**International Trade Law**

**Unit-1**

**WTO Law**

The WTO is the product of an international agreement, and that agreement and the agreements annexed to it constitute the basic source of WTO law. The reports of panels and the Appellate Body, however, add a growingly important gloss to those texts. Most WTO disputes will be resolved primarily, if not solely, with reference to the texts and to prior reports, and in this sense the WTO legal system may be thought of as largely self-contained.

But if the WTO legal system is largely self-contained, it is not entirely self-contained. To the contrary, it is an important part of the larger system of public international law, as reflected not only by the interpretive principles that are brought to bear on its texts, which are explicitly those of public international law, but also by its increasing recourse to the other traditional sources of public international law: custom, the teachings of publicists, general principles of law, and other international instruments, particularly those incorporated by reference into the the WTO and its agreements.

**Basic rules and principles of WTO Law**

The WTO agreements are lengthy and complex because they are legal texts covering a wide range of activities. They deal with: agriculture, textiles and clothing, banking, telecommunications, government purchases, industrial standards and product safety, food sanitation regulations, intellectual property, and much more. But a number of simple, fundamental principles run throughout all of these documents. These principles are the foundation of the multilateral trading system.

**Some Principles**

**Trade without discrimination**

1. **Most-favoured-nation (MFN): treating other people equally**

Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members.

This principle is known as most-favoured-nation (MFN) treatment. It is so important that it is the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. MFN is also a priority in the General Agreement on Trade in Services (GATS) (Article 2) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 4), although in each agreement the principle is handled slightly differently. Together, those three agreements cover all three main areas of trade handled by the WTO.

Some exceptions are allowed. For example, countries can set up a free trade agreement that applies only to goods traded within the group discriminating against goods from outside. Or they can give developing countries special access to their markets. Or a country can raise barriers against products that are considered to be traded unfairly from specific countries. And in services, countries are allowed, in limited circumstances, to discriminate. But the agreements only permit these exceptions under strict conditions. In general, MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners  whether rich or poor, weak or strong.

1. **National treatment:** Treating foreigners and locals equally Imported and locally-produced goods should be treated equally at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. This principle of “national treatment” (giving others the same treatment as one’s own nationals) is also found in all the three main WTO agreements (Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS), although once again the principle is handled slightly differently in each of these.

National treatment only applies once a product, service or item of intellectual property has entered the market. Therefore, charging customs duty on an import is not a violation of national treatment even if locally-produced products are not charged an equivalent tax.

**Freer trade: gradually, through negotiation**

Lowering trade barriers is one of the most obvious means of encouraging trade. The barriers concerned include customs duties (or tariffs) and measures such as import bans or quotas that restrict quantities selectively. From time to time other issues such as red tape and exchange rate policies have also been discussed.

Since GATT’s creation in 1947-48 there have been eight rounds of trade negotiations. A ninth round, under the Doha Development Agenda, is now underway. At first these focused on lowering tariffs (customs duties) on imported goods. As a result of the negotiations, by the mid-1990s industrial countries’ tariff rates on industrial goods had fallen steadily to less than 4%.

**Predictability: through binding and transparency**

Sometimes, promising not to raise a trade barrier can be as important as lowering one, because the promise gives businesses a clearer view of their future opportunities. With stability and predictability, investment is encouraged, jobs are created and consumers can fully enjoy the benefits of competition choice and lower prices. The multilateral trading system is an attempt by governments to make the business environment stable and predictable.

**The Uruguay Round increased bindings**

Percentages of tariffs bound before and after the 1986-94 talks

|  |  |  |
| --- | --- | --- |
|  | Before | After |
| Developed countries | 78 | 99 |
| Developing countries | 21 | 73 |
| Transition economies | 73 | 98 |

(These are tariff lines, so percentages are not weighted according to trade volume or value)

In the WTO, when countries agree to open their markets for goods or services, they “bind” their commitments. For goods, these bindings amount to ceilings on customs tariff rates. Sometimes countries tax imports at rates that are lower than the bound rates. Frequently this is the case in developing countries. In developed countries the rates actually charged and the bound rates tend to be the same.

**Promoting fair competition**

The WTO is sometimes described as a “free trade” institution, but that is not entirely accurate. The system does allow tariffs and, in limited circumstances, other forms of protection. More accurately, it is a system of rules dedicated to open, fair and undistorted competition.

The rules on non-discrimination MFN and national treatment are designed to secure fair conditions of trade. So too are those on dumping (exporting at below cost to gain market share) and subsidies. The issues are complex, and the rules try to establish what is fair or unfair, and how governments can respond, in particular by charging additional import duties calculated to compensate for damage caused by unfair trade.

**Encouraging development and economic reform**

The WTO system contributes to development. On the other hand, developing countries need flexibility in the time they take to implement the system’s agreements. And the agreements themselves inherit the earlier provisions of GATT that allow for special assistance and trade concessions for developing countries.

Over three quarters of WTO members are developing countries and countries in transition to market economies. During the seven and a half years of the Uruguay Round, over 60 of these countries implemented trade liberalization programmes autonomously. At the same time, developing countries and transition economies were much more active and influential in the Uruguay Round negotiations than in any previous round, and they are even more so in the current Doha Development Agenda.

# Economic theories of free Trade

According to the World Bank global trade in goods (merchandise) amounted to roughly 19 trillion US $ (2016 US $) in exports and about the same sum in imports in 2014. The sum of these two divided by World GDP, which in 2014 stood at around 78 trillion US $ gives a figure of around 49,8% trade share of GDP.[1](https://www.exploring-economics.org/en/discover/free-trade-economic-theories/#sdfootnote1sym) If services are included it amounts to 59,2%.

### ****Theory****

#### ****Classical and Neoclassical****

Classical Political Economy, as well as Neoclassical theory, embraces free trade. This is mostly because of the theory of **comparative advantage** first developed by David Ricardo. Broadly speaking, Ricardo’s theory postulates that free trade is advantageous as it allows nations to specialize in production that requires relatively fewer factor inputs. This reasoning is based on the concept of opportunity cost and postulates that even nations that are worse in producing any good stand to gain something from trade. As a consequence of trade, nations would be able to reach consumption (and thereby utility) that goes beyond the possibilities that could be reached by producing all required goods in an autarch manner. The neoclassical theory later refined Ricardo’s assumptions by introducing increasing marginal costs when shifting production factors from one good to another, thereby explaining why there is no complete specialization in countries.

#### ****Institutionalist****

Institutionalists have a more ambiguous stance about free trade. This is mostly because they embrace a more active role for state management of economic development and fear that opening up national economies to world trade (too soon) might interfere with those plans. Also, most of the times a different normative metric for welfare or goodness is applied. Friedrich List, in particular, eschewed the classical’ preoccupation with the utility of individuals or welfare of the world as a whole. Instead, he places an emphasis on the nation as the locus of collective identity. Consequently, national indicators like, for example, the balance of payment, the share of the manufacturing (or any other nationally relevant) industry or the exchange rate of the nation’s currency would become more important issues than consumers’ welfare gains. Another prominent contribution of List is the “kicking away the ladder” metaphor. He argued that the British economy had actually relied on protectionist tariffs and interventionist policies before embracing free trade and that prescribing other nations to go directly from underdevelopment to free trade would be the equivalent of kicking away the ladder. Contemporary institutionalists might not necessarily share List’s strong attachment to economic nationalism. Still, institutionalists are wary of the consequences for political and cultural consequences that might arise due to free trade i.e. when production patterns are shifted.

#### ****Marxian and Developmentalist****

Marx did stress the necessity of international trade for the sake of capital accumulation in his analysis. Others working in the Marxian tradition such as Karl Kautsky, Rosa Luxemburg, J.A. Hobson and V.I. Lenin subsequently developed theories of **imperialism** whereby the conquest of new markets was a function of the capitalist mode of production in the industrialized economies. Consequently, capital needed to expand ruthlessly and violently in order to realize its surplus value and therefore bring all parts of the world not yet subjected to capitalist production under its aegis. It is noteworthy that free trade here is seen as a zero sum game, where value is transferred from the powerless to the powerful, often under the use of (physical) force i.e. in the form of colonial armies, foreign backed dictators or economic and financial pressure.

#### ****Ecological****

Ecological economists take issue with free trade for a variety of reasons. Firstly, they contend that the negative externalities from the shipping of goods around the globe are not sufficiently accounted for (i.e. CO2 emissions from transport, environmental damages from shipwrecks, destruction of the biosphere for transport routes.). So from an environmentalist view, it might actually be preferably to produce and consume locally sidestepping global production chains, which have a high and often not even clearly measurable impact on the environment. Secondly, free trade agreements are criticized as a means to break local or national environmental protection laws. This concern is related to the reduction of non-tariff barriers, which might include environmental protection laws and also the inclusion of international trade arbitration courts, which could fine states for introducing future protection laws. Yet another concern related to trade is that states might “green” their economies not by altering production and consumption patterns but by outsourcing environmentally harmful production to other parts of the world and then import goods, whose production entails, for example, high levels of CO2.

**Absolute advantage Theory**

The theory of absolute advantage was put forward by Adam Smith who argued that different countries enjoyed absolute advantage in the production of some goods which formed the basis of trade between the countries.

Adam Smith’s theory of absolute cost advantage in international trade was evolved as a strong reaction of the restrictive and protectionist mercantilist views on international trade. He upheld in this theory the necessity of free trade as the only sound guarantee for progressive expansion of trade and increased prosperity of nations. The free trade, according to Smith, promotes international division of labour.

# Comparative advantages Theory

Comparative advantage is an economic term that refers to an economy’s ability to produce goods and services at a lower opportunity cost than that of trade partners. A comparative advantage gives a company the ability to sell goods and services at a lower price than its competitors and realize stronger sales margins. The law of comparative advantage is popularly attributed to English political economist David Ricardo and his book “Principles of Political Economy and Taxation” in 1817, although it is likely that Ricardo’s mentor James Mill originated the analysis.

### ****Theory of Comparative Advantage****

Eighteenth-century economist David Ricardo created the theory of comparative advantage. He argued that a country boosts its economic growth the most by focusing on the industry in which it has the most substantial comparative advantage.

For example, England was able to manufacture cheap cloth. Portugal had the right conditions to make cheap wine. Ricardo predicted that England would stop making wine and Portugal stop making cloth. He was right. England made more money by trading its cloth for Portugal’s wine, and vice versa. It would have cost England a lot to make all the wine it needed because it lacked the climate. Portugal didn’t have the manufacturing ability to make cheap cloth. Therefore, they both benefited by trading what they produced the most efficiently.

Ricardo developed his approach to combat trade restrictions on imported wheat in England. He argued that it made no sense to restrict low-cost and high-quality wheat from countries with the right climate and soil conditions. England would receive more value by exporting products that required skilled labor and machinery. It could acquire more wheat in trade than it could grow on its own.

#### ****Comparative Advantage Versus Absolute Advantage****

**Absolute advantage** is anything a country does more efficiently than other countries. Nations that are blessed with an abundance of farmland, fresh water, and oil reserves have an **absolute advantage** in agriculture, gasoline, and petrochemicals.

Just because a country has an **absolute advantage** in an industry doesn’t mean that it will be its comparative advantage. That depends on what the trading opportunity costs are. Say its neighbor has no oil but lots of farmland and fresh water. The neighbor is willing to trade a lot of food in exchange for oil. Now the first country has a comparative advantage in oil. It can get more food from its neighbor by trading it for oil than it could produce on its own.

**Comparative Advantage Versus Competitive Advantage**

**Competitive advantage**is what a country, business, or individual does that provide a better value to consumers than its competitors. There are three strategies companies use to gain a competitive advantage. First, they could be the low-cost provider. Second, they could offer a better product or service. Third, they could focus on one type of customer.

**How It Affects You**

**Comparative advantage** is what you do best while also giving up the least. For example, if you’re a great plumber and a great babysitter, your comparative advantage is plumbing. That’s because you’ll make more money as a plumber. You can hire an hour of babysitting services for less than you would make doing an hour of plumbing. Your opportunity cost of babysitting is high. Every hour you spend babysitting is an hour’s worth of lost revenue you could have gotten on a plumbing job.

**Absolute advantage**is anything you do more efficiently than anyone else. You’re better than everyone else in the neighborhood at both plumbing and babysitting. But plumbing is your comparative advantage. That’s because you only give up low-cost babysitting jobs to pursue your well-paid plumbing career.

**Competitive advantage** is what makes you more attractive to consumers than your competitors. For example, you are in demand to provide both plumbing and babysitting services. But it’s not necessarily because you do them better (absolute advantage). It’s because you charge less.

David Ricardo believed that the international trade is governed by the comparative cost advantage rather than the absolute cost advantage. A country will specialise in that line of production in which it has a greater relative or comparative advantage in costs than other countries and will depend upon imports from abroad of all such commodities in which it has relative cost disadvantage.

**The Ricardian comparative costs analysis is based upon the following assumptions:**

(i) There is no intervention by the government in economic system.

(ii) Perfect competition exists both in the commodity and factor markets.

(iii) There are static conditions in the economy. It implies that factors supplies, techniques of production and tastes and preferences are given and constant.

(iv) Production function is homogeneous of the first degree. It implies that output changes exactly in the same ratio in which the factor inputs are varied. In other words, production is governed by constant returns to scale.

(v) Labour is the only factor of production and the cost of producing a commodity is expressed in labour units.

(vi) Labour is perfectly mobile within the country but perfectly immobile among different countries.

(vii) Transport costs are absent so that production cost, measured in terms of labour input alone, determines the cost of producing a given commodity.

(viii) There are only two commodities to be exchanged between the two countries.

### ****Gain from Trade:****

The comparative cost principle underlines the fact that two countries will stand to gain through trade so long as the cost ratios for two countries are not equal. On the basis of Table 2.3, country A specialises in the production of X commodity, while country B specialises in the production of Y commodity.

**In the absence of international trade, the domestic exchange ratio between X and Y commodities in these two countries are:**

Country A: 1 unit of X = 12/10 or 1-20 units of Y

Country B: 1 unit of Y = 12/16 or 0-75 unit of X

If trade takes place and two countries agree to exchange 1 unit of X for 1 unit of Y, the gain from trade for country A amounts to 0.20 units of Y for each unit of X. In case of country B, the gain from trade amounts to 0.25 unit of X for each unit of Y. Thus the comparative costs principle confers gain upon both the countries.

### Doctrine of Comparative Advantage:

The doctrine of comparative advantage originated as an improvement and development of the 18th century criticism of mercantilist policy. It has continued to command attention mainly because of its use as the basic “scientific” argument of free trade economists in their attack on protective tariffs.

**Ricardo based his analysis on the following assumptions:**

(i) Ample time for long-run adjustments;

(ii) Free competition;

(iii) Only two countries and only two commodities;

(iv) Constant labour costs as output is varied; and

(v) Proportionality of both aggregate real costs and supply prices within each country to labour time costs within that country.

# Heckscher-Ohlin Theory

The Modern Theory of international trade has been advocated by Bertil Ohlin. Ohlin has drawn his ideas from Heckscher’s General Equilibrium Analysis. Hence it is also known as Heckscher Ohlin (HO) Model.

According to Bertil Ohlin, trade arises due to the differences in the relative prices of different goods in different countries. The difference in commodity price is due to the difference in factor prices (i.e. costs). Factor prices differ because endowments (i.e. capital and labour) differ in countries. Hence, trade occurs because different countries have different factor endowments.

The Heckscher Ohlin theorem states that countries which are rich in labour will export labour intensive goods and countries which are rich in capital will export capital intensive goods.

### ****Assumptions of Heckscher Ohlin’s H-O Theory****

Heckscher-Ohlin’s theory explains the modern approach to international trade on the basis of following assumptions:

* There are two countries involved.
* Each country has two factors (labour and capital).
* Each country produce two commodities or goods (labour intensive and capital intensive).
* There is perfect competition in both commodity and factor markets.
* All production functions are homogeneous of the first degree i.e. production function is subject to constant returns to scale.
* Factors are freely mobile within a country but immobile between countries.
* Two countries differ in factor supply.
* Each commodity differs in factor intensity.
* The production function remains the same in different countries for the same commodity. For e.g. If commodity A requires more capital in one country then same is the case in other country.
* There is full employment of resources in both countries and demand are identical in both countries.
* Trade is free i.e. there are no trade restrictions in the form of tariffs or non-tariff barriers.
* There are no transportation costs.

Given these assumption, Ohlin’s thesis contends that a country export goods which use relatively a greater proportion of its abundant and cheap factor. While same country import goods whose production requires the intensive use of the nation’s relatively scarce and expensive factor.

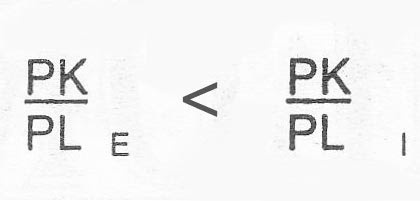
### ****Understanding the Concept of Factor Abundance****

In the two countries, two commodities & two factor model, implies that the capital rich country will export capital intensive commodity and the labour rich country will export labour intensive commodity. But the concept of country being rich in one factor or other is not very clear. Economists quite often define factor abundance in terms of factor prices. Ohlin himself has followed this approach. Alternatively factor abundance can be defined in physical terms. In this case, physical amounts of capital & Labour are to be compared.

**Price Criterion for defining Factor Abundance**

A country where capital is relatively cheaper and labour is relatively costly is said to be capital rich country. Whereas a country where labour is relatively cheaper and capital is relatively costly is said to be labour rich country.

Price of the factor can be symbolically measured as follows:



In above relation,

**P** refers to price of the factor,

**K** refers to Capital,

**L** refers to Labour,

**E** stands for England, and

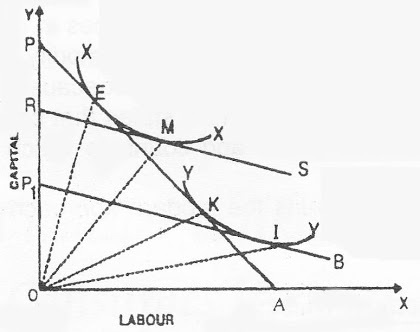
**I** stands for India.

Note:- In reality, England is not a country else a part of United Kingdom (U.K). England is called a country in this article just for the sake of learning example.

The above analysis highlights a fact that in England capital is cheap, and hence it is a capital abundant country. Whereas in India, Labour is cheaper, and thus it is a labour rich country.

Now lets understand how such a pattern of trade will necessarily emerge.

#### ****Diagram Explaining Heckscher Ohlin’s H-O Theory****



Let us take an example of same two countries viz; England and India where England is a capital rich country while India is a labour abundant nation.

In the above diagram XX is the isoquant (equal product curve) for the commodity X produced in England. YY is the isoquant representing commodity Y produced in India. It is very clear that XX is relatively capital intensive while YY is relatively labour incentive. The factor capital is represented on Y-axis while the factor labour is represented on the horizontal X-axis.

PA is the price line or budget line of the country England. The price line PA is tangent to XX at E. The price line PA is also tangent to YY isoquant at K. The point K will help us to find out how much of capital and labour is required to produce one unit of Y in England.

P1B is the price line of the country India, The price line P1B is tangent to YY at I. The price line RS which is drawn parallel to P1B is tangent to XX at M. This will help us to find out how much of capital and labour is required to produce one unit of commodity X in India.

Under the given situations, the country England will choose the combination E. Which means more specialisation on capital goods. It will not choose the combination K because it is more labour intensive and less capital intensive.

Thus according to Ohlin, England will specialise on production of goods X by using the cheap factor capital extensively while India specialises on commodity Y by using the cheap factor labour available in the country.

### ****The Ohlin’s theory concludes that:****

1. The basis of internal trade is the difference in commodity prices in the two countries.
2. Differences in the commodity prices are due to cost differences which are the results of differences in factor endowments in two countries.
3. A capital rich country specialises in capital intensive goods & exports them. While a Labour abundant country specialises in labour intensive goods & exports them.

### ****Limitations of Heckscher Ohlin’s H-O Theory****

Heckscher Ohlin’s Theory has been criticised on basis of following grounds:

**Unrealistic Assumptions:** Besides the usual assumptions of two countries, two commodities, no transport cost, etc. Ohlin’s theory also assumes no qualitative difference in factors of production, identical production function, constant return to scale, etc. All these assumptions makes the theory unrealistic one.

**Restrictive:** Ohlin’s theory is not free from constrains. His theory includes only two commodities, two countries and two factors. Thus it is a restrictive one.

**One-Sided Theory:** According to Ohlin’s theory, supply plays a significant role than demand in determining factor prices. But if demand forces are more significant, a capital abundant country will export labour intensive good as the price of capital will be high due to high demand for capital.

**Static in Nature:** Like Ricardian Theory the H-O Model is also static in nature. The theory is based on a given state of economy and with a given production function and does not accept any change.

**Wijnholds’s Criticism:** According to Wijnholds, it is not the factor prices that determine the costs and commodity prices but it is commodity prices that determine the factor prices.

**Consumers’ Demand ignored:** Ohlin forgot an important fact that commodity prices are also influenced by the consumers’ demand.

**Haberler’s Criticism:** According to Haberler, Ohlin’s theory is based on partial equilibrium. It fails to give a complete, comprehensive and general equilibrium analysis.

**Leontief Paradox:** American economist Dr. Wassily Leontief tested H-O theory under U.S.A conditions. He found out that U.S.A exports labour intensive goods and imports capital intensive goods, but U.S.A being a capital abundant country must export capital intensive goods and import labour intensive goods than to produce them at home. This situation is called Leontief Paradox which negates H-O Theory.

**Other Factors Neglected:**Factor endowment is not the sole factor influencing commodity price and international trade. The H-O Theory neglects other factors like technology, technique of production, natural factors, different qualities of labour, etc., which can also influence the international trade.

# Leontief Paradox Theory

In one of the most widely discussed tests of the factor proportions theory, **Leontief** attempted to reveal the relative factor proportions structure of U.S. participation in international trade.

It was considered that a country will tend to export those commodities which use its abundant factors of production intensively and import those which use its scarce factor intensively.

By common consent the United States is the only country that is most abundantly endowed with capital. Therefore, one would expected the United States to export capital intensive goods and import labour intensive goods.

Leontief’s first study was based on computation from input output tables constructed for the year 1947. Me computed for various industries the direct and indirect capital and labour required to produce a given dollar value of output. He then calculated the effects on capital and labour use of a given reduction in both U.S. imports and exports so that the relative commodity composition of exports and imports remained the same.

### Modern Theory of Comparative Advantage

In order to improve Ricardo’s theory, two Swedish economists, Ela Heckscher (l919) and Ohlin (1933) developed a theory which stressed factor endowment as the basis of international trade.

The Heckscher-Ohlin approach to international trade accepts that inter­national trade is based on differences in comparative costs, but attempts to explain the factors which make for differences in comparative costs.

It is assumed that production functions for different goods use factors of pro­duction in different proportions but that the production function for any good is similar in all countries. On these assumptions differences in com­parative costs in countries can be traced back to factor endowments.

#### ****Criticisms of Modern Theory of Comparative Advantage:****

The Heckscher-Ohlin approach has been subject to much empirical testing as to its ability to explain the pattern of trade. The most celebrated test ways conducted by W.W. Leontief, who in 1954 applied his input-output tech­nique to examine the structure of US foreign trade.

He examined the factor composition of US exports and of US imports, as they would be produced in the USA if the USA had to produce them domestically, and came to the surprising conclusion that US exports were labour-intensive and import substitutes were capital intensive.

Since on any definition the USA is a capital-abundant country, the finding appeared to refute the Heckscher-Ohlin theorem and now goes under the name of the Leontief paradox. Despite this paradox, more sophisticated versions of Heckscher and Ohlin’s ideas still provide the most widely accepted theories of international trade.

# New Trade Theory

**New trade theory (NTT)** suggests that a critical factor in determining international patterns of trade are the very substantial economies of scale and network effects that can occur in key industries.

These economies of scale and network effects can be so significant that they outweigh the more traditional theory of comparative advantage. In some industries, two countries may have no discernible differences in opportunity cost at a particular point in time. But, if one country specialises in a particular industry then it may gain economies of scale and other network benefits from its specialisation.

Another element of new trade theory is that firms who have the advantage of being an early entrant can become a dominant firm in the market. This is because the first firms gain substantial economies of scale meaning that new firms can’t compete against the incumbent firms. This means that in these global industries with very large economies of scale, there is likely to be limited competition, with the market dominated by early firms who entered, leading to a form of monopolistic competition.

Monopolistic competition is an important element of New Trade Theory, it suggests that firms are often competing on branding, quality and not just simple price. It explains why countries can both export and import designer clothes.

**Historical Background of WTO**

The World Trade Organisation (WTO) has taken concrete shape in 1995 after successful operation of the General Agreements in Tariffs and Trade (GAIT) for around five decades. GATT again, had emerged out of some other experimentation on trade negotiations. Indeed GATT owes its origin to the pre- World War II American endeavour to secure mutual tariff reductions from 29 countries through bilateral means.

The concept of a multilateral institution emerged after World War II especially with the initiative of America and Britain and formed the basis of the formation of GATT in 1947 as a transient arrangement. The original intention was to create the third institution to handle the trade side of international economic cooperation, joining the two Bretton Woods institutions, the World Bank and IMF. Over 50 countries participated in negotiations to create an International Trade Organisation (ITO) as a specialised agency of the United Nations.

The draft ITO Charter extended beyond world trade disciplines to include rules on employment, commodity agreements, restrictive business practices, international investment and services. Even before the tasks concluded 23 of the 50 participants decided in 1946 to negotiate to reduce and bind customs tariffs. These 23 nations ratified through negotiations a combined package of trade rules and tariff concessions which later known as General Agreements on Tariffs and Trade. It entered into force in January 1948, while ITO Charter still was being negotiated. The 23 became the founding GATT members. India was also a signatory.

**The main functions of WTO are:**

1. Administering trade agreements;
2. Maintaining a forum for trade negotiations;
3. Handling trade disputes;
4. Monitoring national trade policies;
5. Technical assistance and training for developing countries; and
6. Cooperation with other international organisations.

WTO became an important player in regulating global trade. It became more significant to have a world trade regulatory body as trade liberalisation gradually increased during the 1990s. The share of world exports in world GDP rose from about 6% in 1950 to 12% in 1973 and to 16% in 1992. WTO trade agreements are mainly in goods, services, intellectual property, dispute settlement and policy review. Trade agreements in goods deal with all aspects such as lower customs duty rates and other trade barriers as well as with specific sectors such as agriculture and textiles and specific issues such as state trading, product standards, subsidies and actions taken against dumping.

# Evolution of GATT as trading institution and transition of GATT to WTO

General Agreement on Tariffs and Trade (GATT) was a legal agreement between many countries, whose overall purpose was to promote international trade by reducing or eliminating trade barriers such as tariffs or quotas. According to its preamble, its purpose was the “substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis.”

### ****Objectives of GATT:****

By reducing tariff barriers and eliminating discrimination in international trade, the GATT aims at:

**(i)** Expansion of international trade.

**(ii)** Increase of world production by ensuring full employment in the participating nations.

**(iii)** Development and full utilization of world resources, and

**(iv)** Raising standard of living of the world community as a whole.

However, the GATT do not provide directives for attaining these objectives. These are to be indirectly achieved by the GATT through the promotion of free (unrestricted) and multilateral international trade.

As such, the rules adopted by GATT are based on the following fundamental principles:

**(i)** Trade should be conducted in a non-discriminatory way.

**(ii)** The use of quantitative restrictions should be condemned.

**(iii)** Disagreements should be resolved through consultations.

### ****GATT permits such restrictions only for:****

**(i)** Safeguarding exchange reserves when a country has balance of payments difficulties.

**(ii)** Restricting imports that would harm domestic price supports and production control programmes of a country.

GATT also lays down that state trading should be non-discriminatory. However, the formation of customs unions or free trade areas are allowed by the General Agreement provided their purpose is to facilitate trade between the constituent territories and not to raise barriers to the trade of other member nations.

**(iii)** Underdeveloped countries to further their economic development under procedures approved by GATT.

### ****Transition of GATT to WTO****

The main questioning on the reasons that led to the replacement of the GATT to WTO of is considered as one most important questions on this topic? Is the change of the GATT simply a change of names and thus replace the GATT of 1947 with the GATT of 1994? Or is there any substantial ground for this change relating to the failure of the GATT in achieving its main objectives? And if there are reasons behind this change is faded with the birth of the World Trade Organization?

In fact, the birth of the World Trade Organization by replacing the old organization of the GATT was not merely a new game, but it was a necessity that was required by the stage of the nineties of the last century, especially since the GATT failed to achieve its goals. The weaknesses of the GATT was behind its failure, including the existence of legal problems, particularly in the areas of agriculture and textiles. For example, it can be noted that the United States was not able to convince Japan and China within the framework of the GATT to open its markets to U.S. goods. In addition, the GATT failed to cover trade in services and intellectual property rights, and the absence of an international mechanism to resolve disputes in international trade.

**The Difference Between the GATT and the WTO:**

The GATT “ the General Agreement on Tariffs and Trade” has been established after the Second World War in 1947 and entered into force in 1948 [5] , it has come as a result of the decision of great states to set up the foundations for a new world order. In fact, the idea of new world order required the establishment of two main axes, the first has a political nature known as the United Nations and the second has an economic nature that was the GATT.

#### ****The Impact of WTO on the Global Economy:****

The establishment of the World Trade Organization has changed the features of the global economy by linking the international and commercial relations and the interests of the countries. With the birth of this organization, it can be said that the set up of the modern global economic system has been completed, which is characterized by the dominance of the principles and mechanisms of the capitalist system.

The States belonging to this organization seek to benefit from trade liberalization and the movement of international capital. The birth of this organization has been preceded by difficult negotiations which proved the contradictions that exist among the major industrialized countries, which search for new markets of goods and services, especially those produced by developing countries. The developing countries also seek to protect their economies from the fierce competition and feed its treasury with the proceeds of taxes and customs duties on the imported goods. Such countries considered the organization as a new device to pass the policies of the dominant superpower states.

# Marrakesh Agreement, Origin of WTO, Mandate of WTO, Membership of WTO, Institutional structure of the WTO

The Marrakesh Agreement, manifested by the Marrakesh Declaration, was an agreement signed in Marrakesh, Morocco, by 123 nations on 15 April 1994, marking the culmination of the 8-year-long Uruguay Round and establishing the World Trade Organization, which officially came into being on 1 January 1995.

The agreement developed out of the General Agreement on Tariffs and Trade (GATT), supplemented by a number of other agreements on issues including trade in services, sanitary and phytosanitary measures, trade-related aspects of intellectual property and technical barriers to trade. It also established a new, more efficient and legally binding means of dispute resolution. The various agreements which make up the Marrakesh Agreement combine as an indivisible whole; no entity can be party to any one agreement without being party to them all.

### Origin of WTO

The WTO’s creation was agreed to at the end of the 1986-93 Uruguay Round of international trade negotiations. The agreement was formalised in the Final Act of the Round, which was signed by trade ministers in Marrakesh, Morocco, in April 1994.

Launched on January 1, 1995, it replaced the old General Agreement on Tariffs and Trade (GATT), which had acted as an “interim” world trade watchdog since 1948.

#### Status:

It is officially defined as “the legal and institutional foundation of the multilateral trading system.” Unlike GATT, the WTO is a permanent organisation created by international treaty ratified by the governments and legislatures of member states.

As the principle international body concerned with solving trade problems between countries and providing a forum for multilateral trade negotiations, it has global status similar to that of the International Monetary Fund and the World Bank. But unlike them, it is not a United Nations agency although it has a “co-operative relationship” with the United Nations.

Its underlying documents are the General Agreement — a 38-article code aimed at ensuring open and fair trade in goods, services, agricultural produce and textiles — and 500 pages of specific accords reached in the Uruguay Round.

#### Basic Principle:

Most-favoured-nation (MFN): Article 1 of the General Agreement which binds all members to give equal treatment to the products and services of all other WTO states. But there are let- outs.

### ****Leadership Structure:****

The WTO is headed by a director-general (currently Renato Ruggiera, former Italian Trade Minister) who has four deputies from different member states. The WTO’s ruling body is the General Council, comprising each member country’s permanent envoys. It sits in Geneva an average of once a month. Its supreme authority is the Ministerial Conference, to be held every two years.

The General Council appoints the director-general to a four-year term after consultations among member countries.

### ****Mandate of WTO****

In November 2001, Trade Ministers at the WTO’s Fourth Ministerial Conference in Doha, Qatar, agreed to launch the “Doha Round” of negotiations and more specifically, to commence negotiations on a number of environment and trade issues. These negotiations are to be conducted “with a view to enhancing the mutual supportiveness of trade and environment

In accordance with paragraphs 31, 32 and 33 of the Doha Ministerial Declaration adopted on 14 November 2001, members of the WTO agreed, within their work programme, on a trade and environment mandate focusing on three related legal and policy areas: (i) clarifying the relationship between WTO rules and trade measures in MEAs; (ii) developing procedures for information exchange between MEA Secretariats and relevant WTO Committees and criteria for granting observer status; and (iii) liberalization of trade in environmental goods and services.

### Membership of WTO

Currently, 125 countries. But three more are expected to join during the Singapore Ministerial Conference. Members range from the “Quad Group” of top four world trade powers the United States, the European Union, Japan and Canada to the increasingly influential emerging economies of Asia to some of the world’s poorest countries, like Bangladesh, Guinea and Solomon Islands.

The membership applications of 28 others are being examined by working parties of present members to see if applicants’ domestic trade laws and practices conform to WTO rules.

### ****WTO Bodies:****

Two key units are the Dispute Settlement Body (DSB) and the Trade Policy Review Body (TPRB). The DSB, on which all member countries can sit, usually meets twice a month to hear complaints of violations of WTO rules and agreements. It sets up expert panels to study disputes and decide if the rules are being broken. The DSB’s final decisions, unlike those of a similar but less powerful body in the old GATT, cannot be blocked.

The TPRB is a forum for the entire membership to review the trade policies of all WTO states. Major trading powers are reviewed every two years, others every four years.

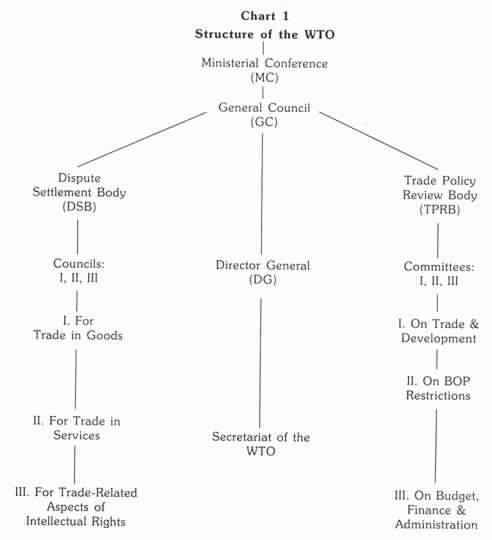
Other major bodies are the Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights.

### ****Institutional structure of the WTO****

The Ministerial Conference (MC) is at the top of the structural organisation of the WTO. It is the supreme governing body which takes ultimate decisions on all matters. It is constituted by representatives of (usually, Ministers of Trade) all the member countries.

The General Council (GC) is composed of the representatives of all the members. It is the real engine of the WTO which acts on behalf of the MC. It also acts as the Dispute Settlement Body as well as the Trade Policy Review Body.

There are three councils, viz.: the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) operating under the GC. These councils with their subsidiary bodies carry out their specific responsibilities



**Decision Making in the WTO**

Beetham acknowledges that democratic institutions to a large extent exemplify democratic principles that require practical institutional form for their realisation. In order to determine whether the WTO is a democratic institution, we examine whether all the participants have popular control and political equality in decision-making and expound on whether the processes used are transparent, that is, are open to other entities such as NGOs. Decision-making is the most important activity in any IO since it is the process by which the individual wills of Members are coordinated in a given body of an organisation and become the will of the organisation. Ultimately whether the WTO meets the ‘democratic’ criteria requires an examination of how decisions are made and who can actually participate in the WTO.

**Representation in decision-making**

Issues as to how representative and transparent the WTO decision-making processes are, often arise because the powers to make decisions arguably originate from Members’ delegation of power to the WTO. It is questionable as to whether the WTO, even with its legal personality, is in practice a fully autonomous IO with a will distinct from its Members. In response one American scholar, Bacchus asserts that the WTO is only a ‘label’ that Members use to describe their shared efforts to collaborate to trade successfully. His argument is shaped by the Realist school of thought where the institution is analysed as a meeting place for states to conduct their trade affairs. States meet because they anticipate that their interests will be best served through their membership and also that the WTO will help further their own particular national objectives. This is true especially when we examine Members’ participation within the Ministerial Conference and the General Council, which are open to representatives from all Members, in order to have equality of participation and representation. This supports the above assertion that Members join to further their own national purposes since they expect to have a voice at each organ. Members send politicians, Ministers and relevant experts such as lawyers and economists to the organs because the WTO policy-making relies heavily on technical trade information and expert knowledge, a practice that excludes those that do not meet the criteria from political participation. Often policies are developed in locations or technical trade law language that removes them from the scrutiny of citizens. Without a parliament and other representative fora, that are available at a national level to offer a chance for ‘non-expert’ input, this practice is a serious hurdle to democracy at the WTO. The WTO will continue to be viewed as unrepresentative and not transparent by NGOs and individuals who might balance the diverse national interests and add value to the discussion with their additional expertise but cannot contribute to the decision-making process.

**The process of Decision Making**

Article IX of the WTO Agreement provides that the WTO Ministerial Conference and the General Council would continue to make decisions by ‘consensus’, as was previously used under the GATT 1947. Consensus is achieved if no Member present at the meeting in question formally objects to the proposed decision. The main advantage of this method is that decisions made are more acceptable to all Members; and in the past, Members have made some important agreements, for example the Agreement relating to ‘Trade and Technology, Goods and Services’ and the Agreement relating to Telecommunications. Each WTO Member has the right to attend meetings, make or withdraw proposals or legal briefs, suggest amendments and approve or oppose consensus. In principle, the WTO’s consensus procedure gives every Member country the power of veto; for example the developing countries were able to resist the inclusion of labour standards on the agenda of the 1999 ministerial summit in Seattle. Thus the principle of sovereign equality applies within a mainly consensus-making system. From this principle we infer that all Members, whether developing or not, are able to exercise popular control of the WTO decision-making and thus seem to have a voice at the WTO in answer to the issue of internal transparency raised in the

**WTO efforts to address problems of decision-making by consensus**

Due to the fact that achieving consensus among 153 Members is difficult, proposals for the creation of a smaller executive body, perhaps like a board of directors each representing different groups of countries, continue to arise regularly. These proposals are not without criticism, as it will be discussed in Section 3. Still, without a consensus of the Members about these reform proposals, the WTO decision-making process by consensus remains with its problems. In order to simplify achieving consensus, Members resort to green room meetings and form country coalitions, two informal practices that sustain consensus as a form of decision-making lacking both transparency and legitimacy. We look at these matters individually below.

**Green room meetings**

According to the United Nations Development Programme (UNDP), widespread concerns remain about how WTO agreements are negotiated. Major key trade negotiations leading to these agreements occur in the ‘green room,’ wherein small group meetings or caucuses are convened by the Director-General and heavily influenced by developed Members such as Canada, the European Union, Japan and the United States. Since the results of the green room meetings must be consented to by all WTO Members, the green room is not exactly totally undemocratic. However, the practice is criticised because Members do not use the prescribed legal procedures to openly delegate tasks to elected committees, and instead use informal arrangements that favour influential Members. Due to this, the WTO setup may not meet the democratic criteria because some Members lack control over the IO and are not treated equally. Additionally it contributes to the WTO being describes as one of the least transparent IOs.

**Reform proposals for a more democratic WTO**

As shown from the discussion above, the WTO does not provide for sufficient levels of participation and transparency that are essential for a totally democratic IO. Arguably there is need for a number of tangible, procedural reforms in order to create a democratic WTO with transparent decision-making procedures and easily accessible to NGOs. Aware of being perceived as undemocratic and illegitimate, the WTO altered the actual practices of consensus building resorting more to country coalitions playing a role as joint-representative platforms for the concerned Members in decision-making processes. The WTO cannot act without the consensus of all its Members towards reform of the green room meeting practice and new rules governing the criteria of who participates in such meetings. Members are aware of the need to reform the WTO, stressing the need for greater procedural transparency, inclusiveness of Members irrespective of their levels of development in the Geneva process and at Ministerial conferences. In view of the possible role that can be played by non-state actors including NGOs, this paper proposes that WTO operations be reformed just like the GATT was, in order to carter for the realities of today’s increasingly democratised world.

**Parliamentary Dialogue**

That the WTO may arguably become more democratic when political influence within the processes of decision-making is equally accessible to affected parties, and not only restricted to states that use it mainly as a forum for trade regulation.

# Other issues-status of WTO

The Uruguay Round (1986-94) saw a shift in North-South politics in the GATT-WTO system. Previously, developed and developing countries had tended to be in opposite groups, although even then there were exceptions. In the run up to the Uruguay Round, the line between the two became less rigid, and during the round different alliances developed, depending on the issues. The trend has continued since then.

In some issues, the divide still appears clear in textiles and clothing, and some of the newer issues debated in the WTO, for example and developing countries have organized themselves into alliances such as the African Group and the Least-Developed Countries Group.

In many others, the developing countries do not share common interests and may find themselves on opposite sides of a negotiation. A number of different coalitions among different groups of developing countries have emerged for this reason. The differences can be found in subjects of immense importance to developing countries, such as agriculture.

This is a summary of some of the points discussed in the WTO.

#### ****Participation in the system: opportunities and concerns****

The WTO agreements, which were the outcome of the 1986-94 Uruguay Round of trade negotiations, provide numerous opportunities for developing countries to make gains. Further liberalization through the Doha Agenda negotiations aims to improve the opportunities.

Among the gains are export opportunities. They include:

Fundamental reforms in agricultural trade

Phasing out quotas on developing countries’ exports of textiles and clothing

Reductions in customs duties on industrial products

Expanding the number of products whose customs duty rates are “bound” under the WTO, making the rates difficult to raise

Phasing out bilateral agreements to restrict traded quantities of certain goods these “grey area” measures (the so-called voluntary export restraints) are not really recognized under GATT-WTO.

In addition, liberalization under the WTO boosts global GDP and stimulates world demand for developing countries’ exports.

But a number of problems remain. Developing countries have placed on the Doha Agenda a number of problems they face in implementing the present agreements.

And they complain that they still face exceptionally high tariffs on selected products (“tariff peaks”) in important markets that continue to obstruct their important exports. Examples include tariff peaks on textiles, clothing, and fish and fish products. In the Uruguay Round, on average, industrial countries made slightly smaller reductions in their tariffs on products which are mainly exported by developing countries (37%), than on imports from all countries (40%). At the same time, the potential for developing countries to trade with each other is also hampered by the fact that the highest tariffs are sometimes in developing countries themselves. But the increased proportion of trade covered by “bindings” (committed ceilings that are difficult to remove) has added security to developing country exports.

A related issue is “tariff escalation”, where an importing country protects its processing or manufacturing industry by setting lower duties on imports of raw materials and components, and higher duties on finished products. The situation is improving. Tariff escalation remains after the Uruguay Round, but it is less severe, with a number of developed countries eliminating escalation on selected products. Now, the Doha agenda includes special attention to be paid to tariff peaks and escalation so that they can be substantially reduced.

#### ****Erosion of preferences****

An issue that worries developing countries is the erosion of preferences special tariff concessions granted by developed countries on imports from certain developing countries become less meaningful if the normal tariff rates are cut because the difference between the normal and preferential rates is reduced.

Just how valuable these preferences are is a matter of debate. Unlike regular WTO tariff commitments, they are not “bound” under WTO agreements and therefore they can be changed easily. They are often given unilaterally, at the initiative of the importing country. This makes trade under preferential rates less predictable than under regular bound rates which cannot be increased easily. Ultimately countries stand to gain more from regular bound tariff rates.

But some countries and some companies have benefited from preferences. The gains vary from product to product, and they also depend on whether producers can use the opportunity to adjust so that they remain competitive after the preferences have been withdrawn.

#### ****The ability to adapt: the supply-side****

Can developing countries benefit from the changes? Yes, but only if their economies are capable of responding. This depends on a combination of actions: from improving policy-making and macroeconomic management, to boosting training and investment. The least-developed countries are worst placed to make the adjustments because of lack of human and physical capital, poorly developed infrastructures, institutions that don’t function very well, and in some cases, political instability.

#### ****Bali Package****

On December 7, 2013, WTO negotiators concluded a four-day meeting in Bali, Indonesia. They agreed to streamline customs for all members. Once ratified, the Bali package would add $1 trillion to global trade and create 18 million jobs. Below are the deal’s five components:

1. **Trade Facilitation**: The aim is to simplify customs procedures to speed shipping, reduce bureaucracy and corruption, and clarify rules for goods being shipped through ports by other countries. The WTO will assist developing countries to update their technology and train customs officials.
2. **Development**: The WTO aims to grant developing countries greater access to developed markets.
3. **Food Security**: The WTO temporarily allows poor countries to stockpile as much food as needed to get them through famines. The aim here is to find a long-term solution so that these countries don’t abuse the practice and distort the free market price of food.
4. **Cotton**: Quotas on cotton imports (by developed countries) will be removed, along with deep subsidies (from emerging market countries). The specific amount of subsidy was negotiated during the Nairobi Round.
5. **Agriculture**: The WTO generally aims to reduce export subsidies and obstacles to trade.

The Bali package has been inserted into the WTO Membership Protocol. More than 50 members have ratified it, but that’s nowhere near the two-thirds needed.

# Budget of WTO

The WTO Secretariat is located in Geneva. It has around 450 staff and is headed by its Director-General, Mr. Renato Ruggiero, and four deputy directors-general. Its responsibilities include the servicing of WTO delegate bodies with respect to negotiations and the implementation of agreements. It has a particular responsibility to provide technical support to developing countries, and especially the least-developed countries. WTO economists and statisticians provide trade performance and trade policy analyses while its legal staff assist in the resolution of trade disputes involving the interpretation of WTO rules and precedents. Much of the Secretariat’s work is concerned with accession negotiations for new members and providing advice to governments considering membership.

The WTO budget is around US$83 million (105 million Swiss Francs) with individual contributions calculated on the basis of shares in the total trade conducted by WTO members. Part of the WTO budget also goes to the International Trade Centre.

#### ****How countries join the WTO****

In the first stage of the accession procedures the applicant government is required to provide the WTO with a memorandum covering all aspects of its trade and economic policies having a bearing on WTO agreements. This memorandum becomes the basis for a detailed examination of the accession request in a working party.

Alongside the working party’s efforts, the applicant government engages in bilateral negotiations with interested member governments to establish its concessions and commitments on goods and its commitments on services. This bilateral process, among other things, determines the specific benefits for WTO members in permitting the applicant to accede. Once both the examination of the applicant’s trade regime and market access negotiations are complete, the working party draws up basic terms of accession.

Finally, the results of the working party’s deliberations contained in its report, a draft protocol of accession, and the agreed schedules resulting from the bilateral negotiations are presented to the General Council or the Ministerial Conference for adoption. If a two-thirds majority of WTO members vote in favour, the applicant is free to sign the protocol and to accede to the Organization; when necessary, after ratification in its national parliament or legislature.

#### ****Assisting developing and transition economies****

Developing countries accounted for 97 of the total GATT membership of 128 at the end of 1994 and, together with countries currently in the process of “transition” to market-based economies, they are expected to play an increasingly important role in the WTO as the Organization’s membership expands. As a consequence, much attention is paid to the special needs and problems of developing and transition economies. For instance, the WTO Secretariat, alone or in cooperation with other international organizations, conducts missions and seminars and provides specific, practical technical cooperation for governments and their officials dealing with accession negotiations, implementing WTO commitments or seeking to participate effectively in multilateral negotiations. Courses and individual assistance is given on particular WTO activities including dispute settlement and trade policy reviews. Moreover, developing countries, especially the least-developed among them, are helped with trade and tariff data relating to their own export interests and to their participation in WTO bodies.

The WTO Secretariat has also continued GATT’s programme of training courses. These take place in Geneva twice a year for officials of developing countries. Since their inception in 1955 and up to the end of 1994, the courses have been attended by nearly 1400 trade officials from 125 countries and 10 regional organizations. Since 1991, special courses have been held each year in Geneva for officials from the former centrally-planned economies in transition to market economies.

# WTO Dispute Settlement

The WTO’s procedure is a mechanism which is used to settle trade dispute under the Dispute Settlement Understanding. A dispute arises when a member government believes that another member government is violating an agreement which has been made in the WTO. However, these agreements are consequential to dialogues between the member States and hence they are the writers of such agreement. In case any dispute arises, the ultimate duty to settle it lies in the hands of member government through Dispute Settlement Body. This system already achieved a great deal and providing some of the necessary attributes of security and predictability which trader and other market participants need and which is called for in the Dispute Settlement Understanding under Article 3.

The WTO’s Dispute Settlement Understanding (DSU) advanced out of the ineffective means used under the GATT for settling disagreements among members. Under the GATT, procedures for settling disputes were ineffective and time consuming since a single nation, including the nation whose actions was the subject of complaint could effectively block or delay every stage of the dispute resolution process. It remains to be seen whether countries will comply with the new WTO dispute settlement mechanism, but thus far the process has met with relative success.

### ****Stages in WTO****

#### ****Consultations (Article 4)****

The DSU permits a WTO Member to consult with another Member regarding “measures affecting the operation of any covered agreement taken within the territory” of the latter. If a WTO Member requests consultations with another Member under a WTO agreement, the latter Member must enter into consultations with the former within 30 days.

If the dispute is not resolved within 60 days, the complaining party may request a panel. The complainant may request a panel before this period ends if the other Member has failed to enter into consultations or if the disputants agree that consultations have been unsuccessful.

#### ****Establishing a Dispute Panel (Articles 6, 8)****

A panel request, which must be made in writing, must “identify the specific measures at issue and provide a brief summary of the legal basis for the complaint sufficient to present the problem clearly” (Art. 6.2). Under GATT and now WTO dispute settlement practice, a Member may challenge a measure of another Member “as such,” “as applied,” or both. An “as such” claim challenges the measure independent of its application in a specific situation and, as described by the WTO Appellate Body, seeks to prevent the defending Member from engaging in identified conduct before the fact.

#### ****Good Offices, Conciliation and Mediation****

Unlike consultation in which “a complainant has the power to force a respondent to reply and consult or face a panel,” good offices, conciliation and mediation “are undertaken voluntarily if the parties to the dispute so agree.” No requirements on form, time, or procedure for them exist. Any party may initiate or terminate them at any time. The complaining party may request the formation of panel,” if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.” Thus the DSU recognized that what was important was that the nations involved in a dispute come to a workable understanding on how to proceed, and that sometimes the formal WTO dispute resolution process would not be the best way to find such an accord. Still, no nation could simply ignore its obligations under international trade agreements without taking the risk that a WTO panel would take note of its behaviour.

#### ****Panel Proceedings (Articles 12, 15, Appendix 3)****

After considering written and oral arguments, the panel issues the descriptive part of its report (facts and argument) to the disputing parties. After considering any comments, the panel submits this portion along with its findings and conclusions to the disputants as an interim report.

Following a review period, a final report is issued to the disputing parties and later circulated to all WTO Members. A panel must generally provide its final report to disputants within six months after the panel is composed, but may take longer if needed; extensions are usual in complex cases. The period from panel establishment to circulation of a panel report to WTO Members should not exceed nine months. In practice, panels have been found to take more than 13 months on average to publicly circulate reports.

#### ****Appellate Body Review****

The DSB establishes a standing Appellate Body that will hear the appeals from panel cases. The Appellate Body “shall be composed of seven persons, three of whom shall serve on any one case.” Those persons serving on the Appellate Body are to be “persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the Covered Agreements generally.” The Body shall consider only “issues of law covered in the panel report and legal interpretations developed by the panel.” Its proceedings shall be confidential, and its reports anonymous.

#### ****Adoption of Panel Reports/Appellate Review (Articles 16, 17, 20)****

Within 60 days after a panel report is circulated to WTO Members, the report is to be adopted at a DSB meeting unless a disputing party appeals it or the DSB decides by consensus not to adopt it. Within 60 days of being notified of an appeal (extendable to 90 days), the Appellate Body (AB) must issue a report that upholds, reverses, or modifies the panel report. The AB report is to be adopted by the DSB, and unconditionally accepted by the disputing parties, unless the DSB decides by consensus not to adopt it within 30 days after circulation to Members. The period of time from the date the panel is established to the date the DSB considers the panel report for adoption is not to exceed nine months (12 months where the report is appealed) unless otherwise agreed by the disputing parties.

#### ****Implementation of Panel and Appellate Body Reports (Article 21)****

In the event that the WTO decision finds the defending Member has violated an obligation under a WTO agreement, the Member must inform the DSB of its implementation plans within 30 days after the panel report and any AB report are adopted. If it is “impracticable” for the Member to comply immediately, the Member will have a “reasonable period of time” to do so. The Member is expected to implement the WTO decision fully by the end of this period and to act consistently with the decision after the period expires.10 Compliance may be achieved by withdrawing the WTO-inconsistent measure or, alternatively, by issuing a revised measure that modifies or replaces it.

#### ****Compliance Panels (Article 21.5)****

Where there is disagreement as to whether a Member has complied i.e., whether a compliance measure exists, or whether a measure that has been taken is consistent with the WTO decision in the case either disputing party may request that a compliance panel be convened under Article 21.5. A compliance panel is expected to issue its report within 90 days after the dispute is referred to it, but it may extend this time period if needed. Compliance panel reports may be appealed to the WTO Appellate Body and both reports are subject to adoption by the DSB.12 Compensation and Suspension of Concessions (Article 22)

If the defending Member fails to comply with the WTO decision within the established compliance period, the prevailing Member may request that the defending Member negotiate a compensation agreement. If such a request is made and agreement is not reached within 20 day.

#### ****Remedies****

There are consequences for the member whose measure or trade practice is found to violate the Covered Agreements by a panel or Appellate Body. The dispute panel issues recommendations with suggestions of how a nation is to come into compliance with the trade agreements. If the member fails to do so within the determined “reasonable period of time,” the complainant may request negotiations for compensation. Within twenty days after the expiration of the reasonable period of time, if satisfactory compensation is not agreed, the complaining party “may request authorization from the DSB to suspend the application to the member concerned of concessions or other obligations under the Covered Agreements.”

#### ****Arbitration****

Members may seek arbitration within the WTO as an alternative means of dispute settlement “to facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.” Those parties must reach mutual agreement to arbitration and the procedures to be followed. Agreed arbitration must be notified to all members prior to the beginning of the arbitration process. Third parties may become party to the arbitration “only upon the agreement of the parties that have agreed to have recourse to arbitration.” The parties to the proceeding must agree to abide by the arbitration award. “Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any member may raise any point relating thereto.”

**Agreements and National Policy**

Since the various agreements that constitute the WTO cover such a wide range of topics, dispute settlement panelists find that a number of subjects come under their authority. This places WTO dispute panels in a delicate position. On the one hand they must identify cases where nations are failing to comply with international trade agreements; on the other, they must be cautious when making recommendations that reverse the preferences of national governments.

# Institutions of WTO Settlement, WTO dispute settlement Proceedings

All the various stages through which a dispute can pass in the (WTO) dispute settlement system. There are two main ways to settle a dispute once a complaint has been filed in the WTO:

(i) The parties find a mutually agreed solution, particularly during the phase of bilateral consultations

(ii) Through adjudication, including the subsequent implementation of the panel and Appellate Body reports, which are binding upon the parties once adopted by the DSB.

There are three main stages to the WTO dispute settlement process:

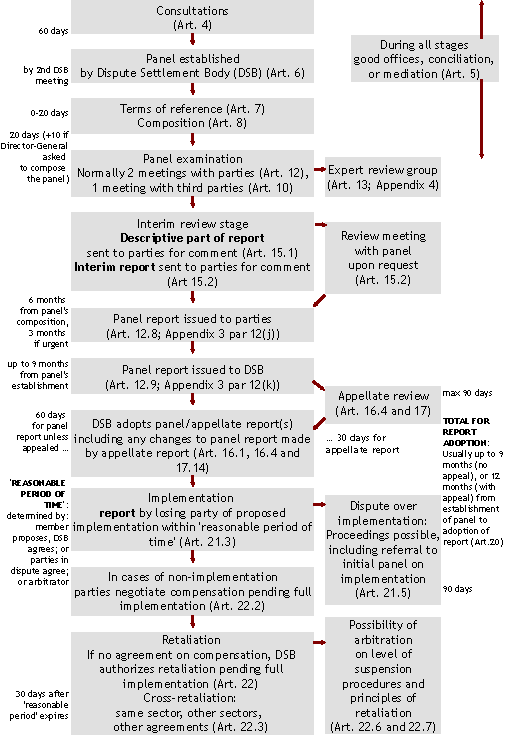
(i) Consultations between the parties

(ii) Adjudication by panels and, if applicable, by the Appellate Body

(iii) The implementation of the ruling, which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling.

### ****Dispute resolution process****

A WTO Member may initiate a dispute where it considers that another Member has adopted measures that breach WTO obligations and that these measures impair benefits accruing to it under the WTO agreements (DSU article 3).



#### Request for consultations

The first stage of the dispute settlement process is for the complaining WTO Member to request consultations with the other Member in an attempt to resolve the complaint. WTO members may also choose to use other diplomatic dispute settlement methods such as good offices, conciliation, or mediation at this stage (DSU articles 4 and 5).

#### Panel proceedings

If the consultations do not resolve the matter, and the complaining Member elects to proceed with dispute settlement proceedings, it may request the establishment of a panel to hear the dispute. A request for the establishment of a panel must identify the specific measures about which the Member is complaining and provide a summary of the legal basis of the complaint. (DSU article 6).

The panel is made up of three members who are nominated by the WTO Secretariat and (in theory) appointed by the disputing parties. The Director-General of WTO may appoint panellists if the disputing parties cannot agree on the panellists. The role of the panel is to examine the relevant measures in light of the relevant provisions of the WTO agreements and to make recommendations to the DSB as to whether the measures at issue comply with relevant WTO rules (DSU articles 7, 8 and 11).

#### Appellate Body

Parties may appeal a panel report. Appeals are heard by the WTO’s standing Appellate Body, consisting of seven permanent members who sit in benches of three. They are limited to issues of law covered in the panel report and legal interpretations developed by the panel. Third parties may participate in appeals, although only parties may initiate them. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel (DSU article 17).

Like panel reports, after an Appellate Body report has been issued, the report will be adopted by the DSB unless the DSB decides by consensus not to adopt it (which has never happened) (DSU article 17.14).

#### Remedies

The responding WTO member decides means of compliance if a violation is found

Where a panel or in the case of an appeal the Appellate Body concludes that a measure is inconsistent with a covered WTO agreement, it may suggest ways in which the Member could implement the recommendations.(DSU article 19.1) However, generally speaking, it is up to the responding WTO Member to determine how it will bring its measure into compliance. The DSB is responsible for maintaining surveillance of the implementation of its rulings and recommendations (DSU article 21).

If it is impracticable for the responding Member to comply immediately with the ruling, the Member will be given a ‘reasonable period of time’ in which to comply; this period of time may, in the absence of agreement between the parties, be determined by arbitration (DSU article 21.3). Should the parties disagree about whether the measures have been brought into compliance, a panel may be established to determine this question (DSU article 21.5).

#### Remedies are prospective

The recommendations of the DSB operate prospectively, meaning that the complaining Member is not entitled to a remedy in respect of harm suffered before the expiry of the ‘reasonable period of time’ to comply with the decision of the panel or Appellate Body.

Where there has been a failure to comply, the DSB may authorise ‘suspension of concessions’. If this happens, the complaining WTO Member may temporarily cease to perform some of its WTO obligations towards the other Member (such as by raising tariffs on goods produced by that Member). A member may only suspend concessions up to the level of nullification or impairment suffered since the expiry of ‘the reasonable period of time’ (DSU article 22)

Unlike the system of remedies in international investment law, monetary compensation for loss or damage that has been suffered is not an available remedy.

**Main challenges to the WTO dispute settlement system**

**An Overloaded System**

Over the past two decades, the WTO dispute settlement system, including the Appellate Body, has been remarkably active. Since its inception, 551 disputes have been initiated by WTO Members, resulting in 230 circulated panel reports and 136 circulated AB reports. More than 65% of WTO Members have engaged in dispute settlement as complainant, respondent, or third party.

The high rate of compliance with DSB decisions testifies to the system’s success. Aside from the sheer number of disputes that Members have submitted to dispute settlement – which is a sign of empirical legitimacy – it is worth mentioning the almost total absence of instances where Members have chosen not to implement a ruling upon losing it. While losing parties have criticized individual rulings, “these critiques have rarely challenged the overall authority or legitimacy of the WTO judicial mechanism”.

But legitimacy is a fragile virtue, and its longevity cannot be taken for granted. This is a theme I will revert to later.

**The Mandate of the DSS**

That brings me to the second challenge confronting the WTO dispute settlement system, namely the critiques about the system’s adherence to its mandate under the DSU.

Article 3.2 of the DSU envisages the WTO dispute settlement system to be “a central element in providing security and predictability to the multilateral trading system”. Article 3.2 further provides that the system “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” It adds for good measure that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”.

It is against this backdrop that we need to reflect on the mandate that the WTO dispute settlement system enjoys. In this connection, I would like to offer a few comments and raise a few questions on two issues arising from recent debates:

* How the system should deal with ambiguity while clarifying the provisions of the WTO Agreements; and
* How it should address the issue of consistency of rulings in the context of the mandated need to provide security and predictability to the multilateral trading system.

**Dealing with Ambiguity**

First, a general comment on the issue of ambiguity in international agreements. While many provisions of international treaties are agreed upon in clear and detailed language, certain provisions may be couched in what international lawyers call “constructive ambiguity,” where consensus on precise language could not be reached during negotiations. In the WTO context, when a dispute arises in relation to such an unclear or ambiguous provision, adjudicators are to examine that provision in accordance with customary rules of interpretation and to apply them to the particular case. Some argue that where adjudicators encounter such ambiguity or lack of clarity, they should refrain from examining it and instead leave it for WTO Members to deal with. Others support the need for resolving the interpretative issue so as to make sure that disputes are not left unresolved.

Second, existing treaty language that is vague or ambiguous is distinct from *lacunae* in international law, that is, where no international law obligation exists. For us, the “customary rules of interpretation of public international law” mean those codified in the Vienna Convention on the Law of Treaties. They say we must begin with the plain text of the treaty provision, but it does not end there. Adjudicators have to discern the “ordinary meaning” to be given to treaty terms in their context and in light of the object and purpose of the instrument in which they appear, and they may have recourse to supplementary means. This interpretative exercise is meant to “clarify”, within the meaning of Article 3.2, the content, scope, and limits of treaty obligations even if they are somewhat unclear on the face of the text.

**Consistency**

The issue of consistency of rulings in WTO dispute settlement is closely connected to the mandated requirement for “security and predictability”. As is well known, one reason for creating the Appellate Body was to provide greater guarantees to WTO Members that panel reports would be subject to review, in the context of the adoption of the reverse consensus principle. The Appellate Body has taken the view that ensuring “security and predictability” implies that, absent cogent reasons, an adjudicator will resolve the same legal question in the same way in a subsequent case.[(9)](https://www.wto.org/english/news_e/news18_e/ab_22jun18_e.htm#fnt-9) At the same time, it needs to be emphasized that the Appellate Body’s approach does not call for a mechanistic or rigid application of this principle. Appellate Body interpretations of certain provisions have evolved over time, as evidenced by the number of AB reports interpreting Article XX of the GATT. Each case has to be considered on its own merits, and cases or issues that appear to be similar may be decided differently when they can be distinguished from earlier cases or when factual scenarios are different.

**Preserving the Legitimacy of the WTO’s Dispute Settlement System**

My point is that a dispute resolution mechanism acquires its legitimacy, or indeed its wisdom, not from the statute that established it, but from the way it continues to meet the changing needs of its users. The global trading system has changed enormously since the WTO’s dispute settlement mechanism was designed and operationalised. The dynamics of global trading relationships have also evolved significantly. The rules and procedures of the system have clearly not kept pace with these developments. It is not for adjudicators to make law by their rulings. That is the job of WTO Members. But sustained inactivity on the legislative front puts more pressure on adjudicators, with attendant risks for the legitimacy of their rulings and their institutions.

**New Challenges to Multilateralism**

These challenges must also be discussed in the larger context of the recent challenges to multilateralism. We have witnessed significant unilateral trade measures by key WTO Members that have evoked countermeasures from affected Members. A number of disputes involving such measures have already been filed in the WTO. These disputes will test the WTO dispute settlement system to its limits. It is unfortunate that these developments are taking place at a time when the system is already experiencing huge stress. The current events are a sobering reminder of what is at stake and how the erosion of the WTO dispute settlement system could lead to the re-emergence of power orientation in international trade policy.

**Principles of Non-Discrimination-Most favored nation treatment, National Treatment obligation**

There are two main principles of non-discrimination in WTO law: the most-favoured-nation (MFN) treatment obligation and the national treatment obligation. In simple terms, the MFN treatment obligation prohibits a country from discriminating *between* other countries; the national treatment obligation prohibits a country from discriminating *against* other countries. This chapter examines these two principles of non-discrimination as they apply to trade in goods and trade in services.

**Most-favoured-nation (MFN):** treating other people equally under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members.

This principle is known as most-favoured-nation (MFN) treatment. It is so important that it is the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. MFN is also a priority in the General Agreement on Trade in Services (GATS) (Article 2) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 4), although in each agreement the principle is handled slightly differently. Together, those three agreements cover all three main areas of trade handled by the WTO.

**National Treatment:** Treating foreigners and locals equally Imported and locally-produced goods should be treated equally at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. This principle of “**national treatment**” (giving others the same treatment as one’s own nationals) is also found in all the three main WTO agreements (Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS), although once again the principle is handled slightly differently in each of these.

National treatment only applies once a product, service or item of intellectual property has entered the market. Therefore, charging customs duty on an import is not a violation of national treatment even if locally-produced products are not charged an equivalent tax.

# Dumping, Anti-dumping Measures

Dumping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country. Thus, in the simplest of cases, one identifies dumping simply by comparing prices in two markets. However, the situation is rarely, if ever, that simple, and in most cases it is necessary to undertake a series of complex analytical steps in order to determine the appropriate price in the market of the exporting country (known as the “normal value”) and the appropriate price in the market of the importing country (known as the “export price”) so as to be able to undertake an appropriate comparison

Previous Agreements

As tariff rates were lowered over time following the original GATT agreement, anti-dumping duties were increasingly imposed, and the inadequacy of Article VI to govern their imposition became ever more apparent. For instance, Article VI requires a determination of material injury, but does not contain any guidance as to criteria for determining whether such injury exists, and addresses the methodology for establishing the existence of dumping in only the most general fashion. Consequently, contracting parties to GATT negotiated more detailed Codes relating to anti-dumping. The first such Code, the Agreement on Anti-Dumping Practices, entered into force in 1967 as a result of the Kennedy Round. However, the United States never signed the Kennedy Round Code, and as a result the Code had little practical significance.

The UR Agreement

Basic principles

Dumping is defined in the Agreement on Implementation of Article VI of the GATT 1994 (The Anti-Dumping Agreement) as the introduction of a product into the commerce of another country at less than its normal value. Under Article VI of GATT 1994, and the Anti-Dumping Agreement, WTO Members can impose anti-dumping measures, if, after investigation in accordance with the Agreement, a determination is made (a) that dumping is occurring, (b) that the domestic industry producing the like product in the importing country is suffering material injury, and (c) that there is a causal link between the two. In addition to substantive rules governing the determination of dumping, injury, and causal link, the Agreement sets forth detailed procedural rules for the initiation and conduct of investigations, the imposition of measures, and the duration and review of measures

Committee on Anti-Dumping Practices

The Committee, which meets at least twice a year, provides Members of the WTO the opportunity to discuss any matters relating to the Anti-Dumping Agreement (Article 16). The Committee has undertaken the review of national legislations notified to the WTO. This offers the opportunity to raise questions concerning the operation of national anti-dumping laws and regulations, and also questions concerning the consistency of national practice with the Anti-Dumping Agreement. The Committee also reviews notifications of anti-dumping actions taken by Members, providing the opportunity to discuss issues raised regarding particular cases.

The Committee has created a separate body, the Ad Hoc Group on Implementation, which is open to all Members of the WTO, and which is expected to focus on technical issues of implementation: that is, the “how to” questions that frequently arise in the administration of anti-dumping laws

Dispute settlement

Disputes in the anti-dumping area are subject to binding dispute settlement before the Dispute Settlement Body of the WTO, in accordance with the provisions of the Dispute Settlement Understanding (“DSU”) (Article 17). Members may challenge the imposition of anti-dumping measures, in some cases may challenge the imposition of preliminary anti-dumping measures, and can raise all issues of compliance with the requirements of the Agreement, before a panel established under the DSU. In disputes under the Anti-Dumping Agreement, a special standard of review is applicable to a panel’s review of the determination of the national authorities imposing the measure. The standard provides for a certain amount of deference to national authorities in their establishment of facts and interpretation of law, and is intended to prevent dispute settlement panels from making decisions based purely on their own views. The standard of review is only for anti-dumping disputes, and a Ministerial Decision provides that it shall be reviewed after three years to determine whether it is capable of general application

Notifications

All WTO Members are required to bring their anti-dumping legislation into conformity with the Anti-Dumping Agreement, and to notify that legislation to the Committee on Anti-Dumping Practices. While the Committee does not “approve” or “disapprove” any Members’ legislation, the legislations are reviewed in the Committee, with questions posed by Members, and discussions about the consistency of a particular Member’s implementation in national legislation of the requirements of the Agreement.

In addition, Members are required to notify the Committee twice a year about all anti-dumping investigations, measures, and actions taken. The Committee has adopted a standard format for these notifications, which are subject to review in the Committee.

Finally, Members are required to promptly notify the Committee of preliminary and final anti-dumping actions taken, including in their notification certain minimum information required by Guidelines agreed to by the Committee. These notifications are also subject to review in the Committee.

### Determination of dumping

#### Determination of normal value

General rule

The normal value is generally the price of the product at issue, in the ordinary course of trade, when destined for consumption in the exporting country market. In certain circumstances, for example when there are no sales in the domestic market, it may not be possible to determine normal value on this basis. The Agreement provides alternative methods for the determination of normal value in such cases

Sales in the ordinary course of trade

One of the most complicated questions in anti-dumping investigations is the determination whether sales in the exporting country market are made in the “ordinary course of trade” or not. One of the bases on which countries may determine that sales are not made in the ordinary course of trade is if sales in the domestic market of the exporter are made below cost. The Agreement defines the specific circumstances in which home market sales at prices below the cost of production may be considered as not made in theordinary course of trade”, and thus may be disregarded in the determination of normal value (Article 2). Those sales must be made at prices that are below per unit fixed and variable costs plus administrative, selling and general costs, they must be made within an extended period of time (normally one year, but in no case less than six months), and they must be made in substantial quantities. Sales are made in substantial quantities when (a)  the weighted average selling price is below the weighted average cost; of (b)  20% of the sales by volume were below cost. Finally, sales made below costs may only be disregarded in the determination of normal value where they do not allow for recovery of costs within a reasonable period of time. If sales are below cost when made but are above the weighted average cost over the period of the investigation, the Agreement provides that they allow for recovery of costs within a reasonable period of time

Insufficient volume of sales

If there are sales below cost that meet the criteria set out in the Agreement, they can simply be ignored in the calculation of normal value, and normal value will be determined based on the remaining sales. However, exclusion of these below-cost sales may result in a level of sales insufficient to determine normal value based on home market prices. It is obvious that, in the case where there are no sales in the exporting country of the product under investigation, it is not possible to base normal value on such sales, and the Agreement recognizes this. However, it is also possible that, while there are some sales in the exporting country’s market, the level of such sales is so low that its significance is questionable. Thus, the Agreement recognizes that in some cases sales in the home market may be so low in volume that they do not permit a proper comparison of home market and export prices. It provides that the level of home market sales is sufficient if home market sales constitute 5 per cent or more of the export sales in the country conducting the investigation, provided that a lower ratio “should” be accepted if the volume of domestic sales nevertheless is “of sufficient magnitude” to provide for a fair comparison

Alternative bases for calculating normal value

Two alternatives are provided for the determination of normal value if sales in the exporting country market are not an appropriate basis. These are (a) the price at which the product is sold to a third country; and  
(b) the “constructed value” of the product, which is calculated on the basis of the cost of production, plus selling, general, and administrative expenses, and profits. The Agreement contains detailed and specific rules for the determination of a constructed value, governing the information to be used in determining the amounts for costs, expenses, and profits, the allocation of these elements of constructed value to the specific product in question, and adjustments for particular situations such as start-up costs and non-recurring cost items.

Constructed normal value

The determination of normal value based on cost of production, selling, general and administrative expenses, and profits is referred to as the “constructed normal value” The rules for determining whether sales are made below cost also apply to performing a constructed normal value calculation. The principal difference is the inclusion of a “reasonable amount for profits” in the constructed value.

Third country price as normal value

The other alternative method for determining normal value is to look at the comparable price of the like product when exported to an appropriate third country, provided that price is representative. The Agreement does not specify any criteria for determining what third country is appropriate

Indirect exports

In the situation where products are not imported directly from the country of manufacture, but are exported from an intermediate country, the Agreement provides that the normal value shall be determined on the basis of sales in the market of the exporting country. However, the Agreement recognizes that this may result in an inappropriate or impossible comparison, for instance if the product is not produced in the exporting country, there is no comparable price for the product in the exporting country, or the product is merely transshipped through the exporting country. In such cases, the normal value may be determined on the basis of the price of the product in the country of origin, and not the price in the exporting country

Non-market economies

In the particular situation of economies where the government has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, GATT 1994 and the Agreement recognize that a strict comparison with home market prices may not be appropriate. Importing countries have thus exercised significant discretion in the calculation of normal value of products exported from non-market economies.

#### Determination of export price

General rule

The export price will normally be based on the transaction price at which the foreign producer sells the product to an importer in the importing country. However, as is the case with normal value, the Agreement recognizes that this transaction price may not be appropriate for purposes of comparison.

Exceptions

There may be no export price for a given product, for instance, if the export transaction is an internal transfer, or if the product is exchanged in a barter transaction. In addition, the transaction price at which the exporter sells the product to the importing country may be unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party. In such a case, the transaction price may not be an arms-length market price, but may be manipulated, for instance for tax purposes. The Agreement recognizes that, in such cases, an alternative method of determining an appropriate export price for comparison is needed

Alternative method of calculation

The Agreement provides that in circumstances where there is no export price, or where the export price is unreliable due to an association or compensatory arrangement between the exporter and the importer or a third party, an alternative method may be used to determine the export price. this results in a “constructed export price”, and is calculated on the basis of the price at which the imported products are first resold in an independent buyer. If the imported product is not resold to an independent buyer, or is not resold as imported, the authorities may determine a reasonable basis on which to calculate the export price.

#### ****Fair comparison of normal value and export price****

Basic requirements

The Agreement requires that a fair comparison of the export price and the normal value be made. The basic requirements for a fair comparison are that the prices being compared are those of sales made at the same level of trade, normally the ex-factory level, and of sales made at as nearly as possible the same time.

As part of the Agreement’s requirements regarding transparency and participation, the investigating authorities are required to inform parties of the information needed to ensure a fair comparison, for instance, information regarding adjustments, allowances, and currency conversion, and may not impose an “unreasonable burden of proof” on parties

Allowance

To ensure that prices are comparable, the Agreement requires that adjustments be made to either the normal value, or the export price, or both, to account for differences in the product, or in the circumstances of sale, in the importing and exporting markets. These allowances must be made for differences in conditions and terms of sale, taxation, quantities, physical characteristics, and other differences demonstrated to affect price comparability

Adjustments in case of constructed export price

The Agreement also provides specific rules on the adjustment to be made if the comparison of normal value is to a constructed export price. In those circumstances, allowance must be made for costs, including duties and taxes, incurred between the importation of the product and the resale to the first independent purchaser, as well as for profits accruing. If price comparability has been affected, the Agreement requires either that the normal value be established at a level of trade equivalent to that of the constructed export price, which is likely to require an adjustment, or allowance must be made for differences in conditions and terms of sale, taxation, quantities, physical characteristics, and other matters demonstrated to affect price comparability

Conversion of currency

Where the comparison of normal value and export price requires conversion of currency, the Agreement provides specific rules governing that conversion (Article 2.4.1). Thus, the exchange rate used should be that in effect on the date of sale (date of contract, invoice, purchase order or order confirmation, whichever establishes material terms of sale). If a forward currency sale is directly linked to export sale, the exchange rate of forward currency sale must be used. Moreover, the Agreement requires that exchange rate fluctuations be ignored, and that exporters be allowed at least 60 days to adjust export prices for sustained exchange rate movements.

### ****Calculation of dumping margins and duty assessment****

Calculation of dumping margins

The Agreement contains rules governing the calculation of dumping margins. In the usual case, the Agreement requires either the comparison of the weighted average normal value to the weighted average of all comparable export prices, or a transaction-to-transaction comparison of normal value and export price (Article 2.4.2). A different basis of comparison can be used if there is “targeted dumping”: that is, if a pattern exists of export prices differing significantly among different purchasers, regions or time periods. In this situation, if the investigating authorities provide an explanation as to why such differences cannot be taken into account in weighted average-to-weighted average or transaction-to-transaction comparisons, the weighted average normal value can be compared to the export prices on individual transactions.

Refund or reimbursement

The Agreement requires Members to collect duties on a non-discriminatory basis on imports from all sources found to be dumped and causing injury, except with respect to sources from which a price undertaking has been accepted. Moreover, the amount of the duty collected may not exceed the dumping margin, although it may be a lesser amount. The Agreement specifies two mechanisms to ensure that excessive duties are not collected. The choice of mechanism depends on the nature of the duty collection process. If a Member allows importation and collects an estimated anti-dumping duty, and only later calculates the specific amount of anti-dumping duty to be paid, the Agreement requires that the final determination of the amount must take place as soon as possible, upon request for a final assessment. In both cases, the Agreement provides that the final decision of the authorities must normally be made within 12  months of a request for refund or final assessment, and that any refund should be made within 90 days

Individual exporter dumping margins

The Agreement requires that, when anti-dumping duties are imposed, a dumping margin be calculated for each exporter. However, it is recognized that this may not be possible in all cases, and thus the Agreement allows investigating authorities to limit the number of exporters, importers, or products individually considered, and impose an anti-dumping duty on uninvestigated sources on the basis of the weighted average dumping margin actually established for the exporters or producers actually examined. The investigating authorities are precluded from including in the calculation of that weighted average dumping margin any dumping margins that are de minimis, zero, or based on the facts available rather than a full investigation, and must calculate an individual margin for any exporter or producer who provides the necessary information during the course of the investigation

New shippers

The Agreement makes provision for the assessment of anti-dumping duties on exports from producers or exporters who were not sources of imports considered during the period of investigation. In this circumstance, the investigating authorities are required to conduct an expedited review to determine a specific margin of dumping attributable to the exports of such a “new shipper”. While that review is in progress, the authorities may request guarantees or withhold appraisement on imports, but may not actually collect anti-dumping duties on those imports.

### ****Determination of injury and casual link****

Like product

Definition (Article 2.6)

An important decision must be made early in each investigation to determine the domestic “like product”. Like product is defined in the Agreement as “a product which is identical, i.e. alike in all respects to the product under consideration or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration”. The determination involves first examining the imported product or products that are alleged to be dumped, and then establishing what domestically produced product or products are the appropriate “like product”. The decision regarding the like product is important because it is the basis of determining which companies constitute the domestic industry, and that determination in turn governs the scope of the investigation and determination of injury and causal link.

Domestic industry

Definition (Article 4)

The Agreement defines the term “domestic industry” to mean “the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products”

Related domestic producers

The Agreement recognizes that in certain circumstances, it may not be appropriate to include all producers of the like product in the domestic industry. Thus, Members are permitted to exclude from the domestic industry producers related to the exporters or importers under investigation, and producers who are themselves importers of the allegedly dumped product. The Agreement provides that a producer can be deemed “related” to an exporter or importer of the allegedly dumped product if there is a relationship of control between them, and if there is reason to believe that the relationship causes the domestic producer to behave differently from non-related producers

Regional domestic industry

The Agreement contains special rules that allow in exceptional circumstances, consideration of injury to producers comprising a “regional industry”. A regional industry may be found to exist in a separate competitive market if producers within that market sell all or almost all of their production of the like product in that market, and demand for the like product in that market is not to any substantial degree supplied by producers of the like product located outside that market. If this is the case, investigating authorities may find that injury exists, even if a major proportion of the entire domestic industry, including producers outside the region, is not materially injured. However, a finding of injury to the regional industry is only allowed if (1) there is a concentration of dumped imports into the market served by the regional industry, and (2) dumped imports are causing injury to the producers of all or almost all of the production within that market.

Imposition of duties in regional industry cases

If an affirmative determination is based on injury to a regional industry, the Agreement requires investigating authorities to limit the duties to products consigned for final consumption in the region in question, if constitutionally possible. If the Constitutional law of a Member precludes the collection of duties on imports to the region, the investigating authorities may levy duties on all imports of the product, without limitation, if anti-dumping duties cannot be limited to the imports from specific producers supplying the region. However, before imposing those duties, the investigating authorities must offer exporters an opportunity to cease dumping in the region or enter a price undertaking.

### ****Injury****

Types of injury

The Agreement provides that, in order to impose anti-dumping measures, the investigating authorities of the importing Member must make a determination of injury. The Agreement defines the term “injury” to mean either (i)  material injury to a domestic industry, (ii) threat of material injury to a domestic industry, or (iii) material retardation of the establishment of a domestic industry, but is silent on the evaluation of material retardation of the establishment of a domestic industry.

Basic requirements for determination of material injury

The Agreement does not define the notion of “material”. However, it does require that a determination of injury must be based on positive evidence and involve an objective examination of (i) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (ii) the consequent impact of the dumped imports on domestic producers of the like product. Article 3 contains some specific additional factors to be considered in the evaluation of these two basic elements, but does not provide detailed guidance on how these factors are to be evaluated or weighed, or on how the determination of causal link is to be made

Basic requirements for determination of threat of material injury

The Agreement sets forth factors to be considered in the evaluation of threat of material injury. These include the rate of increase of dumped imports, the capacity of the exporter(s), the likely effects of prices of dumped imports, and inventories. There is no further elaboration on these factors, or on how they are to be evaluated. The Agreement does, however, specify that a determination of threat of material injury shall be based on facts, and not merely on allegation, conjecture, or remote possibility, and moreover, that the change in circumstances which would create a situation where dumped imports caused material injury must be clearly foreseen and imminent.

Elements of analysis

Consideration of volume effects of dumped imports

The Agreement requires investigating authorities to consider whether there has been a significant increase in the dumped imports, either in absolute terms or relative to production or consumption in the domestic industry. Consideration of price effects of dumped imports.

Consideration of price effects of dumped imports

In addition, the Agreement requires investigating authorities to consider whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member. Investigating authorities are also required to consider whether the effect of dumped imports is “otherwise” to depress prices to a significant degree, or to prevent price increases, which otherwise would have occurred, to a significant degree

Evaluation of volume and price effects of dumped imports

The Agreement provides that no one or several of these factors can necessarily give decisive guidance. It does not specify how the investigating authorities are to evaluate the volume and price effects of dumped imports: merely that consideration of these effects is required. Thus, investigating authorities have to develop analytical methods for undertaking the consideration of these factors. Moreover, since no single factor or combination of factors will necessarily result in either an affirmative or negative determination, in each case investigating authorities have to evaluate which factors are relevant, and which are important, in light of the circumstances of the particular case at issues.

Examination of impact of dumped imports on the domestic industry

The Agreement provides that, in examining the impact of dumped imports on the domestic industry, the authorities are to evaluate all relevant economic factors bearing upon the state of the domestic industry. The Agreement lists a number of factors which must be considered, including actual or potential declines in sales, profits, output, market share, productivity, return on investments, utilization of capacity, actual or potential effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments, and the magnitude of the margin of dumping. However, the list is not exhaustive, and other factors may be deemed relevant. In addition, the Agreement again specifies that no single factor or combination of factors will necessarily lead to either an affirmative or negative determination.

Demonstration of causal link

The Agreement requires a demonstration that there is a causal relationship between the dumped imports and the injury to the domestic industry. This demonstration must be based on an examination of all relevant evidence. The Agreement does not specify particular factors or give guidance in how relevant evidence is to be evaluated. Article 3.5 does require, however, that known factors other than dumped imports which may be causing injury must be examined, gives examples of factors (such as changes in the pattern of demand, and developments in technology) which may be relevant, and specifies that injury caused by such “other factors” must not be attributed to dumped imports. Thus, the investigating authorities must develop analytical methods for determining what evidence is or may be relevant in a particular case, and for evaluating that evidence, taking account of other factors which may be causing injury.

Cumulative analysis

Cumulative analysis refers to the consideration of dumped imports from more than one country on a combined basis in assessing whether dumped imports cause injury to the domestic industry. Obviously, since such analysis will increase the volume of imports whose impact is being considered, there is a greater possibility of an affirmative determination in a case involving cumulative analysis. The practice of cumulative analysis was the subject of much controversy under the Tokyo Round Code, and in the negotiations for the Agreement. Article 3.3 of the Agreement establishes the conditions in which a cumulative evaluation of the effects of dumped imports from more than one country may be undertaken. The authorities must determine that the margin of dumping from each country is not de minimis, that the volume of imports from each country is not negligible, and that a cumulative assessment is appropriate in light of the conditions of competition among the imports and between the imports and the domestic like product. De minimis dumping margins and negligible import volumes are defined in the Agreement.

### ****Procedural requirements****

Investigation

Provisional measures and price undertakings

Imposition of provisional measures

Article 7 of the Agreement provides rules relating to the imposition of provisional measures. These include the requirement that authorities make a preliminary affirmative determination of dumping, injury, and causality before applying provisional measures, and the requirement that no provisional measures may be applied sooner than 60 days after initiation of an investigation. Provisional measures may take the form of a provisional duty or, preferably, a security by cash deposit or bond equal to the amount of the preliminarily determined margin of dumping. The Agreement also contains time limits for the imposition of provisional measures generally four months, with a possible extension to six months at the request of exporters. If a Member, in its administration of anti-dumping duties, imposes duties lower than the margin of dumping when these are sufficient to remove injury, the period of provisional measures is generally six months, with a possible extension to nine months at the request of exporters.

Price undertakings

Article 8 of the Agreement contains rules on the offering and acceptance of price undertakings, in lieu of the imposition of anti-dumping duties. It establishes the principle that undertakings between any exporter and the importing Member, to revise prices, or cease exports at dumped prices, may be entered into to settle an investigation, but only after a preliminary affirmative determination of dumping, injury and causality has been made. It also establishes that undertakings are voluntary on the part of both exporters and investigating authorities. In addition, an exporter may request that the investigation be continued after an undertaking has been accepted, and if a final determination of no dumping, no injury, or no causality results, the undertaking shall automatically lapse.

Collection of duties

Imposition and collection of duties

Article 9 of the Agreement establishes the general principle that imposition of anti-dumping duties is optional, even if all the requirements for imposition have been met. It also states the desirability of application of a “lesser duty” rule. Under a lesser duty rule, authorities impose duties at a level lower than the margin of dumping if this level is adequate to remove injury. In addition, the Agreement contains rules intended to ensure that duties in excess of the dumping margin are not collected, and rules for applying duties to new shippers.

Retroactive application of duties

The Agreement sets forth the general principle that both provisional and final anti-dumping duties may be applied only as of the date on which the determinations of dumping, injury and causality have been made. However, recognizing that injury may have occurred during the period of investigation, or that exporters may have taken actions to avoid the imposition of an anti-dumping duty, Article 10 contains rules for the retroactive imposition of dumping duties in specified circumstances. If the imposition of anti-dumping duties is based on a finding of material injury, as opposed to threat of material injury or material retardation of the establishment of a domestic industry, anti-dumping duties may be collected as of the date provisional measures were imposed. If provisional duties were collected in an amount greater than the amount of the final duty, or if the imposition of duties is based on a finding of threat of material injury or material retardation, a refund of provisional duties is required. Article 10.6 provides for retroactive application of final duties to a date not more than 90 days prior to the application of provisional measures in certain exceptional circumstances involving a history of dumping, massive dumped imports, and potential undermining of the remedial effects of the final duty.

Review and public notice

Duration, termination, and review of anti-dumping measures

Article 11 of the Agreement establishes rules for the duration of anti-dumping duties, and requirements for periodic review of the continuing need, if any, for the imposition of anti-dumping duties or price undertakings. These requirements respond to the concern raised by the practice of some countries of leaving anti-dumping duties in place indefinitely. The “sunset” requirement establishes that dumping duties shall normally terminate no later than five years after first being applied, unless a review investigation prior to that date establishes that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. This five year “sunset” provision also applies to price undertakings. The Agreement requires authorities to review the need for the continued imposition of a duty upon request of an interested party.

Public notice

Article 12 sets forth detailed requirements for public notice by investigating authorities of the initiation of investigations, preliminary and final determinations, and undertakings. The public notice must disclose non-confidential information concerning the parties, the product, the margins of dumping, the facts revealed during the investigation, and the reasons for the determinations made by the authorities, including the reasons for accepting and rejecting relevant arguments or claims made by exporters or importers. These public notice requirements are intended to increase the transparency of determinations, with the hope that this will increase the extent to which determinations are based on fact and solid reasoning.