integration of production processes that separate identification and analysis of different production stages is impossible. [87]

It is important to understand all the concepts surrounding the definition of a domestic industry since remedial measures that address only the effects of imports on one aspect of a continuous line of production would be inadequate to prevent or remedy serious injury and to facilitate adjustment under the Safeguards Agreement since any adjustment by that industry segment would not insulate the other (higher value-added) segments from the effects of increased imports. Processors may pass back any injury from increased imports to the input producers. When processors confront lower prices, they may pass the lower prices back to feeders and then growers, with the result that and all suffer to some extent. The reverse is also true: if a safeguard measure were applied in respect of imports of the finished product by definition this may also benefit the input producers.

It is true that there is economic interdependence between operators at different stages of production for most processed products, with a continuous line of production from raw materials or inputs to the final product. In the case of final products composed of a larger number of inputs, producers of those inputs may just as easily be highly economically dependent on the producers of the final product. Depending on the allocation of market power in the manufacturing and processing chain of a particular end-product, the opposite may also be true and producers of the final product may be dependent on producers of raw materials or intermediate inputs rather than vice versa. Furthermore, the interests of producers in different industry segments may coincide, regardless of whether they are involved in a continuous line of production, whether there is a single or more inputs into a final product, and whether an input is wholly dedicated to a single final product. Interests may happen to coincide even if producers are engaged in entirely unrelated economic activities.

13 Domestic/municipal legislation and WTO rules[88]

Panels and the Appellate Body undertake interpretations of the meaning of terms and language in domestic laws. This is done where domestic laws are challenged as breaching WTO provisions. The WTO Panels will examine the domestic law of a
Member involved in a dispute in order to determine whether the Member would have complied with its obligations under the covered Agreements, since there may simply be no way for the Panel to make the relevant determinations without engaging in an examination of a Member’s domestic or municipal legislation. The mandate for Panels is to examine a Member’s law solely for the purpose of determining whether the Member meets its WTO obligations. In doing so, the Panel does not interpret the Member’s law ‘as such’, the way it would, for example, interpret provisions of the covered agreements. As a result, terms used both in the Member’s domestic legislation and in WTO provisions do not necessarily have to have the same meaning. The Panel is called upon to establish the meaning of the law as factual elements and to check whether these factual elements constitute conduct by the Member contrary to its WTO obligations.

The manner in which the municipal law of a WTO Member, for example, classifies an item cannot, in itself, be determinative of the interpretation of the relevant provisions of the WTO covered agreements, since municipal laws – in particular those relating to property – vary amongst WTO Members. Clearly, it would be inappropriate to characterise, for purposes of applying any provisions of the WTO covered agreements, the same thing or transaction differently, depending on its legal categorisation within the jurisdictions of different Members. Accordingly, municipal law classifications are not determinative of issues raised in a dispute. In making factual findings concerning the meaning of a Member’s domestic legislation, the Panel is not bound to accept the interpretation presented by the Member. However, any Member can reasonably expect that considerable deference be given to its views on the meaning of its own law.

There is some feeling that interpretations put to certain domestic laws of especially the USA have been overly accommodating in order not to rattle the domestic legal systems of important WTO members. For instance, the Appellate Body ruled that India was in breach of its obligations under the TRIPs Agreement to provide for applications for patents on pharmaceutical and agrochemical products, though according to the Indian parliamentary system for enacting laws, it was merely an administrative matter. On the other hand, the Appellate Body did not find the US Trade Act of 1974 to be in breach of the WTO prohibition against unilateral measures because of the administrative undertaking to congress that the Act would be applied in accordance with the WTO Agreement.

14 Duty of Members under the DSU

Under Article 13.1 of the DSU, when a dispute arises, a Member has a duty to engage in the dispute settlement procedures in good faith in an effort to resolve the dispute. A Member is not to consider the use of the procedures as contentious acts.

In cases where Members seek the redress of WTO inconsistencies, they have to discharge certain duties expected of them. These duties, which are set out in Article 23.2 of the DSU are that Members should

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

Article 23.2 clearly prohibits specific instances of unilateral conduct by WTO Members when they seek redress for WTO inconsistencies in any given dispute.

According to Article 13.1, a Member should respond promptly and fully to any request by a Panel for such information as the Panel considers necessary and appropriate. Although the word ‘should’ is often used colloquially to imply an exhortation, or to state a preference, it is not always used in those ways. It can also be used ‘to express a duty [or] obligation’. In the context of the whole of Article 13, the word ‘should’ is used in a normative, rather than a merely exhortative, sense. In other words, Members are under a duty and an obligation to ‘respond promptly and fully’ to requests made by Panels for information under Article 13.1 of the DSU. This approach may create problems for developing countries that due to lack of resources may not be in a position to respond ‘promptly and fully’ to the request by panel.

It has been stated in the WTO that if Members that were requested by a panel to provide information had no legal duty to "respond" by providing such information, that panel’s undoubted legal “right to seek” information under the first sentence of Article 13.1 would be rendered meaningless. It is difficult to understand the principle developed here, especially how the panel’s right automatically places a duty of a Member. While it is generally accepted international law that where an entity has a right, then there must be another entity with a corresponding duty, the relationship between the panel and Member States does not appear to be one where a panel’s right translates automatically into a duty on Members. Although it is true that a Member party to a dispute could, at will, thwart the panel’s fact-finding powers, and in other words, prevent a panel from carrying out its task of finding the facts constituting the dispute before it, the right of a panel would seem able to subsist independently of any corresponding duty on any Member or Members. Rather, the argument should simply be that in terms of
the DSU, a Member has a duty to respond promptly and fully to a Panel's request.

The argument that if a panel is prevented from ascertaining the real or relevant facts of a dispute, it will not be in a position to determine the applicability of the pertinent treaty provisions to those facts, and, therefore, it will be unable to make any principled findings and recommendations to the DSU[96] appears to ignore the fact that adverse inferences can be drawn against a Member who refuses to make available the requested information. Although the DSU does not purport to state in what detailed circumstances inferences, adverse or otherwise, may be drawn by panels from infinitely varying combinations of facts, in all cases, in carrying out their mandate and seeking to achieve the "objective assessment of the facts" required by Article 11 of the DSU, panels routinely draw inferences from the facts placed on the record.[97] The inferences drawn may be inferences of fact: that is, from fact A and fact B, it is reasonable to infer the existence of fact C. Or the inferences derived may be inferences of law: for example, the ensemble of facts found to exist warrants the characterization of a subsidy or a subsidy contingent in fact upon export performance. The facts must, of course, rationally support the inferences made, but inferences may be drawn whether or not the facts already on the record deserve the qualification of a prima facie case. The drawing of inferences is, in other words, an inherent and unavoidable aspect of a panel's basic task of finding and characterizing the facts making up a dispute.[98] And on the basis of such inferences, including the fact that a Member had refused to provide information sought by the panel, a panel will still be in a position to determine the applicability of the pertinent treaty provisions to those facts, and will be able to make principled findings and recommendations to the DSB.

15 Duty of Panels[99]

The obligations of Panels are set out in general terms in Article 11 of the DSU, which reads, in the relevant part:

> ...a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

The standard terms of reference of a Panel, set out in Article 7.1 of the DSU, speak in very similar terms. A Panel should make 'such findings as will assist the DSB' in making recommendations or rulings. Under Article 7.2 of the DSU, a Panel 'shall address the relevant provisions in any covered Agreement or Agreements cited by the parties to the dispute'.

The question which then arises is this: when may a Panel be regarded as having failed to discharge its duty under Article 11 of the DSU to make an objective assessment of the facts before it? Clearly, not every error in the appreciation of the evidence may be characterised as a failure to make an objective assessment of the facts. The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a Panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a Panel would be incompatible with a Panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a Panel is similarly inconsistent with an objective assessment of the facts.

'Disregard' and 'distortion' and 'misrepresentation' of the evidence, in their ordinary significations in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a Panel. A claim that a Panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the Panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.[100]

A Panel comes under a duty to address issues in at least two instances. First, as a matter of due process, and the proper exercise of the judicial function, Panels are required to address issues that are put before them by the parties to a dispute. Second, Panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues, since the vesting of jurisdiction in a Panel is a fundamental prerequisite for lawful Panel proceedings. For this reason, Panels cannot simply ignore issues that go to the root of their jurisdiction—that is, to their authority to deal with and dispose of matters. Rather, Panels must deal with such issues—if necessary, on their own motion—in order to satisfy themselves that they have authority to proceed.[101]

16 Enabling Clause[102]

The Enabling Clause,[103] which is part of the GATT 1994,[104] provides in its Paragraph 1, which applies to all measures authorised by that Clause, that:

> Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.

(Footnote omitted)

The ordinary meaning of the term 'notwithstanding' is, 'in spite of, without regard to or prevention by'[105]. By using the word 'notwithstanding', Paragraph 1 of the Enabling Clause permits Members to provide differential and more favourable treatment to developing countries in spite of the MFN obligation of Article I.1. Such treatment would otherwise be inconsistent with Article I.1 because that treatment is not 'immediately and unconditionally' extended to all Members of the WTO.[106] Paragraph 1 thus exempts Members from complying with the obligation contained in Article I.1 for the purpose of providing
differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. Its legal function is to authorise derogation from Article I,[107] a positive rule which establishes the obligation upon WTO Members to treat like products equally, irrespective of their origin, so as to enable the developed countries, *inter alia*, to provide GSP to developing countries. As such, the Enabling Clause operates as an exception to Article I:1 GATT[108] and functions similarly to other GATT 1994 provisions that have been characterised as exceptions,[109] such as Articles XX, XXI and XXIV.

Between the entry into force of the GATT and the adoption of the Enabling Clause, WTO Members determined that the MFN obligation failed to secure adequate market access for developing countries so as to stimulate their economic development. Overcoming this required recognition by the multilateral trading system that certain obligations, applied to all Members, could impede rather than facilitate the objective of ensuring that developing countries secure a share in the growth of world trade. This recognition came through an authorisation for preferential treatment for developing countries in the Enabling Clause. Indeed, under the Enabling Clause, Members are encouraged to deviate from Article I in the pursuit of 'differential and more favourable treatment' for developing countries. This deviation, however, is encouraged only to the extent that it complies with the series of requirements set out in the Enabling Clause.

There is no legal obligation in the Enabling Clause itself requiring the developed country Members to provide developing countries with GSP schemes. The granting of them of GSP is an option rather than an obligation. This is, however, a limited authorisation of derogation in that the GSP has to be 'generalised, non-discriminatory and non-reciprocal'.

The Enabling Clause permits a series of individual, preferential measures, each of which contributes to the goal of better market access for exports from developing countries and, consequently, increased world trade. In its anticipation of simultaneous actions, the Enabling Clause is more like the group action contemplated by Article II of GATT 1994[110] than the individual action described in many provisions of the WTO agreements. Action under the Enabling Clause benefits the trading system, in contrast to some other permitted individual actions, such as those under Article VI or Article XIX [111].

### 16.1 Applicability of Article I:1

The Enabling Clause does not exclude the applicability of GATT Article I:1 in the sense that, as a matter of procedure, the challenged measure is submitted successively to the test of compatibility with the two provisions.[112] But, as a matter of final determination or application, only one provision applies at a time. And it is here that the Enabling Clause takes precedence to the extent of the conflict between the two provisions. Therefore, challenges to measures, brought under Article I:1, cannot succeed where such measures are in accordance with the terms of the Enabling Clause. This is so because the text of Paragraph 1 of the Enabling Clause ensures that, to the extent that there is a conflict between measures under the Enabling Clause and the MFN obligation in Article I:1, the Enabling Clause, as the more specific rule, prevails over Article I:1.

In order to determine whether such a conflict exists, however, a dispute settlement Panel will, as a first step, examine the consistency of a challenged measure with Article I:1 as the general rule. If the measure is considered at this stage to be inconsistent with Article I:1, the panel will then examine, as a second step, whether the measure is nevertheless justified by the Enabling Clause. It is only at this latter stage that a final determination of consistency with the Enabling Clause or inconsistency with Article I:1 can be made.[113]

### 16.2 Burden of proof under the Enabling Clause

The relationship between Article I:1 of the GATT 1994 and the Enabling Clause has implications for the allocation of the burden of proof in a dispute. As a general rule, the burden of proof for an exception falls on the respondent, that is the party asserting the affirmative of a particular defence.[114] From this allocation of the burden of proof, it is normally for the respondent, first, to raise the defence and, second, to prove that the challenged measure meets the requirements of the defence provision. With respect to the legal responsibility for raising the Enabling Clause as a defence in a dispute settlement proceeding, however, a special approach is dictated by the fundamental role of the Enabling Clause in the WTO system, as well as its contents.[115]

Paragraph 1 of the Enabling Clause enhances market access for developing countries as a means of improving their economic development by authorising preferential treatment for those countries, ‘notwithstanding’ the obligations of Article I. It is evident that a Member cannot implement a measure authorised by the Enabling Clause without according an ‘advantage’ to a developing country’s products over those of a developed country. It follows, therefore, that every measure undertaken pursuant to the Enabling Clause would necessarily be inconsistent with Article I, if assessed on that basis alone, but it would be exempted from compliance with Article I because it meets the requirements of the Enabling Clause. The Enabling Clause authorises developed country Members to grant enhanced market access to products from developing countries beyond that granted to products from developed countries. Enhanced market access is intended to provide developing countries with increasing returns from their growing exports, which returns are critical for those countries’ economic development. The Enabling Clause thus plays a vital role in promoting trade as a means of stimulating economic growth and development. In this respect, the Enabling Clause is not a typical ‘exception’, or ‘defence’, in the style of Article XX of the GATT 1994, or of other exception provisions identified by the Appellate Body in previous cases.[116] The rationale is that exposing preference...
developing countries may have different needs according to their levels of development and particular circumstances. The and especially the least developed among them, secure a share in the growth in international trade commensurate with the Enabling Clause, explicitly recognises the ‘need for positive efforts designed to ensure that developing countries, hence, the Enabling Clause), explicitly recognises the ‘need for positive efforts designed to ensure that developing countries, lockstep for all developing countries at once, now and for the future.

The absence of an explicit requirement in the text of Paragraph 3(c) to respond to the needs of ‘all’ developing countries, or to ‘differential and more favourable treatment’ provided under the Enabling Clause... shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

The word ‘shall’ in Paragraph 3(c) suggests that Paragraph 3(c) sets out an obligation for developed country Members in providing preferential treatment under a GSP scheme to ‘respond positively’ to the ‘needs of developing countries’. The question that arises is whether the ‘development, financial and trade needs of developing countries’ to which Members are required to respond when granting preferences must be understood to cover the ‘needs’ of developing countries. The ordinary meaning of the term ‘discriminate’ is ‘to make or constitute a difference in or between’, ‘distinguish’ and ‘to make a distinction in the treatment of different categories of peoples or things’, The word can also mean ‘to make a distinction in the treatment of different categories of people or things, especially unjustly or prejudicially against people on grounds of race, colour, sex, social status, age, etc.

These ordinary meanings of ‘discriminate’ point in conflicting directions with respect to the propriety of according differential treatment. The principal distinction between these definitions is that the first conveys a neutral meaning of making a distinction, whereas the second conveys a negative meaning carrying the connotation of a distinction that is unjust or prejudicial Paragraph 2(a), on its face, does not explicitly authorise or prohibit the granting of different tariff preferences to different GSP beneficiaries. It is clear from the ordinary meanings of ‘non-discriminatory’, however, that preference-granting countries must make available identical tariff preferences to all similarly situated beneficiaries.

16.4 Paragraph 3(c) of the Enabling Clause

Paragraph 3(c) of the Enabling Clause is further context for the term ‘non-discriminatory’ in footnote 3. It specifies that ‘differential and more favourable treatment’ provided under the Enabling Clause...

The absence of an explicit requirement in the text of Paragraph 3(c) to respond to the needs of ‘all’ developing countries, or to the needs of ‘each and every’ developing country, suggests that, in fact, that provision imposes no such obligation Developing countries may have ‘development, financial and trade needs’ that are subject to change, and certain development needs may be common to only a certain number of developing countries. Indeed, Paragraph 3(c) contemplates that ‘differential and more favourable treatment’ accorded by developed to developing countries may need to be ‘modified’ in order to ‘respond positively’ to the needs of developing countries. It is unrealistic to assume that such development will be in lockstep for all developing countries at once, now and for the future.

In addition, the Preamble to the WTO Agreement, which informs all the covered agreements including the GATT 1994 (and, hence, the Enabling Clause), explicitly recognises the ‘need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development’. The word ‘commensurate’ in this phrase appears to leave open the possibility that developing countries may have different needs according to their levels of development and particular circumstances. The
In sum, Paragraph 3(c) authorises preference-granting countries to ‘respond positively’ to ‘needs’ that are not necessarily common or shared by all developing countries. Responding to the ‘needs of developing countries’ may thus entail treating different developing country beneficiaries differently.

However, Paragraph 3(c) does not authorise any kind of response to any claimed need of developing countries. The types of needs to which a response is envisaged are limited to ‘development, financial and trade needs’. A ‘need’ cannot be characterised as one of the specified ‘needs of developing countries’ in the sense of Paragraph 3(c) based merely on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country. Rather, when a claim of inconsistency with Paragraph 3(c) is made, the existence of a ‘development, financial or trade need’ must be assessed according to an objective standard. Broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organisations, could serve as such a standard.

Paragraph 3(c) mandates that the response provided to the needs of developing countries be ‘positive’. ‘Positive’ is defined as ‘consisting in or characterised by constructive action or attitudes’. This suggests that the response of a preference-granting country must be taken with a view to improving the development, financial or trade situation of a beneficiary country, based on the particular need at issue. The expectation that developed countries will respond positively to the ‘needs of developing countries’ suggests that a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure and, on the other hand, the likelihood of alleviating the relevant ‘development, financial or trade need’. In the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences. Therefore, only if a preference-granting country acts in the positive manner suggested, in response to a widely recognised development, financial or trade need, can such action satisfy the requirements of Paragraph 3(c).

By requiring developed countries to respond positively to the needs of developing countries, which are varied and not homogeneous, Paragraph 3(c) indicates that a GSP scheme may be ‘non-discriminatory’ even if identical tariff treatment is not accorded to all GSP beneficiaries. Moreover, Paragraph 3(c) suggests that tariff preferences under GSP schemes may be ‘non-discriminatory’ when the relevant tariff preferences are addressed to a particular development, financial or trade need and are made available to all beneficiaries that share that need. Since the Enabling Clause specifically allows developed countries to provide differential and more favourable treatment to developing countries ‘notwithstanding’ the provisions of Article I, and given that Paragraph 3(c) of the Enabling Clause contemplates, in certain circumstances, differentiation among GSP beneficiaries, the right to MFN treatment cannot be invoked by a GSP beneficiary vis-à-vis other GSP beneficiaries in the context of GSP schemes that meet the conditions set out in the Enabling Clause.

17 Exception

An exception is a provision or rule in the covered Agreements allowing a Member, subject to certain limits and conditions, to derogate from obligations under other provisions or positive rules of the General Agreement. Such deviations are not prevented by the existence and the application of positive rules establishing obligations.

Members have discretion whether or not to use these exceptions. There is no legal obligation requiring a Member, for example, to take an Article XX measure, or to take a national security measure, or to form a free-trade area or customs union with other Members. Members are free to choose either to take these measures or to do nothing. If they decide to take such measures, they are authorised to do so by these provisions, subject to certain conditions. The fact that when Members choose to take such measures, they are also required to comply with certain conditions prescribed in these exceptions provisions, such as those in the chapeau of Article XX, does not change the basic ‘non-obligatory’ nature of these provisions.

Exceptions provisions can be invoked as affirmative defences to justify an inconsistency of a measure with positive rules setting out obligations. The burden of establishing such a defence rests on the party asserting it. The practice of Panels is to interpret exception provisions narrowly. But merely characterising a treaty provision as an ‘exception’ does not by itself justify a ‘stricter’ or ‘narrower’ interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in light of the treaty’s object and purpose, or, in other words, by applying the normal rules of treaty interpretation.

The relationship between exceptions provisions and provisions setting out basic GATT obligations is not one where the application of one provision excludes the application of the other. Taking the example of the relationship between Article XX and Articles I, III or XI:1, the jurisprudence demonstrates that the two apply concurrently to a given measure. The Panels and the Appellate Body then proceed to examine whether the measure could be justified under Article XX. The same relationship has been said to apply between Article XXV and Article XI of GATT 1994. Accordingly, the relationship between Article XX or Article XXV, on the one hand, and Article I, Article III or Article XI, on the other, is one where both categories of provisions apply concurrently to the same measure, but where, in the case of conflict between these two categories of provisions, Article XX or Article XXV prevails.

But the general rule in a dispute settlement proceeding requiring a complaining party to establish a prima facie case of inconsistency with a provision of a covered Agreement before the burden of showing consistency with that provision is taken on by the defending party, is not avoided by simply describing that same provision as an ‘exception’. 

Preamble to the WTO Agreement further recognises that Members’ ‘respective needs and concerns at different levels of economic development’ may vary according to the different stages of development of different Members.
This restrictive interpretation of exceptions can be useful in regulating the adoption of protective measures against exports of developing countries. It is particularly noteworthy that the common users of these measures against products from developing countries have been the USA and the EU, which are major markets for developing country exports. Natural resources including animals and plants constitute major resources for developing countries that they exploit for purposes of economic development. Trade restrictions that restrict the exploitation of natural resources could adversely impact on developing countries. On the other hand, the restrictive approach would pose significant difficulties for developing countries to defend at the WTO measures they adopt under the general exception to protect important public policy including the conservation of exhaustible natural resources.

18 Fact and law – the difference between[138]

Under Article 17.6 of the DSU, Appellate review is limited to appeals on questions of law covered in a Panel report and legal interpretations developed by the Panel. Findings of fact, as distinguished from legal interpretations or legal conclusions by a Panel, are, in principle, not subject to review by the Appellate Body.

The distinction between fact and law is not one that is always easy to make. The determination of whether or not a certain event did occur in time and space is typically a question of fact; for example, the question of whether or not a Member adopted an international standard, guideline or recommendation is a factual question. The determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact-finding process and is, in principle, left to the discretion of a Panel. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterisation issue. It is a legal question. Whether or not a Panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review. A claim that a Panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the Panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.

19 Footnote – status and effect[139]

Footnotes are considered to be an integral part of the text of the articles to which they are attached. The Panels/Appellate Body will rely on the text of a footnote for guidance and will examine such text to determine whether or not the footnote prohibits or allows certain action[140] or whether certain action taken by a Member falls within the meaning of the footnote[141] or the category of measures listed in the footnote[142].

20 GATT 1994 and GATT 1947 – relationship between[143]

Article II of the WTO Agreement provides in its Paragraph 4 that the General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (GATT 1994) is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, (GATT 1947). GATT 1994 is the first agreement that appears in Annex 1A to the WTO Agreement, and consists of: the provisions of the GATT 1947, as rectified, amended or modified by the terms of legal instruments that entered into force before the entry into force of the WTO Agreement; the provisions of certain legal instruments, such as protocols and certifications, decisions on waivers and other decisions of the CONTRACTING PARTIES to the GATT 1947, that entered into force under the GATT 1947 before the entry into force of the WTO Agreement; certain Uruguay Round Understandings relating to specific GATT articles; and the Marrakesh Protocol to the GATT 1994 containing Members’ Schedules of Concessions. Thus, the GATT 1994 is not the GATT 1947. It is legally distinct from the GATT 1947.

It must be noted that the relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the GATT 1947 were incorporated into, and became part of, the GATT 1994, they are not the sum total of the rights and obligations of WTO Members concerning a particular matter. For example, with respect to subsidies on agricultural products, Articles III, VI, XVI of the GATT 1994 alone do not represent the total rights and obligations of WTO Members. The Agreement on Agriculture and the SCM Agreement reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies.

21 Good faith[147]

The concept of good faith is explained in Article 18 of the Vienna Convention on the Law of Treaties, which states: ‘A State is obliged to refrain from acts which would defeat the object and purpose of a treaty[148]. This can be considered an application of the international law principle according to which international agreements must be applied in good faith, in light of the pacta sunt servanda principle[149] The Panel in United States – Sections 301-310 of the Trade Act of 1974[150], noted that it is notoriously difficult, or at least delicate, to construe the requirement of the Vienna Convention that a treaty shall be interpreted in good faith in third party dispute resolution, not least because of the possible imputation of bad faith to one of the parties. The Panel adopted the approach that it is to be preferred to thus consider which interpretation suggests better faith, and proceeded to give an elaborate example as follows[151]
Imagine two farmers with adjacent land and a history of many disputes concerning real and alleged mutual trespassing. In the past, self help through force and threats of force has been used in their altercations. Naturally, exploitation of the lands close to the boundaries suffers since it is viewed as dangerous terrain. They now sign an agreement under which they undertake that henceforth in any case of alleged trespassing they will abjure self help and always and exclusively make recourse to the police and the courts of law. They specifically undertake never to use force when dealing with alleged trespass. After the entry into force of their agreement one of the farmers erects a large sign on the contested boundary: "No Trespassing. Trespassers may be shot on sight.

One could, of course, argue that since the sign does not say that trespassers will be shot, the obligations undertaken have not been violated. But would that be the "better faith" interpretation of what was promised? Did they not after all promise always and exclusively to make recourse to the police and the courts of law?

Likewise, it is not good faith on the part of a Member that promised its WTO partners that it would generally (including in its legislation) have recourse to and abide by the rules and procedures of the DSU, to ignore those rules and procedures, or make unilateral determinations of inconsistency prior to the exhaustion of DSU proceedings. The good faith requirement in the Vienna Convention suggests, thus, that a promise to have recourse to and abide by the rules and procedures of the DSU includes the undertaking to refrain from adopting national laws which threaten prohibited conduct.

The principle of good faith, a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of \textit{abus de droit}, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right "impinges on the field covered by a treaty obligation, it must be exercised bona fide, that is to say, reasonably."\cite{152} An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.

It is generally felt by developing countries that obligations on developed countries requiring them to take measures in favour of developing and least developed countries have only been minimally implemented. Although it may not, however, be expected that the principle of good faith can be deployed to resolve implementation and special and differential issues, unsatisfactory progress on finalising the implementation issues in the WTO, as well as the lack of progress with the review of special and differential provisions, could constitute some indication that there can be bad faith in implementing certain obligations of particular importance to developing countries.

Implementation issues as well as special and differential treatment have huge development implications developing countries. Pro-development provisions in this regard relate to the technical co-operation obligations, the requirements on developed countries to accord enhanced market access to developing and particularly least developed countries, the possibility of transition periods, and in some cases the possibility of flexibilities that could be utilised to implement development programmes.

\section{22 Individuals and the WTO\cite{153}}

It is accepted that unlike the doctrine of direct effect under which obligations addressed to States are construed as creating legally enforceable rights and obligations for individuals, neither the GATT nor the WTO has so far been interpreted as a legal order producing direct effect. Therefore, the GATT/WTO did not create a legal order, the subjects of which comprise both contracting parties or Members and their nationals.

It is equally accepted, however, that it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members, which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global marketplaces. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions that would allow this individual activity to flourish\cite{154}.

The security and predictability that the GATT/WTO provides is that of ‘the multilateral trading system’. The multilateral trading system is, \textit{per force}, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators. Trade is conducted, most often and increasingly, by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member, which flows from a breach is often indirect and results from the impact of the breach on the marketplace and the activities of individuals within it.

\section{23 Judicial Economy\cite{155}}

In discharging its functions under Articles 7 and 11 of the DSU, a Panel is not required to examine all legal claims made before it. Nothing in Article 11 of the DSU or in previous GATT practice requires a Panel to examine all legal claims made by the complaining party. It may exercise what is called judicial economy.
Previous GATT 1947 and WTO Panels have frequently addressed only those issues that such Panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues. Thus, if a Panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated.

The principle of judicial economy is applied by Panels/Appellate Body keeping in mind the aim of the dispute settlement system, which is to resolve the matter at issue and to secure a positive solution to a dispute. To provide only a partial resolution of the matter at issue would be false judicial economy. A Panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings in order to ensure effective resolution of disputes to the benefit of all Members. But for purposes of transparency and fairness to the parties, a Panel should, in all cases, expressly address those claims which it declines to examine and rule upon for reasons of judicial economy. Silence does not suffice for these purposes.[156]

24 Legal claims and legal arguments[157]

There is a distinction between legal claims made by the complainant and arguments used by that complainant to sustain its legal claims. Claims are identified in the request for the establishment of a Panel, and establish the Panel's terms of reference under Article 7 of the DSU. Therefore, all claims must be included in the request for the establishment of a Panel in order to come within the Panel's terms of reference. The arguments support those claims, and are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second Panel meetings with the parties, as a case proceeds.

Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a Panel to freely use arguments submitted by any of the parties—or to develop its own legal reasoning—to support its own findings and conclusions on the matter under its consideration. A Panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute.[158]

25 ‘Less favourable treatment’[159]

The relevant part of Article III:4 of the GATT 1994 states that the products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. This is called the national treatment principle.

The term ‘less favourable treatment’ expresses the general principle, in Article III:1, that internal regulations should not be applied so as to afford protection to domestic production. It is also inherently part of the non-discrimination principle, as embodied here in the national treatment requirement provision. If there is less favourable treatment of the group of ‘like’ imported products, there is, conversely, ‘protection’ of the group of ‘like’ domestic products. [160] To fulfil the national treatment obligation, less favourable treatment must be offset, and thereby eliminated, in every individual situation that exists under a measure.

Article III:4 requires only that a measure accord treatment to imported products that is ‘no less favourable’ than that accorded to like domestic products. A measure that provides treatment to imported products that is different from that accorded to like domestic products is not necessarily inconsistent with Article III:4, as long as the treatment provided by the measure is ‘no less favourable’. A Member may draw distinctions between products which have been found to be ‘like’, without, for this reason alone, according to the group of ‘like’ imported products ‘less favourable treatment’ than that accorded to the group of ‘like’ domestic products. Whether or not imported products are treated ‘less favourably’ than like domestic products should be assessed by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products[161]

The examination of whether a measure involves ‘less favourable treatment’ of imported products within the meaning of Article III:4 of the GATT 1994 must be grounded in close scrutiny of the ‘fundamental thrust and effect of the measure itself’. This examination cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the actual effects of the contested measure in the marketplace.[162]

26 ‘Like’ products[163]

The term ‘like product’ appears in many different provisions of the covered agreements, such as in Articles I, II, III, IV, VI, VII, IX, XI, XII(c), XIII, XVI and XIX of the GATT 1994. [164] The term is also a key concept in the Agreement on Subsidies and Countervailing Measures, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the ‘Anti-Dumping Agreement’), the Agreement on Safeguards and other covered agreements. In some cases, such as in Article 2.6 of the Anti-Dumping Agreement, the term is given a specific meaning to be used throughout the Agreement, while in others, it is not. In each of the provisions where the term ‘like products’ is used, the term
must be interpreted in the light of the context, the object and purpose, the provision at issue, and the object and purpose of the covered agreement in which the provision appears.\[165\]

While the meaning attributed to the term ‘like products’ in other provisions of the GATT 1994, or in other covered agreements, may be relevant context in interpreting a particular provision in question, the interpretation of ‘like products’ need not be identical, in all respects, to those other meanings. No one approach to exercising judgement will be appropriate for all cases. There can be no one precise and absolute definition of what is ‘like’. The concept of ‘likeness’ is a relative one that evokes the image of an accordion.\[166\] The accordion of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term ‘like’ is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.

The ordinary, dictionary definition of the word ‘like’ in the term ‘like products’ in Article III:4 is having the same characteristics or qualities as some other thing of approximately identical shape, size, etc. But this ordinary meaning does not resolve three issues of interpretation. First, it does not indicate, which characteristics or qualities are important in assessing the ‘likeness’ of products under Article III:4. For instance, most products will have many qualities and characteristics, ranging from physical properties such as composition, size, shape, texture, and possibly taste and smell, to the end-uses and applications of the product. Second, it provides no guidance in determining the degree or extent to which products must share qualities or characteristics in order to be ‘like products’ under Article III:4. Products may share only very few characteristics or qualities, or they may share many. Thus, in the abstract, the term, ‘like’, can encompass a spectrum of differing degrees of ‘likeness’ or ‘similarity’. Third, this dictionary definition of ‘like’ does not indicate from whose perspective ‘likeness’ should be judged. For instance, consumers may have a view about the ‘likeness’ of two products that is very different from that of the inventors or producers of those products.\[167\]

The Report of the Working Party on Border Tax Adjustments outlined an approach for analysing ‘likeness’ that has been followed and developed since by several Panels and the Appellate Body.\[168\] This approach has, in the main, consisted of employing four general criteria in analysing ‘likeness’: (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers’ tastes and habits–more comprehensively termed consumers’ perceptions and behaviour—in respect of the products; and (iv) the tariff classification of the products.\[169\] These four criteria comprise four categories of ‘characteristics’ that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.

These general criteria, or groupings of potentially shared characteristics, provide a framework for analysing the ‘likeness’ of particular products on a case-by-case basis. But these criteria are simply tools to assist in the task of sorting and examining the relevant evidence. They are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterisation of products. But whether the framework is adopted or not, it is important to take account of evidence which indicates whether, and to what extent, the products involved are—or could be—in a competitive relationship in the marketplace.

Although each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are interrelated. For instance, the physical properties of a product shape limit the end-uses to which the products can be devoted. Consumer perceptions may similarly influence—modify or even render obsolete—traditional uses of the products. Tariff classification clearly reflects the physical properties of a product.\[170\] A Panel will examine the evidence relating to each of those four criteria and then, weighing all of that evidence, along with any other relevant evidence, make an overall determination of whether the products at issue could be characterised as ‘like’.

As already pointed out, the concept of ‘likeness’ is a relative one that evokes the image of an accordion, which stretches and squeezes in different places as different provisions of the WTO Agreement are applied. In Article III:2, the first sentence of the GATT 1994, the accordion of ‘likeness’ is meant to be narrowly squeezed. It must be kept in mind how narrow the range of ‘like products’ in Article III:2, first sentence, is meant to be as opposed to the range of ‘like’ products contemplated in some other provisions of the GATT 1994 and other Multilateral Trade Agreements of the WTO Agreement.

Evidence about the extent to which products can serve the same end-uses, and the extent to which consumers are—or would be—willing to choose one product instead of another to perform those end-uses, is highly relevant in assessing the ‘likeness’ of those products under Article III:4 of the GATT 1994.\[171\] Evidence of this type is of particular importance because this provision is concerned with competitive relationships in the marketplace.\[172\]

Article III:4 of the GATT 1994 reads, in part:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use…

As products that are in a competitive relationship in the marketplace could be affected through treatment of imports ‘less favourable’ than the treatment accorded to domestic products, it follows that the word ‘like’ in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. But not all products which are in some competitive relationship are ‘like products’ under Article III:4.

It is understood that the price and quality of products are important determinants of the competitiveness of the products on the market; as well as timeliness and consistency in delivery to retailers. The lower the price, the better the quality, the more timely the delivery, and the more reliable the supply, the more competitive the product will be on the market; and the more confident
the retailers will be in seeking to stock the product and providing shelf space. Product competitiveness is critical for the
survival of producers, (especially producers from developing countries) because producers will not be in business if their
products cannot compete on the market. But producers require resources to assist them promote the competitiveness of their
products. As producers provide jobs to themselves and their employees, pay tax, promote the stability of the social fabric,
assist meet the requirements of the public, and may be a way of preserving certain lifestyles, administrations may have
political interest in maintaining them in business; and may seek to provide them with supportive resources.

However, this can constitute unfair competition. Administrations with vast resources would be able to support their producers
wipe out producers from developing countries without comparable resource levels. Or, companies could under-price their
products for a period of time in order to drive out competitors from the market; then revise the prices up exercising monopoly
power.

In applying the criteria cited to the facts of any particular case, and in considering other criteria that may also be relevant in
certain cases, Panels can only apply their best judgement in determining whether in fact products are ‘like’. This will always
involve an unavoidable element of individual, discretionary judgement. Although it is a discretionary decision, it does not
mean that the Panels’ decision should be an arbitrary decision. Rather, it is a discretionary decision that must be made after
considering the various characteristics of products in individual cases.

27 Mandatory versus discretionary legislation[173]

The concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT Panels as a
threshold consideration in determining when legislation as such—rather than a specific application of that legislation—was
inconsistent with a Contracting Party’s GATT 1947 obligations. Panels developed the concept that mandatory and
discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of
GATT obligations can be found as such to be inconsistent with those obligations. In other words, legislation as such cannot be
found to be inconsistent with a Member's WTO obligations unless it is mandatory in nature. This is called the ‘classical test’.

There is a considerable body of dispute settlement practice under both GATT and WTO standing for the principle that only
legislation that mandates a violation of GATT/WTO obligations can be found, as such, to be inconsistent with those
obligations. Panels have consistently ruled that legislation which mandated action inconsistent with the General Agreement
could be challenged as such, whereas legislation which merely gave the discretion to the executive authority of a contracting
country to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such
legislation could be subject to challenge[174].

It has been stated that the distinction between mandatory and discretionary legislation has a rational objective in ensuring the
predictability of conditions for trade. It is difficult to understand how discretionary legislation, which by its nature leaves
everybody guessing as to how it will be applied, ensures the predictability of conditions of trade. The covered Agreements are
there to protect expectations of the contracting parties as to the competitive relationship between their products and those of
the other contracting parties. They do not only protect current trade but also create the predictability needed to plan future
trade[175] Discretionary legislation makes planning that much more difficult.

What has been said in respect of discriminatory legislation can also be true of discretionary legislation: this is that what
constitutes the violation exists in the fact that the WTO Agreement is a treaty whose benefits depend, in part, on the activity of
individual operators such that the mere existence of discretionary legislation could have an appreciable ‘chilling effect’ on the
economic activities of these individuals. In the light of the object and purpose of the GATT, it is a promise by contracting
parties not only that they would abstain from actually taking WTO inconsistent language, but also to give certain guarantees to
the marketplace and the operators within it that WTO inconsistent laws, whether or not discretionary in their application, would
not be enacted.

The following is instructive: “...a domestic law which exposes imported products to future discrimination has been recognised
as constituting, by itself, a violation of Article III, even before the law came into force[176]. Even where there was no certainty
but only a risk under the domestic law that a tax would be discriminatory, that law can be found to violate the obligation in
Article III.” The rationale has always been the negative effect on economic operators. Such risk or threat, when real, can affect
the relative competitive opportunities. Discretionary legislation can have the same effect as a threat where carrying a big stick
is considered, in many cases, as effective a means to having one’s way as actually using the stick. The threat alone of
conduct prohibited by the WTO enables the Member concerned to exert undue leverage on other Members. So does
discretionary legislation.

There are dangers in the differentiation between discretionary and mandatory legislation, and the principle that those laws that
permit a Member to choose between WTO-consistent and WTO-inconsistent measures would not be found WTO-inconsistent
as such; only measures taken in their application can be found WTO-inconsistent. No complete solution would be provided for
disputes over certain types of measures if the DSB can find only the application of measures under the “discretionary law” to
be WTO-inconsistent, and thus recommend them to be brought into conformity. For example, if trade remedy measures are
abused, trade would be affected only by the initiation of an investigation. Also, it would be practically difficult to remove
subsidies after they have been granted, or to reverse government procurement after the tendering procedures have been
completed. Concerning these measures in particular, a Member may not hesitate to apply WTO-inconsistent measures with a
The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. This may result in a "hit-and-run" situation.

To prevent Members from repeating the same violation or from engaging in "hit-and-run" tactics under the "discretionary law", there may be need for the WTO to make an exception to the application of the "discretionary law" theory when repetition of the same violation is highly probable. This should be limited to such cases, for example, where it is evident that, in exercising the authority granted under the "discretionary law", a Member has intentionally applied the same measure that was found to be WTO-inconsistent through the dispute settlement procedure. In such cases, panels or the Appellate Body may find the "discretionary law" inconsistent with the WTO Agreement, and, thus, may recommend that necessary steps be taken to prevent, under the "discretionary law", the repetition of WTO-inconsistent measures. Such an exception of the "discretionary law" theory could be established through amendments in the DSU, or may be more appropriately done in any other form, including the adoption of an authoritative interpretation on Article XVI:4 of the Marrakesh Agreement Establishing the WTO in accordance with Article IX:2 thereof.

It may be useful as well to consider making a rule that, where a measure under a discretionary law was found to be WTO-inconsistent and a similar measure has been taken under the same law, the latter would presumed to be WTO-inconsistent. Accordingly, the burden of proof would be shifted to the Member taking the measure. The panel or the Appellate Body should be obliged to address repeated violation or hit-and-run tactics under a "discretionary law".[177]

The mandatory/discretionary question is not considered in the abstract. Rather, the Panels first resolve any controversy as to the requirements of the GATT/WTO obligations at issue, and only then consider in the light of those findings whether the defending party has demonstrated adequately that it had sufficient discretion to conform to those rules. That is, the mandatory/discretionary distinction is applied in a given substantive context.[178]

28 MFN (Most-Favoured-Nation Treatment)[179]

The ‘most-favoured-nation’ (‘MFN’) principle contained in GATT Article 1.1, has long been a cornerstone of the GATT, and is one of the pillars of the WTO trading system.

Article I:1 states, in the pertinent part:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation... any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

The words of Article I:1 do not restrict its scope only to cases in which the failure to accord an ‘advantage’ to like products of all other Members appears on the face of the measure, or can be demonstrated on the basis of the words of the measure. Although neither the words ‘de jure’ nor ‘de facto’ appear in Article I:1, this article does not cover only ‘in law’, or de jure, discrimination, but covers also ‘in fact’, or de facto, discrimination.[180] The words of Article I:1 refer not to some advantages granted with respect to the subjects that fall within the defined scope of the Article, but to ‘any advantage’: not to some products, but to ‘any product’, and not to like products from some other Members, but to like products originating in or destined for ‘all other’ Members.[181]

That object and purpose of Article I.1 is to prohibit discrimination among like products originating in or destined for different countries. Apart from Article I:1, several ‘MFN-type’ clauses dealing with varied matters are contained in the GATT 1994.[182] The very existence of these other clauses demonstrates the pervasive character of the MFN principle of non-discrimination. It should be noted, however, that various exceptions to the MFN principle exist in the WTO Agreement.[183]

29 National Treatment[184]

Article III of the GATT 1994, entitled ‘National Treatment on Internal Taxation and Regulation’, reads in the relevant part as follows:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory
measures. More specifically, the purpose of Article III is to ensure that internal measures "not be applied to imported or domestic products so as to afford protection to domestic production" [185] Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products [186]. The intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Moreover, it is irrelevant that the trade effects of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products [187]. Members of the WTO are free to pursue their own domestic goals through internal taxation or regulation as long as they do not do so in a way that violates Article III or any of the other commitments they have made in the WTO Agreement.

The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the WTO Agreement. Although the protection of negotiated tariff concessions is certainly one purpose of Article III, its major purpose is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production.

Article III:1 articulates a general principle, which is that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Article III:1 informs Article III:2, first sentence, by establishing that if imported products are taxed in excess of like domestic products, then that tax measure is inconsistent with Article III. Article III:2, first sentence, does not refer specifically to Article III:1.

There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures "so as to afford protection". This omission must have some meaning, and the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence. However, this does not mean that the general principle of Article III:1 does not apply to this sentence. On the contrary, the first sentence of Article III:2 is, in effect, an application of this general principle, based on the ordinary meaning of the words of Article III:2.

Read in their context and in light of the overall object and purpose of the WTO Agreement, the words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are "like" and, second, whether the taxes applied to the imported products are "in excess of" those applied to the like domestic products. If the imported and domestic products are "like products", and if the taxes applied to the imported products are "in excess of" those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence [188].

The issue under Article III:2, first sentence, is whether the taxes on imported products are "in excess of" those on like domestic products. If so, then the Member that has imposed the tax is not in compliance with Article III. Even the smallest amount of "excess" is too much. The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a "trade effects test" nor is it qualified by a de minimis standard [189]. A tax conforming to the requirements of the first sentence of Paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2, second sentence. These are whether (1) the imported products and the domestic products are "directly competitive or substitutable products" which are in competition with each other; (2) the directly competitive or substitutable imported and domestic products are "not similarly taxed"; and (3) the dissimilar taxation of the directly competitive or substitutable imported domestic products is "applied...so as to afford protection to domestic production" [190]. These are three separate issues. Each must be established separately by the complainant for a Panel to find that a tax measure imposed by a Member of the WTO is inconsistent with Article III:2, second sentence.

29.1 ‘Directly Competitive or Substitutable Products’

If imported and domestic products are not 'like products' for the purposes of Article III:2, first sentence, then they are not subject to the strictures of that sentence and there is no inconsistency with the requirements of that sentence. However, depending on their nature, and depending on the competitive conditions in the relevant market, those same products may well be among the broader category of ‘directly competitive or substitutable products’ that fall within the domain of Article III:2, second sentence. How much broader that category of ‘directly competitive or substitutable products’ may be in any given case is a matter for the Panel to determine based on all the relevant facts in that case. As with ‘like products’ under the first sentence, the determination of the appropriate range of ‘directly competitive or substitutable products’ under the second sentence must be made on a case-by-case basis. The decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-uses, inter alia, as shown by elasticity of substitution [191].

29.2 ‘So As To Afford Protection’
The inquiry under Article III:2, second sentence, must determine whether ‘directly competitive or substitutable products’ are ‘not similarly taxed’ in a way that affords protection. This is not an issue of intent. It is not necessary for a Panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported, or domestic, products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless applied to imported or domestic products so as to afford protection to domestic production. This is an issue of how the measure in question is applied.

An examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products. The underlying criteria used in a particular tax measure must be examined objectively—its structure, and its overall application—in order to ascertain whether it is applied in a way that affords protection to domestic products. Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure. The very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application. Most often, there will be other factors to be considered as well. In conducting this inquiry, Panels will give full consideration to all the relevant facts and all the relevant circumstances in any given case.

Article III:2 does not prescribe the use of any specific method or system of taxation. There could be objective reasons proper to the tax in question, which could justify or necessitate differences in the system of taxation for imported and for domestic products. It could be compatible with Article III:2 to allow two different methods of calculation of price for tax purposes. Since Article III:2 prohibits only discriminatory or protective tax burdens on imported products, what matters is whether the application of the different taxation methods actually has a discriminatory or protective effect against imported products.

### 30 Notice of Appeal

A notice of appeal must relate to the Panel’s findings, and must make specific mention of the Panel’s findings being appealed in either the Notice of Appeal or in the main arguments of the appellant’s submission, in order to give the respondent notice of the finding being appealed. The Working Procedures for Appellate Review enjoin the appellant to be brief in its notice of appeal in setting out the nature of the appeal, including the allegations of errors. In principle, the ‘nature of the appeal’ and ‘the allegations of errors’ are sufficiently set out where the notice of appeal adequately identifies the findings or legal interpretations of the Panel, which are being appealed as erroneous.

The notice of appeal is not expected to contain the reasons why the appellant regards the findings or interpretations as erroneous, and is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant’s submission.

### 31 Non-Violation

Article XXIII:1(b) of GATT 1994 sets forth a cause of action for a claim that, through the application of a measure, a Member has nullified or impaired benefits accruing to another Member, whether or not that measure conflicts with the provisions of the GATT 1994. It is not necessary, under Article XXIII:1(b), to establish that the measure involved is inconsistent with, or violates, a provision of the GATT 1994. Cases under Article XXIII:1(b) are, for this reason, sometimes described as ‘non-violation’ cases even though the word ‘non-violation’ does not appear in this provision. The purpose of this rather unusual remedy was described by the Panel in European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins in the following terms:

> The idea underlying the provisions of Article XXIII:1(b) is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.

It is considered that the remedy in Article XXIII:1(b) should be approached with caution and should remain an exceptional remedy.

The origins of the non-violation doctrine lay in the recognition that a wide range of governmental measures can affect the value of commitments entered into in international trade agreements and that it would be very difficult, and perhaps undesirable, to seek to regulate all such measures. The non-violation provisions serve mainly to protect the value of tariff concessions. The idea is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.

The basis of a cause of action for non-violation is the nullification or impairment of a benefit accruing to a Member under a covered agreement. The following are the essential requirements that have had to be met by a complaining party in order to mount a successful case of non-violation: that a measure attributable to the respondent party government exists; that the measure could not reasonably have been expected by the complaining party at the time that it negotiated a commitment with
the respondent party, and that the measure adversely upsets the competitive relationship between products established by the commitment in question.\[200\]

Non-violation requires the application by a Member of a ‘measure’, without providing for any a priori exclusions as to what a ‘measure’ might be. It can be noted, however, that successful non-violation claims under GATT 1947 have concerned governmental laws or regulations, for example to impose charges, to grant production aids or to discontinue a subsidy.\[201\]

What is constraining for developing countries in the application of the non-violation provisions is that for example, a WTO Member may be reasonably entitled to assume that the subsidies granted by a developing country to the fertilizer, in respect of which it had negotiated a tariff concession, and a competing fertilizer would remain the same as that which had obtained at the time it negotiated the tariff concession. For those developing countries that produce fish, the imposition of import duties and charges at different rates on different fish, and the removal of quantitative restrictions on preparations of a certain variety of fish but not others, which may result in relatively less favourable treatment for those that had been the subject of a tariff concession, it could be reasonably assumed that at the time of the negotiation of the concession this could not have been anticipated by the Member bringing the complaint. A WTO Member can also argue that it could not have anticipated the introduction of subsidies that protected producers completely from the movement of prices for imports and thereby prevented tariff concessions from having any impact on the competitive relationship between domestic and imported seeds.\[202\]

The GATT jurisprudence establishes that the non-violation remedy is only available where nullification or impairment of a benefit accruing under an Agreement is caused by the relevant measure. And it is an upsetting of the conditions of competition, and not necessarily an actual lowering of import volumes, which must be caused by the relevant measure. Developing countries must worry that in determining causality, the intention of the government is not considered important. What matters for purposes of establishing causality is the impact of the measure, i.e., whether the measure upsets competitive relationships. However, a showing of intent to restrict imports might make a panel more inclined to find a causal relationship in specific cases involving measure which, on their face, appear to be origin-neutral.\[203\]

Developing countries may, however, take comfort in that while in cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered prima facie to constitute a case of nullification or impairment, in a non-violation claim the party bringing a claim is called upon to provide a detailed justification.\[204\] The failure to meet the burden of demonstrating actual nullification and impairment can be decisive against the complaining party.

Since in a non-violation case the measure having the effect of nullifying or impairing benefits is not in itself inconsistent with the obligations under the agreement in question of the country which has taken it, GATT and WTO practice and law make it clear that the remedy that may be recommended in such a case cannot require withdrawal of the measure. The recommendation that may be made in non-violation cases is that the Members concerned make a mutually satisfactory adjustment. Some panels have recommended or suggested particular ways by which a mutually satisfactory adjustment could be effected, such as the removal of any competitive inequality between the two products arising from subsidization, or the reduction of certain MFN tariff rates, which would have effectively restored MFN treatment.\[205\]

Both under the provisions of the GATT 1947 and under the WTO, authorization of suspension of concessions or other obligations remains the final, and least preferred, remedy in regard to successful non-violation cases as well as violation cases.\[206\]

The TRIPS Agreement provides that the non-violation provision would not apply to the settlement of disputes under the Agreement for a period of five years from the date of entry into force of the WTO Agreement. The Agreement further provides that during this grace period of five years, the Council for TRIPS had to examine the scope and modalities for complaints of the type provided for under the provision, and submit its recommendations to the Ministerial Conference for approval. Discussion on the scope and modalities of non-violation nullification or impairment complaints under the TRIPS Agreement was initiated in 1999 in the Council for TRIPS, which has been unable to reach any conclusion on the application of these complaints under the TRIPS Agreement. While all other countries seem to agree that this remedy should not apply under the TRIPS Agreement, the United States thinks it should. Non-violation complaints should in no way be applied under the TRIPS Agreement since this would affect access to affordable medicines by developing countries. Developing countries would then often not predict with precision what the impact of their interventions in making medicine more readily available for their populations would have on the so-called reasonable expectations of other Members.\[207\]

### 32 Object and purpose of the DSU\[208\]

The Preamble to the WTO Agreement states that Members recognise that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services.\[209\]

Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the marketplace and its different operators. DSU provisions are thus interpreted in the light of this object and purpose and in a manner that would most effectively enhance it.
In addition, positive law provisions in the DSU itself, such as Article 3.2, provide the following:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements ...[210]

The security and predictability of the ‘multilateral trading system’ are in question. This approach is also expressed in Article 23.1 of the DSU, which stresses the primacy of the multilateral system and rejects unilateralism as a substitute for the procedures foreseen in that agreement.

### 33 Object and purpose of the WTO Agreement[211]

The WTO Agreement favours a multilateral approach to trade issues. The Preamble to the WTO Agreement provides that Members are ‘resolved ... to develop an integrated, more viable and durable multilateral trading system (and are) ... determined to preserve the basic principles and to further the objectives underlying this multilateral trading system’.

Article III:2 of the WTO Agreement states:

> The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide for a forum for further negotiations among its Members concerning their multilateral trade relations ...[212]

The central focus of the WTO Agreement is the promotion of economic development through trade; the provisions of GATT are essentially turned toward liberalization of access to markets on a non-discriminatory basis.

The development programmes of developing countries invariably include the promotion of their trade with other WTO members; and in this regard market access rights through multilateral instruments and preferences are key objectives in their international economic relations. Secondly, the programmes include elements that are regulated by the WTO Agreement, in terms of permitting or restricting them; good examples being incentive regimes for use of domestic inputs, for promotion of exports, for investment in key sectors, for supporting research, or for assisting depressed areas. Thirdly, the development programmes envisage technical co-operation with developed countries and international organisations, in terms of development assistance. The WTO Agreement contains provisions requiring in varying degrees of obligation that developed countries and the WTO collectively as an institution assist developing particularly least developed countries with financial and technical resources including technology to effectively utilise and beneficially participate in the multilateral framework.

The extent to which developing countries can enforce their rights under the WTO dispute settlement system, including market access rights and the rights to directly facilitate their development programmes, affects their development prospects. Also, the extent to which developing countries can enforce the obligations of other members, in particular the obligations on technical co-operation, affects their development prospects.

Although developing countries have not been active players in the WTO dispute settlement system. Most cases have been between developed countries, with only a few having involved other developing countries as complaints and defendants. But developed countries must trade to survive. Trade provides individuals with an important means of earning a living by selling goods or services, and earn incomes, which they in turn use to meet their needs, to look after their families and to further develop themselves. Trade can assist create conditions for regional and international peaceful co-existence, as well as freedom from poverty and disease.

The social economic welfare of the individual, however, should be the ultimate measure of the concrete contribution of trade to economic development. In this regard, market access opportunities should be translated into trade opportunities through creating the matching supply capacity on the part of actual enterprises and individuals. And when enterprises and individuals take up the market access opportunities, trade can be considered to be contributing to freedom from poverty and disease; the prevalence of trade relations between countries would be a motive for peaceful co-existence.[213]

Developing countries could take comfort in the first paragraph of the Preamble of the WTO Agreement that acknowledges that the optimal use of the world’s resources must be pursued ‘in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means of doing so in a manner consistent with (Members’) respective needs and concerns at different levels of economic development’. The second paragraph of the Preamble of GATT and the third paragraph of the WTO Agreement Preamble refer to ‘entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment’ in international trade relations.
34 Objectives of a measure[214]

The Appellate Body has taken a position on how Panels should conduct an inquiry into the objectives of a measure. It did so in the context of an analysis under Article III:2, second sentence, of the GATT 1994. In examining whether a tax measure was applied “so as to afford protection to domestic production”, the Appellate Body stated that

… it is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent.” The subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters. It does not follow, however, that the statutory purposes or objectives – that is, the purpose or objectives of a Member’s legislature and government as a whole – to the extent that they are given objective expression in the statute itself, are not pertinent. [215]

Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure. [216]

35 Precautionary principle[217]

The status of the precautionary principle in international law finds reflection in Article 5.7 of the SPS Agreement, and continues to be the subject of debate among academics, legal practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallised into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear. Article 5.7, the sixth paragraph of the preamble, and Article 3.3 reflect the precautionary principle by explicitly recognizing the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e. more cautious) than that implied in existing international standards, guidelines and recommendations.

It appears important, however, to note some aspects of the relationship of the precautionary principle to the SPS Agreement, such as the fact that the principle has not been written into the SPS Agreement as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of the Agreement. In addition, while the precautionary principle indeed finds reflection in Article 5.7 of the SPS Agreement, there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle since it is reflected also in the sixth paragraph of the preamble and in Article 3.3.

Further, a Panel charged with determining, for instance, whether ‘sufficient scientific evidence’ exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, such as life-terminating, damage to human health are concerned. It should be noted that the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a Panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement. [218]

36 Omissions in the text of an agreement[219]

The fact that there is nothing in the language of the text that specifically includes or allows a certain action does not mean that that action is specifically excluded or prohibited. While omissions in different contexts may have different meanings, omission, in and of itself, is not necessarily conclusive. Where the text of the provision is not conclusive on a point, additional means of interpretation, such as the relevant context of the provision and the object and purpose of the relevant agreement, will be resorted to.

For example, although Article 13 of the DSU gives only the Panels the authority to receive amicus curiae briefs, the Appellate Body has said that it has the authority to accept them as well, on the reasoning that although nothing in the DSU or the Working Procedures specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal, neither the DSU nor the Working Procedures explicitly prohibits acceptance or consideration of such briefs. [220] In dealing with a similar issue under the SCM Agreement, the Appellate Body noted that just as there is nothing in the language of Article 3.1(b) that specifically includes subsidies contingent ‘in fact’, so, too, is there nothing in that language that specifically excludes subsidies contingent ‘in fact’ from the scope of coverage of this provision. [221]

37 Panel’s terms of reference[222]

The request for the establishment of a Panel under Article 6.2 of the DSU must identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. A matter referred to a Panel for consideration consists of the specific claims stated by the parties to the dispute, in the relevant documents specified in the terms of reference. A matter which includes the claims composing that matter, does not fall within a Panel’s terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference. [223] Panels are inhibited from addressing legal claims falling outside their terms of reference.

A Panel’s terms of reference are important for two reasons. First, terms of reference fulfill an important due process objective – they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow
38 Participation by lawyers in WTO proceedings

There is nothing in the Marrakesh Agreement Establishing the World Trade Organization (the ‘WTO Agreement’), the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings. Since it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body, it is free to include lawyers in that delegation. Representation by counsel of a government’s own choice may well be a matter of particular significance—especially for developing-country Members—to enable them to participate fully in dispute settlement proceedings. Moreover, given the Appellate Body’s mandate to review only issues of law or legal interpretation in Panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings.

39 Prima facie case

A prima facie case is a case which, in the absence of effective refutation by the defending party, requires a Panel to rule in favour of the complaining party presenting the prima facie case. The Panel will begin the analysis of each legal provision by examining whether a Member has presented evidence and legal arguments sufficient to demonstrate that the measures in question are inconsistent with the obligations assumed under each Article. In order to make a prima facie case, the complaining party must adduce evidence, as well as arguments, that would require the Panel to rule, as a matter of law, in its favour.

In accordance with Article 3.8 of the DSU, a violation is prima facie presumed to nullify or impair benefits under Article XXIII of the GATT 1994. Article 3.8 reads:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

40 Rationale behind findings

Article 12.7 of the DSU provides, in the relevant part, that the report of a Panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. The duty of Panels under Article 12.7 of the DSU to provide a ‘basic rationale’ reflects and conforms to the principles of fundamental fairness and due process that underlie and inform the provisions of the DSU. In particular, in cases where a Member has been found to have acted inconsistently with its obligations under the covered agreements, that Member is entitled to know the reasons for such finding as a matter of due process. In addition, the requirement to set out a ‘basic rationale’ in the Panel report assists such a Member to understand the nature of its obligations and to make informed decisions about: (i) what must be done in order to implement the eventual rulings and recommendations made by the DSB; and (ii) whether and what to appeal. Article 12.7 also furthers the objectives, expressed in Article 3.2 of the DSU, of promoting security and predictability in the multilateral trading system and of clarifying the existing provisions of the covered agreements, because the requirement to provide ‘basic’ reasons contributes to other WTO Members’ understanding of the nature and scope of the rights and obligations in the covered agreements.

Whether a Panel has articulated adequately the ‘basic rationale’ for its findings and recommendations must be determined on a case-by-case basis, taking into account the facts of the case, the specific legal provisions at issue, and the particular findings and recommendations made by a Panel. Panels must identify the relevant facts and the applicable legal norms. In applying those legal norms to the relevant facts, the reasoning of the Panel must reveal how, and why, the law applies to the facts. In this way, Panels will, in their reports, disclose the essential or fundamental justification for their findings and recommendations. The obligation on a Panel to set out the ‘basic rationale’ behind any findings will be discharged by the Panel identifying the legal standard it would have applied, examining the relevant facts, and providing reasons for its conclusions.

Article 12.7 therefore establishes a minimum standard for the reasoning that Panels must provide in support of their findings and recommendations, but does not require Panels to expound at length on the reasons for their findings and recommendations. Cases can be envisaged in which a Panel’s ‘basic rationale’ might be found in reasoning that is set out in other documents, such as in previous Panel or Appellate Body reports—provided that such reasoning is quoted or, at a minimum, incorporated by reference.

41 Retroactivity
A treaty shall not be applied retroactively unless a different intention appears from the treaty or is otherwise established. Unless a contrary intention is expressed, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force. [232] It would seem that Article 28 of the Vienna Convention on the Law of Treaties also necessarily implies that, absent a contrary intention, treaty obligations do apply to any situation which has not ceased to exist—that is, to any situation that arose in the past, but continues to exist under the new treaty. [233] In other words, a treaty applies to existing rights, even when those rights result from acts which occurred before the treaty entered into force.

42 Request for the Establishment of a Panel

The request for the establishment of a Panel is to be made in terms of Article 6.2 of the DSU, and must identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. A matter referred to a Panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference. A matter, including the claims composing that matter, does not fall within a Panel's terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference. Panels are inhibited from addressing legal claims falling outside their terms of reference.

A Member has broad discretion in deciding whether to bring a case against another Member under the DSU, and is expected to be largely self-regulating in deciding whether any such action would be fruitful. [234]

43 Right to request establishment of a Panel

Neither Article 3.3 nor 3.7 of the DSU, nor any other provision of the DSU, contains any explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting the establishment of a Panel. The need for a 'legal interest' is not implied in the DSU or in any other provision of the WTO Agreement. [235]

With the increased interdependence of the global economy, it is thought that Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.

44 Rules of origin[236]

Rules of origin (RoO) describe the conditions used for the determination of a product's origin, thus setting the parameters for preferential access to a given trade partner's domestic market. Rules of origin are used as a tool for determining the 'economic nationality' of a product, rather than merely deeming the last geographic location from which a product is shipped as its nationality. They define many of the conditions of market access alongside other issues such as such as technical standards, sanitary and phytosanitary measures, and labeling requirements. Rules of origin can thus promote or curb trade, depending on the restrictiveness of the given origin rules applicable. Since trade policy often requires market preferences to be made available only to certain countries, for example the parties to a trade agreement, an absence of origin rules could lead to problems with transshipment. Known as trade deflection, products exported to a specific country could then be channeled through third countries having more favourable market access to a given export market (that of the final destination), without any economic value adding and associated benefits taking place in these preference-receiving third countries. [237]

The Rules of Origin (RO) Agreement aims at long-term harmonisation of rules of origin and at ensuring that such rules do not themselves create unnecessary obstacles to trade. The agreement sets up a harmonisation programme, to be initiated as soon as possible after the completion of the Uruguay Round and to be completed within three years of initiation. It would be based upon a set of principles, including making rules of origin objective, understandable and predictable.

Much work was done and substantial progress has been made in the three years foreseen in the Agreement for the completion of the work. However, due to the complexity of the issues the harmonisation could not be finalised within the foreseen deadline. Until the completion of the harmonisation programme, contracting parties are expected to ensure that their rules of origin are transparent; that they do not have restricting, distorting or disruptive effects on international trade; that they are based upon a set of principles, including making rules of origin objective, understandable and predictable.

Article 2 of the Rules of Origin (RO) Agreement lays down disciplines governing Members’ application of non-preferential rules of origin until the work programme for the harmonisation of rules of origin set out in Part IV is completed. [238] The RO Agreement provides that until the work programme for the harmonisation of rules of origin set out in Part IV is completed, Members shall ensure that, notwithstanding the measure or instrument of commercial policy to which they are linked, their rules of origin are not used as instruments to pursue trade objectives directly or indirectly. After this transition period that is, upon implementation of the results of the harmonisation work programme, Members will apply harmonised rules of origin. So, while during the post-harmonisation period Members will be constrained by the result of the harmonisation work programme, during the transition period, Members retain considerable discretion in designing and applying their rules of origin.

The RO Agreement sets out what rules of origin should not do: rules of origin should not pursue trade objectives directly or indirectly; they should not themselves create restrictive, distorting or disruptive effects on international trade; they should not pose unduly strict requirements or require the fulfilment of a condition unrelated to manufacturing or
processing[245]; and they should not discriminate between other Members[246]. They shall not pose unduly strict requirements or require the fulfillment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin. These provisions do not prescribe what a Member must do. By setting out what Members cannot do, these provisions leave for Members themselves the discretion to decide what, within those bounds, they can do. But what is clear is that rules of origin should not themselves create restrictive, distorting, or disruptive effects on international trade.

It is intended that rules of origin be used to implement and support trade policy instruments, rather than to substitute for, or to supplement, the intended effect of trade policy instruments. Allowing Members to use rules of origin to pursue the objectives of ‘protecting the domestic industry against import competition’ or ‘favoring imports from one Member over imports from another’ would be to substitute for, or supplement the intended effect of a trade policy instrument.[247] That is what the rules say. However, in practice Members have been seen to use rules of origin to pursue trade objectives.

The rules of origin that Members have adopted and implemented are a matter of infinite complexity. Some Members had adopted the approach that in order to be deemed the manufacture of an exporting country, a product must be either “wholly produced” or “substantially transformed” in the exporting country. Substantial transformation is measured according to three methods, which apply only to the non-originating components of a product. Materials wholly sourced from within a country or specific regional grouping (where applicable) are not required to undergo further processing.

The first method is the value-added method which confers origin based on a specific proportion of production value that must be added locally. The second method is the specific processing method, which requires a non-originating material or product to have complied with a predefined set of local operations or processes, for example the fabric used in garments must be woven locally. The third method, the change in tariff heading, based on the internationally recognised and used Harmonised System nomenclature (HS), requires that a product must be classified under a different heading than that of any non-originating input materials used in its manufacture.

One rules of origin principle that may work in favour of developing countries in regional economic communities is that of cumulation. Cumulation is important in expanding the scope of preferential trade. Cumulation provisions essentially describe the extent to which production may be shared between countries without forfeiting preferences under a given trade agreement. In other words, cumulation permits countries to use inputs produced in specific third countries without having to comply with the usual origin requirements, provided that such inputs are further processed in the exporting country claiming preferences. Various forms of cumulation exist. These are bilateral, diagonal and full cumulation.[248]

Bilateral cumulation, being the simplest and most common form of cumulation, permits the parties to a preferential trade agreement to freely use each others materials. In other words, bilateral cumulation allows cumulation between the preference giving and preference receiving country. Where cumulation is permitted between certain preference receiving countries, this is referred to as regional diagonal cumulation. Diagonal cumulation always has a regional component, and can substantially expand the scope of a trade agreement in that it implicitly recognizes that different countries within a defined geographic area may have different industrial and productive capabilities and efficiencies. Diagonal cumulation can therefore play an important supporting role in fostering regional economic integration. Full cumulation can perhaps be described as an extended form of diagonal cumulation without the geographic or regional limitations. Full cumulation permits production to be shared among all members of a preferential trade regime, without the processing of an individual country having to be sufficient to confer origin on its own. In other words, the sum of all processing is seen in its totality. The main benefit of cumulation lies in the flexibility it gives to manufacturers and exporters, for example allowing certain processes or material requirements to be outsourced to more competitive beneficiary countries without jeopardizing the final product’s originating status.[249]

Rules of origin are especially important for developing countries that rely heavily on agriculture. The Cotonou rules of origin, for example, are known to make strict restrictions on agricultural products. The origin requirements for many agricultural categories are based on the wholly obtained method. Products must be wholly produced in the exporting country, meaning that, for example, livestock must be born and raised within the exporting country to be deemed originating there; fruit and vegetables must be grown there, and fish must be caught within a country’s inland or territorial waters.

Specific sectors where Cotonou’s origin requirements are deemed to be particularly restrictive are those applying to the fisheries and textiles and clothing sectors. With respect to textiles and clothing, two distinct stages of transformation are required to be undertaken by the exporting country. This requirement implicitly fails to recognize that dynamics within the global textile and clothing production pipeline have shifted substantially since the 1970’s when these rules were originally determined, making them excessively restrictive in today’s environment. In practice they prevent ACP countries from availing themselves of the benefits of sourcing input materials (i.e. textiles) from low-cost countries in South-East Asia, for example as is permitted under the AGOA RoO which permit virtually unconstrained fabric inputs from third countries. Making matters worse is the fact that textile, and more importantly, garment production are relatively important manufacturing sectors in many ACP countries, and are often seen as an important step as developing countries diversify their economies away from a complete reliance on say a single agricultural product.[250]
The fisheries sector is a further example of Cotonou’s RoO shortcomings, showing unambiguous protectionist elements on the part of the EU (fish products constitute one of the largest export categories from the ACP). These restrictions extend beyond the product-specific RoO. Besides describing what product categories are deemed to be wholly obtained in the exporting country (livestock born and raised there, fruit and vegetable products grown and harvested there, fish caught in the territorial waters…etc.), they impose further restrictions on the use of vessels used to harvest a country’s fish stocks. Specifically, any fish caught outside of a country’s territorial waters, but still within its 200 mile exclusive economic zone (EEZ), is subject to stringent fishing vessel, crew, registration (flag) and ownership nationality requirements. Essentially, all fish must be caught by a country’s own vessels, or those owned by EU stakeholders. To be considered a domestic fishing vessel, the ship must be registered in and sail under the flag of an ACP State or the EU, be at least half-owned by nationals of the ACP (subject to further conditions pertaining to head office, the Board of Directors and capital), and must use the services of a crew that are at least half nationals of the ACP.

In the design of rules of origin, sectoral issues, particularly around the textiles and fisheries sectors, need a substantial lessening of restrictions if developing countries are to achieve their full share of world trade. Beneficiation activities are today far more diverse than they were decades ago (for example, a simple fabric can undergo various stages of beneficiation that make it a product with unique technical, design and aesthetic characteristics without changing its classification or general product description), and that global dynamics have changed with regard to geographical centres having distinct price competitiveness. The issue of cumulation remains important, since it is likely that as regional economic integration advances over the years, cross-border trade will also grow. Since RoO potentially play such a vital role of enhancing (or denying) market access among preferential trade partners, an apparent lack of awareness of important RoO issues among stakeholders – including some policy makers and economic agents such as producers and exporters – emphasizes the need for ongoing capacity building in this area. As long as import tariffs and related measures continue to form part of trade policy, preferential RoO will be an important variable for countries wishing to benefit from preferential market access.[251]

45 Standard of review[252]

For all but the Anti-Dumping Agreement[253] Article 11 of the DSU sets forth the appropriate standard of review for Panels under the covered agreements. Article 11, which describes the parameters of the function of Panels, articulates the appropriate standard of review for Panels in respect of both the ascertainment of facts, and the legal characterisation of such facts under the relevant agreements, as follows:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a Panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a Panel would be incompatible with a Panel's duty to make an objective assessment of the facts. The willful distortion or misrepresentation of the evidence put before a Panel is similarly inconsistent with an objective assessment of the facts.

So far as fact-finding by Panels is concerned under the SPS Agreement, their activities are of course constrained by the mandate of Article 11 of the DSU: the applicable standard is neither de novo review as such, nor total deference, but rather the objective assessment of the facts. Many Panels have in the past refused to undertake de novo review.[254] On the other hand, total deference to the findings of the national authorities could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU.[255] As far as the legal questions are concerned—that is, consistency or inconsistency of a Member's measure with the provisions of the applicable agreement—no standard found in the text of the SPS Agreement itself cannot absolve a Panel or the Appellate Body from the duty to apply the customary rules of interpretation of public international law.[256]

The standard of review applicable in proceedings under the SPS Agreement must reflect the balance established in the Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves. To adopt a standard of review not clearly rooted in the text of the SPS Agreement itself, is thought to amount to changing that balance, which neither a Panel nor the Appellate Body is authorised to do.[257]

46 Status of adopted Panel Reports[258]

The Dispute Settlement Understanding does not contain any express provision concerning the status of adopted Panel or Appellate Body reports, or concerning their potential impact in separate proceedings under the DSU concerning the same matter.[259] However, the Appellate Body has indicated that the status of adopted Panel reports is that they are binding on the parties with respect to that particular dispute.[260] On the basis that the Ministerial Conference and the General Council have
the exclusive authority to adopt interpretations of the WTO Agreement and of the Multilateral Trade Agreements. The Appellate Body has said it did not believe that the CONTRACTING PARTIES, in deciding to adopt a Panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. The fact that the exclusive authority in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.

The Appellate Body has however, clarified that adopted Panel reports are an important part of the GATT acquis and noted that subsequent Panels often take them into consideration. These reports create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. On the other hand, unadopted Panel reports have no legal status in the GATT or WTO system. But a Panel can nevertheless find useful guidance in the reasoning of an unadopted Panel report that it considers relevant.

47 Subsidy – definition of

Under the heading ‘Definition of a Subsidy’, Article 1.1 of the Subsidies and Countervailing Agreement (SCM Agreement) provides, in relevant part, the following:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”) …

…

and

(b) a benefit is thereby conferred.

Thus, the definition of a subsidy has two distinct elements: (i) a financial contribution (or income or price support), (ii) which confers a benefit. Financial contribution and benefit are separate legal elements in Article 1.1, which together determine whether a ‘subsidy’ exists. The two should not be blended by importing the concept of benefit into the definition of financial contribution.

A subsidy exists if there is a financial contribution by a government and a benefit is thereby conferred. A ‘financial contribution’ is deemed to exist, inter alia, where government revenue that is otherwise due is foregone or not collected. Foregoing of revenue ‘otherwise due’ implies that less revenue is raised by the government than would have been raised in a different situation. The word ‘foregone’ suggests that the government has given up an entitlement to raise revenue that it could otherwise have raised. This, however, is not an entitlement in the abstract, because governments, in theory, could tax all revenues. The basis of comparison must be the tax rules applied by the Member in question. What is ‘otherwise due’ depends on the rules of taxation that each Member, by its own choice, establishes for itself.

Not all government actions providing goods and services are necessarily financial contributions. If a government provides goods and services that are ‘general infrastructure’, no financial contribution will exist. For a financial contribution to qualify as a subsidy, it must confer a benefit. In addition, a subsidy must be ‘specific’ in order to be subject to the disciplines of the SCM Agreement. What matters for determining the existence of a subsidy is whether all elements of the subsidy definition are fulfilled as a result of a transaction, irrespective of whether all elements are fulfilled simultaneously.

Thus, subparagraphs (a) and (b) of Article 1.1 define a ‘subsidy’ by reference, first, to the action of the granting authority and, second, to what was conferred on the recipient. The prohibition is on the granting of a subsidy, and not on receiving it. The treaty obligation is imposed on the granting Member, and not on the recipient. But a benefit does not exist in the abstract. The term therefore implies that there must be a recipient. It must be received and enjoyed by a beneficiary or a recipient. A benefit can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something.

The dictionary meaning of ‘benefit’ is ‘advantage’, ‘good’, ‘gift’, ‘profit’, or, more generally, a ‘favourable or helpful factor or circumstance’. Each of these alternative words or phrases gives flavour to the term ‘benefit’ and helps to convey some of the essence of that term. The word ‘benefit’, as used in Article 1.1(b), implies some kind of comparison. There can be no ‘benefit’ to the recipient unless the ‘financial contribution’ makes the recipient ‘better off’ than it would otherwise have been, in the absence of that contribution. The marketplace provides an appropriate basis for comparison in determining whether a benefit has been conferred, because the trade-distorting potential of a financial contribution can be identified by determining whether the recipient has received a financial contribution on terms more favourable than those available to the recipient on the market.

Article 3.1(a) of the SCM Agreement prohibits a subsidy that is ‘contingent …in law …upon export performance’. A subsidy is contingent ‘in law’ upon export performance when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure. An example is where the condition of exportation is set out expressly, in so many words, on the face of the law, regulation or other legal instrument. But a subsidy can also properly be held to be de jure export contingent where the condition to export is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be de jure export contingent, the underlying legal instrument does not always have to provide expressis verbis that the subsidy is available only upon fulfilment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the measure. The ordinary connotation of ‘contingent’ is ‘conditional’ or ‘dependent for its existence on something else’. This
common understanding of the word 'contingent' is borne out by the text of Article 3.1(a), which makes an explicit link between 'contingency' and 'conditionality' in stating that export contingency can be the sole or 'one of several other conditions'. [275]

The legal standard expressed by the word 'contingent' is the same for both de jure and de facto contingency. [276] There is a difference, however, in what evidence may be employed to prove that a subsidy is export contingent. While de jure export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument, proving de facto export contingency may be a much more difficult task, since there is usually no single legal document which will demonstrate, on its face, that a subsidy is 'contingent...in fact...upon export performance'. The existence of contingency between the subsidy and export performance must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case.

De facto export contingency must be demonstrated by the facts. What facts should be taken into account in a particular case will depend on the circumstances of that case. There is no general rule as to what facts, or what kinds of facts, must be taken into account. The standard for determining de facto export contingency requires proof of three different substantive elements: first, the 'granting of a subsidy'; second, 'is ... tied to ...'; and, third, 'actual or anticipated exportation or export earnings'. The initial inquiry is about whether the granting authority imposed a condition based on export performance in providing the subsidy. The ordinary meaning of 'tied to' is to 'limit or restrict as to ... conditions' [277]. A relationship of conditionality or dependence must be demonstrated. In any given case, the facts must demonstrate that the granting of a subsidy is tied to or contingent upon actual or anticipated exports.

It does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result. The prohibition in Article 3.1(a) applies to subsidies that are contingent upon export performance. The dictionary meaning of the third substantive element of 'anticipated', is 'expected' [278]. Whether exports were anticipated or 'expected' is to be gleaned from an examination of objective evidence. This examination is quite separate from, and should not be confused with, the examination of whether a subsidy is 'tied to' actual, or anticipated, exports. A subsidy may well be granted in the knowledge, or with the anticipation, that exports will result. Yet, that alone is not sufficient, because that alone is not proof that the granting of the subsidy is tied to the anticipation of exportation.

48 Suspension of Concessions[279]

The obligation of WTO Members not to suspend concessions or other obligations without prior DSB authorisation is explicitly set out in Articles 22.6 and 23.2(c), of the DSU. Article 22.6 states, in the relevant part, that the DSB, upon request, shall grant authorisation to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. Article 23.2(c) provides that Members shall follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorisation in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

Article 3.7 of the DSU, last sentence, states that the last resort which the Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorisation by the DSB of such measures. If a Member acts in breach of Articles 22.6 and 23.2(c) of the DSU, that Member will also, in view of the nature and content of Article 3.7, last sentence, necessarily act contrary to the latter provision.[280]

49 Tariff concessions[281]

Tariff concessions provided for in a Member's Schedule are reciprocal and result from a mutually advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1944. The concessions provided for in the Schedule are part of the terms of the treaty. As such, the only rules that may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention.[282]

Tariff negotiations are a process of reciprocal demands and concessions, of 'give-and-take'. It is only normal that importing Members define their offers (and their ensuing obligations) in terms that suit their needs. On the other hand, exporting Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed. There was a special arrangement made for this in the Uruguay Round. For this purpose, a process of verification of tariff schedules took place from 15 February through 25 March 1994, which allowed Uruguay Round participants to check and control, through consultations with their negotiating partners, the scope and definition of tariff concessions. Indeed, the fact that Members' Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by one Member, they represent a common agreement among all Members. [283]

The ordinary meaning of the term 'concessions' suggests that a Member may yield, or waive some of its own rights and grant benefits to other Members, but that it cannot unilaterally diminish its own obligations. [284]

50 Terms of a treaty authenticated in more than one language[285]
Terms of a treaty authenticated in more than one language, like the WTO Agreement, are presumed to have the same meaning in each authentic text. A treaty interpreter should seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language.

51 Third Party Rights

The rights of third parties to a dispute are provided for as follows in Article 10 of the DSU:

Article 10

Third Parties

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a “third party”) shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

The rights of third parties in Panel proceedings are limited to the rights granted under Article 10 and Appendix 3 to the DSU. Beyond those minimum guarantees, Panels enjoy the discretion to grant additional participatory rights to third parties in particular cases, as long as such ‘enhanced’ rights are consistent with the provisions of the DSU and the principles of due process. This decision to grant enhanced third parties rights to participate in a dispute falls within the discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law. Such discretionary authority is, of course, not unlimited and is circumscribed, for example, by the requirements of due process. However, Panels have no discretion to circumscribe the rights guaranteed to third parties by the provisions of the DSU.

As regards the receipt of submissions by third parties, it should be noted that Article 10.3 of the DSU is couched in mandatory language. By its terms, third parties shall receive the submissions of the parties to the first meeting of the Panels. Article 10.3 does not say that third parties shall receive the first submissions of the parties, but rather that they shall receive the submissions of the parties. The number of submissions that third parties are entitled to receive is not stated. Rather, Article 10.3 defines the submissions that third parties are entitled to receive by reference to a specific step in the proceedings—the first meeting of the Panel. It follows, under this provision, that third parties must be given all of the submissions that have been made by the parties to the Panel up to the first meeting of the Panel, irrespective of the number of such submissions which are made, including any rebuttal submissions filed in advance of the first meeting.

It should be noted that the implications of international trade disputes, just like some disputes in other international fora, are not always exclusively bilateral and indeed the interests of a third party are often involved. Considering that resource and monetary constraints often preclude small and developing Member countries from making full use of the system, enhance accessibility to information and knowledge of the dispute settlement system to third parties, especially developing countries, is to be encouraged.

52 Threats

By accepting the WTO Agreement, Members commit themselves to certain obligations, which limit their right to adopt certain measures. They commit themselves to respect the present and future rights of other Members, and to discharge the obligations placed upon them by the covered Agreements. Relevant articles in the covered Agreements are there to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. They do not only protect current trade but also create the predictability needed to plan future trade. It is for this reason that Members are not allowed under the GATT/WTO to threaten to take action that would be inconsistent with their obligations. This prohibition is especially important for poor developing countries who may easily be threatened and prevailed upon by powerful developed countries.

While normally state responsibility is incurred only when an actual violation takes place, under the GATT/WTO legislation ‘as such’, even where no specific application or specific discrimination has been made, can be found to be inconsistent with a Member’s obligation. What constitutes the violation exists in the fact that the WTO Agreement is a treaty whose benefits depend, in part, on the activity of individual operators such that the mere existence of threatening legislation could have an appreciable ‘chilling effect’ on the economic activities of these individuals.

Although, for example, Article III:2 of GATT 1947, would not, on the face of it, seem to prohibit legislation independently from its application to specific products, in the light of the object and purpose of the GATT, it has been read in GATT jurisprudence as
a promise by contracting parties not only that they would abstain from actually imposing discriminatory taxes, but also that they would not enact legislation to that effect. It is commonplace that domestic law in force imposing discriminatory taxation on imported products would, in and of itself, violate Article III irrespective of proof of actual discrimination in a specific case. In this sense, Article III.2 is not only a promise not to discriminate in a specific case, but is also designed to give certain guarantees to the marketplace and the operators within it that discriminatory taxes will not be imposed.

Furthermore, a domestic law which exposes imported products to future discrimination has been recognised as constituting, by itself, a violation of Article III, even before the law came into force. Even where there was no certainty but only a risk under the domestic law that a tax would be discriminatory, that law can be found to violate the obligation in Article III. As regards Article II of GATT 1994, it has been found that the very change in system from ad valorem to specific duties was a breach of a Member’s ad valorem tariff binding even though such change only brought about the potential of the tariff binding being exceeded depending on the price of the imported product. In the Japan - Measures on Imports of Leather case, the Panel found that an import quota constituted a violation of Article XI of GATT even though the quota had not been filled. It noted that the existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons, for example, that it would lead to increased transaction costs and would create uncertainties which could affect investment plans.

The rationale has always been the negative effect on economic operators created by domestic laws that threaten certain WTO inconsistent action. An individual would simply shift his or her trading patterns—buy domestic products, for example, instead of imports—so as to avoid the would-be taxes announced in the legislation or even the mere risk of discriminatory taxation. Such risk or threat, when real, can affect the relative competitive opportunities between imported and domestic products because it could, in and of itself, bring about a shift in consumption from imported to domestic products. This shift would be caused by, for example, an increase in the cost of imported products and a negative impact on economic planning and investment, to the detriment of those products.

Merely carrying a big stick is considered, in many cases, as effective a means to having one's way as actually using the stick. The threat alone of conduct prohibited by the WTO enables the Member concerned to exert undue leverage on other Members.

### 53 Treaty interpretation

The purpose of treaty interpretation is to establish the common intention of the parties to the treaty. Article 3.2 of the DSU directs Panels to clarify WTO provisions in accordance with customary rules of interpretation of public international law. In this connection, resort is made to Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which have attained the status of rules of customary international law. The principal provision of the Vienna Convention in this respect is Article 31(1), which provides as follows:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The jurisprudence of the Panels/Appellate Body has become one of the richest sources from which to receive guidance on the application of Articles 31 and 32 of the Vienna Convention. Text, context and object-and-purpose correspond to well-established textual, systemic and teleological methodologies of treaty interpretation, all of which typically come into play when interpreting complex provisions in multilateral treaties. The normal usage is to start the interpretation from the ordinary meaning of the ‘raw’ text of the relevant treaty provisions and then to seek to construe it in its context and in the light of the treaty's object and purpose. Thus, the words actually used in the text provide the basis for an interpretation that must give meaning and effect to all its terms.

The elements referred to in Article 31—text, context and object-and-purpose, as well as good faith—are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order. Context and object-and-purpose may often appear simply to confirm an interpretation seemingly derived from the ‘raw’ text. In reality, it is always some context, even if unstated, that determines which meaning is to be taken as ‘ordinary’, and frequently it is impossible to give meaning, even ‘ordinary meaning’, without looking also at object-and-purpose.

If, after applying the rules of interpretation set out in Article 31(1), the meaning of the treaty remains ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, Article 32 allows the treaty interpreter to have recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

### 54 Unilateral measures

As far as the WTO Agreement is concerned, certain unilateral measures, insofar as they could jeopardise the multilateral trading system, cannot be allowed. General international law clearly favours the use of negotiated instruments rather than unilateral measures when addressing transboundary or global problems, particularly where developing countries are concerned. Hence, a negotiated solution is clearly to be preferred, both from a WTO and an international law perspective.
Article 23 of the DSU deals, as its title indicates, with the ‘Strengthening of the Multilateral System’. Its overall design is to prevent WTO Members from unilaterally resolving their disputes in respect of their WTO rights and obligations. It does so by obligating Members to follow the multilateral rules and procedures of the DSU, as follows:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding

It has been noted that the United States, in particular, frequently resorted to unilateral trade measures inconsistent with GATT 1947 when dispute settlement under the existing procedures was ineffective, explaining that: “If such action was considered unilateral, it should be nevertheless recognised as perfectly justifiable, responsive action necessitated by the failure of bilateral or multilateral efforts to address a problem. The way to minimise or avoid unilateralism was to create a credible multilateral system – by strengthening the existing system” [302] No matter when and where these threats are made, their effect smaller developing countries is magnified by the overwhelming size of the United States’ economy and by the relative insignificance to the United States of trade with any one small economy. However, in addition to disrupting the worldwide balance of trade for all WTO Members, threats of retaliatory action outside the GATT/WTO framework further magnify this disproportion to the special disadvantage of smaller countries

This pervasive inequality of bargaining power is one thing that the GATT/WTO dispute settlement system was designed to ameliorate. Thus Article 23.2 clearly prohibits specific instances of unilateral conduct by WTO Members when they seek redress for WTO inconsistencies in any given dispute. Therefore, it is for the WTO through the DSU process – not for an individual WTO Member – to determine that a WTO inconsistency has occurred. It is for the WTO or both of the disputing parties, through the procedures set forth in Article 21 – not for an individual WTO Member – to determine the reasonable period of time for the Member concerned to implement DSB recommendations and rulings. It is for the WTO through the procedures set forth in Article 22 – not for an individual WTO Member – to determine, in the event of disagreement, the level of suspension of concessions or other obligations that can be imposed as a result of a WTO inconsistency, as well as to grant authorisation for the actual implementation of these suspensions.

Threats may be used by strong developed countries as a bargaining tool in order to extract trade concessions from their trading partners, which they are not bound to make under WTO law. Whatever one may think about the legitimacy of this type of action outside the WTO, it should be comforting to developing countries that this is no longer acceptable in the WTO system, which was established on the basis of multilateralism, equality and law. The Damocles sword effect of threats for developing countries is thus very real.

When a Member imposes unilateral measures in violation of Article 23, serious damage is created both to other Members and the market place. The creation of damage is not confined to actual conduct in specific cases. A law reserving the right for unilateral measures to be taken contrary to DSU rules and procedures may constitute an ongoing threat.

First, there is the damage caused directly to another Member. Members faced with a threat of unilateral action, especially when it emanates from an economically powerful Member, may in effect be forced to give in to the demands imposed by the Member exerting the threat, even before DSU procedures have been activated. This disrupts the very stability and equilibrium which multilateral dispute resolution was meant to foster and consequently establish, namely equal protection of large and small, powerful and less powerful Members through the consistent application of a set of rules and procedures.

Second, there is the damage caused to the market place itself. The mere fact of having legislation, the statutory language of which permits conduct which is WTO prohibited – namely, the imposition of unilateral measures against other Members with which it is locked in a trade dispute – may in and of itself prompt economic operators to change their commercial behaviour in a way that distorts trade. Economic operators may be afraid, say, to continue on-going trade with, or investment in, the industries or products threatened by unilateral measures.

Existing trade may also be distorted because economic operators may feel a need to take out extra insurance to allow for the illegal possibility that the legislation contemplates, thus reducing the relative competitive opportunity of their products on the market. Other operators may be deterred from trading with such a Member altogether, distorting potential trade. The damage thus caused to the market place may actually increase when national legislation empowers individual economic operators to trigger unilateral State action. Although this in itself is not illegal, the ability conferred upon economic operators to threaten their foreign competitors with the triggering of a State procedure, which includes the possibility of illegal unilateral action, is another matter. It may affect their competitive economic relationship and deny certain commercial advantages that foreign competitors would otherwise have. The threat of unilateral action can be as damaging on the market place as the action itself.

For developing countries, the important systemic issues raised in cases which threaten the multilateral system is that those without the power either to threaten unilateral measures or to defend themselves against them depend on this system for protection. Although at times unilateral action could be responded to by similar action, developing countries ordinarily to not possess such power.

55 Waivers[303]

Waivers are granted according to Article XXV:5 of GATT 1994 only in exceptional circumstances, set aside obligations under the basic rules of the General Agreement. Their terms and conditions have to be interpreted narrowly. Where the waiver granted does not specify precisely which concrete measures a Member or Members are authorised to take, this gives the Member(s) a wide scope of discretion[304] But a waiver should not be interpreted to permit breaches of WTO rules that are
not clearly required to satisfy the provisions of the waiver. A Member has to observe the terms, conditions and procedures 
subject to which the waiver is granted.

A request for a waiver or for an extension of an existing waiver shall describe the measures which the Member proposes to 
take, the specific policy objectives which the Member seeks to pursue and the reasons which prevent the Member from 
achieving its policy objectives by measures consistent with its obligations under GATT 1994. Any Member considering 
that a benefit accruing to it under GATT 1994 is being nullified or impaired as a result of the failure of the Member to whom a 
waiver was granted to observe the terms or conditions of the waiver, or the application of a measure consistent with the terms 
and conditions of the waiver, may invoke the provisions of Article XXIII of GATT 1994 as elaborated and applied by the 
Dispute Settlement Understanding.

The power of Members to grant waivers under Article XXV:5 implies the power to withdraw or modify the waivers granted. 
The question of whether a Member used the waiver in a manner expected by the other Members when they granted the waiver, 
and the question whether it acts in accordance with the assurances in consideration of which the other Members granted the 
waiver, may be relevant for a decision of the Members to withdraw or modify the waiver.

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Belgian Family Allowances, G/32, BISD 1S/59 7 November 1952
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United States – Section 337 of the Tariff Act of 1930, BISD 36S/345


United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, 27 April 1994


[9] These are written submissions made by interested persons (other than parties or third parties to the dispute) to present their views on a matter subject of the dispute. The Latin term amicus curiae means ‘friend of the court’.

[10] The EU
Article 17.9 of the DSU provides as follows:

Procedures for Appellate Review

Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.


Agreement on Safeguards, Preamble.


WTO Agreement, Article II:2.


United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS/58/R, (Panel Report) para 7.28. However, as the conditions contained in the chapeau apply to any of the paragraphs of Article XX, it would seem more appropriate to consider the chapeau first.


United States – Import Prohibition of Certain Shrimp and Shrimp Products, (Panel Report) para 7.44.


See ‘Burden of Proof’ in this Guide.


Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, BISD 37S/200, 7 November 1990, para 75.

European Communities – Conditions for Granting of Tariff Preferences to Developing Countries, (Appellate Body Report), supra, page 145.


Ibid.


European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS/27/R/ECU 22 May 1997; Canada – Certain Measures Concerning Periodicals, WT/DS/31/AB/R, 30 June 1997; Indonesia – Certain Measures
[39] For instance, Article XI:1 of GATT 1994 prohibits the imposition of quantitative restrictions, while Article XI:2 of GATT 1994 contains a rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing (ATC) authorises the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2:1-21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorises rather than mandates the imposition of quantitative restrictions. However, such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994.

[40] In Canada – Certain Measures Concerning Periodicals, WT/DS31/AB/R, 30 June 1997, supra, the Appellate Body stated at page 19: ‘The entry into force of the GATS, as Annex 1B of the WTO Agreement, does not diminish the scope of application of the GATT 1994’.

[41] European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/ECU 22 May 1997; and explained: In Bananas III, the Appellate Body stated in paragraph 221: ‘The second issue is whether the GATS and the GATT are mutually exclusive agreements...’ Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods, certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. ...[W]hile the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different’.


[45] Ibid.


[50] This conclusion is confirmed, amongst other provisions, by the footnote to Article 32.1 of the SCM Agreement, which recognises that actions against subsidies remain possible under GATT 1994. Article 32.1 of the SCM Agreement reads as follows: ‘No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement’. The footnote 56 to this Article reads as follows: ‘This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate’.


[53] Article 3.1 reads:

   Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
   
   (a) ......
   
   (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.


[57] Mangeni Francis, WTO Disputes and Economic Development in Africa, paper prepared for COMESA, 2004

Under Article 8.10 of the Agreement on Textiles and Clothing, a matter may be taken to the DSB without prior consultations under the DSU.

If there is a failure to consult, Article 4.3 of the DSU provides that a Panel may be requested after 30 days.


LDC Group, TN/DS/W/37

Japan, TN/DS/W/32

European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/ECU 22 May 1997, para 7.19

DSU, Article 4.3.

DSU, Article 4.7.

Article 6 reads:

Establishment of Panels

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB’s agenda, unless at that meeting the DSB decides by consensus not to establish a panel.

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a Panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.


Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, (Appellate Body Report), supra, paras. 70.


Section 34, entitled ‘Treaty Interpretation’.


ibid.

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, (Appellate Body Report), supra, paras 151-2.


United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, (Appellate Body Report), 84.

id., at paragraph 4.5.


[86] Id., at paragraph 5.14

[87] Id.


[89] United States – Sections 301-310 of the Trade Act of 1974, (Panel Report) paras 7.17-20, where the Panel said: ‘for example, the word “determination” need not always have the same meaning in Sections 304 and 306 as it has in Article 23.2(a) of the DSU. Thus, conduct not meeting, say, the threshold of a “determination” under Sections 304 and 306, is not by this fact alone precluded from meeting the threshold of a “determination” under Article 23.2(a) of the DSU. By contrast, the facts that a certain act is characterized as a “determination” under domestic legislation, does not necessarily mean that it must be construed as a determination under the covered agreements’.

[90] In this respect, the International Court of Justice (ICJ), referring to an earlier judgment by the Permanent Court of International Justice (PCIJ) noted the following: ‘Where the determination of a question of municipal law is essential to the Court’s decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and “if this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law’ (Brazilian Loans, PCIJ, Series A, Nos. 20/21, p. 124)’ (Elettronica Sicula S.p.A. (ELSI), Judgment, ICJ Reports 1989, p. 47, para. 62).


[95] Ibid, para. 188

[96] Ibid

[97] Ibid, para 198

[98] Ibid


[101] Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, supra, para 36.

[102] European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R, 1 December 2003; European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries WT/DS246/AB/R, 7 April 2004.


[104] The Enabling Clause is one of the ‘other decisions of the “CONTRACTING PARTIES” within the meaning of Paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1944 into the WTO Agreement. That provision stipulates that:

1. The General Agreement on Tariffs and Trade 1944 (“GATT 1944”) shall consist of:

   (b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:

   (iv) other decisions of the CONTRACTING PARTIES to GATT 1947[.]’
Article 1.1 reads: ‘With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties’.

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, (Appellate Body Report), supra, paras 89-90.

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, (Panel Report) paras 7.36-9.

Article XXIV, considered an exception to Article I, is a more limited form of joint action, which often raises questions about the contribution of the Article XXIV arrangement to trade liberalisation.

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, (Panel Report) supra, para 9.18.

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, (Appellate Body Report), supra, paras 101-2.

ibid.

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, (Panel Report) supra, para 109-11.

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, (Appellate Body Report), supra, paras 114-5.

ibid.

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, (Appellate Body Report), supra, para 118.


ibid.

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, (Appellate Body Report), supra, paras 151-2.

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, (Appellate Body Report), supra, paras 157-66.

ibid.

The Enabling Clause, para 1.

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, (Appellate Body Report), supra, paras 157-66.

WTO Agreement, Preamble, second recital.

WTO Agreement, Preamble, first recital.

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, (Appellate Body Report), supra, paras 157-66.

ibid.

Morocco Case


[164] In addition, the term ‘like commodity’ appears in Article VI:7 and the term ‘like merchandise’ is used in Article VII:2 of the GATT 1994.


[168] See, further, Appellate Body Report, Japan – Alcoholic Beverages, supra, footnote 58, at 113 and, in particular, footnote 46. See, also, Panel Report, United States – Gasoline, supra, footnote 15, para. 6.8, where the approach set forth in the Border Tax Adjustment case was adopted in a dispute concerning Article III: 4 of the GATT 1994 by a Panel. This point was not appealed in that case.

[169] The fourth criterion, tariff classification, was not mentioned by the Working Party on Border Tax Adjustments, but was included by subsequent Panels (see, for instance, EEC – Animal Feed, supra, footnote 58, para. 4.2, and 1987 Japan – Alcoholic Beverages, supra, footnote 58, para. 5.6).


[172] If there is–or could be–no competitive relationship between products, then there is no reason why a Member would intervene, through internal taxation or regulation, to protect domestic production.


[176] US – Superfund, BISD 34S/136, 17 June 1987, paras 5.2.1 and 5.2.2. Where tax legislation as such was found to violate GATT obligations even though the legislation had not yet entered into effect. US – Malt Beverages, supra, paras 5.39, 5.57, 5.60 and 5.66, where the legislation imposing the tax discrimination, for example, was not being enforced by the authorities.

[177] DSU proposal by Japan
10 November 1987 para 5.9(c).  

Alcoholic Beverages  
BISD 34S/136, 17 June 1987. 5.1.9;  
Internal Taxes  

Article XXIII of the GATT 1994.  Article 3.8 reads as follows: 

January 1987 para 5.5(b).  

Japan  


1982 These relate to such matters as internal mixing requirements (Article III:7); cinema films (Article V(b)); transit of goods (Article V:2, 5, 6); marks of origin (Article IX:1); quantitative restrictions (Article XII:1); and measures to assist economic development (Article XVIII:20); and measures for goods in short supply (Article XX(j)).  

1983 Such as in Articles XX (general exceptions), XXI (security exceptions) and XXIV (customs unions and free trade areas).  


1985 United States – Section 337 of the Tariff Act of 1930, BISD 36S/345, supra, para 5.10  


1988 In accordance with Article 3.8 of the DSU, such a violation is prima facie presumed to nullify or impair benefits under Article XXIII of the GATT 1994. Article 3.8 reads as follows:  

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.  


Japan – Taxes on Alcoholic Beverages, (see footnote 181)  

Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverage, BISD 34S/83, 10 November 1987 para 5.9(c).  

EC – Bananas III, para 152, WT/DS27/AB/R.  

US – Shrimp, para 95 WT/DS58/AB/R.  


[198] Non-violation complaints and the TRIPS Agreement, Note by the Secretariat, IP/C/W/124 dated January 1999


[200] Maonera Felix, 'WTO Agreements (other than the TRIPS Agreement) and other WTO measures relevant to access by African countries to affordable medicines.' Paper prepared for UNDP, 2007

[201] Ibid.

[202] Maonera Felix, 'WTO Agreements (other than the TRIPS Agreement) and other WTO measures relevant to access by African countries to affordable medicines.' Paper prepared for UNDP, 2007

[203] WT/DS44/R, para. 10.82.

[204] See DSU Articles 3.8 and 26.1(a)

[205] Maonera Felix, 'WTO Agreements (other than the TRIPS Agreement) and other WTO measures relevant to access by African countries to affordable medicines.' Paper prepared for UNDP, 2007

[206] While this is made explicit in Article XXIII:3 of the GATS, which states that "in the event an agreement cannot be reached between the Members concerned [on a renegotiation of the commitment], Article 22 of the DSU shall apply", there is nothing in the DSU which would exclude non-violation cases from applicability the rules of Article 22 on withdrawal of concessions or other obligations. There has been no specific experience in regard to requests for, let alone authorization of, withdrawal of concessions or other obligations in regard to non-violation cases.

[207] Maonera Felix, 'WTO Agreements (other than the TRIPS Agreement) and other WTO measures relevant to access by African countries to affordable medicines.' Paper prepared for UNDP, 2007


[209] See also similar language in the second preambles to GATT 1947 and GATS. The TRIPS Agreement addresses even more explicitly the interests of individual operators, obligating WTO Members to protect the intellectual property rights of nationals of all other WTO Members. Creating market conditions so that the activity of economic operators can flourish is also reflected in the object of many WTO agreements, for example, in the non-discrimination principles in GATT, GATS and TRIPS and the market access provisions in both GATT and GATS.

[210] The importance of security and predictability as an object and purpose of the WTO has been recognised as well in many Panel and Appellate Body reports. See the Appellate Body report on Japan – Alcoholic Beverages, page 31: 'WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system'. It has also been referred to under the TRIPS Agreement. In the Appellate Body Report on India – Patents (US), it was found, at para. 58, that 'India is obliged, by Article 70.8(a), to provide a legal mechanism for the filing of mailbox applications that provides a sound legal basis to preserve both the novelty of the inventions and the priority of the applications as of the relevant filing and priority dates'.


[212] The emphasis on multilateralism is also found in the General Agreement on Trade in Services, where the second paragraph of its Preamble states that Members wish to ‘establish a multilateral framework of principles and rules for trade in services ...’ (emphasis added). Similarly, the Preamble to the Agreement on Trade-Related Aspects of Intellectual Property Rights stresses the need for a multilateral approach (TRIPS Agreement, Preamble, paras. 3 and 7). See also Marrakesh Declaration, 15 April 1994, para 2


[224] EC – Bananas III, para 10, WT/DS27/AB/R.

[225] EC – Bananas III, para 12, WT/DS27/AB/R.


[229] Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Appellate Body Report), supra, paras 106-9

[230] Chile – Taxes on Alcoholic Beverages, (Appellate Body Report) supra, para 78


[234] EC – Bananas III, para 135, WT/DS27/AB/R.

[235] EC – Bananas III, para 132, WT/DS27/AB/R.


[238] Chapeau of Article 2 of the RO Agreement.

[239] Article 2(b)

[240] Title of Article 2 of the RO Agreement.

[241] Article 3 of the RO Agreement.

[242] Article 2

[243] Article 2(b) of the RO Agreement.

[244] Article 2(c), first sentence, of the RO Agreement.

[245] Article 2(c), second sentence, of the RO Agreement.

[246] Article 2(d) of the RO Agreement.


Naumann Eckart, ‘Rules of Origin under EPAs: key issues and new directions’ Tralac working paper No. 9, December 2005

ibid

Naumann Eckart, ‘Rules of Origin under EPAs: key issues and new directions’ Tralac working paper No. 9, December 2005

United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/R, 6 January 1997.

Also known as Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 17.6(i).


DSU, Article 3.2.


Article IX: 2.


GATT established and accepted law and practice, upon which Members can base legitimate expectations.

Ibid.


Articles 1.2 and 2 of the SCM Agreement.


than like domestic products to which the law does not apply'.

A mandatory law in respect of imported products does not ensure that imported beer and wine are not treated less favourably
continues to be mandatory legislation which may influence the decisions of economic operators. Hence, a non-

‘Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure
continues to be mandatory legislation which may influence the decisions of economic operators. Hence, a non-enforcement of
a mandatory law in respect of imported products does not ensure that imported beer and wine are not treated less favourably
than like domestic products to which the law does not apply’.


[278] I, page 88, states that a colloquial meaning for ‘anticipate’ is ‘expect’. The Concise Oxford English Dictionary,

[279] United States – Import Measures on Certain Products from the European Communities, WT/DS165/AB/R, 11
December 2000.

[280] United States – Import Measures on Certain Products from the European Communities, (Appellate Body Report), supra,
para 120.

and WT/DS68/AB/R, 5 June 1998; European Communities – Measures Affecting the Importation of Certain Poultry

[282] European Communities – Customs Classification of Certain Computer Equipment, (Appellate Body Report), supra,
para 84.

[283] European Communities – Customs Classification of Certain Computer Equipment, (Appellate Body Report), supra,
para 109.

supra, para 98.

[285] United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada,

[286] Article 33(3) of the Vienna Convention, provides: ‘[t]he terms of the treaty are presumed to have the same meaning in
each authentic text’.

[287] EC – Bed Linen (Article 2.15 – India). In discussing the draft article that was later adopted as Article 33(3) of the Vienna
Convention, the International Law Commission observed that the ‘presumption [that the terms of a treaty are intended to have
the same meaning in each authentic text] requires that every effort should be made to find a common meaning for the texts


Measures Affecting Alcoholic and Malt Beverages (‘US – Malt Beverages’), BISD 39S/206, 19 June 1992; United States -
Measures Affecting the Importation, Internal Sale and Use of Tobacco ('US – Tobacco'), BISD 41S/131, 4 October 1994;
Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items (‘Argentina – Textiles and Apparel

1987, para 5.2.2

[293] A change in the relative competitive opportunities caused by a measure of general application as such, to the detriment
of imported products and in favour of domestically produced products, is the decisive criterion.

[294] US – Superfund, BISD 34S/136, 17 June 1987, paras 5.2.1 and 5.2.2. Where tax legislation as such was found to
violate GATT obligations even though the legislation had not yet entered into effect. US – Malt Beverages, supra, paras 5.39,
5.57, 5.60 and 5.66, where the legislation imposing the tax discrimination, for example, was not being enforced by the
authorities.

[295] Argentina – Textiles and Apparel (US) supra, paras 6.45-6.47, in particular para 6.46: ‘In the present dispute we
consider that the competitive relationship of the parties was changed unilaterally by Argentina because its mandatory measure
clearly has the potential to violate its bindings, thus undermining the security and the predictability of the WTO system’
(emphasis added).

5.60, where legislation was found to constitute a GATT violation even though it was not being enforced, for the following
reason:

‘Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure
continues to be mandatory legislation which may influence the decisions of economic operators. Hence, a non-enforcement of
a mandatory law in respect of imported products does not ensure that imported beer and wine are not treated less favourably
than like domestic products to which the law does not apply’.
Articles 31 and 32 of the Vienna Convention read as follows:

"Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable'.

As noted by the International Law Commission (ILC) – the original drafter of Article 31 of the Vienna Convention – in its commentary to that provision:

'The Commission, by heading the article “General Rule of Interpretation” in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation. Thus [Article 31] is entitled “General rule of interpretation” in the singular, not “General rules” in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule’ (Yearbook of the ILC, 1966, Vol. II, pp. 219-220).


'Every text, however clear on its face, requires to be scrutinized in its context and in the light of the object and purpose which it is designed to serve. The conclusion which may be reached after such a scrutiny is, in most instances, that the clear meaning which originally presented itself is the correct one, but this should not be used to disguise the fact that what is involved is a process of interpretation'.
United States – Restrictions on the Importation of Sugar and Sugar-containing Products Applied under the 1955 waiver and under the Headnote to the Schedule of Tariff Concessions, BISD 37S/228, L/6631, 7 November 1990, para 5.9.

Understanding in Respect of Waivers of Obligations Under the General Agreement on Tariffs and Trade 1994, para 1.

Understanding in Respect of Waivers of Obligations Under the General Agreement on Tariffs and Trade 1994, para 3.

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