ENFORCING TRIPS: THE ROLE OF WTO DISPUTE SETTLEMENT MECHANISM

Dissertation submitted to the National University of Advanced Legal Studies, Kochi in partial fulfillment of the requirements for the award of LL.M. Degree in International Trade Law

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CERTIFICATE

This is to certify that Ms. **AFRA RAHIMAN**, Reg No. LM0224002 has submitted her Dissertation titled "**ENFORCING TRIPS: THE ROLE OF WTO DISPUTE SETTLEMENT MECHANISM**" in partial fulfillment of the requirement for the award of the Degree of Master of Laws in International Trade Law to the National University of Advanced Legal Studies, Kochi, under my guidance and supervision. It is also affirmed that the dissertation submitted by her is original, bona fide, and genuine.

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DECLARATION

I AFRA RAHIMAN, do hereby declare that this Dissertation titled "**ENFORCING TRIPS: THE ROLE OF WTO DISPUTE SETTLEMENT MECHANISM**" is researched and submitted by me to the National University of Advanced Legal Studies, Kochi in partial fulfilment of the requirement for the award of the Degree of Master of Laws in International Trade Law, under the guidance and supervision of Dr. BALAKRISHNAN K, Associate Professor, and is an original, bona fide and legitimate work. It has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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PREFACE

As an LLM student specializing in International Trade Law at the National University of Advanced Legal Studies, my academic journey has consistently aligned with a global perspective on law and governance. Among the many areas that captivated my interest, the intersection of trade and intellectual property stood out as a uniquely complex and evolving subject.

Over time, I became especially drawn to the enforcement dimension of international intellectual property rights, particularly under the TRIPS Agreement. What intrigued me most was not just the substantive provisions of TRIPS, but how compliance is ensured, and what role the World Trade Organization's Dispute Settlement Mechanism plays in this enforcement.

Every country's ability to protect intellectual property effectively has implications for its innovation ecosystem, economic development, and global competitiveness. The TRIPS Agreement, which came into force in 1994 as part of the Uruguay Round of WTO negotiations, marked a major shift in global IP governance by making IP protection a binding part of the multilateral trading system. However, the real strength of TRIPS lies not merely in its substantive provisions, but in its enforceability through the WTO's highly structured and legalistic dispute resolution process, a mechanism often heralded as one of the most effective in international law.

This dissertation explores how TRIPS is enforced through the WTO Dispute Settlement Mechanism. It examines the frequency and nature of TRIPS disputes, the procedural and substantive challenges faced in their adjudication, and the broader implications for both developed and developing countries. By comparing TRIPS disputes with other WTO-covered agreements like Anti-Dumping and Subsidies, the study attempts to understand the dynamics behind the relatively limited number of TRIPS cases and assess whether enforcement is adequate and equitable.

LIST OF ABBREVIATIONS

AB	Appellate Body
ACWL	Advisory Centre on WTO Law
AD	Anti-Dumping
CVD	Countervailing duties
COVID 19	Coronavirus Disease 2019
DG	Director General
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSS	Dispute Settlement System
DSU	Dispute Settlement Understanding
EC	European Communities
EMR	Exclusive Marketing Rights
EU	European Union
EVI	Economic and Environmental Vulnerability Index
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariff and Trade

GDP	Gross Domestic Product
GSP	Generalized System of Preferences
HAI	Human Assets Index
HIV	Human Immunodeficiency Virus
ICJ	International Court of Justice
ICC	International Criminal Court
ITLOS	International Tribunal for the Law of the Sea
IP	Intellectual Property
IPR	Intellectual Property Rights
ISDS	Investor-State Dispute Settlement
ITO	International Trade Organization
LDC	Least Developed Country
MAS	Mutually Agreed Solutions
MFN	Most Favoured Nation
MIC	Multilateral Investment Court
MPIA	Multi-Party Interim Appeal Arbitration Arrangement
OECD	Organisation for Economic Co-operation and Development

RTA	Regional Trade Agreements
SCM	Subsidies and Countervailing Measures
SDT	Special and Differential Treatment
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-related aspects of Intellectual Property Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
U.S	United States
VCLT	Vienna Convention on the Law of Treaties
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

TABLE OF CASES

DS No.	TITLE
DS615	United States — Measures on Certain Semiconductor and other Products, and Related Services and Technologies
DS611	China — Enforcement of Intellectual Property Rights
DS590	Japan — Measures Related to the Exportation of Products and Technology to Korea
DS583	Turkey — Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products
DS567	Saudi Arabia, Kingdom of — Measures concerning the Protection of Intellectual Property Rights
DS549	China — Certain Measures on the Transfer of Technology
DS542	China— Certain Measures Concerning the Protection of Intellectual Property Rights
DS528	Saudi Arabia, Kingdom of — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights
DS527	Bahrain, Kingdom of — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights
DS526	United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights
DS467	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging
DS458	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging
DS441	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging

DS435	Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging
DS434	Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging
DS409	— Seizure of Generic Drugs in Transit
DS408	— Seizure of Generic Drugs in Transit
DS372	China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers
DS362	China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights
DS290	European Union (formerly EC) — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs
DS224	United States — US Patents Code
DS199	Brazil — Measures Affecting Patent Protection
DS196	Argentina — Certain Measures on the Protection of Patents and Test Data
DS186	United States — Section 337 of the Tariff Act of 1930 and Amendments thereto
DS176	United States — Section 211 Omnibus Appropriations Act of 1998
DS174	European Union (formerly EC) — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs
DS171	Argentina — Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals
DS170	Canada — Term of Patent Protection
DS160	United States — Section 110(5) of US Copyright Act
DS153	European Union (formerly EC) — Patent Protection for Pharmaceutical and Agricultural Chemical Products
DS125	Greece — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs

DS124	European Union (formerly EC) — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs
DS115	European Union (formerly EC) — Measures Affecting the Grant of Copyright and Neighbouring Rights
DS114	Canada — Patent Protection of Pharmaceutical Products
DS86	Sweden — Measures Affecting the Enforcement of Intellectual Property Rights
DS83	Denmark — Measures Affecting the Enforcement of Intellectual Property Rights
DS82	Ireland — Measures Affecting the Grant of Copyright and Neighbouring Rights
DS79	India — Patent Protection for Pharmaceutical and Agricultural Chemical Products
DS59	Indonesia — Certain Measures Affecting the Automobile Industry
DS50	India — Patent Protection for Pharmaceutical and Agricultural Chemical Products
DS42	Japan — Measures concerning Sound Recordings
DS37	Portugal — Patent Protection under the Industrial Property Act
DS36	Pakistan — Patent Protection for Pharmaceutical and Agricultural Chemical Products
DS28	Japan — Measures Concerning Sound Recordings

**This Table of Cases includes only the WTO dispute settlement cases arising under the TRIPS Agreement. The 141 cases under the SCM Agreement and the 144 cases under the Anti-Dumping Agreement, which are referred to in the comparative analysis table in Chapter 2 (pages 37 – 38), are not individually listed here*.

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CHAPTER- I

INTRODUCTION

1.1 BACKGROUND AND CONTEXT

In an era defined by unprecedented international trade and economic interdependence, strong governance frameworks are essential to maintaining order among nations. The World Trade Organization is an international organization established in 1995 with the primary objective of regulating trade between nations to ensure smooth and free international commerce. It provides a multilateral framework for trade negotiations, establishes legal ground rules for international trade and facilitates the resolution of disputes between member countries. The WTO is the successor to the General Agreement on Tariffs and Trade, created in 1947. By the late 1980s, there were calls among the GATT members for a stronger multilateral organization to monitor trade and resolve trade disputes, which resulted in the establishment of the World Trade Organisation. WTO emerged from GATT's shortcomings, mainly its dispute settlement mechanism.

At the heart of the WTO is a series of multilateral agreements that establish legal rules for international trade in goods, services, intellectual property, agriculture, etc. One of the important agreements under the WTO is the Trade-Related Aspects of Intellectual Property Rights agreement, which serves as a key instrument in this global trading system. The TRIPS Agreement represents the unique interface between trade and intellectual property rights. It was designed to harmonize the intellectual property-related laws among the member nations while balancing interests between creators and public access. It sets minimum standards for protecting and enforcing intellectual property rights. The Agreement details measures related to the protection and enforcement of Intellectual property rights and includes provisions on dispute resolution. However, the ambitious scope of TRIPS also meant that its enforcement will frequently overlap with domestic legal systems, which have differing levels of economic development, thereby creating a complex enforcement landscape.

Intellectual property has gained increasing importance in the global economy, especially with advances in technology, pharmaceuticals, information technology and

creative industries. Countries depend more on protecting and monetizing intellectual property rights as their economies grow in order to promote innovation and draw in foreign direct investment. However, different nations have different levels of intellectual property protection due to disparities in economic growth, legal traditions and policy agendas, which makes international enforcement difficult.

One of the most critical functions of the WTO is its Dispute Settlement Mechanism (DSM), often heralded as the jewel in the WTO's crown. It plays a pivotal role in enforcing the WTO agreements, including TRIPS, as it has exclusive and compulsory jurisdiction on matters arising under the agreements. The DSM gives member nations a forum to contest and settle disagreements over the interpretation and implementation of WTO agreements by offering a methodical approach to trade dispute resolution. Because it holds nations responsible for their failure to fulfill their IP responsibilities, this mechanism is essential for guaranteeing compliance with TRIPS. Member nations have the option to bring disputes with the WTO when issues emerge, such as claims of insufficient IP enforcement or breach of IP commitments.

Since its inception, the WTO has played a crucial role in preserving stability and predictability in the global trade system through its multilateral agreements and dispute resolution processes. Its main purpose is to give member nations a legal framework within which they can establish trade regulations, uphold legally binding agreements and amicably resolve conflicts. WTO dispute resolution is essential to this system because it guarantees consistent rule enforcement and prevents disagreements from turning into unilateral trade retaliation.

However, only a small percentage of disputes within the WTO Dispute Settlement Mechanism have been filed under TRIPS, despite the fact that it plays a crucial role in protecting intellectual property. Considering the growing importance of intellectual property in international trade, this is startling. An examination into the distinctive difficulties and dynamics of intellectual property disputes in the multilateral trade regime is hence crucial, especially considering the low number of TRIPS disputes in comparison to other agreements such as GATT or GATS, antidumping agreements, agreements on agriculture, etc.

Additionally, countries' economic standing plays a crucial role in determining their ability to engage in WTO disputes. Disparities between developed and developing

countries often result in unequal access to the dispute settlement system, creating barriers for less developed nations in protecting their IP rights.

India has been a member of WTO since 1 January. 1995. India's experience with the WTO Dispute Settlement Mechanism under the TRIPS Agreement has played a crucial role in shaping the country's intellectual property rights framework. As a developing country with a strong focus on public health, agriculture and affordable access to medicines, India has navigated a complex landscape of balancing domestic interests with international IP obligations. The TRIPS Agreement, which mandates minimum standards for IPR protection, has led to significant reforms in India's legal regime, particularly in areas like pharmaceuticals, biotechnology and patents.

The future of the WTO DSM is in a dilemma at present. Central to this crisis is the dysfunction of the WTO Appellate Body, its appellate tribunal responsible for hearing appeals on dispute rulings. Since December 2019, the Appellate Body has been unable to function because the United States and other WTO members have blocked new appointments of judges, leading to a complete paralysis of the appellate process. When parties appeal a panel decision, the WTO dispute rulings are essentially non-binding because the Appellate Body discontinued operations by November 2020. This circumstance calls into doubt the general legitimacy of the WTO's two-tier dispute resolution system and seriously impairs the enforceability of WTO rulings, including those pertaining to TRIPS violations.

1.2 STATEMENT OF THE PROBLEM

Although the TRIPS Agreement was created to offer a standardized framework for the protection and enforcement of intellectual property rights, the small number of conflicts under TRIPS calls into question the efficiency of the IP dispute resolution procedure under the WTO dispute settlement mechanism. Additionally, there are concerns that developing countries may be disadvantaged by economic differences that impact their access to the DSM. The ongoing Appellate Body crisis further weakens the enforceability of WTO rulings, jeopardizing the legal certainty and predictability that the DSM was meant to uphold.

1.3 RESEARCH QUESTIONS

The research questions involved in the study are:

1. Why have TRIPS-related disputes constituted only a small percentage of total WTO disputes, and what factors contribute to the limited enforcement of intellectual property rights through the WTO Dispute Settlement Mechanism?

2. How does the economic standing of countries influence their capacity to engage with the WTO Dispute Settlement Mechanism?

3. What has been India's experience with the WTO Dispute Settlement Mechanism under the TRIPS Agreement and its impact on the Indian IPR regime?

4. What is the impact of the current Appellate Body crisis on the bindingness of WTO DSM decisions?

1.4 RATIONALE AND SIGNIFICANCE OF THE STUDY

With the onset of the modern international era, cooperative frameworks and multilateral agreements, such as the TRIPS Agreement and the WTO, are now faced with rising nationalism and tensions between regional and international or domestic interests. This trend often forces countries to give greater precedence to bilateral agreements and, at times, neglect or replace their multilateral agreement commitments, advancing protectionism, economic isolation and trade conduct that are capable of disrupting the international economy.

The main goal of creating multilateral agreements has been to solve common problems by encouraging countries to work together, reduce trade barriers and create a fair and rule-based system to support global economic stability and growth. But the resurgence of protectionist trade actions and competitive protectionism implies a move backward to the way it was prior to globalization, which erodes the advantage of cooperation and threatens international cooperation.

In such an evolving context, it's crucial to examine closely what's hindering multilateral agreements like TRIPS and the Dispute Settlement Mechanism under the WTO to determine what's keeping them back. Problems like economic disparities between nations and newer impediments, such as the impasse in the WTO's Appellate Body,

make it increasingly difficult for these systems to function as they must. By examining why intellectual property disputes that come before the WTO DSM are so rare, how countries' economic positions affect their ability to use the dispute system and what happens when WTO rulings lose their power, this study attempts to show what's needed to keep these agreements effective.

1.5 SCOPE AND DELIMITATION

This study focuses specifically on the functioning of the WTO Dispute Settlement Mechanism as it pertains to the Trade-Related Aspects of Intellectual Property Rights Agreement. While the WTO encompasses various agreements covering different aspects of trade, the scope of this research is restricted to analysing how the DSM enforces intellectual property rights under TRIPS. The study will assess TRIPS-related disputes within the DSM, focusing on the unique challenges, economic factors and procedural barriers that TRIPS-related disputes face in the DSM.

To better understand why TRIPS-related disputes constitute only a small percentage of total WTO disputes, a comparative analysis will be conducted with DSM's involvement in the Agreement on Subsidies and Countervailing Measures and Anti-Dumping Agreement cases, which are the most frequently brought disputes before the DSM. This comparison is intended solely to illustrate how TRIPS disputes differ in frequency and nature from cases filed under other WTO agreements. It will provide context for understanding the reasons behind the lower enforcement rate of TRIPS obligations through the DSM.

Additionally, studying India's experience with TRIPS under the WTO DSM will shed light on how developing nations deal with this dispute resolution mechanism, emphasizing their larger challenges and tactical adjustments within the WTO DSM. The study aims to provide an in-depth exploration of TRIPS within the DSM framework, particularly considering its challenges, underuse and the implications of economic disparities and the Appellate Body crisis on the enforceability of intellectual property rights. The findings from this study aim to shed light on potential reforms and adjustments needed to enhance the effectiveness of TRIPS enforcement through the WTO DSM.

1.6 THEORETICAL FRAMEWORK AND LITERATURE REVIEW

The literature review provides a critical examination of books, articles, and recent studies surrounding the enforcement of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement via the World Trade Organization's (WTO) Dispute Settlement Mechanism (DSM).

1. In 1999, Paul Vandoren in his article, "THE IMPLEMENTATION OF THE TRIPS AGREEMENT", discussed an early but foundational assessment of the TRIPS Agreement's integration into the multilateral trading system. He discusses how TRIPS emerged from the Uruguay Round as a major breakthrough in international IP law, setting minimum standards across categories like patents, trademarks and copyrights. Vandoren also highlights how uneven levels of IP protection prior to TRIPS, particularly in developing countries, led to significant trade distortions.
2. In 2011, Hiroko Yamane, in her book "INTERPRETING TRIPS: GLOBALISATION OF INTELLECTUAL PROPERTY RIGHTS AND ACCESS TO MEDICINES" provides the historical evolution of the TRIPS agreement and analysis of its contents, which help form a base for the research work. The book provides a detailed examination of how the TRIPS Agreement has been interpreted in practice and often extended beyond its text through both WTO jurisprudence and bilateral "TRIPS-Plus" free trade agreements. Yamane traces the evolution of IP norms from their origins in WIPO treaties to their entrenchment in the WTO and she pays special attention to the public health implications of stricter patent regimes, particularly for access to essential medicines in developing countries.
3. In 2006, Peter K. Yu, in his influential article "TRIPS AND ITS DISCONTENTS, " examined the evolution, criticisms, and future directions of the TRIPS Agreement. He outlined four narratives explaining its origin: bargaining, coercion, ignorance and self-interest, and emphasized how the agreement disproportionately favors developed countries while limiting developing countries' policy space.
4. In 2020, Peter Van den Bossche's "THE TRIPS AGREEMENT AND WTO DISPUTE SETTLEMENT: PAST, PRESENT, AND FUTURE" offers a comprehensive legal and historical analysis of how intellectual property rights

enforcement has been woven into the WTO's dispute settlement framework. Van den Bossche begins with the conceptual foundations of TRIPS, tracing its Uruguay Round origins and the political–economic bargain that brought IP under the WTO's purview and then meticulously examines how both panels and the Appellate Body have interpreted key TRIPS provisions over time. He assesses the strengths and limitations of WTO DSM in handling TRIPS disputes, highlighting the challenges such as the balance between statutory text and policy considerations, the role of developing-country flexibilities and the emerging strains and overload on appellate review.

5. In 2008, Yoshifumi Fukunaga, in his article "ENFORCING TRIPS: CHALLENGES OF ADJUDICATING MINIMUM STANDARDS AGREEMENTS, " examined the effectiveness of the WTO Dispute Settlement Mechanism in enforcing the TRIPS Agreement, a minimum standards treaty. He highlighted how TRIPS differs from other WTO agreements in requiring members to meet baseline standards for intellectual property protection, leading to disputes focused more on domestic legal application than international trade measures.
6. In 2011, Edward Lee's analysis in "MEASURING TRIPS COMPLIANCE AND DEFIANCE: THE WTO COMPLIANCE SCORECARD" explores the DSM's effectiveness in enforcing TRIPS mandates, identifying a pattern of selective compliance among member states. He develops an empirical framework for assessing how WTO members adhere to or circumvent their TRIPS obligations. Using a detailed "compliance scorecard," Lee evaluates national patent, trademark and enforcement laws against TRIPS benchmarks, identifying patterns of both formal compliance and de facto defiance.
7. In 2019, Aarshi Tirkey's "THE WTO DISPUTE SETTLEMENT SYSTEM: AN ANALYSIS OF INDIA'S EXPERIENCE AND CURRENT REFORM PROPOSALS" combines doctrinal review with forward-looking policy analysis to chart India's multifaceted engagement with the WTO DSM. Tirkey systematically examines India's roles both as complainant and respondent, including landmark TRIPS cases like India–Patents and evaluates how domestic legal reforms (such as the 1999 Patents (Amendment) Act) were shaped by and in turn influenced, WTO jurisprudence. The paper also surveys the range of

reform proposals on the table from procedural tweaks to the broader debate over appellate review and assesses their potential implications for India's interests.

8. In 2017, Jerome O'Leary's "FLEXIBILITY AND BALANCE: SOLUTIONS TO THE INTERNATIONAL IP PROBLEM" examines how multilateral IP rules principally under TRIPS can be designed and implemented to accommodate both rights-holders' interests and broader public policy goals, such as public health and technology transfer. O'Leary argues that the perceived rigidity of TRIPS has contributed to uneven enforcement and has discouraged many disputes, particularly where domestic policy space is at stake.
9. In 1997, J.H. Reichman, in his article "ENFORCING THE ENFORCEMENT PROCEDURES OF THE TRIPS AGREEMENT", emphasizes the DSM's limitations due to the political dynamics surrounding IP enforcement. This study outlines how influential economies can exercise considerable power in dispute outcomes, sometimes resulting in disparities in enforcement.
10. In 2020, Amponsah Afari-Djan's *"*USING THE DISPUTE SETTLEMENT MECHANISM (DSM) AS AN INDICATOR FOR THE PARTICIPATION OF DEVELOPING NATIONS IN WTO*"* critically examines the extent to which developing countries are actively involved in the WTO's legal system through the lens of dispute initiation and participation. The study explores various indicators, such as the number of complaints filed, representation as third parties and outcomes of disputes, to assess how effectively these nations utilize the DSM. However, it only covers case laws till 2019 and also only takes into account two agreements, which are the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") and the Anti-Dumping Agreement.
11. The 2017 World Trade Organization's "THE HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM*"* is an official WTO publication that provides a comprehensive and authoritative overview of how the Dispute Settlement Mechanism (DSM) functions in practice. It covers procedural aspects from consultation to panel and appellate stages, outlines legal principles and timelines and explains the rights and obligations of WTO members throughout the dispute process. The handbook also touches upon special provisions for developing and least-developed countries, such as technical assistance and extended deadlines under the DSU.

12. In 2016, Makane Moise Mbengue, in his article “THE SETTLEMENT OF TRADE DISPUTES: IS THERE A MONOPOLY FOR THE WTO”, explored whether the WTO has exclusive authority over trade dispute resolution. He traced the historical development of the WTO Dispute Settlement Mechanism (DSM) from its GATT origins to its current structure, emphasizing that the goal of the DSM was to centralize and legalize trade dispute resolution to curb unilateralism, not to create a legal monopoly.
13. In 2010, Gregory C. Shaffer and Ricardo Meléndez-Ortiz’s “DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE” offered an in-depth, empirical exploration of how developing nations engage with the WTO Dispute Settlement Mechanism. The book contains detailed case studies of countries such as Brazil, India, China, Bangladesh, Egypt, Kenya and South Africa, and examines the institutional, legal, and political challenges these nations face in initiating and defending disputes in the WTO DSM. It highlights the importance of domestic legal capacity, inter-agency coordination and public-private partnerships in effectively navigating the DSM.
14. In 2016, Abhijit Das and James J. Nedumpara, in their book "WTO DISPUTE SETTLEMENT AT TWENTY: INSIDERS’ REFLECTIONS ON INDIA’S PARTICIPATION," offered a comprehensive examination of India's engagement with the WTO Dispute Settlement Mechanism over two decades. Insights from academics, industry representatives, legislators and attorneys who have directly participated in India's WTO disputes are included in this work. The book also contains India's litigation strategies, the development of legal and stakeholder infrastructure, and the implementation of dispute settlement decisions. The book also shows how these disputes influenced India’s domestic laws and trade policies, especially in areas like patents, agriculture, and industrial policy.
15. In 2013, Mervyn Martin's book, “WTO DISPUTE SETTLEMENT UNDERSTANDING AND DEVELOPMENT”, examined how the World Trade Organization's Dispute Settlement Understanding aligns with the developmental goals of its member countries. The book argues that although the DSU was created to provide a fair platform for resolving trade disputes, in practice, it usually helps developed nations. This is due to the fact that

developed countries typically have the resources, legal expertise, and institutional backing necessary to manage the conflict resolution process effectively. Martin points out that developing nations may be discouraged from fully engaging in the system or defending their interests in dispute due to the WTO DSM's complexity and resource-intensive character.

16. In 2001, Andrew Law, in his work "AN ANALYSIS OF THE TRIPS AGREEMENT, IN PATENTS AND PUBLIC HEALTH", offered a comprehensive legal analysis of the TRIPS Agreement with a focus on its objectives, scope, and the interpretative flexibility it allows member states, particularly developing countries. The book explains how TRIPS is not only a binding legal treaty but also one that acknowledges national policy differences through "minimum standards" and Articles 7 and 8, which emphasize public interest and developmental objectives. Law emphasizes that while TRIPS contains legal obligations, it also provides interpretative space for member states to implement the agreement in ways that suit their social and economic needs.
17. In 2001, Ronald J.T. Corbett, in his article "PROTECTING AND ENFORCING INTELLECTUAL PROPERTY RIGHTS IN DEVELOPING COUNTRIES", discusses the practical challenges of enforcing intellectual property rights in developing countries after TRIPS. He highlights rampant piracy, weak enforcement mechanisms, and cultural differences in understanding IP rights. He also notes that enforcing strict IP laws often clashes with public health and economic realities in poorer nations, where cheap generics and local innovation are vital.
18. In 2002, Frederick M. Abbott's "THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH: LIGHTING A DARK CORNER AT THE WTO" examined the political and legal significance of the 2001 Doha Declaration, which affirmed the right of WTO members to prioritize public health over patent enforcement. The article highlights key events like disputes involving South Africa and Brazil that triggered a global debate about the balance between IP rights and access to essential medicines.
19. In 2004, Bernard Hoekman, in his paper "DEVELOPING COUNTRIES AND THE WTO DOHA ROUND: MARKET ACCESS, RULES AND DIFFERENTIAL TREATMENT", discusses the role of developing countries in

the WTO, especially during the Doha Round. He emphasizes how developing countries have historically struggled to influence WTO rules and have been cautious after the Uruguay Round, particularly about agreements like TRIPS, which seemed to benefit developed countries more. Hoekman calls for a more innovative approach to Special and Differential Treatment (S&DT) based on real country-specific needs, rather than a one-size-fits-all model.

20. In 2006, Kevin Kennedy, through his article “THE 2005 TRIPS EXTENSION FOR THE LEAST-DEVELOPED COUNTRIES: A FAILURE OF THE SINGLE UNDERTAKING APPROACH?” analysed how the extension given to Least-Developed Countries (LDCs) for complying with TRIPS obligations exposed flaws in the WTO's "single undertaking" model. He criticizes developed countries for not providing enough technical assistance, and questions whether it is realistic to expect uniform compliance from such economically diverse members.
21. In 2013, Craig VanGrasstek, “THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION”, provided a comprehensive institutional history of the WTO that traces the organization’s evolution from its GATT roots, its legal foundations, and its transformation into a near-universal body. He explores how the dispute settlement system grew into a strong judicial mechanism but later became politically strained. The book also examines how developing countries gained influence in WTO negotiations, but still face systemic challenges, including access to litigation and decision-making.
22. In 2000, John H. Jackson, Robert E. Hudec, and Donald Davis, in their article *“*THE ROLE AND EFFECTIVENESS OF THE WTO DISPUTE SETTLEMENT MECHANISM,” provided a detailed evaluation of the institutional development, functioning, and legal significance of the WTO DSM. The authors reviewed the evolution from the weaker, consensus-based GATT system to the stronger, rules-oriented WTO dispute mechanism, highlighting its near-automatic enforcement, binding rulings, and appellate system
23. In 2022, Nirmalya Syam, in her paper, "A REVIEW OF WTO DISPUTES ON TRIPS: IMPLICATIONS FOR USE OF FLEXIBILITIES FOR PUBLIC HEALTH", offered a critical examination of how WTO dispute settlement panels and the Appellate Body have interpreted TRIPS obligations, particularly

in cases involving pharmaceuticals and public health. The study reviews key disputes, including India–Patents and Canada–Pharmaceutical Patents, and highlights the tendency of WTO jurisprudence to narrowly interpret TRIPS flexibilities.

24. In 2009, Bernard Hoekman and Michel Kostecki's book, "THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: WTO AND BEYOND," explored the institutional and political dynamics that shaped the global trading system, with a focus on the World Trade Organization. Hoekman and Kostecki analysed how the WTO operates at the intersection of law, politics, and economics, explaining both the formal structure such as the Dispute Settlement Mechanism and the informal power dynamics that influence negotiations and enforcement.
25. In 2014, Thomas Bernhardt, in his article "NORTH-SOUTH IMBALANCES IN THE INTERNATIONAL TRADE REGIME," examined how the WTO's structure and agreements continue to favor developed countries, leading to unequal market access and reduced policy space for developing nations. According to him, power dynamics between member countries were asymmetrical during the negotiation of agreements like TRIPS, which frequently restricted developing nations' ability to industrialize or safeguard public health.
26. In 2023, Peter Van den Bossche, in his paper *"*CAN THE WTO DISPUTE SETTLEMENT SYSTEM BE REVIVED? OPTIONS FOR ADDRESSING A MAJOR GOVERNANCE FAILURE OF THE WORLD TRADE ORGANIZATION*"*, examined the crisis of the dispute settlement system of the WTO caused by paralysis of the Appellate Body. The paper traces the DSM's evolution from a celebrated system of rule-based trade adjudication to one now hampered by U.S. objections and institutional deadlock. It also analyzes the past reform efforts like the Walker Process, alternative mechanisms such as the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), and current revival efforts under the Molina Process.
27. In 2020, Fiorini, Hoekman, Mavroidis, Saluste, and Wolfe, in their article "WTO DISPUTE SETTLEMENT AND THE APPELLATE BODY CRISIS: INSIDER PERCEPTIONS AND MEMBERS' REVEALED PREFERENCES*,"* investigated WTO members' views on the Appellate Body

crisis through a detailed survey and data on member participation in disputes and AB debates. The study found that while there was broad agreement regarding the significance of the WTO's dispute settlement system, there was also a significant disagreement regarding how the AB operated, specifically regarding allegations that it went beyond its authority.

28. In 2020, Bernard Hoekman and Petros C. Mavroidis, "TO AB OR NOT TO AB? DISPUTE SETTLEMENT IN WTO REFORM," examined the root causes and implications of the Appellate Body crisis in the WTO Dispute Settlement Mechanism. The authors argued that the real challenge is not simply the AB's paralysis, but a broader erosion of commitment to depoliticized dispute resolution. They traced how the DSU's foundational principles particularly negative consensus and the AB's role in promoting coherence became strained under U.S. criticism against the WTO DSM.
29. In 2021, Kenneth Holland in his article "THE TRUMP ADMINISTRATION'S CRITIQUE OF THE WORLD TRADE ORGANIZATION AND ITS IMPLICATIONS FOR THE INTERNATIONAL TRADING SYSTEM," analysed how U.S. dissatisfaction particularly under President Trump triggered the Appellate Body crisis and reshaped global trade politics. He traced the paralysis of the WTO dispute settlement system to strategic rivalry with China, highlighting how the U.S. weaponized its veto over Appellate Body appointments to undermine the multilateral framework. Holland argues that the USA's shifting stance to the WTO DSM reflects broader geopolitical tensions rather than specific trade decisions related grievances.
30. In 2024, Maria Angelica Suarez, in her article "THE APPELLATE BODY IMPASSE: HOW TO MAKE THE WTO GREAT AGAIN?" offered a critical and timely examination of the prolonged deadlock in the WTO Appellate Body. The study examined alternate conflict resolution procedures such as regional dispute frameworks and the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), stressing both its advantages and disadvantages. Suarez also warned of growing forum shopping and institutional erosion, calling for comprehensive reforms that can bring back the legal integrity to the multilateral trade framework.

1.7 RESEARCH OBJECTIVES

The objective of the research is as follows:

- To examine why TRIPS-related disputes form a small portion of total WTO disputes.
- To evaluate how the economic standing of countries affects their engagement with the WTO DSM
- To examine India's experience with the WTO DSM under the TRIPS Agreement and its influence on the Indian IPR regime.
- To examine the impact of the Appellate Body crisis on the effectiveness of the WTO DSM in resolving TRIPS disputes.

1.8 HYPOTHESIS

The significance of enforcing TRIPS through the WTO is declining in the current global landscape with the Appellate Body crisis significantly undermining the credibility and enforceability of dispute resolutions.

1.9 RESEARCH METHODOLOGY

The study will adopt doctrinal analysis to assess patterns in TRIPS disputes, using data from the WTO dispute settlement database to identify trends in case initiation, country participation, and outcomes. The study will also employ analytical research that will involve a detailed examination of primary sources such as the TRIPS Agreement, Understanding on rules and procedures governing the settlement of disputes, WTO case laws, Panel reports and secondary sources such as research papers, academic books, and journal articles.

1.10 STRUCTURE OF THE DISSERTATION

- ✓ CHAPTER I: INTRODUCTION

This chapter provides an introduction to the WTO Dispute settlement system and the TRIPS Agreement. It also lays out the scope of the dissertation, reviews the relevant literature, and puts forth the hypothesis for the study.

- ✓ CHAPTER - II: THE TRIPS AGREEMENT AND THE WTO DISPUTE SETTLEMENT MECHANISM

  This chapter provides a brief history and evolution of the WTO, touching upon the reasons for its establishment and its predecessor, GATT. TRIPS and its importance in the global trade scenario is discussed, emphasizing its important provisions and objectives. This chapter also examines the working of WTO DSM in IP cases through bringing out a comparison with Anti- dumping and subsidies disputes as they together constitute a significant portion of WTO disputes.

- ✓ CHAPTER III: ECONOMIC DISPARITIES AND ACCESS TO THE WTO DISPUTE SETTLEMENT MECHANISM

  This chapter examines how economic differences among countries influence their ability to participate effectively in the DSM, with an emphasis on India's experience at the WTO under the TRIPS Agreement.

- ✓ CHAPTER – IV: THE APPELLATE BODY CRISIS AND ITS IMPACT ON TRIPS DISPUTES

  This part discusses the ongoing crisis in the WTO's Appellate Body, its implications for the enforceability of TRIPS-related rulings, and the broader effect on the credibility of the DSM.

- ✓ CHAPTER – V: CONCLUSION AND SUGGESTIONS

  This chapter summarizes the main findings, drawing together insights on the limitations and challenges of enforcing TRIPS through the DSM. It also provides observations and practical recommendations aimed at improving the effectiveness of the WTO DSM in handling TRIPS disputes.

1.11 LIMITATIONS OF THE STUDY

- The comparative analysis with other WTO agreements like the SCM Agreement and Anti-Dumping Agreement is intended solely to provide context, not a comprehensive examination.
- The study does not extensively explore the broader political or geopolitical factors that may influence the dynamics of TRIPS enforcement and WTO disputes.

CHAPTER-II

THE TRIPS AGREEMENT AND THE WTO DISPUTE SETTLEMENT MECHANISM

2.1 INTRODUCTION

The history of the human race is a history of the application of imagination, or innovation and creativity to an existing base of knowledge to solve problems.[1] Some of the finer manifestations of these human achievements are protected by the Intellectual Property Law [2]. It regulates the creation, use, and exploitation of mental or creative labor.[3]

The significance of safeguarding intellectual property rights in the context of international competition and across different aspects of economic relations was increasing. Amid these increasing concerns regarding the disparities within intellectual property rights systems and the challenges these posed for the global utilization of intellectual assets, nations resolved during the Uruguay round to establish a uniform set of protection standards. This was achieved through the Agreement on Trade-Related Aspects of Intellectual Property Rights.[4] This agreement marked a significant expansion of IPR disciplines at the international level, as it goes beyond the foundational WIPO Conventions by introducing substantive obligations and regulatory frameworks under the World Trade Organization (WTO).[5] With nations bringing their laws into compliance with international standards, the WTO has been instrumental in lowering trade distortions and promoting innovation in the post-WTO age. Each member nation modified its domestic legislation as needed to comply with the agreement's requirements. This has encouraged cross-border trade, foreign investment, and technology transfer, especially benefiting developing nations by enhancing their access to global markets.

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[1] Louis Harms, The Enforcement of Intellectual Property Rights: A Case Book 14 (WIPO, Geneva, 2012)
[2] William R. Cornish, D. Llewelyn, et.al., Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights 4 (Sweet & Maxwell, London, 2010)
[3] Lionel Bently and Brad Sherman, Intellectual Property Law 1 (Oxford University Press, 2001).
[4] Bernard M. Hoekman & Michel M. Kostecki, The Political Economy Of The World Trading System, The WTO and Beyond (3rd ed. Oxford University Press, 2009)
[5] Id.

2.2 AGREEMENT ON THE TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

2.2.1 Historical Background of TRIPS

Since the late 19th century, countries have attempted to harmonize IP Law.[6] The first IP treaties, the Paris Convention on the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works, did not require states to conform to international standards when protecting IP.[7] The Paris Convention put forth minimum standards for the protection of industrial property and called for national treatment of patents among signatory countries.[8] The Berne Convention called for standards of protection for art and written works and called for national treatment and a most-favoured-nation obligation.[9] However, this changed when the World Trade Organization enacted TRIPS in 1995.[10] The WTO's goals in enacting TRIPS were to facilitate global trade and to strengthen the protection of IP rights.[11]

It was in the year 1970 that the World Intellectual Property Organization or WIPO, was formed with the mission of administering IP issues for the United Nations.[12] The developed world eventually grew tired of WIPO, and business interests articulated their desire for stronger investment and IPR protections.[13] In the early 1980's executives from major American multinational companies came up with the idea of creating a trade-based approach to protect intellectual property. This approach was intended to protect investments made in the developing world and would involve a broad multilateral agreement providing global coverage for intellectual property rights. In 1994, TRIPS was born in response to such a vision.[14] Touted as the most ambitious

[6] Levin M, The Pendulum Keeps Swinging – Present Discussions on and around the TRIPS Agreement (Edward Elgar Publishing Limited, 2011)
[7] Id.
[8] Henning Grosse Ruse-Khan, The International Law Relation between TRIPS and Subsequent TRIPs-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities, 18 J. INTELL. PROP. L. 325 (2011).
[9] Ryan Cardwell & Pascal L. Ghazalian, The Effects of the TRIPS Agreement on International Protection of Intellectual Property Rights, 26 International Trade Journal 1 (2012).
[10] Levin M, *supra* note 6.
[11] Id at 12.
[12] Ctr. for Int'l Envtl. Law (CIEL), A Citizen's Guide to WIPO 9 (2007).
[13] Yoshifumi Fukunaga, Enforcing TRIPS: Challenges of Adjudicating Minimum Standards Agreements, 23 Berkeley Tech L.J. 867, 924 (2008).
[14] Alan M. Anderson & Bobak Razavi, The Globalization of Intellectual Property Rights: TRIPS, BITs, and the Search for Uniform Protection, 38 Ga. J. Int'l & Comp. L. 2 (2010)

international IP agreement in history, it brought together all WTO member nations to set a global baseline for minimum IPR Protection standards.[15]

2.2.2 Origin of TRIPS Agreement

The origin of the TRIPS agreements has been explained by four main narratives.[16] While none

of these narratives is complete, each of these narratives provides valuable insights into understanding the context and circumstances in which the Agreement was created.[17]

- **Bargain Narrative:**

The bargain narrative, which holds that the Agreement was the result of a compromise between developed and less developed nations, is the most frequently accepted narrative.[18] Developed nations gained enhanced protection for intellectual property rights and fewer limitations on foreign direct investment. Lower agricultural and textile tariffs, as well as protection from unilateral penalties imposed by the US and other developed nations through the mandated dispute resolution mechanism, were given to less developed nations in return.[19]

- **Coercion Narrative:**

The second narrative is the Coercion narrative.[20] This version is frequently put forth by academics hailing from or who express solidarity with less developed nations. This perspective views the TRIPS Agreement as an inequitable trade instrument that developed countries have enforced upon their less developed peers. The Agreement disregards the objectives and interests of less developed nations and is "coercive" and "imperialist" according to this narrative.[21]

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[15] Id at 270.
[16] Peter K. Yu, TRIPs and its Discontents, 10 Marquette Intellectual Property Law Review 2, 371 (2006).
[17] Id at 370.
[18] Frederick M. Abbott, The WTO TRIPS Agreement and Global Economic Development, 72 Chicago-Kent Law Review, 385 (1997).
[19] Id.
[20] Peter K. Yu, *supra* note 16.
[21] Peter K. Yu, Toward a Nonzero-sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists, 70 U. CIN. L. REV. 569, 580 (2002).

- **Ignorance Narrative:**

The third narrative is the ignorance narrative.[22] In this narrative, developing nations are depicted as having failed to recognize the significance of safeguarding intellectual property rights during the negotiations of the TRIPS agreement. Because of their ignorance, many less developed countries did not understand the consequences of the agreement and how the required level of protection under the agreement would impact their countries.[23] They also did not negotiate in a manner that would protect their interests.

- **Self-Interest Narrative:**

A direct contrast to the above three narratives is the fourth and final narrative. Edmund Kitch presented a counterargument in an article that attempted to refute the bargain narrative, arguing that less developed nations consented to stronger intellectual protection because they believed it would benefit them personally.[24]

The TRIPS Agreement has complicated origins, which makes it difficult to pinpoint how the Agreement was created; different scholars have different opinions on the same. While various scholars have differing views on the origins of the agreement, there is a unanimous consensus regarding its significance.

2.2.3 Uruguay Round Negotiations and Adoption of TRIPS

During the Uruguay Round negotiations (1986-1994), the TRIPS Agreement was introduced into the trade regime, aiming to create a binding system that enables member countries to uphold the intellectual property rights of their domestic companies on a global scale. As stipulated in the TRIPS Agreement, member nations were required to implement legislative reform in order to create laws and regulations that adhere to international norms. Disputes between the host country of the firm and the offending country are resolved through the WTO's Dispute Settlement Understanding if firms from member countries are unhappy with the degree of IPR protection granted to their innovations.[25]

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[22] Peter K. Yu, *supra* note 16.
[23] Id.
[24] Edmund W. Kitch, The Patent Policy of Developing Countries, 13 UCLA Pac. Basin L.J. 166 (1994).
[25] Ryan Cardwell & Pascal L. Ghazalian, The Effects of the TRIPS Agreement on International Protection of Intellectual Property Rights, 26 International Trade Journal 1 (2012).

The level of protection offered by the IPR conventions, including the Paris Conventions for the Protection of Industrial Property (1967), the Berne Conventions (1971), the Rome Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits (1967), was actually preserved (with some updates) by the TRIPS negotiators.[26] Provisions on enforcement and the enhancement of international dispute resolution, which were absent from these earlier accords, were two novel features of the GATT IP agreement.[27] A few other criteria were also put forth, like most-favourable-nation treatment and transparency, which were absent from earlier intellectual property treaties but are crucial for preventing unilateral measures.[28]

Numerous academics have attributed the origins of the TRIPS Agreement to the profitability of imitation and growing R&D expenditures: the higher the R&D to manufacturing cost ratio, the greater the incentive to cut the process through unauthorized copying.[29] However, other academics contend that the Uruguay Round, in which the US was a leading player, intended to reduce US trade deficits by expanding exclusive markets for intellectual property, a goal that gave user rights relatively little weight.[30] Whatever the motives might have been, the TRIPS Agreement resulted from the last multilateral trade negotiations in the GATT, where reciprocity and the exchange of mutual advantage in different economic sectors were given due importance.[31] However, TRIPS did not provide for any reservations for developing or underdeveloped countries, which means that countries could not opt out from following any particular clause. The only way in which differences in the economic standing of countries were taken into account was by providing transitional periods for developing and underdeveloped countries to incorporate the provisions of the agreement into their domestic systems.

2.2.4 Objectives and Key Provisions

The TRIPS Agreement, finalized in 1994 and effective from 1995, sets minimum intellectual property standards for all WTO members. It provides a comprehensive

[26] Yamane, Hiroko. Interpreting TRIPS: Globalisation of Intellectual Property Rights and Access to Medicines. (London: Hart Publishing, 2011.)
[27] Id.
[28] Id at 105.
[29] GE Evans, Lawmaking under the Trade Constitution: A Study in Legislating by the World Trade Organization, (The Hague, London, Boston, Kluwer Law International, 2000).
[30] R Cooper Dreyfuss, 'TRIPS Round II: Should Users Strike Back?', 71 U. Chi. L. Rev. 21 (2004).
[31] Id.

definition of intellectual property, including patents, industrial designs, geographical indications, copyrights, and trademarks. Part I, which sets criteria, and Part II, which addresses enforcement, form the foundation of the agreement. All WTO members, even those who are not party to the Paris Convention (1967), are required by Article 2 to abide by its essential requirements. The most extensive pact on intellectual property rights is the TRIPS Agreement, which focuses more on trade-related issues than the rights themselves.

National treatment and most-favoured-nation treatment are two of the TRIPS Agreement's main tenets. Article 3.1's "national treatment" clause guarantees that WTO members do not treat their own citizens differently from those of other members in terms of intellectual property protection. The MFN principle, established in Article 4, prohibits preferential treatment for nationals of specific countries unless covered by certain exemptions. This is the first time such a principle was included in a multilateral IP treaty, reinforcing equal treatment across nations.

The agreement covers various forms of IP protection. Articles 9 – 14 outline copyright and related rights, including protections for performers, producers of phonograms, and broadcasters. Articles 15 – 21 regulate trademarks, ensuring signs that distinguish goods or services can be registered. Articles 22 – 24 address geographical indications, ensuring that certain products are recognized for their regional origin. Industrial designs, under Articles 25 – 26, are protected for a minimum of ten years if they are independently created and new or original.

Articles 27 – 34 deal with patents, defining the field of protection, provisions for licensing, and government use. The TRIPS Agreement binds members to implement these standards in national laws, extending beyond earlier WTO agreements in that it requires full compliance. Article 72 forbids diminution of the scope of the agreement to ensure legal enforceability. Failure to comply may result in sanctions, including the withdrawal of trade concessions.

The TRIPS Agreement also obliges Member States to integrate these substantive legal standards into their national legislation. This affirmative obligation exceeds the

obligations flowing from the other WTO Agreements.[32] Article 72 of the TRIPS Agreement specifically prohibits reducing its scope. Member States must completely comply with all provisions of the TRIPS Agreement, as partial compliance is not permitted. The consequence of this system is that it now has legal 'teeth'.[33] If an infringing party is unwilling to comply with the TRIPS Agreement, its sanctions extend beyond chastisement, enabling the withdrawal of trade concessions by the infringed party.[34] However, implementation of the TRIPS Agreement need not exceed its requirements. Member states are only required to provide minimal standards of protection for intellectual property rights holders. Member States are free to grant further intellectual property protection. Provided that the extra measures do not violate any other TRIPS provisions. The preamble emphasizes that effective protection of intellectual property rights requires only 'adequate' measures. The TRIPS agreement does not require more of any member State.[35]

2.2.5 Major Achievements of the TRIPS Agreement

TRIPS marks a major advancement in the global intellectual property framework and stands out as one of the major achievements of the Uruguay Round. Due to widespread copying in countries with weak intellectual property protections and poor enforcement, prior to this, developed nations were increasingly losing their competitive edge in sectors such as pharmaceuticals, software, music recordings, and luxury goods.[36] These trade imbalances are intended to be addressed and corrected under the TRIPS Agreement. The following significant provisions are established by the agreement:

1. Minimum standards of Protection: For a number of different categories of rights, each Member must include the Agreement's minimum substantive protection criteria in their national laws. It clearly outlines key components of protection, including the scope

[32] Frederick Abbott, WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Rights, in The International Intellectual Property System: Commentary and Materials 719 (Thomas Cottier & Francis Gurry eds., Kluwer Law Int'l 1999).
[33] Andrew Law, Patents and Public Health: Legalizing the Policy Thoughts in the Doha TRIPS Declarations of 14 November 2001, (1st ed, Nomos MIPLC, 2009)
[34] Id.
[35] B.N. Pandey & Prabhat Kumar Saha, Local Working Under the TRIPS Agreement, 60 J. Indian L. Inst. 312 (2018).
[36] Paul Vandoren, The Implementation of the TRIPS Agreement, 2 J. World Intell. Prop. 25 (1999).

of what must be safeguarded, the specific rights to be granted, allowable exceptions to these rights, and the minimum length of time such protection should last.[37]

2. Enforcement: A key feature of the agreement is its requirement for Members to ensure effective mechanisms and remedies for enforcing intellectual property rights. This includes enforcement through standard civil judicial processes, customs interventions against counterfeit and pirated goods, and criminal proceedings for intentional large-scale counterfeiting and piracy.[38]

3. Dispute Settlement: The TRIPS Agreement places disputes between governments over compliance with its obligations, whether concerning substantive standards or domestic enforcement, under the WTO's unified dispute settlement system.[39] This system represents a substantial improvement over the earlier GATT dispute resolution framework.

4. Transitional Periods: Recognizing that the TRIPS Agreement introduced numerous new obligations, transitional periods were established to allow WTO members time to review and adjust their laws accordingly. This was the only manner in which the developed-developing divide between the countries was taken into consideration by the TRIPS agreement.

- Developed country members were granted a one-year transition period after the WTO Agreement took effect, until January 1, 1996.
- Developing countries generally received five years, until January 1, 2000,
- Least-developed countries were given eleven years, until January 1, 2006.

The transition period has been extended three times following specific requests from the LDC Group. On 29 November 2005, the TRIPS Council extended the deadline to 1 July 2013, and on 11 June 2013, it was further extended to 1 July 2021.[40] Recently, on

[37] Id.
[38] J.H. Reichman, Enforcing the Enforcement Procedures of the TRIPS Agreement, 37 Va. J. Int'l L. 335 (1997).
[39] Paul Vandoren, *supra* note 36.
[40]Developing countries' transition periods, World Trade Organisation (Nov 22.2024), https://www.wto.org/english/tratop_e/TRIPS_e/factsheet_pharm04_e.htm

29 June 2021, the Council extended it further until 1 July 2034 or when a particular country ceases to be in the least developed category, if that happens before 2034.[41]

All WTO Members were required to comply with the national treatment and most-favoured-nation principles by January 1, 1996. Additionally, a standstill clause was in place, ensuring that, during the transition period, no Member could alter its laws or practices in ways that would reduce their alignment with TRIPS Agreement provisions.

5. TRIPS Council: The Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) serves as the platform for WTO members to discuss issues related to the functioning and implementation of the TRIPS Agreement, as well as to consult on intellectual property and trade matters. It is tasked with overseeing and ensuring members' compliance with the TRIPS Agreement (Article 68) and reviewing how members have incorporated the Agreement into their national legal frameworks (Article 71). The Council also facilitates consultations on trade-related IP issues and handles other duties assigned by members.

2.3 WORLD TRADE ORGANISATION

For low-income nations, engaging in international trade presents a huge potential to support their social and economic advancement.[42] The promise of liberalized commerce is summed up in this statement: it creates new markets, permits the effective distribution of resources, and may raise living standards internationally. However, how international trade agreements are drafted and implemented will determine whether or not this promise is fulfilled.

A new international trade system began on December 15, 1993, when the seven-year Uruguay Round of Negotiations, which were conducted under the General Agreement on Tariffs and Trade, came to an end.[43]

The World Trade Organization is now the central international organization that governs world trade, ensures fair competition, and resolves trade disputes among nations. Moreover, the WTO is credited with reducing the complexity of international trade law.

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[41] Id.

[42] Thomas Bernhardt, North-South Imbalances in the International Trade Regime: Why the WTO Does Not Benefit Developing Countries as Much as it Could, 12 Consilience: The Journal of Sustainable Development 1, (2014).

[43] Leora Blumberg, GATT Gives Way to WTO, 3 Juta's Bus. L. 31 (1995).

As noted in academic discussions, many observers assume these trends are linked and praise the institution for transforming world commerce. The WTO has significantly influenced how nations interact economically.[44] Its origins date back to the post-World War II era when nations agreed that there was a need for an international multilateral system to stimulate international trade and prevent economic wars.

2.3.1 History and Background

Before the establishment of the WTO, international trade was governed by the General Agreement on Tariffs and Trade, an interim regime of trade between 1947 and 1994. The GATT was the unfortunate, and birth-defected result of the failure of the once contemplated International Trade Organisation (in the Havana Charter of 1948), to come into existence.[45] In its initial guise as the General Agreement on Tariffs and Trade, the multilateral trade system had the dual aims of preventing a retreat to the discriminatory economic blocs that fragmented the world in the 1930s and of promoting economic recovery and growth through the promotion of international trade.[46] The conclusion of GATT constituted a major departure from previous forms of trade cooperation.[47] Since the League of Nations was established after World War I, international conferences have been held to address deteriorating trade conditions. However, the world needed a wake-up call from another war to commit to specific commitments supported by a standardized structure rather than lofty declarations.

The General Agreement on Tariffs and Trade was founded in 1947 with the objective of tariff reduction and liberalization of trade among its 23 initial member countries. GATT was originally conceived as an interim measure, but it became the primary tool of international trade negotiations when the intended ITO, as outlined in the Havana Charter (1948), fell apart due to the absence of U.S. congressional ratification.[48] Over the subsequent decades, GATT permitted a succession of rounds of trade negotiations, progressively reducing tariffs and expanding trade rules. The most significant of these

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[44] Judith L. Goldstein, Douglas Rivers, and Michael Tomz, Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade," 61 International Organization 1, (2007).

[45] Yasuhei Taniguchi, Alan Yanovich, Jan Bokanes, The WTO in the Twenty-first Century: Dispute Settlement, Negotiations and Regionalism in Asia, (1st ed. Cambridge University Press,2007).

[46] Douglas A. Irwin, Petros Mavroidis, and Alan Sykes, The Genesis of the GATT (Cambridge University Press, 2008).

[47] Joost Pauwelyn, The Transformation of World Trade,104 Michigan Law Review 1,1-65(2005).

[48] Mervyn Martin, WTO Dispute Settlement Understanding and Development, (13 Martinus Nijhoff Publishers, 2013).

negotiations was the Uruguay Round (1986-1994), which led to the establishment of the WTO.[49]

On January 1, 1995, the World Trade Organization was established, succeeding GATT as the permanent organization that governs international trade. In comparison to GATT, which primarily focused on the trade in goods, the WTO had binding rules on goods, services, agriculture, and intellectual property. A second fundamental difference was the WTO's system of dispute settlement, with a more powerful enforcement mechanism for resolving trade disputes among member states. The new World Trade Organization, which was created by combining these agreements and the new dispute resolution process, finally placed the multilateral trading system on par with the other Bretton Woods organizations, such as the World Bank and the IMF.[50] Thus, the WTO became the central institution of international trade governance immediately, with membership extending to cover most of the world's economies.

Following its formation, the WTO undertook a succession of attempts at further opening up trade, most notably the Doha Development Round, launched in 2001. The round aimed at cutting back trade barriers and opening developing nations' market access, particularly in agriculture and manufactured goods. The negotiations failed due to disagreement among developed and developing nations over farm subsidies, cuts in tariffs, and special protection from trade. The failure of the Doha Round proved the growing sophistication of modern trade negotiations and the difficulty of securing consensus among a diverse membership.

2.3.2 The WTO Dispute Settlement Mechanism

The WTO Agreement presents a comprehensive structure of rights and obligations for member countries regarding many different trade measures. It touches upon many issues involving tariffs, subsidies, intellectual property rights, and anti-dumping duties. Such an extensive treaty could not but imply
compromise, be it in conception or in the text. Additionally, the implementation of the agreement can result in divergent interpretations among members, leading to disputes,

[49] The Uruguay round, World Trade Organization, (Nov 24. 2024), https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm
[50] Bernard M. Hoekman & Michel M. Kostecki, *supra* note 4.

which are integral to the functioning of the treaty.[51] The WTO has developed a robust dispute settlement system designed to maintain the integrity of the agreement, provide a fair platform for conflict resolution, and ensure adherence to the negotiated terms. The WTO's dispute resolution rules are mostly outlined in the Understanding on Rules and Procedures Governing the Settlement of Disputes, also known as the Dispute Settlement Understanding.[52] Giving the multilateral trading system stability and predictability is one of the main goals of the WTO dispute settlement process.[53] Over the past two decades, the WTO's dispute settlement mechanism has proven to be highly effective, with hundreds of disputes initiated.

Traditionally, in international society, there was no court system, but then came the International Court of Justice.[54] However, the ICJ can exercise jurisdiction only when both of the disputing states agree to submit their dispute to the ICJ, without which it cannot intervene in the dispute.[55] This problem of consent of the parties has been overcome by the WTO. In the WTO DSM, one member of the WTO may bring a complaint against any other member with regard to any of the WTO agreements. The consent of the other party is not required under WTO DSM. The WTO Panel and Appellate Body are empowered to bring a binding decision on the dispute after having heard both parties and according to the rules of procedure of the DSM. Hence, the WTO is said to have compulsory jurisdiction over its members, unlike the ICJ, in the same way as domestic courts.

2.3.3 Dispute Settlement Mechanisms: WTO DSM vs. GATT DSM

WTO DSM constitutes a clear deviation from the earlier, more decentralized General Agreement on Tariffs and Trade (GATT) dispute settlement processes. GATT's mechanism for dispute settlement had long been criticized as being subject to consensus decision-making and susceptible to being blocked by opposing parties. The GATT 1947 only had 2 provisions dealing with dispute settlement: Article XXII on consultation and Article XXIII on nullification and impairment.[56] The Uruguay Round ushered in a new

[51] World Trade Organization, A Handbook on the WTO Dispute Settlement System, (2nd ed. Cambridge University Press, 2017).
[52] Annex 2 of the WTO Agreement.
[53] Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2 of the WTO Agreement
[54] Yasuhei Taniguchi, Alan Yanovich, Jan Bokanes, *supra* note 45.
[55] Id at 8.
[56] Mervyn Martin, *supra* note 48.

era. The institutional design of the DSM is itself a reflection of the broader shift toward rule-based governance. The dispute settlement mechanism regulated under the DSU annexed to the Agreement on the World Trade Organization is considered one of the main achievements of the Uruguay Round.[57] DSU Article 6.1 addresses one of the major criticisms of the GATT panel process, namely, the lack of automaticity in the establishment of a panel after a complaining party requests.[58] According to DSU Article 6.1, unless the DSB unanimously decides otherwise, a panel will be automatically formed and at the latest at the Dispute Settlement Body meeting that follows the meeting where the issue is on the DSB's agenda.

Prolonged panel sessions, which were another reason for dissatisfaction with the GATT dispute settlement process, are eliminated through DSU Article 20.[59] Unless the disputing Members agree otherwise, DSU Article 20 establishes a general time period of nine months (12 months if the panel report is appealed) for the conclusion of a panel proceeding. The nine-month timeframe begins on the day the panel is formed and ends on the day the DSB considers adopting the report.[60]

Placing dispute settlement in a single framework under the WTO granted the DSM more jurisdiction, a more defined procedure, and a more "judicial" character. In doing so, the mechanism was not just formalized, but made to be a more predictable and legally consistent forum to resolve disputes in international trade.[61]

The creation of a centralized Dispute Settlement Body with the responsibility of overseeing the dispute resolution process was at the heart of this transformation. But unlike its GATT predecessor, the DSB does not initiate disputes; instead, it promotes the process by designating panels, approving reports, and making sure decisions and recommendations are followed. In addition, a permanent Appellate Body has been established, providing a second level of judicial review and expanding the system's ability to develop a coherent body of WTO case law. Though restricted to legal interpretations in appellate review, it has helped to establish precedents that define

[57] Makane Moise Mbengue, The Settlement of Trade Disputes: Is There a Monopoly for the WTO?, 15 Law & Prac. Int'l Cts. & Tribunals 207 (2016).
[58] Kevin C. Kennedy, The GATT-WTO System at Fifty, 16 Wis. Int'l L.J. 421 (1997-1998).
[59] Id at 512.
[60] Id at 513.
[61] Christopher Thomas, Litigation Process under the GAIT Dispute Settlement System. Lessons for the World Trade Organisation, 30 Journal of World Trade 2 (April 1992).

international trade law.[62] However, the current situation with the Appellate Body brings into question the dispute settlement process in general.

Several institutional changes distinguish the WTO system from its GATT predecessor:

- **The Dispute Settlement Body (DSB)**

A major innovation is the creation of the DSB, which inherits and expands the functions of the old GATT Council. All disputes concerning the application of the agreements listed in Appendix 1 of the DSU may be brought before the WTO dispute settlement mechanism.[63] In the DSU, these agreements are referred to as the "covered agreements".[64] The DSB's responsibilities include forming panels, adopting reports, monitoring implementation, and authorizing retaliatory measures. Although the DSB does not initiate disputes, it acts as the central forum where disputes are discussed and managed.

- **The Appellate Review**

The establishment of a standing Appellate Body marks a shift toward a two-tiered judicial process. This body reviews legal questions raised by panel reports and is intended to refine and harmonize WTO jurisprudence.[65] While its jurisdiction to modify panel findings is limited to disputed legal issues and the General Council must accept its decisions, the existence of the Appellate Body reinforces the judicial character of the system. It also allows dissenting opinions, although such opinions might dilute the authoritative impact of majority rulings.

- **Working Groups of Experts**

The DSU allows panels (and parties) to obtain technical evidence or guidance because it recognizes that complicated technical disagreements might occasionally surpass panellist's knowledge. Technical committees or specialized expert groups may be formed to offer unbiased evaluations.[66] This measure further strengthens the judicial, "court-like" nature of the process by ensuring that decisions are informed by specialized knowledge.

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[62] Christopher Thomas, *supra* note 61.
[63] Article 1.1 of the DSU.
[64] World Trade Organization, *supra* note 51 at 46.
[65] Article 17.1 of the DSU.
[66] Appendix 4 to the DSU.

Operational Changes

In order to increase efficiency and reduce delays, the DSU also implements a number of procedural reforms:

- **Negative Consensus Principle**

The conventional consensus rule has been replaced, which is a major operational change. Adopting a panel's recommendation under the previous system required unanimous consent, which frequently resulted in blocking the adoption of reports. Unless all members oppose, the DSU's "negative consensus" rule automatically accepts panel and Appellate Body reports. This shift not only speeds up decision-making but also transfers more influence from individual states to the adjudicatory process.[67]

- **Consultations**

Emphasizing diplomacy, the DSU requires that parties first engage in consultations to try to resolve disputes amicably.[68] There are defined deadlines for requesting, responding to, and concluding consultations (with a maximum of 60 days before a panel must be convened).[69] This structured approach ensures that diplomatic efforts remain central before proceeding to adjudication.

- **Conciliation**

The DSU permits the use of conciliation and mediation as voluntary methods alongside the formal panel process.[70] Although conciliation can occur simultaneously with other proceedings, its integration within the DSU is strengthened by prescribed timeframes that allow parties to escalate the matter to panel proceedings if no resolution is reached. But unlike the 1979 DSU, the DSU establishes a closer linkage between conciliation and the adjudication process since it sets out a timetable for conciliation after which a party has a right to demand establishment of a panel.[71]

- **Right to a Panel**

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[67] Norio Komuro, The WTO Dispute Settlement Mechanism, Coverage and Procedures of the DSU,29 Journal of World Trade 4,40, (1995).
[68] Article 4 of the DSU.
[69] Article 4.7 of the DSU.
[70] Article 5 of the DSU.
[71] Lei Wang, Some Observation on the Dispute Settlement System in the WTO, 29 Journal of World Trade, 175, (1995).

Unlike under GATT, the DSU explicitly guarantees a party's right to have a panel established after consultations fail. [72] Once a request is made and consultations do not produce a resolution, a panel must be formed unless the DSB unanimously objects. This provision eliminates prior delays and underscores the move toward a more adjudicatory system.

- **Arbitration**

The DSU incorporates arbitration as both an alternative and a supplementary process.[73] Arbitration can determine issues such as the "reasonable period" for implementing a ruling or the level of suspension (retaliatory measures) if a member fails to comply. In practice, arbitration is used to resolve disputes over compensation, the proportionality of retaliation, and implementation timeframes.

- **Domestic Judicial Review**

An additional feature is the empowerment of domestic courts or tribunals to review the executive decisions related to trade policy. Certain WTO agreements require that members exhaust domestic remedies, ensuring that national legal bodies play a role in enforcing WTO rules.[74]

- **Rules of Interpretation**

The DSU formally links the interpretation of WTO agreements with customary rules of public international law.[75] Panels are directed to use the Vienna Convention's principles,[76] thereby reducing reliance on the preparatory work of GATT and promoting consistency in legal interpretations.

- **Non-Violation Complaints**

The DSU permits complaints even when a member's benefits under a covered agreement are indirectly nullified or impaired (non-violation cases).[77]However,

[72] Article 6 of the DSU.
[73] Article 25 of the DSU.
[74] GATT 1994, Article X. Anti-Dumping Agreement, Article 13. Agreement on Subsidies and Countervailing Measures, Article 23. The General Agreement on Trade in Services, Article VI. TRIPS Agreement Articles 41-50,59. Agreement on Government Procurement Article XX.
[75] Article 3.2 of the DSU.
[76] Articles 31,32 and 33 of VCLT.
[77] Article 26.1 of the DSU.

compared with GATT, such claims under the WTO require detailed justification and do not automatically compel the respondent to withdraw its measures.

- **Implementation**

To overcome the long-standing problem under GATT of the failure to implement panel rulings, the DSU sets firm deadlines and procedures:

- **Deadlines:** The DSU asserts that timely adherence to the DSB's recommendations or decisions is necessary to guarantee that disputes are resolved effectively to the advantage of all WTO members.[78] The DSU requires that a member submit a written report on its implementation progress within 30 days of a report's adoption.[79] If immediate compliance is not possible, a "reasonable period" for compliance is defined either by the member, mutually agreed upon by the parties, or determined by binding arbitration.[80](but never exceeding 15 months).
- **Compensation and Suspension:** If a member fails to implement within the prescribed period, compensation may be negotiated. If no agreement is reached, the DSB may authorize temporary suspension of concessions. However, compensation and countermeasures (the suspension of concessions or other obligations) are available only as secondary responses to a violation of the obligations laid down in the WTO Agreements.[81]The system also provides for "cross-sector retaliation" under certain conditions, although some agreements (like Government Procurement) are exempt.
- **Modalities of Implementation:** The DSU leaves it to the concerned member to choose the means of implementing the decision, but if the chosen remedy is insufficient, the dispute may be referred back to the panel for further review.[82]
- **Retaliation:** Retaliation remains a last-resort measure aimed at incentivizing compliance. The DSU sets up detailed rules governing:
- **Authorization to Suspend:** If a member fails to correct its measures after a defined period, it may be subject to suspension of concessions.

[78] Article 21.2 of the DSU.
[79] Article 21.3 of the DSU.
[80] Article 21.3 (a),(b),(c) of the DSU.
[81] Article 3.7 of the DSU.
[82] Article 21.5 of the DSU.

- **Cross-Sector Retaliation:** In cases where the non-compliance affects sectors beyond the specific dispute, the complainant may seek suspension of concessions in other sectors, provided certain conditions are met.[83]
- **Arbitration in Retaliation:** Disputes over the appropriate level of suspension are referred to arbitration, ensuring that any retaliatory measures are proportional to the harm caused.[84]
- **Surveillance:** The DSB not only oversees dispute resolution but also monitors the implementation of its rulings. It requires periodic written status reports from the defaulting member and schedules regular reviews until the issue is resolved. Surveillance continues even after sanctions or compensation measures are in place if full compliance is not achieved.

2.4 PROCESS AND DURATION OF A DISPUTE

In principle, the two ways to settle a dispute that has come up before the WTO DSM are: parties find a mutually agreed solution or through adjudication, followed by implementation of the panel and appellate reports. The WTO dispute settlement process is divided into three main stages: (i) parties' consultations; (ii) panel and, if applicable, Appellate Body adjudication; and (iii) the implementation of the rulings and recommendations, which includes the possibility of countermeasures in the event that the respondent fails to abide by the rulings and recommendations of the panel or appellate body.[85] The Agreement on Rules and Procedures for the Resolution of Disputes of the WTO lays out a range of procedures for settling disputes that emerge between WTO Members over their rights and responsibilities under the WTO Agreement. [86]

Approximate Duration	Stages of a dispute
60 days	Consultations and mediation
45 days	Establishment of the Panel and Appointment of Panellists.
6 months	Panel Proceedings and Report to Parties.

[83] Article 22.3(b) of the DSU.
[84] Article 22.3(d) of the DSU.
[85] World Trade Organization, *supra* note 51 at 49.
[86] Amponsah Afari-Djan, Using the dispute settlement mechanism (DSM) as an indicator for the participation of developing nations in the world, 30 ECTS, (2020).

3 weeks	Report Circulated to WTO Members
60 days	Adoption of the Report by the Dispute Settlement Body (if no appeal filed)
1 year	Total duration (without appeal)
60-90 days	Appeal of the Panel Report
30 days	Adoption of the Appellate Body Report
1y 3 months	Total duration (with appeal)

Source: The process — Stages in a typical WTO dispute settlement case[87]

2.5 COMPARISON OF TRIPS DISPUTES UNDER WTO DSM WITH AGREEMENT ON ANTI-DUMPING AND AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

An essential component of the WTO Agreement is the Multilateral Trade Agreements mentioned in Annexes 1, 2 and 3. The Annex 1A contains the GATT 1947 as well as related legal documents, such as the accession procedures, list of recognized waivers, and understandings on state trading, balance of payments rules, and waivers under Article XXV:5.[88] The fundamental GATT trade rules on agriculture, textiles and apparel, sanitary and phytosanitary measures, technical trade barriers, trade-related investment measures, customs valuation, antidumping measures, pre-shipment inspection, rules of origin, import licensing procedures, subsidies and countervailing measures, and safeguards are all covered in Annex IA.[89]

The Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, is Annex IC, and the General Agreement on Trade in Services (GATS) is Annex 1B. Another agreement binding on all WTO members is the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2), which applies to the WTO Agreement, all the annexed multilateral trade agreements, and any annexed plurilateral agreement for which the signatories confirm such

[87] The process — Stages in a typical WTO dispute settlement case, World Trade Organization, (Nov.26.2024), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm#:~:text=There%20are%20three%20main%20stages,by%20the%20losing%20party%20to

[88] Judith H. Bello & Mary E. Footer, Uruguay Round - GATT/WTO - Preface, 29 INT'l L. 335 (1995).

[89] Id at 341.

application. The Trade Policy Review Mechanism, another multilateral agreement that was started during the Uruguay Round, is carried forward in Annex 3.[90]

All disputes arising under these various agreements, be it related to the GATT, GATS, TRIPS, or other annexed trade instruments, are resolved through the WTO Dispute Settlement Mechanism. The DSM is the exclusive forum for adjudicating disputes among WTO members, ensuring that disagreements over trade practices, tariff schedules, and the interpretation of the multilateral agreements are addressed in a structured, rules-based environment. This centralized mechanism plays a crucial role in maintaining the stability and predictability of the global trading system by enforcing compliance with WTO rules and facilitating the resolution of conflicts in an impartial and orderly manner.

2.5.1 Overview Of Disputes by WTO Agreement

According to the data from the official WTO website, GATT 1994 accounts for the largest share of disputes, with 525 cases, followed by the Anti-Dumping Agreement (144 cases) and the Subsidies Agreement (141 cases) as of December 2024. Other frequently invoked agreements include Agriculture (89 cases), the Technical Barriers to Trade Agreement (57), and the Sanitary and Phytosanitary Agreement (54). Safeguards, Licensing, Trade-Related Investment Measures, TRIPS, and GATS also appear, though they have been the subject of fewer disputes compared to GATT 1994, Anti-Dumping, and Subsidies.[91]

However, the WTO dispute settlement system is “integrated”, such that several agreements can be at issue in the same dispute. The total numbers provided above, therefore, exceed the total number of distinct disputes initiated.[92] In cases involving trade in goods, the GATT 1994 is frequently cited alongside more specific agreements, leading to its high invocation rate. However, this is largely due to its broad applicability. The second and third most individually cited agreements are the Anti-Dumping Agreement and the SCM agreement, respectively, which are the most invoked on their own merit.

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[90] Id.
[91] Dispute Settlement: The Disputes, World Trade Organization, (15.11.2024), https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm
[92] Id.

Given the prominence of Anti-Dumping and Subsidies disputes in terms of sheer volume, this section will focus on these two areas. Both are essential to understanding trade remedies and government support measures, which together constitute a significant portion of the WTO Dispute Settlement Body's workload. Then, a comparison will be brought about with TRIPS disputes under the WTO DSM over the years, highlighting how the nature of IP-related conflicts differs both substantively and procedurally from the more commonly encountered trade remedies disputes.

2.5.2 Agreement on Implementation of Article VI of The General Agreement On Tariffs And Trade 1994 [Anti-Dumping Agreement]

For member countries of the WTO, anti-dumping action is governed by the anti-dumping agreement that resulted from the Uruguay Round negotiations. The WTO agreement disciplines anti-dumping actions by providing rules for calculating the amount of dumping, detailed procedures for initiating and conducting anti-dumping investigations. the agreement also provides the particular standards for dispute settlement panels to apply in anti-dumping disputes.[93]

A company is automatically accused of "dumping" a product if it exports it for less than what it typically charges in its native market.[94] The exporters tolerate initial losses in order to gain market share in the importing country. With the establishment of the WTO in 1995, the Anti-Dumping Agreement was codified to harmonize practices across member states and to prevent the misuse of anti-dumping measures as protectionist tools. This harmonization was intended to ensure that measures taken were both justified and proportionate to the injury sustained by domestic producers.[95]

The Agreement serves two main purposes. First, it acts as a corrective mechanism by neutralizing the price advantage gained from dumped imports. It does this by imposing duties that are roughly equivalent to the dumping margin. Second, it serves as a deterrent against future dumping by signalling that any attempts to undercut domestic prices will likely face countervailing measures.[96] However, critics argue that anti-

[93] Michael Showalter, A Cruel Trilemma: The Flawed Political Economy of Remedies to WTO Subsidies Disputes. 37 VJTL 2, (2021).
[94] Y.H. Mai, An Analysis of EU Anti-Dumping Cases Against China,9 Asia-Pacific Development Journal 2 (2002).
[95] Leora Blumberg, GATT Gives Way to WTO, 3 Juta's Bus. L. 31 (1995).
[96] Bown, Chad P. & Mavroidis, Petros C., WTO Dispute Settlement in 2015: Going Strong after Two Decades,16 World Trade Review 2, 153-158, (2017).

dumping duties are sometimes misused, protecting domestic industries more than necessary to counteract actual dumping.[97] For instance, some scholars argue that well-established domestic firms may lobby for anti-dumping measures to shield themselves from competition, thereby raising concerns about the potential for protectionist abuse.[98] Empirical research has shown that anti-dumping cases constitute a significant share of the cases brought before the WTO Dispute Settlement Body, underscoring both their economic importance and the contentious nature of anti-dumping measures.

2.5.3 Agreement on Subsidies and Countervailing Measures

The WTO's framework for countervailing duties is embodied within the Agreement on Subsidies and Countervailing Measures (SCM Agreement), a vital component of the multilateral trading system. Countervailing duties (CVDs) are imposed by importing countries to offset the advantage that foreign exporters gain from government subsidies. By levying duties roughly equivalent to the benefit conferred by these subsidies, the SCM Agreement aims to restore fair competition in domestic markets.[99]

The Agreement deals with two separate but related topics.[100] Firstly, it provides for multilateral rules regarding the provision of subsidies by WTO members and the enforcement of such rules through the dispute settlement mechanism of the WTO.[101] Secondly, it addresses countervailing duties, which a WTO member may impose unilaterally upon determining that subsidized imports have harmed its domestic industry. Part I of the agreement provides that the agreement applies only to such subsidies as are specifically provided to an enterprise or industry or a group of them.[102] It defines a subsidy to be a financial contribution by a government or a public body that confers a benefit on the recipient.[103] It also outlines the concept of specificity, encompassing enterprise-specific, industry-specific, and regional-specific subsidies, where certain producers within a defined region receive benefits. Additionally, it

[97] Nam-Ake Lekfuangfu, Rethinking the WTO Anti-Dumping Agreement from a Fairness Perspective, 4 Cambridge Student L. Rev.300 (2009).
[98] Bown, Chad P. & Mavroidis, Petros C, *supra* note 96.
[99] Francois-Charles Laprévote and Sungjin Kang, Subsidies Issues in the WTO – An Update, 10 European State Aid Law Quarterly 3,(2015).
[100] C. Satapathy, Subsidies and Countervailing Measures: Case for Review of WTO Agreement, 34 Economic and Political Weekly 34/35,(1999).
[101] Id at 2377.
[102] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14.
[103] Id.

includes prohibited subsidies, which are those granted specifically for export goods or products that utilize domestic inputs.

At its core, Parts II, III, and IV of the SCM Agreement distinguishes between different types of subsidies.[104] Subsidies are broadly categorized as either prohibited, actionable, or non-actionable. Prohibited subsidies typically include export subsidies those contingent on export performance and local content subsidies that favor domestic over imported goods. These measures are deemed inherently trade-distorting because they artificially enhance export competitiveness, thereby affecting industries in the importing countries.[105]Actionable subsidies, by contrast, are not banned outright. Instead, they can be challenged and potentially offset by countervailing measures if they are found to cause material injury, nullification, or impairment of benefits to other members. Finally, non-actionable subsidies, such as certain research or environmental subsidies, are recognized as having merit and are not subject to countervailing actions, although the original non-actionable lists have since expired, leaving only non-specific subsidies in that category.[106] The Agreement carefully delineates what constitutes a "financial contribution" by a government.[107] The Agreement further explains the concept of "benefit" by contrasting government activities with what would have been accessible under normal business procedures.

The remedial mechanism provided by the SCM Agreement, ie, countervailing measures, serves as a vital tool for importing countries. Once it is established that subsidized imports have caused injury to the domestic industry, a countervailing duty can be imposed that is roughly equivalent to the benefit conferred by the subsidy. This process not only helps restore a level playing field but also signals to exporting countries the need for consistency in their subsidy policies. However, the determination of the appropriate countervailing margin is often a complex, fact-intensive process involving detailed economic analysis, which in turn has led to numerous disputes before

[104] Id.
[105] C. Satapathy, *supra* note 100.
[106] Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), World Trade Organisation, (Jan.20.2025), https://www.wto.org/english/tratop_e/scm_e/subs_e.htm
[107] Id.

the WTO Dispute Settlement Body.[108] From 1995 to 2024, 141 cases related to the SCM agreement have been initiated before the WTO DSM.[109]

2.5.4 Stage-Wise Classification of WTO Disputes Under Key Agreements

The cases analyzed span from 1995 to 2024, with their procedural stages assessed as of April 2025.

PRESENT STAGE	NUMBER OF CASES (Anti-Dumping)	NUMBER OF CASES (SCM)	NUMBER OF CASES (TRIPS)
Panel composed	2	4	1
In consultations	47	47	9
Panel establishment requested	2	2	-
Panel established (but not yet composed)	2	5	-
Mutually agreed solution notified	17	19	14
Report adopted (including "no further action required")	10	9	5
Reasonable time approved by DSB or mutually agreed	7	2	1
Arbitrator (Decision of Article 22.6 DSU arbitrator circulated/composed)	4	4	1
Implementation notified by respondent	25	29	8
Non-compliance findings (compliance proceedings completed with findings)	6	3	-

[108] Hyunjeong Hwang, Entrusted or Directed Subsidies in WTO Disputes, 25 Journal of International and Area Studies 2, (2018).
[109]Disputes by agreement, World Trade Organisation, (Jan 20. 2025), https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm

Compliance proceedings completed without finding of non-compliance	-	1	-
Appeal pending (Panel report under appeal)	8	8	-
Request for authorization to retaliate withdrawn	2	-	-
Authorization to retaliate granted	2	4	-
Withdrawn/terminated	3	2	2

Source: World Trade Organization [110]

2.5.5 Analysis of the Table

Among the total cases recorded, AD and SCM disputes vastly outnumber TRIPS cases at every stage of the dispute resolution process. Unlike the other agreements enforced through the WTO, the TRIPS Agreement requires member nations to adopt policies for IP protection that meet certain minimum standards.[111]

The number of disputes involving various agreements has fluctuated from year to year, with a variety of causes contributing to these fluctuations. TRIPS disputes, on the other hand, have only steadily declined over time.[112] For instance, while 47 AD and 47 SCM cases have been in consultations, only 9 TRIPS disputes have reached this stage.

- **More likely to be resolved through mutual settlement**

Notably, a significant portion of TRIPS disputes (14 out of 44, or 32%) have been resolved through mutually agreed solutions, whereas this figure is lower for AD (17 out of 144, or 12%) and SCM (19 out of 141, or 13%) cases. This suggests that TRIPS disputes are more likely to be resolved through negotiations rather than formal adjudication. Hence, some disputes that would have been otherwise brought before the WTO DSM would have been settled through bilateral negotiations between the

[110] Disputes by agreement, *supra* note 109.
[111] Bernard M. Hoekman & Michel M. Kostecki, *supra* note 4.
[112] Disputes by agreement, *supra* note 109.

countries without reaching the DSM, as the countries saw benefits in compromising rather than bearing the diplomatic costs if their defeat was practically guaranteed. Also, about 5% (2 out of 44 cases) of TRIPS disputes have been withdrawn or terminated, which is higher compared to the other two agreements. As of December 2024, the last case brought before the WTO DSM citing the TRIPS Agreement was on 12 December 2022, without any cases coming up in 2023 and 2024.[113]

- **Lower number of implementation and compliance**

Additionally, while the WTO Dispute Settlement Body has adopted reports for 10 AD, 9 SCM, and 5 TRIPS cases, the overall number of TRIPS disputes reaching the ruling stage remains low. Similarly, implementation was notified by the respondent in only 8 TRIPS cases, compared to 25 AD and 29 SCM cases, further reflecting the lower frequency and enforcement of TRIPS rulings.

These figures reinforce the broader trend that TRIPS disputes are not only fewer in number but are also less likely to escalate to full adjudication compared to AD and SCM disputes. The legal complexity of TRIPS cases, difficulties in enforcement, lack of direct industry pressure, and the nature of available remedies all contribute to this phenomenon. Consequently, while AD and SCM disputes continue to dominate WTO litigation, TRIPS disputes remain significantly underrepresented, relying more on diplomatic resolution mechanisms than formal dispute adjudication.

The relatively low number of TRIPS disputes in the WTO Dispute Settlement Mechanism compared to Anti-Dumping and Subsidies and Countervailing Measures disputes can be attributed to several key factors.

First, TRIPS disputes are inherently complex due to their legal nature, requiring an extensive interpretation of domestic intellectual property laws and their compatibility with international obligations under TRIPS. This contrasts with AD and SCM disputes, which primarily focus on technical and quantifiable trade measures such as tariff rates, countervailing duties, and anti-dumping margins, making them easier to litigate at the WTO.

[113] Id.

Additionally, enforcement challenges also contribute to the lower frequency of TRIPS disputes. Implementing WTO rulings on TRIPS often requires legislative amendments or judicial intervention within a country's domestic legal system, whereas AD and SCM cases usually lead to direct modifications in trade measures, such as lifting duties or adjusting trade policies, which are administratively simpler.

The type of dispute initiation and private-sector engagement are important additional factors. Domestic industries usually petition their governments to oppose foreign trade practices that have a direct impact on their company operations, which is what drives AD and SCM disputes. In contrast, TRIPS disputes are less influenced by industry pressure because intellectual property holders often prefer resolving disputes through private negotiations, licensing agreements, or bilateral trade discussions rather than engaging in protracted WTO litigation. Furthermore, the nature of WTO remedies under TRIPS discourages disputes, as WTO rulings do not provide direct compensation to private entities for IP infringements. In contrast, AD/SCM rulings often lead to immediate economic benefits, such as the removal of trade barriers or retaliatory tariffs, incentivizing countries to pursue such disputes more actively.

- **TRIPS disputes take longer periods to reach the final stage**

There are 5 TRIPS dispute cases in which the final report was adopted. 10 Anti-dumping cases and 9 SCM cases also fall under this category. Even after this stage, in certain cases, a reasonable time would be granted for complying with the measures when certain conditions are met.

The longest period to reach this stage is taken by the TRIPS dispute when compared with the other two agreements. In DS441, consultations were requested on 18 July,2012, and the appellate body report was circulated only on 9th June 2020 to the members and finally adopted by the DSB on 29th June 2020.[114] It took about 8 years to finally reach a binding decision in this case. Similarly, in DS 435, consultations were requested on 4th April 2012, and the appellate body report was circulated only on 29 June 2020, again taking years to finally resolve the dispute.[115] Due to the extraordinary size and

[114] DS441: Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, World Trade Organization, (Jan. 10, 2025), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds441_e.htm
[115] DS435: Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, World Trade Organization, (Jan. 10, 2025), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm

complexity of consolidated proceedings, including the significant volume of the panel report and records and the numerous intricate aspects of the proceedings, the appellate body in both of these cases had notified the DSB that it would not be able to circulate the appellate body report by the end of the 60-day period or within the 90-day time frame provided as per Article 17.5 of DSU.[116] In addition to the complexity of the matter, the delay was also partly due to the backlog of pending appeal cases due to the reduced number of appellate body members.

However, in Anti-dumping cases, the highest time taken is 5 years.[117]In addition to the complexity of the dispute, the delay was caused due to the translation demands the appellate proceedings placed on the Appellate Body Secretariat, which was understaffed. The rest of the cases reached the decision stage within a time period of 2-3 years. Similarly, in SCM dispute as well the highest time taken is 5 years.[118] This delay was majorly due to the complainant's request to suspend the work of the panel pursuant to Article 12.12 of the DSU which was granted several times with the rest of the cases only taking 2-3 years.

2.6 CONCLUSION

There can be no doubt to the fact that the establishment of the World Trade Organisation marked a new era in global trade governance, bringing a more structured, rules-based system in place to ensure a level playing field for its members. Now, the importance of the WTO cannot be understated with 98 per cent of trade taking place under WTO rules.

The WTO was established to overcome the drawbacks of its predecessor GATT. One of the major changes brought about by the WTO was expanding its focus area, bringing in agriculture, intellectual property rights, services, etc, within its framework. Another major deviation of the WTO from its predecessor, GATT, was with respect to its Dispute settlement body. 1st January 1995 not only marked the establishment of WTO but also, with that, came into force under the Marrakesh Agreement and various other agreements such as the GATS, TRIPS, WTO agreement on agriculture, TRIMS, etc.

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[116] Id.

[117] DS442: European Union — Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia, World Trade Organization, (Jan. 10, 2025), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds442_e.htm

[118] DS593: European Union — Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels, World Trade Organization, (Jan. 25, 2025), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds593_e.htm

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) set minimum standards for intellectual property protection and enforcement, ensuring greater harmonization across member states. It also introduced a dispute settlement mechanism under the WTO, allowing countries to challenge non-compliance with IP obligations through binding adjudication.

Unlike the GATT system, which relied on a more diplomatic and consensus-based approach, the WTO DSM introduced a structured, rules-based process with binding decisions. This shift enhanced the enforceability of trade rules, reducing the ability of members to block rulings and ensuring greater compliance with international trade obligations. WTO DSM has played an important role with a huge number of cases initiated since its establishment. However, from 1995 to 2024, only 44 TRIPS-related disputes have been initiated, which amounts to less than 7% of the total WTO disputes. The complex nature of the TRIPS proceedings, along with the time taken in TRIPS disputes, has led to this disparity between IP and non-IP cases under the WTO DSM.

Furthermore, the remedies offered under the Dispute Settlement Understanding provide limited relief to the victorious complainant, as they apply only to future actions. Although future economic losses may be addressed, the remedy, usually involving the reduction of trade barriers on unrelated goods or services, is typically of little interest to IP holders

Moreover, there is a striking difference with regard to the possession of IP between developed and developing countries, which will be dealt with in detail in the next chapter. The ongoing appellate body crisis has also weakened the WTO DSM, leaving it ineffective, which will also have an impact on TRIPS disputes.

CHAPTER -III

ECONOMIC DISPARITIES AND ACCESS TO THE WTO DISPUTE SETTLEMENT MECHANISM

3.1 INTRODUCTION

A country's economic standing is a crucial factor in its ability to effectively participate in the global trading system. The economic power of a nation affects its trade policies and market access. Moreover, it also affects the country's capacity to influence international trade rules and resolve disputes. The World Trade Organization, which is the central figure in regulating global trade by ensuring that trade agreements are implemented fairly among its members, provides a legal framework for addressing trade conflicts through its Dispute Settlement Mechanism.[119] However, disparities in economic resources create significant inequalities in how countries engage with this system.

Developed countries, with their strong economies, extensive legal expertise, and institutional support, have a greater capacity to initiate and sustain trade disputes at the WTO.[120] In contrast, developing and least-developed countries often struggle to navigate the complexities of the WTO's legal framework due to financial constraints, lack of technical expertise, and limited domestic institutional capacity. These disparities affect their ability to enforce their rights and their negotiating power in global trade agreements.[121]

The impact of economic standing extends beyond formal disputes. Wealthier nations often shape trade policies through bilateral and multilateral agreements, while economically weaker nations are forced into reactive positions, limiting their ability to protect their trade interests. This imbalance is particularly evident in areas like intellectual property rights under the TRIPS Agreement, where developing countries face significant challenges in implementation and enforcement.

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[119] Ekram Yawar, M., & Amani, A., Review of the World Trade Organization General Agreement on Trade in Services and International Trade in Legal Services, 2 Acta Globalis Humanitatis Et Linguarum 1, 297-307. (2025).

[120] Bown, Chad P. Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement (Brookings Institution Press, 2009)

[121] Dispute Settlement At The WTO: The Developing Country Experience, (Gregory Shaffer And Ricardo Meléndez-Ortiz,ed., Cambridge University Press, 2010).

3.2 DEFINING ECONOMIC DISPARITIES

3.2.1 Developed, Developing and Least Developed Countries under the WTO

It is difficult to ascertain from the WTO on how many of its members are developing countries, as it merely states that developing countries make up around two-thirds of total membership.[122] To identify developing countries, the WTO refers to the UNCTAD GSP list of beneficiaries.[123]

The WTO does not define "developed" and "developing" nations. Members declare for themselves if their nations are "developed" or "developing." Other members, however, have the right to contest a member's choice to utilize the resources made available to developing nations. Certain rights come with being a developing country in the WTO. For instance, certain WTO agreements contain clauses that provide developing nations certain advantages such as transition time before they must completely implement the agreement, eligibility for technical assistance etc.

- **Developing Countries**

In the World Trade Organization, the designation of "developing country" status is primarily based on self-selection, allowing members to declare themselves as developing nations. This self-designation grants access to special rights and leniencies known as Special and Differential Treatment (S&D) provisions, which are intended to support developing countries to play an important role in the global trading system.[124]

The practice of self-designation has been a subject of debate within the WTO. Some critics argue that it allows economically advanced countries to claim developing status, thereby accessing the developing country benefits under the WTO, which may not be appropriate given their level of development. For instance, countries like China, which is the world's number one exporter and India continue to classify themselves as developing countries despite their significant economic growth, which has raised concerns among other WTO members.[125] The category for a developing country is

[122] Who are the developing countries in the WTO?, World Trade Organization, (March 25.2025), https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm,
[123] Id.
[124] Anoop Kumar, Role of the WTO for Developing Countries,4 IJLMH 2, (2021).
[125] Till Schöfer, Clara Weinhardt, Developing-country status at the WTO: the divergent strategies of Brazil, India, and China, 98 International affairs 6, (2022).

broad indeed, encompassing the island of Samoa, the sub-continent of India, the Kingdom of Bahrain etc.[126]

Moreover, the recent decision of South Korea to stop seeking the Special treatment reserved for developed countries in future WTO negotiations, but at the same time not to renounce its developing country status in the WTO, has called for amendments in the WTO rule of self-selection.

In 2019, the United States, for the first time in WTO history, advocated for a complete revision of how the organization classifies "developing" countries. The U.S. argued that the WTO continued to rely on an outdated and overly simplistic division between "developed" and "developing" nations, which failed to reflect contemporary economic, social, and trade realities.[127] To replace the current system of self-designation, the U.S. proposed new external criteria for classification. Under this proposal, a country would not qualify as "developing" if it were a member of the OECD or G20, had High-Income status, or accounted for more than 0.5% of global trade. While China was a key focus of this initiative, the policy shift would have affected 34 countries, impacting more than half of the global population.[128]

In response, a group of ten developing countries opposed the U.S. proposal, emphasizing that self-designation of "developing" status had long been a core principle of the WTO and remained the most suitable classification method.[129] Despite the U.S. push for reform, the proposal ultimately failed to gain sufficient public support and was not adopted. As of now, the WTO has not adopted any formal criteria for determining developing country status, and the self-designation practice remains in place.

- **Least developed countries**

Article XI:2 of the Marrakesh Agreement, which establishes the World Trade Organization, recognizes the United Nations' categorization of a nation as least developed for the purposes of the WTO agreements.[130] The United Nations classifies

[126] Dmitry Grozoubinski, The World Trade Organization: An Optimistic Pre-Mortem in Hopes of Resurrection, Lowy Institute for International Policy (2020).
[127] Deborah Barros Leal Farias, Unpacking the 'developing' country classification: origins and hierarchies,31 Review of International Political economy 2, (2024).
[128] Id at 659.
[129] WTO Reform- An Overview, World Trade Organization, (March 25.2025), https://www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bfwtoreform_e.htm?utm_
[130] Kevin Kennedy, The 2005 TRIPS Extension for the Least-Developed Countries: A Failure of the Single Undertaking Approach? 40 The International Lawyer 3, (2006).

certain economies as Least Developed Countries (LDCs) based on economic and social criteria that assess their vulnerabilities.[131] This classification is important because it determines the level of international support these countries receive, including preferential trade access, development aid, and technical assistance. The WTO recognizes the UN's classification and provides special provisions for LDCs to support their participation in the global trading system. Every three years, the list of LDCs is reviewed by the Committee for Development Policy (CDP), which is a subsidiary of the UN Economic and Social Council (ECOSOC). The classification is based on three main criteria: income level, human assets, and economic and environmental vulnerability.

First, the income criterion is determined by a country's Gross National Income (GNI) per capita, measured as a three-year average. A country is classified as an LDC if its GNI per capita is $1,088 or below, while the threshold for graduation from LDC status is $1,306 or above.[132]

Second, the Human Assets Index (HAI) assesses the country's levels of health and education. The index includes factors such as under-five mortality rates, maternal mortality, malnutrition prevalence, school completion rates, and adult literacy levels. A country qualifies as an LDC if its HAI score is 60 or below, while a score of 66 or above is required for graduation.

Third, the Economic and Environmental Vulnerability Index (EVI) measures a country's economic instability and exposure to environmental risks. This includes factors such as the share of agriculture in GDP, export concentration, economic remoteness, and exposure to natural disasters. Countries with an EVI score of 36 or above qualify as LDCs, while those with a score of 32 or below may graduate.

A country becomes eligible for graduation if it meets two out of these three criteria for two consecutive triennial reviews. However, a country can also graduate based solely on income if its GNI per capita is three times the graduation threshold ($3,918 or above). Currently, there are 44 LDCs, mostly concentrated in Africa (32 countries), followed by Asia (8 countries), the Caribbean (1 country), and the Pacific (3

[131] UN list of least developed countries, UN Trade and Development, (March 25.2025), https://unctad.org/topic/least-developed-countries/list
[132] UN list of least developed countries, *supra* note 131.

countries).[133] In recent years, several countries have successfully graduated from LDC status.

3.3 SPECIAL AND DIFFERENTIAL TREATMENT

Special and Differential Treatment is a fundamental aspect of the global trade system. It was created to help developing and least-developed nations overcome their economic difficulties. A number of policies have been put in place under the World Trade Organization and the General Agreement on Tariffs and Trade to guarantee that developing nations can engage in global trade on more advantageous terms. [134] These clauses seek to encourage their economic expansion, ease their assimilation into the world economy, and provide them leeway in meeting their trade obligations.[135]

The concept of SDT is based on a number of fundamental ideas.[136] Essentially, it acknowledges that developing nations are inherently at a disadvantage in international commerce, frequently as a result of institutional flaws or disparities in economic strength. Any multilateral trade agreement involving both developed and developing nations must therefore take these differences into consideration when outlining rights and responsibilities.[137] Additionally, developed countries have a vested interest in supporting the deeper integration and effective participation of developing countries within the international trading system.

Another key concept is that trade laws and policies that support sustainable development in poor nations might not be the same as those that work well in developed ones, suggesting that some regulations shouldn't be imposed consistently.

The SDT provisions introduced into the WTO agreements fall into two broad categories:

1. positive actions by developed country members;

2. exceptions to the overall rules contained in the agreements that apply to developing countries; and, sometimes, additional exceptions for the LDCs.

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[133] Id.
[134] Bernard Hoekman, Developing Countries and the WTO Doha Round: Market Access, Rules and Differential Treatment, 19 Journal of Economic Integration 2, (2004).
[135] Joel Trachtman, Ensuring a Development-friendly WTO, 1 Bridges Monthly Rev. 18 (Feb. 2008).
[136] Bernard Hoekman, *supra* note 134.
[137] Barton, John H. et al., The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO (Princeton University Press, 2006).

There are three kinds of actions that developed countries have agreed to take to support developing countries participation in international trade:

1. Provide preferential access to their markets;

2. Offer technical and other support to help them fulfill their WTO commitments and improve the benefits that developing nations receive from international trade in general;
3. Enforce the overall agreements in a way that best serves or is least damaging to the interests of developing and least developed nations. [138]

3.3.1 Special and Differential Treatment under GATT

Throughout the evolution of GATT, three major legal developments provided a foundation for S&DT principles. These include the amendment of Article XVIII, the incorporation of Part IV, and the adoption of the Enabling Clause in 1979.

- **Amendment of Article XVIII**

Sections B, C, and D were added to GATT's Article XVIII in 1957. These provisions gave developing nations a great deal of trade flexibility:

Section B: In order to address balance-of-payments issues, Section B gave developing countries greater freedom than developed nations to apply quantitative restrictions.[139] These clauses, which essentially gave them exemptions from stringent free trade responsibilities during the GATT era, were heavily depended upon by many developing countries.

Section C and D: Developing nations were able to assist domestic industrial growth by implementing protective measures as permitted through sections C and D.

- **Incorporation of Part IV: Trade and Development**

In 1966, GATT was further modified with the inclusion of Part IV, titled Trade and Development, which consisted of Articles XXXVI, XXXVII, and XXXVIII. [140] This incorporation sought to transform proposals from the United Nations Conference on

[138] S. Sibanda, Towards a Revised GATT/WTO Special and Differential Treatment Regime for Least Developed and Developing Countries, 50 Foreign Trade Review 1, 31-40 (2015).
[139] Anjaria, S. J, Balance of payments and related issues in the Uruguay Round of trade negotiations, 1 World Bank Economic Review, 669-88, (1987).
[140] Hoekman, Bernard M. & Kostecki, Michel M**.** The Political Economy of the World Trading System: The WTO and Beyond (3rd ed., Oxford University Press 2009).

Trade and Development (UNCTAD) into binding trade rules.[141] However, much of its language was ambiguous, lacking clear enforcement mechanisms.

One of the most significant provisions of Part IV was Paragraph 8 of Article XXXVI, which explicitly stated that developed countries did not expect reciprocity from developing countries in trade negotiations. This principle ensured that developing nations were not required to undertake trade obligations inconsistent with their economic development, financial constraints, and trade interests.

The non-reciprocity principle laid the foundation for the Generalized System of Preferences (GSP). During the UNCTAD-II conference in 1968, the proposal for GSP was formally articulated, and by 1970, major developed economies including the United States, European nations, Japan, and Canada had agreed to grant tariff preferences for certain products from developing countries. Since such preferences conflicted with the most-favoured-nation (MFN) principle under GATT, a waiver under Article XXV:5 was granted for ten years.

- **Adoption of the Enabling Clause (1979)**

In 1979, the GATT Contracting Parties enacted a historic decision known as the Enabling Clause, as the original ten-year waiver term for trade preferences was about to expire. This provision formally created a legal foundation for giving developing nations permanent preferential treatment.[142] The Enabling Clause emphasized Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries in global trade.[143] It became the third major legal measure within GATT aimed at promoting SDT.

The Enabling Clause solidified SDT as an integral part of international trade law, ensuring that developing countries received more favourable treatment to facilitate their active participation in global commerce. Over time, preferences and international commodity agreements became key mechanisms for implementing SDT.

However, the efficacy of commodity and preference agreements declined dramatically in spite of these actions. Moreover, the capability of international commodity

[141] John Whalley, Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries, 100 Eco. J. 1318, (1990).
[142] Hoekman, Bernard M. & Kostecki, Michel M,*supra* note 140.
[143] Id.

agreements was insufficient to reverse these negative tendencies. Additionally, many of the preferences granted to developing nations were subject to strict restrictions, which reduced their ability to resolve persistent economic inequalities.

The GATT framework, namely the amendments to Article XVIII, gave the developing nations the leeway to enact protectionist policies while continuing to participate in global trade. These strategies initially aided emerging countries in strengthening their political and economic independence. However, it was short-lived. Productivity stagnated and production inefficiencies threatened long-term economic equity in the absence of competition.[144]

By the early 1980s, there was a growing consensus that both efficiency and equity could be better achieved through an open-market economy guided by competition. Many developing countries, regardless of ideological orientation, began shifting towards trade liberalization. This shift created momentum for the Uruguay Round negotiations, which ultimately led to the establishment of the WTO in 1995. The WTO, shaped by the prevailing neoliberal economic philosophy of the 1980s and 1990s, brought about a significant transformation in the application of SDT principles.[145]

3.3.2 Special and Differential Treatment under WTO

One of the central principles of the World Trade Organization is Special and Differential Treatment, which was created to address the particular difficulties that developing and least-developed nations face in the international trade system. In WTO agreements, S&D provisions give these nations preferential treatment since they acknowledge their economic weaknesses and limited ability to carry out trade commitments on an equal footing with industrialized nations.[146] These clauses seek to facilitate the integration of developing and LDC members into the global economy, encourage economic progress, and encourage fair participation in international trade.

S&D provisions are incorporated into several WTO agreements, including the General Agreement on Tariffs and Trade (GATT) 1994, the Agreement on Agriculture, the

[144] John Whalley, Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries, 100 The Economic Journal 403, (1990).
[145] Bernard Hoekman, Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential
Treatment, 8 J. Int'l Eco. L. 409, 422 (2005).
[146] Anoop Kumar, *supra* note 124.

Agreement on Subsidies and Countervailing Measures, the Agreement on Trade-Related Aspects of Intellectual Property Rights, and the Dispute Settlement Understanding. These provisions are intended to ensure fair trade opportunities while acknowledging economic disparities between members.[147]

3.3.3 Special and Differential Treatment under the DSU

The challenging conditions faced by developing and least-developed nations are taken into consideration under the World Trade Organization's Dispute Settlement Understanding.[148] In order to guarantee that these members can successfully engage in the dispute resolution procedures, the DSU has incorporated special and differential treatment rules that are applicable to developing and underdeveloped countries. These include flexible deadlines, the ability to use expedited procedures, access to legal aid, and consideration of the potential economic effects of disputes on developing and least-developed nations.

- **Special and Differential Treatment during Consultations**

Article 4.10 of the DSU mandates that WTO members should pay special attention to the particular problems and interests of developing country members during consultations. The parties may agree to prolong the consultation period if the dispute concerns a measure implemented by a developing country. Furthermore, when parties cannot agree on the resolution of the dispute, Article 12.10 permits the chairperson of the Dispute Settlement Body (DSB) to decide whether to extend the consultation time further.

- **Special and Differential Treatment at the Panel Stage**

If a dispute involves a developing country and a developed country, Article 8.10 of the DSU requires that, upon request, the panel include at least one panelist from a developing country. Furthermore, when a developing country is a respondent, Article 12.10 ensures that the panel accords it sufficient time to prepare and present its argumentation, although the overall dispute settlement timeline remains unchanged.[149]

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[147] J. Michael Finger, Developing Countries in the WTO System, 31 World Economy 887, (2008).
[148] Andrew Mitchell, A Legal Principle of Special and Differential Treatment for WTO Disputes, 5 World Trade Review 446, (2006).
[149] For example, in DS90 India – Quantitative Restrictions, India requested additional time to prepare and present its first written submission, pursuant to Article 12.10 of the DSU, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds90_e.htm.

Article 12.11 also requires that panel reports explicitly indicate how S&D provisions have been taken into account.

- **Special and Differential Treatment at the Implementation Stage**

Issues affecting developing member countries shall get special consideration during implementation, as provided under Article 21.2 of the DSU. In reality, arbitrators have taken into account both the economic consequences for the developing nation in question as well as the influence on trade. Furthermore, in accordance with Article 21.7, the DSB may take appropriate measures beyond routine surveillance if a developing nation expresses concerns. Article 21.8 reaffirms that both trade coverage and wider economic ramifications should be taken into account when evaluating the application of judgments.

- **Accelerated Procedures – Decision of 5 April 1966**

A special accelerated procedure is available under the Decision of 5 April 1966 for disputes where a developing country member brings a complaint against a developed country member. If a developing country member brings a complaint against a developed country member, it has the discretionary right to invoke, as an alternative to the provisions in Articles 4, 5, 6 and 12 of the DSU, the accelerated procedures of the Decision of 5 April 1966.[150] Under this mechanism, the WTO Director-General may use good offices to facilitate dispute resolution. If consultations fail, a report is submitted to the DSB, which then establishes a panel with the approval of the parties. The panel considers the trade and economic development impacts of the challenged measures and must submit its findings within sixty days. Despite its availability, this procedure has been rarely used due to the increasing complexity of WTO disputes and the preference of developing countries for more time to prepare submissions.

- **Special Dispute Settlement Provisions for Least-Developed Country Members**

Article 12.10 is also applied in Panel Reports, EC – Bananas III (Article 21.5 – Ecuador II), paras. 2.73–2.76 and 7.505–7.508; Philippines – Distilled Spirits, paras. 7.189–7.195; Dominican Republic – Safeguard Measures, paras. 7.442–7.444; Argentina – Import Measures, paras. 6.9–6.10; Peru – Agricultural Products, paras. 7.529–7.531; Colombia – Textiles, paras. 7.601–7.606; and India – Solar Cells, fn. 6 to para. 1.7.

[150] BISD 14S/18. The Decision of 5 April 1966 is reproduced in Annex VIII.

LDCs benefit from additional protections under Article 24 of the DSU. Article 24.1 calls for WTO members to exercise due restraint when raising complaints against an LDC. Members are also encouraged to be cautious when seeking compensation or requesting authorization to suspend concessions against an LDC. In practice, this provision has been applied in cases such as US – Upland Cotton, where the panel noted its consideration of Benin and Chad's special circumstances.[151] Article 24.2 of the DSU allows LDCs to request good offices, conciliation, and mediation by the WTO Director-General or the DSB chairperson if consultations fail. These mechanisms aim to help LDCs resolve disputes before formal panel proceedings commence.

- **Legal Assistance for Developing and Least-Developed Countries**

All members receive legal help from the WTO Secretariat, although developing and least-developed nations receive extra assistance. In order to ensure impartiality in dispute resolution, developing nations may request a qualified legal expert from the WTO's technical cooperation services under Article 27.2 of the DSU.

For this, independent consultants are hired by the WTO Secretariat's Institute for Training and Technical Cooperation.[152] In practice, the Secretariat has offered legal aid to all members of developing nations who have asked for it since 1995, keeping in mind that "the WTO Secretariat is bound by an obligation of neutrality and any legal assistance it provides can only be very limited".[153]

Under Article 27.3 of the DSU, the WTO Secretariat also carries out technical cooperation and training initiatives. Building legal capacity in poor and least-developed nations is the goal of these programs, which involve training sessions in Geneva and overseas.

- **Representation by External Counsel and the Advisory Centre on WTO Law (ACWL)**

External counsel is available to developing nations for conflict resolution procedures at all stages. But legal fees are frequently unaffordable. An alternative is provided by the

[151] DS267: United States — Subsidies on Upland Cotton, World Trade Organization, (March 25.2025), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm
[152] B. N. Pandey and Prabhat Kumar Saha, Technical Cooperation under Trips Agreement: Flexibilities And Options For Developing Countries, 53 Journal of the Indian Law Institute 4, (2011).
[153] Lamy lauds role of Advisory Centre on WTO Law, World Trade Organization, (March 25.2025), https://www.wto.org/english/news_e/sppl_e/sppl207_e.htm

Advisory Centre on WTO Law, which gives free legal aid to LDCs and inexpensive legal aid to developing nations. The ACWL was founded in 2001 upon the initiative of a number of countries, such as the Netherlands and Colombia, to provide legal views on WTO law and negotiation issues in addition to assisting developing nations in WTO disputes.[154] It has contributed hundreds of legal opinions and been involved in about 20% of all WTO disputes. Thirty-nine developing countries are members of the independent intergovernmental organization known as the ACWL.

While LDCs receive their services for free, developing nations that have made contributions to its Endowment Fund enjoy them at drastically discounted rates. Also, all least developed countries that are members of the WTO are entitled to make use of the services offered by ACWL irrespective of whether they are members of the ACWL or not. Additionally, the ACWL offers secondment and training programs to improve WTO members' legal capabilities.

The legal services provided by the ACWL fall into two categories:[155]

(i) assistance in WTO dispute settlement proceedings; and
(ii) assistance on matters not subject to dispute settlement proceedings.

The ACWL assists and represents WTO members throughout dispute settlement proceedings by, for example, drafting submissions and participating in oral pleadings before panels and the Appellate Body. In respect of matters that are not related to dispute settlement, the ACWL assists by, for example, drafting opinions on issues arising at WTO negotiations, or on measures taken or contemplated by ACWL members or least-developed countries.[156] In addition, the ACWL provides training on WTO law and operates a secondment programme, whereby officials from countries that are members of the ACWL gain valuable expertise on WTO procedural law.

Hence, the DSU's special and differential treatment provisions ensure that developing and least-developed country members receive adequate support and flexibility in WTO dispute settlement. These provisions aim to mitigate resource constraints and legal disadvantages, facilitating fairer participation in WTO litigation. However, despite

[154] Advisory Centre on WTO Law (ACWL), UNITED NATIONS (March 26.2025), https://www.un.org/ldcportal/content/advisory-centre-wto-law-acwl
[155] World Trade Organization, *supra* note 51.
[156] World Trade Organization, *supra* note 51.

these measures, in practice, developing countries often face challenges in fully utilizing the dispute settlement system due to financial and technical limitations.

3.4 TRIPS AND DEVELOPING COUNTRIES

When the World Trade Organization came into force in 1994, the Trade-Related Aspects of Intellectual Property Rights Agreement was introduced as a compulsory requirement for WTO membership. However, at the time, very few developing and least-developed countries (LDCs) had intellectual property laws or enforcement mechanisms that matched those of developed countries. Historically, some nations had used intellectual property laws as a means of protectionism, for the purpose of restricting foreign competition and to foster their domestic industries.[157] One of the key reasons for integrating IP regulations into the WTO framework was to eliminate these potential barriers to international trade.[158] However, even after 30 years, the IP protection is not uniform among nations and often depends on a country's level of economic development.

Many developing countries initially opposed the introduction of TRIPS due to concerns that strong IP protection would grant monopoly power to rights holders, limiting access to knowledge-based goods and essential pharmaceutical products.[159] An example is India, which, before 2005, did not recognize pharmaceutical product patents. As a result, many Indian companies became specialized in the production of generic drugs, which do not require patent protection and are typically more affordable than patented alternatives. However, participation in the WTO and integration into the global trade system created economic incentives for these countries to comply with TRIPS despite their initial resistance.

A significant difference between the IP protection required by TRIPS and the voluntary adoption of IP laws prior to WTO membership is that the former reduces concerns about endogeneity in IP policy.[160] This means that countries could no longer independently

[157] Mercedes Delgado, Margaret Kyle and Anita M. McGahan, Intellectual Property Protection And The Geography Of Trade, 61 The Journal of Industrial Economics 3, (2013).
[158] Id at 737.
[159] Biswajit Dhar and C. Niranjan Rao Dunkel Draft on TRIPS: Complete Denial of Developing Countries' Interests, 27 Economic and Political Weekly 6 (1998).,
[160] Anna Lanoszka, The Global Politics of Intellectual Property Rights and Pharmaceutical Drug Policies in Developing Countries, 24 International Political Science Review 2, (2003).

shape their IP frameworks based on their domestic innovation capacity; instead, they had to follow TRIPS mandates as a condition of WTO membership.

Despite having to comply with TRIPS, developing and least-developed countries successfully negotiated for several important exemptions and transition periods to delay implementation. When the WTO was formed, different compliance deadlines were established for various categories of member states. Developed countries were required to ensure their laws and enforcement mechanisms were in line with the TRIPS requirements within one year by January 1, 1996. However, most developed nations already had strong IP laws in place, making this adjustment relatively straightforward.

By contrast, developing countries that joined the WTO were granted an extended transition period of five years, giving them until January 1, 2000, to implement TRIPS-compliant IP protection. At the time of the WTO's formation, 69 nations, including some high-income countries like Israel and South Korea, self-designated as developing countries, enabling them to benefit from these extended deadlines.[161]

Subsequently, the WTO approved additional extensions for developing countries under specific circumstances. Countries that did not previously provide product patent protection in a certain field of technology by January 1, 2000, were granted up to five additional years to comply, extending their deadline to January 1, 2005. This provision applied particularly to pharmaceuticals and agricultural chemical products. However, products from these sectors that were already being sold during the transition period were permitted to enjoy exclusive marketing rights for up to five years or until a product patent was granted whichever came first.

For Least-Developed Countries (LDCs), which are classified according to United Nations criteria, the compliance period was even more lenient. LDCs were originally given until January 1, 2006, to fully implement TRIPS provisions. However, recognizing the significant challenges that these countries faced in enforcing IP regulations, the 2002 Doha Round negotiations further extended this deadline. Specifically, LDCs were granted two separate extensions:

[161] Peter K. Yu, Are Developing Countries Playing A Better Trips Game? 16 Journal of International Law and Foreign Affairs, 2. (2011).

1. The deadline for implementing pharmaceutical patent protection (including protection for undisclosed information and trade secrets) was extended to 2016.
2. For all other categories of intellectual property, the transition period was extended to 2013.

However, in 2013 it was again extended till 1st July 2021. In 2021, the Council extended it further until 1st July 2034 or when a particular country ceases to be in the least developed category, if that happens before 2034.[162]

As a result, countries adopted TRIPS regulations at different times, depending on their level of economic development and their specific classification within the WTO framework, and some countries haven't yet fully complied with their obligations.

3.5 SPECIAL AND DIFFERENTIAL TREATMENT UNDER TRIPS

The developing nations face structural disadvantages in engaging with global trade. Consequently, the global community has acknowledged that these countries should, in principle, be subject to different rules and obligations than developed countries and that the latter should fulfil their trade commitments in ways that support the development goals of the former. Reflecting this, the principle of Special and Differential Treatment (SDT) was incorporated into the WTO agreements resulting from the Uruguay Round.

Before the Trade-Related Aspects of Intellectual Property Rights Agreement was brought into force by the developed countries during the Uruguay round, developing countries had applied very different rules to protect intellectual property rights in their national jurisdictions.[163] By and large, there was less protection of IPRs than in developed countries for various reasons, including the difficulty of enforcement as well as the belief that strong IPR protection compromised the diffusion of technology essential for development.[164] In light of these very large differences in the rules affecting IPRs, one may have expected to find extensive SDT provisions in the TRIPS

[162] Responding to least developed countries' special needs in intellectual property, World Trade Organization, (March 25.2025), https://www.wto.org/english/tratop_e/trips_e/ldc_e.htm#:~:text=Transition%20period%20extension%20under%20TRIPS%20Article%2066.1&text=Most%20recently%2C%20on%2029%20June,if%20that%20happens%20before%202034.

[163] Hiroko Yamane, Interpreting TRIPS: Globalisation of Intellectual Property Rights and Access to Medicines, (1st ed, London: Hart Publishing, 2011).

[164] Donald G. Richards, Intellectual Property Rights and Global Capitalism The Political Economy of the TRIPS Agreement (1st ed. Routledge Taylor & Francis Ltd, 2004)

Agreement. Paradoxically, while the Agreement contains a certain amount of in-built flexibility, there are very few provisions calling for SDT of developing countries.

The SDT provisions under TRIPS are explicitly and implicitly embedded in several Articles, particularly in terms of transitional periods, technical assistance, and technology transfer.

Key provisions include:

3.5.1 Transitional Periods (Articles 65 & 66)

These are among the clearest expressions of Special treatment under the TRIPS.

- **Article 65.2**: Provided developing countries five years (until 2000) to comply with TRIPS obligations (compared to one year for developed countries).
- **Article 65.4**: Allowed developing countries an additional five years (until 2005) to extend patent protection to areas not previously covered.
- **Article 66.1**: LDCs were granted an initial 11-year transitional period (until 2006), which has since been extended multiple times (currently until 2034 for pharmaceutical products). These extensions have been crucial in providing LDCs the necessary legal and policy space to focus on development priorities such as health, education, and infrastructure before undertaking the complex requirements of IP enforcement.

3.5.2 Technology Transfer Obligations under Article 66.2

Article 66.2 of the TRIPS Agreement is particularly noteworthy because it places a positive obligation on developed countries to encourage the transfer of technology to LDCs. It requires developed country members to provide incentives to enterprises and institutions within their jurisdictions to promote and facilitate technology transfer to LDCs.[165] The aim is to make it possible for these nations to develop a "sound and viable technological base," which is essential for sustained economic expansion and significant involvement in the global economy.[166]

[165] B.N. Pandey, Prabhat Kumar Saha, Competition Flexibilities In The Trips Agreement: Implications For Technology Transfer And Consumer Welfare, 57 Journal Of The Indian Law Institute, 1,(2015).
[166] Apoorva Singh Vishnoi, Rishabha Meena, Technology Transfer at the WTO: Old Promises and New Hopes of the Developing World, 16 Global Trade and Customs Journal 7/8,(2021).

Despite its potential significance, the implementation of Article 66.2 has been limited and inconsistent. Most developed countries have interpreted this obligation narrowly, focusing on reporting existing aid or training programs rather than initiating specific, targeted technology transfer initiatives.[167] Many LDCs have voiced concerns regarding the non-binding nature of these incentives and the absence of quantifiable results, despite the establishment of annual reporting procedures, especially through the TRIPS Council. The mandate of Article 66.2 is still largely unfulfilled, and its potential for growth has been impeded by imprecise promises and inadequate accountability systems.

3.5.3 Technical and Financial Cooperation under Article 67

Complementing the technology transfer provisions, Article 67 of the TRIPS Agreement provides for technical and financial cooperation to developing countries and LDCs. Developed country members are obliged to offer support for the preparation of domestic IP laws, institutional capacity-building, enforcement mechanisms, and training of relevant stakeholders, such as judges, patent examiners, and policy-makers.[168]

In practice, technical assistance has been one of the more active dimensions of TRIPS SDT. The WTO, WIPO, and state development agencies have all sponsored a number of initiatives. Such aid, however, frequently suffers from being donor-driven and not being in line with the priorities or capacity of recipient nations to absorb it. Moreover, much of this assistance tends to focus on compliance and enforcement, rather than enabling the use of flexibilities or tailoring IP regimes to local developmental needs. Consequently, even though Article 67 offers a potentially useful assistance mechanism, it has frequently been applied in a way that strengthens TRIPS compliance rather than encouraging innovative ecosystems in recipient nations for development.

3.5.4 Flexibilities for Public Health (Doha Declaration 2001)

The Doha Declaration on the TRIPS Agreement and Public Health, which was adopted in 2001, was a significant turning point in the acceptance of SDT inside the TRIPS framework. The right of WTO members to fully employ TRIPS flexibilities,

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[167] Id.

[168] B. N. Pandey, Prabhat Kumar Saha, Technical Cooperation Under Trips Agreement: Flexibilities And Options For Developing Countries, 53 Journal Of The Indian Law Institute,4,(2011).

particularly in the field of public health, was reiterated in this declaration.[169] The agreement made it clear that TRIPS "does not and should not prevent Members from taking measures to protect public health," and that each Member's right to safeguard public health and advance universal access to medications should be supported by the way the Agreement is construed.[170]

Even though various flexibilities were incorporated in the TRIPS agreement itself, the developing countries were unable to make use of it due to bureaucratic complications, political pressure from developed nations, and fear of trade reprisals. The US, EU, and their research-based pharmaceutical enterprise initiated aggressive campaigns against countries that threatened to take advantage of the IPR-related policy options left open by the TRIPS Agreement.[171] The most visible case involved a multi-pronged attack against the government of the Republic of South Africa that combined government threats to impose trade and economic sanctions with private Pharma litigation to delay the implementation of health reform legislation.[172] Similarly, Brazil also had to face a similar attack from developed countries against its HIV/AIDS treatment program, which resulted in a WTO dispute.[173] Even though the specific objectives of the developed nations, especially the US, EU, and the pharma corporations, were not realized in these cases, the concerns of the developing countries with regard to using the special provisions under TRIPS came into the limelight, which ultimately led to the Doha Declarations.

Key flexibilities reinforced by the Doha Declaration include the use of compulsory licenses, parallel imports, and the freedom to determine the grounds upon which compulsory licenses are granted. The Declaration was particularly important for developing countries that lacked manufacturing capacities and needed to import generics.[174] It culminated in the 2003 Decision and the 2005 Protocol Amending

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[169] Frederick M. Abbott, The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO, 5 J. Int'l Econ. L. 469 (2002).
[170] Bryan C. Mercurio, TRIP Patents and Access to Life Saving Drugs in the Developing World, & MARQ. INTELL. PROP. L. REV. 211, 1 (2004)
[171] Frederick M. Abbott, 'The Enduring Enigma of TRIPS: A Challenge for the World Economic System', 1 JIEL 497 (1998).
[172] Id.
[173]Henning Grosse Ruse-Khan, The International Law Relation between TRIPS and Subsequent TRIPs-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities, 18 J. INTELL. PROP. L. 325 (2011).
[174] Ellen Hoen, TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha, 3 CHI. J. INT'L L. 27, 28 (2002).

TRIPS, which created a mechanism allowing Members to export medicines under compulsory licenses to countries lacking manufacturing capability. The Doha Declaration remains a cornerstone of SDT in TRIPS, symbolizing the broader struggle for equitable access to essential goods in the global IP regime.

Nevertheless, in the practical aspect, the utilization of the flexibilities, such as compulsory licensing, has been sporadic and fraught with political challenges. Many developing countries, although theoretically empowered to issue compulsory licenses, face external pressure from pharmaceutical companies, bilateral trade partners, and diplomatic channels. Because of these influences, nations are reluctant to assert their rights for fear of financial reprisals. The efficient operationalization of these flexibilities has also been hampered by capacity and administrative limitations.[175]

The implementation of Article 31bis, which facilitates the export of generic medicines under compulsory licenses to countries lacking manufacturing capacity, has also been largely ineffective, with only a handful of instances where the mechanism was used. (e.g., Rwanda importing drugs from Canada in 2007).[176] The procedural complexity and inefficiency of the system have rendered it more symbolic than practical.

3.6 ANALYSIS OF TRIPS DISPUTES

The patterns of participation in TRIPS-related disputes provide insight into how economic disparities influence access to the WTO Dispute Settlement Mechanism. The cases analyzed span from 1995 to 2024. [177]

Countries	Number of Cases as Complainant
United States (US)	18
European Union (EU)	10
China	1

[175] Jerome H. Reichman, Compulsory licensing of patented pharmaceutical inventions: evaluating the options, 37 J. LAW. MED. ETHICS 247, 255 (2009).
[176] Carlos M. Correa, Will the Amendment to the TRIPS Agreement Enhance Access to Medicines? SOUTH CENTRE POLICY BRIEF 57, 5 (2019).
[177] Disputes by agreement, *supra* note 109.

India	1
Brazil	2
Qatar	4
Indonesia	1
Cuba	1
Dominican Republic	1
Honduras	1
Ukraine	1
Korea	1
Australia	1
Canada	1

Countries	**Number of Cases as Respondents**
United States (US)	5
European Union (EU)	7
China	5

India	2
Brazil	1
Australia	5
Canada	2
Japan	3
Netherlands	2
Saudi Arabia	2
Argentina	2
Turkey	1
Bahrain	1
United Arab Emirates	1
Denmark	1
Ireland	1
Greece	1
Portugal	1
Sweden	1

Indonesia	1
Pakistan	1

A thorough analysis of the complainants in these TRIPS disputes shows that developed nations, especially the US and the EU, initiate the majority of the cases. Together, they are responsible for 28 out of 44 cases, with the US accounting for 18 and the EU for 10. In rare cases, South Korea, Australia, and Canada have initiated disputes. On the other hand, developing nations have filed comparatively fewer TRIPS lawsuits. They include four complaints from Qatar, two from Brazil, and one each from India, China, Indonesia, Cuba, the Dominican Republic, Honduras, and Ukraine. The substantial disparity in how various nations access and use the DSM with regard to TRIPS enforcement is seen in this distribution.

On the respondent side, the data indicate that both developed and developing countries have been targeted in TRIPS complaints. At the conclusion of the transitional periods provided under the TRIPS Agreement, particularly the five-year extension for developing countries, there was a widely held expectation that the number of disputes initiated against developing countries would surge.[178] However, contrary to this expectation, the anticipated flood of TRIPS disputes targeting developing countries did not materialize. In fact, developed countries such as the European Union emerged as the most frequent respondents, with a total of seven disputes. The United States and China each appear as respondents in five disputes. Australia follows closely, also appearing in five disputes. Developing countries have also been respondents in a noticeable number of cases, including India (2), Argentina (2), and Saudi Arabia (2). Turkey, Brazil, Indonesia, Bahrain, the United Arab Emirates, Pakistan, Portugal, Greece, Sweden, Denmark, and Ireland have each been respondents in one case.

3.7 ANALYSIS OF THE TABLE

The TRIPS disputes pertained to the domestic enforcement of IPRs, copyright, trademarks, patents, and the national treatment obligation. There is a clear imbalance

[178] Yoshifumi Fukunaga, *supra* note 13.

in how nations use the WTO's dispute resolution process in TRIPS disputes. With the United States (18 cases) and the European Union (10 cases) starting the majority of TRIPS disputes, developed nations predominate in the role of complainants. Their extensive representation indicates their superior technical expertise, legal ability, and strategic involvement in defending intellectual property rights globally. These nations possess the institutional framework necessary to keep an eye on compliance in other jurisdictions and the financial means to bring legal action when breaches are suspected. Moreover, their private sectors, particularly the pharmaceutical, entertainment, and technology industries, often exert pressure to enforce IP standards abroad. In contrast, developing countries are far less visible as complainants.

On the respondent side, the picture is more balanced but still instructive. While developing countries such as India, Brazil, Argentina, and Indonesia have faced TRIPS disputes, developed countries like the United States, the EU and Australia appear just as frequently. This implies that developing countries are not the only ones targeted by TRIPS enforcement. However, developed nations are better equipped to defend themselves, frequently with the help of highly skilled legal teams and more bargaining power.[179] In contrast, when developing countries are respondents, the risk of compliance challenges or unfavourable outcomes may be more burdensome.[180]

- **TRIPS disputes initiated by developed countries**

Out of the 30 Cases initiated by developed countries, 24 cases have been resolved, i.e., 80% of cases.[181] The analysis of these disputes shows a clear success rate to the complainants. The WTO DSM ruled in favour of the complainant in 10 of these cases.[182] The remaining 14 cases have been resolved through mutually agreed solutions. Out of

[179] Bown, Chad P., *supra* note 120.
[180] Busch, Marc L. & Eric Reinhardt, Developing Countries and GATT/WTO Dispute Settlement", 37 Journal of World Trade, 2003.
[181] Disputes by Agreement, *supra* note 109.
[182] DS583 Türkiye — Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products, DS362 China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights, DS176 United States — Section 211 Omnibus Appropriations Act of 1998, DS174 European Union — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, DS290 European Union — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, DS170 Canada — Term of Patent Protection, DS160 United States — Section 110(5) of US Copyright Act, DS160 United States — Section 110(5) of US Copyright Act, DS114 Canada — Patent Protection of Pharmaceutical Products, DS79 India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, DS59 Indonesia — Certain Measures Affecting the Automobile Industry,DS50 India — Patent Protection for Pharmaceutical and Agricultural Chemical Products.

these 14 cases initiated by a developed country, which were resolved through the mutually agreed solution, only 6 of them were against developing countries.[183]

- **Decision in favour of Complainant**

The resolution patterns of TRIPS disputes initiated by developed countries reveal important findings into how economic disparity shapes the outcomes and international intellectual property enforcement. Out of 30 such cases, 24 reached resolution, an impressively high rate that signals the strategic efficiency and legal advantage wielded by developed country complainants. The WTO DSM ruled in favour of the complainant in 10 of these cases, demonstrating that developed countries not only access the DSM more often but also win the cases, most likely due to their strong legal capacity, institutional preparedness, and ability to sustain prolonged litigation.

- **Mutually agreed solution (MAS)**

The large number of cases that have been settled through mutually agreed solutions as opposed to panel or Appellate Body decisions is especially noteworthy. In certain instances, this led to the enactment of laws that brought the legal standards of IP protection by the member complained against to the satisfaction of the complaining party. In other instances, complaints were dismissed when the opposing party provided a satisfactory guarantee regarding the practical application of the relevant legal provisions.[184]

For example, in Pakistan—Patent Protection,[185] the adoption of an ordinance to implement a "mailbox system" for receiving patent applications for pharmaceutical substances and the granting of exclusive marketing rights was the mutually agreed solution by all parties. Another example is the Brazil-Patent case.[186] In this the US

[183] DS372 China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers, DS199 Brazil — Measures Affecting Patent Protection, DS196 Argentina — Certain Measures on the Protection of Patents and Test Data, DS171 Argentina — Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals, DS37 Portugal — Patent Protection under the Industrial Property Act, DS36 Pakistan — Patent Protection for Pharmaceutical and Agricultural Chemical Products.

[184] Nirmalya Syam, A Review of WTO Disputes on TRIPS: Implications for Use of Flexibilities for Public Health, S. Ctr. Research Paper No. 146 (2022).

[185] DS36: Pakistan — Patent Protection for Pharmaceutical and Agricultural Chemical Products, World Trade Organization, (March 27.2025).
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds36_e.htm

[186] DS199: Brazil — Measures Affecting Patent Protection, World Trade Organization, (March 27.2025), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds199_e.htm

agreed to withdraw its complaint against a Brazilian law with regard to a provision that dealt with compulsory licensing on the condition that if this provision is applied, prior consultation would be undertaken with the US.[187] Brazil had to agree to this even though throughout the proceedings, it consistently held that the provision was not against any TRIPS provisions.

Also, in some instances, the mutually agreed solutions have had the effect of limiting the TRIPS flexibilities by respondents, especially when developed countries are the complainants in the cases. In Argentina–Patents dispute,[188] resolving the case through MAS, Argentina agreed to conditions that significantly curtailed its ability to grant compulsory licences limiting their issuance for anti-competitive practices only after a prior finding of abuse by a national competition authority, a requirement not found in TRIPS. The agreement also imposed restrictions on parallel importation, requiring voluntary licensing for imports even though Article 6 of TRIPS excludes such issues from dispute settlement. Furthermore, Argentina had to amend its patent law, shifting the burden of proof in process patent disputes away from the patent holder to the defendant, exceeding TRIPS Article 34 obligations.[189] The MAS did not address U.S. demands on data exclusivity but left open the possibility of future law amendments depending on potential DSB rulings.[190] While the case did not proceed to a panel, the settlement effectively limited Argentina's TRIPS flexibilities and demonstrated how developed countries may use the DSM and MAS as tools of pressure, leading to outcomes beyond TRIPS requirements, often to the detriment of developing countries.[191]

This may be because developed nations frequently apply economic and diplomatic pressure outside of the official adjudicatory process, resulting in early or negotiated compliance. Moreover, developed countries may deliberately use the DSM as a

[187] Notification of Mutually Agreed Solution in Brazil — Measures Affecting Patent Protection, World Trade Organization, (JULY 19.2001). https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/IP/D/23A1.pdf&Open=True
[188] DS171: Argentina — Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals, World Trade Organization, (March 27.2025), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds171_e.htm
[189] United Nations Conference on Trade and Development, Intellectual Property in the World Trade Organization: Turning it into Developing Countries' Real Property (United Nations, New York and Geneva), 2010, https://unctad.org/system/files/official-document/ditctncd20068_en.pdf.
[190] Carlos M. Correa, Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines, 36 Case Western Reserve Journal of International Law, (2004).
[191] Daya Shanker, Argentina-US Mutually Agreed Solution, Economic Crisis in Argentina and Failure of the WTO Dispute Settlement System, 44 Journal of Law and Technology 4, (2004).

coercive tool not solely for the purpose of seeking legal remedies but to compel compliance through the mere threat of proceedings.

However, only six of the cases resolved through mutually agreed solutions had respondents from developing nations, indicating that when the other party is a developing nation, developed nations might be more likely to pursue litigation as opposed to settlement, as the developed nations have higher chances of winning.

Also, another aspect that this trend indicates is that, as a result, many potential TRIPS-related disputes may be resolved behind closed doors without even reaching the consultation stage of the DSM. This hidden layer of informal resolution contributes to the relatively low number of formal TRIPS disputes on record. Hence, while the DSM is formally open to all members, the data suggests that developed countries are far better positioned to use it effectively, both as complainants and as negotiators.

- **TRIPS disputes raised by developing countries**

The developing countries initiated 14 TRIPS disputes out of which 8 cases can be said to have culminated ie only 57.14%.[192] However, the trend in cases raised by developing countries is different from that of developed countries. Out of the 8 cases[193], 3 cases has been withdrawn/terminated[194] in which 2 cases were against developed

[192] Disputes by agreement, supra note 109.

[193] DS590 Japan — Measures Related to the Exportation of Products and Technology to Korea, DS567 Saudi Arabia, Kingdom of — Measures Concerning the Protection of Intellectual Property Rights, DS526 United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, DS467 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, DS458 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, DS441 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, DS435 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, DS434 Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging.

[194] DS590 Japan — Measures Related to the Exportation of Products and Technology to Korea, DS567 Saudi Arabia, Kingdom of — Measures Concerning the Protection of Intellectual Property Rights, DS434 Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging.

countries.[195]Authority for the panel lapsed in 1 case.[196] WTO DSM ruled against the complainants in 4 cases, which were all against developed nations.[197]

The resolution rate is significantly lower for disputes initiated by developing countries as compared to disputes initiated by developed countries. This points to key barriers that developing countries face in following through with dispute proceedings.

- **Mutually agreed solutions**

Moreover, another important point is that none of these cases have been resolved through a mutually agreed solution. This indicates the structural challenges that developing countries face in leveraging the DSM. Several interlinked factors may explain this trend. Developing countries often lack the negotiating capital, both in terms of economic leverage and diplomatic influence, to induce developed country respondents to engage in meaningful settlement discussions, unlike their developed counterparts, as they are not dominant players in global trade. Also, they are less able to use the threat of prolonged litigation or retaliatory measures as bargaining chips, which weakens their position in reaching negotiated outcomes.[198]

3.8 THIRD PARTIES IN WTO DSM

According to the Dispute Settlement Understanding rules, a WTO member may also participate as a third party in the panel procedures and consultations.[199] To participate in the panel proceedings, the members who wish to participate as third parties must have a "substantial interest" in the matter before the panel and they should also notify their interest to the DSB.[200] This requirement differs from that of the consultations

[195] DS590 Japan — Measures Related to the Exportation of Products and Technology to Korea, DS434 Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging.
[196] DS526 United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights.
[197] DS467 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging,DS458 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, DS441 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, DS435 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging.
[198] Bown, Chad P. & Hoekman, Bernard. WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector, 8 J. Int'l Econ. L. 861, (2005).
[199] Dispute Settlement Understanding, Article 10.
[200] Id, Article 10.2.

stage, where members wanting to join as third parties in the consultations are required to have a "substantial trade interest" and, in practice, must be accepted by the respondent. Also, unlike at the consultations stage, neither disputing party has the right to prevent another WTO member from being a third party. In practice, requiring just a "substantial interest," which could be of a systemic nature, leaves the door open to any WTO member wanting to become a third party to panel proceedings without the respondent being able to block it.

Being a third party offers the advantage of receiving the initial submissions of the disputing parties and being heard by the panel and the parties. The panel report, however, will not include conclusions and recommendations with respect to the third parties.[201]

The DSU grants limited rights to third parties and draws clear distinctions between parties in the dispute and third parties. The first is the "opportunity to be heard by the panel."[202] Second, third parties have the "opportunity to make written submissions to the panel."[203] Finally, third parties "shall receive the submissions of the parties to the dispute to the first meeting of the panel".[204]

For developing countries that do not have the financial or legal means to initiate a dispute against another member, they can choose to join as a third party in the dispute. For developing countries and recently acceded members, third-party participation can also serve as a means of learning. Legal capacity has been found to be driven not only by a country's wealth but also by experience.[205]

- **Third-Party In TRIPS Disputes.**

TRIPS-related disputes at the WTO often attract a wide range of third-party participants due to the significance of intellectual property. Unlike other trade disputes, TRIPS cases frequently involve cross-cutting issues such as public health and access to medicines. Hence, the ruling of the WTO panel may have an impact on many member nations. Hence, developed and developing countries engage as third parties to safeguard

[201] A Handbook on the WTO Dispute Settlement System (Peter Van den Bossche ed., 2d ed. 2017).
[202] Dispute Settlement Understanding, Article 10.2
[203] Id.
[204] Dispute Settlement Understanding, Article 10.3.
[205] Leslie Johns and Krzysztof J. Pelc, Who Gets to Be In the Room? Manipulating Participation in WTO Disputes,68 International Organization Foundation 3, (2014).

their policy interests; however, developing nations engage in disputes more frequently as third parties.

A few examples would be: In Canada – Patent Protection for Pharmaceutical Product case,[206] Australia, Brazil, Colombia, Cuba, India, Israel, Japan, Poland, Switzerland, Thailand, USA joined the dispute as third parties. In Brazil- Measures affecting Patent protection, the Dominican Republic, Honduras, India, and Japan were the third parties. In China – Intellectual Property Rights[207], the third parties were Argentina, Australia, Brazil, Canada, EU, India, Japan, Korea, Mexico, Chinese Taipei, Thailand, and Turkey. In the European Union and a Member State - Seizure of Generic Drugs in Transit, [208] Canada, China, Ecuador, India, Japan and Turkey requested to join as third parties. In the series of Australia -tobacco products and packaging dispute, 39 members joined as a third party.[209]

3.9 INDIA'S EXPERIENCE IN TRIPS DISPUTES

Since the WTO's founding in 1995, India has been an active member and has steadily become one of the developing nations most involved in the organization's Dispute Settlement Mechanism.[210] India has participated in multiple disputes as both a complainant and a respondent because it understands the strategic significance of international trade regulations for its expanding economy.[211] Its involvement reflects a larger effort to establish its rights inside the international trade regime and safeguard

[206] Canada — Patent Protection of Pharmaceutical Products, World Trade Organization, (March 28.2025), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm
[207] DS362: China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights, World Trade Organization, (March 28.2025), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm
[208] DS409: European Union and a Member State — Seizure of Generic Drugs in Transit, World Trade Organization,(March 28.2025), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds409_e.html
[209] DS435: Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, World Trade Organization, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm (Member countries who joined as third party; Argentina; Brazil; Canada; Chile; China; Cuba; Dominican Republic; European Union; India; Indonesia; Japan; Korea, Republic of; New Zealand; Nicaragua; Nigeria; Norway; Oman; Panama; Philippines; South Africa; Chinese Taipei; Thailand; Ukraine; United States; Uruguay; Zimbabwe; Guatemala; Singapore; Guatemala; Malawi; Malaysia; Mexico; Singapore; Turkey; Zambia; Peru; Ecuador). Also, in DS441, DS458, DS467.
[210] Abhijit Das and James J. Nedumpara, WTO dispute settlement at twenty: Insiders' reflections on India's participation. Indian Journal of International Law. (2016).
[211] Mark Daku and Krzysztof J. Pelc, Who Holds Influence over WTO Jurisprudence? 20 Journal of International Economic Law, 233-255 (2017).

domestic regulatory space, particularly in industries like technology, agriculture, and pharmaceuticals.

Within the domain of TRIPS, India's most prominent engagement came as a respondent in India – Patents (WT/DS50 and WT/DS79), where the United States and the European Communities respectively challenged India's implementation of transitional obligations under Articles 70.8(a) and 70.9 of TRIPS, which required WTO members, even during their transitional periods, to establish a so-called "mailbox system" for pharmaceutical and agricultural patent applications and to provide exclusive marketing rights (EMRs) for such filings.

India, exercising its right as a developing country, had opted to defer product patent protection in these sectors until the deadline of 1 January 2005, as allowed under Article 65 of TRIPS. However, the U.S. and the EC contended that India had failed to establish a legally sound mechanism to receive and preserve patent applications filed during this transitional period and that it had not adequately ensured exclusive marketing rights as required. India argued that it had, through administrative instructions, allowed the filing of patent applications and simply postponed their examination in line with the transition clause.

India's stand in the dispute was that Article 70.8(a) merely required a mechanism for such applications to be submitted, and that this was already possible under its existing patent law.[212] In India's opinion, the existing legislation allowed for the submission of patent applications for agricultural and pharmaceutical products, and the government had issued an administrative order suspending the review of such applications until the end of the transition period. India further argued that Article 70.9 did not mandate the implementation of a system for granting EMRs from the date the TRIPS Agreement came into force, as it does not specify such a requirement.[213]

However, the panel rejected this contention and made India liable even though India was going through the transitional period. According to the panel and the AB, India had violated its obligations outlined in TRIPS Articles 70.8 (a) and 70.9.[214]The

[212] Report of the panel in India - Patent Protection for Pharmaceutical and Agriculture, World Trade Organization, (Sept 5. 1997), https://www.worldtradelaw.net/reports/wtopanels/india-patents(panel)(us).pdf.download
[213] Id.
[214] Id.

administrative instructions, the panel held, could not substitute for a formal legal mechanism to preserve the novelty and priority of mailbox applications.

- **Impact of the DSM decision on India**

India was thus found to be in violation of its TRIPS obligations in both disputes. Following this, India amended its domestic patent law in 1999 through the Patents (Amendment) Act, establishing a mailbox system and providing EMRs.[215] While India complied with the ruling, the case had broader consequences.[216] It set a precedent that narrowed the scope of transitional flexibilities available to developing countries under TRIPS. The ruling introduced a judicial expectation of a "sound legal basis", implying that those administrative mechanisms, even if functionally equivalent, would not suffice. This effectively raised the standard of implementation for other countries similarly situated and set a tone of strict interpretation of TRIPS obligations.

Although the India–Patents dispute concerned transitional obligations that are now obsolete for most developing countries, the panel and Appellate Body reports have had significant implications for interpreting TRIPS obligations. The AB found India in violation of Articles 70.8(a) and 70.9 of TRIPS, but importantly rejected the notion of "legitimate expectations" beyond the treaty text.[217]

The panel interpreted Articles 70.8(a) and 70.9 beyond their text. For e.g., reading in requirements like a legally sound mailbox system or a date for granting Exclusive Marketing Rights. Despite TRIPS Article 1.1 allowing flexibility in implementation methods, the AB affirmed that such national measures could be scrutinized by panels. Notably, the AB reviewed Indian laws not examined by the panel, blurring the distinction between legal and factual questions and effectively expanding its mandate under the DSU.[218]

The case also raises questions about the panel's interpretative role. Some scholars argue that when TRIPS provisions are unclear, panels should declare non-liquet (no conclusion possible) instead of filling gaps, leaving formal interpretation to the WTO

[215] Chaudhuri, Sudip. The WTO and India's Pharmaceuticals Industry: Patent Protection, TRIPS, and Developing Countries, 35 Oxford Development Studies, (2005).
[216] Prabhu Ram, India's New "TRIPS-Compliant" Patent Regime Between Drug Patents And The Right To Health, Chicago-Kent Journal Of Intellectual Property, (2006).
[217] Nirmalya Syam, *supra* note 184.
[218] Carlos M. Correa, Trade-Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement, p.27 (2nd ed. Oxford University Press, Oxford, 2020).

membership per DSU Article 3.9 and WTO Article IX.2. Panels and the AB arguably overstepped by issuing binding interpretations rather than suggestions for DSB consideration.

3.10 CONCLUSION

The analysis of TRIPS disputes within the WTO Dispute Settlement Mechanism indicates that the formal equality of members under the WTO framework masks significant economic disparities in terms of access, participation, and outcomes as far as developing countries are concerned. While developing countries are theoretically entitled to the same rights and remedies as developed members, practical realities ranging from limited legal capacity to financial constraints and geopolitical pressure continue to undermine their ability to fully utilize the DSM.

The distribution of TRIPS disputes demonstrates a clear inequality: developed countries, particularly the United States and the European Union, dominate as complainants, initiating the vast majority of cases. In contrast to these, developing countries initiate a smaller number of cases, and even when they do, they face lower resolution rates and higher attrition. None of the TRIPS disputes brought by developing countries have ended in mutually agreed solutions, and those that proceeded to rulings have often ended unfavourably. This suggests not only weaker bargaining power but also a limited ability to convert legal entitlement into practical enforcement. By contrast, developed countries have successfully used the DSM not just to secure favourable rulings but also to pressure developing states into settlements that sometimes go beyond TRIPS requirements.

- **Cost Constraints and Unequal Access**

Two significant problems have arisen in the DSM because of the inability to temper power inequalities. The first is the cost associated with bringing complaints before the DSM.[219] The dispute process is extremely costly, and many developing countries simply do not have the resources required to mount a challenge.[220] This resource problem is exacerbated by the length of WTO disputes. Once the panel made its ruling, however, problems don't end. The greater problem for developing countries is the

[219] Gary N. Horlick, The WTO and Developing Countries,100 American Society of International Law, (2006).
[220] Id.

lengthy appeals process. Countries like the US, EU are able to afford such a lengthy process, but the effect on developing countries is crippling. Therefore, what is purported as an equal process is anything but: wealthier countries simply outspending poorer members until the poorer members have no money left to continue the dispute. This conclusion is supported by the WTO TRIPS disputes analysed in this chapter.

When possible, developing countries use their own legal staff, but in some instances, the complexity of WTO law proves too great. In these cases, they are left with no option but to contract legal services for a fee.

Moreover, TRIPS disputes, on average, take about years to reach a solution. Poor countries are thus left with a rising legal bill, but does not have ability to pay it. At some point, the financial obligations of participating in the DSM may simply be too great for these countries to meet, and hence, most of the developing countries join as third parties in the disputes rather than initiating the disputes themselves. However, adopting third-party status meant that these countries would not be able to support the complaint, and hence they would be unable to guide the discussion.[221]

Furthermore, the amount of money and time consumed by the process may dissuade the developing country members from bringing cases to the DSM. Developed countries have strong financial capabilities and are able to continue to extend the process of dispute settlement, ensuring a barrier to developing country participation.

- **Lack of resources**

Various efforts has been taken to ensure every member is equal under the WTO system through various special and differential treatment provisions, but however the problem of financial strength is a crucial issue that impedes developing countries from making use of the DSM effectively and ensuring their rights are protected., given the large transaction costs of settling disputes. To bring a case to the DSM, legal teams must be assembled, who are experts in WTO law. These experts are neither plentiful nor cheap. The lack of trained experts presents a serious impediment to the participation of developing country members in the dispute settlement process. As such, legal capacity is a major barrier to developing country participation in the DSM especially with regard to TRIPS.

[221] Jeffrey Walters, Power In WTO Dispute Settlement, 28 Journal of Third World Studies 1, (2011).

The Advisory Centre on WTO Law (ACWL) was established to address the financial and legal capacity gaps faced by developing countries in the WTO DSM. It provides free legal advice and subsidized representation to developing countries. However, while the ACWL was envisioned as a tool to level the legal playing field, its effectiveness has been limited. ACWL is under-resourced, relying on a small team, and is funded by voluntary contributions from developed countries, raising concerns about bias, especially when those funds are used to support cases against donor countries. Additionally, some developing countries have criticized the quality of legal support received and complained that it is ineffective. Compared to the extensive legal teams deployed by developed countries like the U.S., the support available through the ACWL remains inadequate. As a result, for many developing countries, DSM is biased and financially burdensome.

- **Lack of Leverage to Enforce WTO Ruling**

Compliance is another issue in the WTO DSM. While WTO dispute rulings are legally binding, the WTO lacks enforcement powers to compel compliance.[222] The responsibility to implement DSM recommendations lies with the member states themselves and their economic and political position in the global regime, and the only recourse for non-compliance is offering compensation or allowing retaliation options that often prove ineffective for developing countries. This structure even though was added to WTO structure to preserve member sovereignty, it inadvertently protects powerful countries from being held accountable.

In practice, major economies sometimes choose to compensate rather than adjust their policies, knowing that weaker countries lack the economic leverage to retaliate meaningfully. For developing nations, enforcing rulings against powerful trade partners remains a significant challenge, making formal victories in the DSM difficult to translate into real outcomes.

- **High Indirect Costs**

While deciding whether to file a WTO dispute, developing nations must contend with significant indirect costs, direct legal fees, and a limited ability to litigate. These include

[222] Mavroidis, Petros C., Remedies in the WTO Legal System: Between a Rock and a Hard Place, 11 European Journal of International Law 4, 763–813, (2000).

possible loss of development funds, trade problems, or diplomatic fallout, especially if the dispute is to be raised against a significant trading partner. For many developing countries, the strategic cost-benefit analysis of pursuing litigation often results in non-participation. Even when legal arguments are strong, the risk of damaging economic or political relations can outweigh the perceived benefits of a legal victory.

Hence, the WTO's Dispute Settlement Mechanism replicates the inequalities that exist globally. The DSM assumes all states are equal, when this is far from true in reality. Vast disparities exist with respect to economic and political strength, something the DSM takes for granted. The special treatment accorded to the weaker states falls short. Thus, while the North can hold the South accountable for failing to abide by its agreements by threatening to withdraw aid and debt relief, this relationship is not reciprocal.

CHAPTER- IV

THE APPELLATE BODY CRISIS AND ITS IMPACT ON TRIPS DISPUTES

4.1 INTRODUCTION

The once highly praised dispute settlement system of the World Trade Organization has declined, the major reason being the ongoing appellate crisis. Ambassador Ujal Bhatia, India's representative and former Chair of the WTO Appellate Body, in his address on 28 May 2019, captured the gravity of the situation facing the multilateral trading system as he sees it, in the following terms:

> "*The transformation of the AB from 'crown jewel' to a problem child in urgent need of reform in the space of a few months has been as dramatic as it is mystifying ... In the next few weeks and months, WTO Members face critical choices regarding the future of the multilateral trading system. Let us be clear – the crisis of the AB is the crisis of trade multilateralism ... The choices that are made will define the prospects for international cooperation in trade for the next decades*."[223]

His words underscore not only the institutional breakdown of the Appellate Body but also the broader threat it poses to the credibility and future of rules-based global trade.

Established in 1995 as part of the Dispute Settlement Understanding, the Appellate Body was designed to provide binding legal interpretations and review of panel decisions within a structured, two-tier adjudicatory framework. Its functioning is governed by a set of WTO rules, embodied in the Dispute Settlement Understanding or DSU, the 1995 Decision of the Dispute Settlement Body on the Establishment of the Appellate Body (1995 DSB Decision)[224], the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (Rules of Conduct)[225],

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[223] Launch of the WTO Appellate Body's Annual Report for 2018, Address by Ambassador Ujal Singh Bhatia, 2018 Chair of the Appellate Body, (28 May 2019). https://www.wto.org/english/tratop_e/dispu_e/ab_report_launch_e.htm.

[224] Establishment of the Appellate Body, Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body, WT/DSB/1, World Trade Organization, (June 19.1995), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=13919&CurrentCatalogueIdIndex=0&FullTextSearch

[225] Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes adopted by the Dispute Settlement Body, WT/DSB/RC/1, (Dec. 11, 1996), https://www.wto.org/english/tratop_e/dispu_e/rc_e.htm

and the Working Procedures for Appellate Review (Appellate Body Working Procedures).[226]

Collectively, these instruments were meant to ensure impartiality, consistency, and legal certainty in WTO dispute resolution. However, the paralysis of the Appellate Body since December 2019, because of the obstruction in judicial appointments, has dismantled this two-tier structure, leaving a legal void in the WTO's adjudication system.

4.2 THE APPELLATE BODY: STRUCTURE, ROLE, AND IMPORTANCE

Panels and the Appellate Body have different functions in the DSU's hierarchical framework. The Uruguay Round created the Appellate Body as a permanent entity to strengthen dispute resolution within the multilateral trade framework.[227] The Appellate Body serves as the second and final level of adjudication in the WTO's dispute settlement process. Its establishment marked a key innovation of the Uruguay Round, introducing a formal appeals mechanism into the multilateral trading system.

One of the main reasons for creating the Appellate Body was the quasi-automatic adoption of panel reports under the DSU framework.[228] According to Article 16.4 of the DSU, a panel report is adopted unless all WTO members present at the Dispute Settlement Body (DSB) meeting agree not to adopt it, a scenario that is virtually impossible in practice. This system removed the ability of the losing party to block an unfavourable report, as had been possible under the pre-WTO system, and also limited the influence of other members who might object to the panel's legal reasoning.

In this context, the Appellate Body was designed to offer a check on potential legal errors by panels and to serve as a mechanism for legal review. By doing so, it upholds the overarching objectives of the DSM: to ensure security and predictability in the rules-based trading system, as reflected in Article 3.2 of the DSU. Under Article 17.6, the Appellate Body's jurisdiction is limited to issues of law and the legal interpretations made by panels, and Article 17.13 authorizes it to uphold, reverse, or modify those

[226] Working Procedures for Appellate Review, WT/AB/WP/6, (Aug. 16 2010), https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm
[227] A Handbook on the WTO Dispute Settlement System (Peter Van den Bossche ed., 2d ed. 2017).
[228] John H. Jackson, The Case of the World Trade Organization,84 Oxford Journals 3,(2008).

findings. In certain instances, the Appellate Body has also gone beyond review by completing the legal reasoning where panels left issues unresolved.[229]

4.2.1 Composition and Appointment of Members

The Appellate Body was created under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, which forms an integral part of the WTO Agreement.[230] It consists of seven members, all appointed by the Dispute Settlement Body.

These individuals serve in their personal capacity and are not representatives of their respective governments.[231] The seven members of the Appellate Body are expected to be broadly representative of the WTO's diverse membership.[232]Although they do not represent their home countries, they act in an independent capacity for the WTO as a whole. Over the years, members have come from both developed and developing states such as Australia, India, Brazil, China, South Africa, and the United States.[233] At any given time, typically three or four members of the Appellate Body hail from developing countries.[234]

Appellate Body members have typically included a diverse group of professionals such as academics, practicing lawyers, senior judges, and former government officials.[235] Although the position is officially considered part-time, the actual workload varies depending on the volume of appeals, and members are required to be available on short notice at all times, as stipulated by Article 17.3 of the DSU. This significantly restricts their ability to take on other professional roles during their term.

Also, to maintain impartiality and independence, there is an express rule laid down in the DSU that no two Appellate Body members may be nationals of the same WTO member simultaneously.[236] The selection process for appointments requires consensus

[229] Jeffrey Walters, Power In WTO Dispute Settlement, 28 Journal of Third World Studies 1, (2011).
[230] Id at 31.
[231] John H. Jackson. *supra* note 228.
[232] Article 17.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[233] A Handbook on the WTO Dispute Settlement System, *supra* note 51 at 33.
[234] Id.
[235] Id at 35.
[236] Art. 17.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

among all WTO members, which makes it particularly vulnerable to political gridlock, as later developments have shown, resulting in the present crisis.[237]

Members of the Appellate Body are appointed for a four-year term and are eligible for reappointment for a further term.[238] In practice, members serve with high levels of professionalism, and their backgrounds typically include international law, trade law, or judicial experience at the national or global level.

The members of the Appellate Body choose a chairperson from among themselves, who holds office for a term of one or two years, in accordance with the Working Procedures for Appellate Review (Rule 5). According to Rule 5(3), the chairperson is in charge of the Body's overall leadership and internal management, making sure the appellate process runs smoothly and effectively.

4.2.2 Qualifications and Expertise

The DSU mandates that AB members must be "persons of recognized authority with demonstrated expertise in law, international trade, and the subject matter of WTO agreements."[239] This criterion is mandated under the DSU to ensure that those who interpret and elucidate WTO regulations have a solid grasp of both trade policy and legal principles.

The composition of the Appellate Body was also intended to be broadly representative of WTO membership, taking into account diversity in legal systems and geographic regions. Although the representation goal has often been met, political tensions have at times overshadowed the importance of legal competence and balance.

4.2.3 Working Procedure and Decision-Making

A division of three members, chosen by rotation, hears each appeal even though the Appellate Body has seven members. Rule 6(2) of the Working Procedures for Appellate Review codifies this procedure, which guarantees equitable participation from all members throughout time and uniformity among decisions.

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[237] Peter Van den Bossche, The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication? World Trade Institute (2021).
[238] Art. 17.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[239] Art. 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Crucially, rulings are rendered on behalf of the full Appellate Body, which means that the other four members continue to participate in internal deliberations and reviews even while only three members hear a particular case. Legal consistency across disputes and institutional coherence are strengthened by this shared obligation.

Confidential discussions and decision-making are carried out with assistance from a specialized Appellate Body Secretariat made up of global legal specialists. Unless the DSB unanimously agrees not to adopt the report (a so-called "negative consensus"), which has never actually occurred in practice, a report becomes binding once it is adopted.

4.2.4 Appellate Body Secretariat

According to Article 17.7 of the DSU, the Appellate Body Secretariat is in charge of giving the Appellate Body administrative and legal support. The Secretariat functions independently of the main WTO Secretariat and has its own budget in order to ensure the Body's institutional independence. It does, however, report to the WTO Director-General for administrative reasons. Although independent in function, the Appellate Body Secretariat is physically located within the WTO premises in Geneva, where it shares space with the WTO Secretariat and where meetings of the Dispute Settlement Body, panels, and the Appellate Body itself are held.

4.2.5 Jurisdiction and Scope of Review

The Appellate Body is empowered to review issues of law and legal interpretations developed by WTO panels.[240] It cannot engage in a de novo review or reconsider the facts of the case; rather, its function is to assess whether the panel correctly interpreted and applied the relevant WTO rules.

Appeals are typically limited to clarifying provisions of WTO agreements such as the GATT, GATS, and TRIPS. In the TRIPS context, the AB has been especially important in interpreting sensitive provisions related to patent protection, transitional arrangements, and public health exceptions areas where textual ambiguity and political sensitivity often intersect.

4.2.6 Impartiality of Panels

[240] Art. 17.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

The DSU's Rules of Conduct provide that a person serving on a panel or the Standing Appellate Body, including arbitrators and experts participating in dispute settlement proceedings, "shall be independent and impartial and shall avoid direct or indirect conflicts of interest."[241] The Rules of Conduct impose on such individuals "self-disclosure requirements" to reveal any information that may cast "justifiable doubts as to their independence or impartiality."[242] Further, ex parte communication with a panel or Appellate Body - albeit, apparently not expressly with Secretariat staff is prohibited concerning matters under consideration.[243] Notwithstanding the importance of these procedural protections, serious questions about conflicts of interest, representations, and unnecessary contact with Secretariat officials remain.[244]

4.3 THE WTO APPELLATE BODY CRISIS

In 1996, Director-General Renato Ruggiero referred to the WTO dispute settlement system as the 'jewel in the crown' of the WTO and has long been heralded as the most important aspect of the multilateral trading system.[245] It brought unprecedented legal certainty to international trade law. And now the WTO Appellate body is faced with a crisis that has the potential to destroy the very existence of the AB under the WTO framework. Since 2016, the Appellate Body has been in deep crisis, culminating in its functional paralysis after December 10, 2019, when its membership dropped below the quorum of three required to hear appeals.[246] At present, there are no members in the appellate body.

4.3.1 Chronological Breakdown of the Crisis

Despite long-standing dissatisfaction with the Appellate Body, the United States took a confrontational stance on May 11, 2016, which precipitated the current crisis. The chairman of the Dispute Settlement Body was notified by the U.S. delegation that it would not back Mr. Chang's reappointment as an A.B. member. This nomination process is governed by the DSB's basic rule of consensus decision-making, but any

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[241] Rules of Conduct for the Understanding of Rules and Procedures Governing the Settlement of Disputes, art. 11(1), (Dec. 11.1996).
[242] Id. Art. VI (2).
[243] John Ragosta, Navin Joneja and Mikhail Zeldovich, WTO Dispute Settlement: the System is Flawed and Must Be Fixed, 37 The International Lawyer 3, (2003).
[244] John Ragosta, Navin Joneja and Mikhail Zeldovich, *supra* note 243 at 738.
[245] Peter Van den Bossche, The TRIPS Agreement and WTO Dispute Settlement: Past, Present and Future, World Trade Institute, 2020.
[246] Peter Van den Bossche, *supra* note 237.

member who objects to a proposed decision may stop it. The appointment of the Appellate Body members was considered at the subsequent DSB meeting, and the United States made an effort to inform the other members of its decision not to re-appoint Mr. Chang.[247] The United States emphasized that re-appointing members of the WTO Appellate Body is a crucial duty entrusted to WTO Members and is not automatic. Concerns regarding certain appellate decisions involving Mr. Chang that were not strictly legal were also voiced by the USA.[248]

The U.S expressed disapproval of Mr. Chang's oral hearings, which concentrated on issues that were neither relevant to settling the disagreements between the parties nor brought up on appeal. Other members, however, disagreed with this perspective. The other members were concerned that disregarding Chang because of rulings from the Appellate Body, in which he participated, may undermine trust in the dispute resolution process.[249]

In response, the Chair of the DSB announced on July 21, 2016, that dedicated sessions would begin in September to discuss reforms to the reappointment process and to find a solution to the concerns raised by the US. This came amid broader concerns that the U.S. might continue to block appointments in the future without offering alternatives or agreeing to procedural changes.[250]

However, on November 23, 2016, the DSB managed to appoint two new AB members. Hong Zhao of China was appointed to take the place of the departing Chinese member, whose second term had ended in May 2016, while José Alfredo Graça Lima of Brazil was selected to succeed Mr. Chang.[251] In 2017, things got worse. These appointments, however, did little more than postpone the looming structural problem.[252]

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[247] Henry S. Gao, Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis, in The Appellate Body of the WTO and Its Reform 215 (Chang-fa Lo, Jinji Nakagawa & Tsai-yu Lin eds., Springer 2019).
[248] Id.
[249] Baroncini, E, Preserving the Appellate Stage in the WTO Dispute Settlement Mechanism: The EU and the Multi-Party Interim Appeal Arbitration Arrangement, 29 The Italian Yearbook of International Law Online,1, (2020).
[250] Henry Gao, A Rule-Based Solution to the Appellate Body Crisis and Why the MPIA Would Not Work, 48 Legal Issues Econ. Integration 139 (2021).
[251] Jens Lehne, Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified? 6 Sui generis, (2019).
[252] Id.

The tenure of two notable AB members was coming to an end: Peter Van den Bossche of Belgium in December and Ricardo Ramírez-Hernández of Mexico in June. The European Union proposed that both vacancies be filled through a single, joint process, while the United States argued for a sequential approach, demanding that Ramírez be replaced first before considering Van den Bossche's seat. Due to this disagreement, neither seat was filled.

The abrupt departure of Hyon Chong Kim, a South Korean member of the AB, to take a position as Korea's Minister for Trade in 2017 further escalated tensions. Due to his early departure, the AB's ability to operate was further strained by an unexpected third vacancy. By 2018, the problem had become critical.[253]

Shree Babu Chekitan Servansing of Mauritius reached the end of his first term on September 30, but his reappointment was again blocked by the United States, further reducing the number of sitting judges. With only three members remaining, the AB was functioning at the bare minimum level required to hear appeals.[254]

As concerns mounted, WTO members looked to diplomacy. An informal negotiation procedure was initiated by the General Council President in January 2019. The task of leading talks was assigned to David Walker, New Zealand's ambassador to the WTO. Finding a middle ground to resume the appointment process and restore the appellate's functionality was his aim. Addressing U.S. concerns was also one of the main tasks, but these talks ultimately failed, as the United States refused to engage.

The final blow came at the DSB meeting on October 28, 2019, the last real chance to begin selecting new Appellate Body members before the system collapsed. Again, the United States blocked the proposal to start the process. When the terms of the last two remaining AB members, Thomas R. Graham of the United States and Ujal Singh Bhatia of India, ended on December 10, 2019, the Appellate Body was left with fewer than the required three members. From the following day, December 11, 2019, the Appellate Body was officially paralyzed, unable to review any new appeals, effectively dismantling the WTO's two-tier dispute settlement system.[255] There are currently no

[253] Amrita Bahri, Appellate Body Held Hostage": Is Judicial Activism at Fair Trial? Journal of World Trade, (2019).
[254] Id.
[255] Henry Gao, Finding A Rule-Based Solution to the Appellate Body Crisis: Looking Beyond The Multiparty Interim Appeal Arbitration Arrangement, 24 Journal of International Economic Law 3, (2021).

Members of the Appellate Body. On 30 November, the term of the last sitting Appellate Body member expired, leaving the AB with no members.

4.3.2 The Crisis: A Breakdown of Functionality

The current crisis, though unprecedented in its severity, cannot be said to have reached this stage completely unexpectedly. In the earlier years of the WTO dispute settlement system, members largely expressed satisfaction with its operation in various instances. These included the Helms-Burton Act national security dispute in 1997, the Articles 21.5/22.6 sequencing issue in 1999, and the amicus curiae controversy in 2000.[256] Despite the overall approval of the system, numerous proposals to reform the Dispute Settlement Understanding were put forward, especially in the lead-up to and during the early phases of the Doha Round in the early 2000s.[257] Due to several factors, pressure on the WTO DSM had increased dramatically by the 2010s, indicating a more serious crisis was imminent.

First of all, the number and complexity of conflicts that are brought before the DSM for settlement have increased significantly, surpassing the institutional and financial resources allotted for handling them in many ways.

Secondly, the stagnation of the WTO's negotiating function led members to use dispute settlement as a means of effecting legal change, since political avenues were blocked. This legislative paralysis also meant that members could not correct perceived misinterpretations of WTO law by the Appellate Body. Thirdly, allegations, particularly from the United States, began to mount, accusing the Appellate Body of overstepping its mandate and disregarding procedural obligations, especially the 90-day limit for issuing appellate decisions[258]. Lastly, the United States undertook both direct and indirect actions that undermined the independence and impartiality of Appellate Body members, especially in the context of their reappointment.[259]

4.3.3 The Existential Crisis: US Dissatisfaction with the Appellate Body

[256] Peter Van den Bossche, *supra* note 237.
[257] Thomas Cottier, Preparing for Structural Reform in the WTO, 10 J. INT'l ECON. L. 497, (2007).
[258] Bernard M. Hoekman & Petros C. Mavroidis, To AB or Not to AB? Dispute Settlement in WTO Reform, 23 J. INT'l ECON. L. 703 (September 2020).
[259] Kenneth Holland, The Trump Administration's Critique of the World Trade Organization and Its Implications for the International Trading System, 13 INDIAN J. INT'l ECON. L. 154 (2021).

The looming crisis escalated into a full-scale and existential breakdown when the Trump administration began blocking both the appointment and reappointment of members to the WTO Appellate Body.[260]

The United States cited long-standing reservations about the Appellate Body's operations as justification for its refusal to appoint members. In February of 2020, the United States elaborated in a report published by the Office of the United States Trade Representative on the complaints it has against the Appellate Body.[261] The most important of them was the allegation that the Appellate Body had exceeded its authority by changing or restricting the rights and responsibilities of WTO Members as specified in the WTO agreements.[262] In areas like safeguard measures, countervailing tariffs, subsidies, anti-dumping, and technical barriers to trade, the U.S. accused the body of engaging in "judicial activism." It further contended that the U.S. government's ability to defend domestic sectors against harmful imports was hampered by the Appellate Body's jurisprudence. Also in 2020, the United States described as invalid an Appellate Body report in a dispute between Canada and the United States, claiming that none of the three persons who were in the Appellate panel for that dispute were, in fact, bona fide Appellate Body members.[263]

In addition, the United States criticized the Appellate Body for procedural violations, including:

1. Exceeding the 90-day mandatory deadline for issuing appellate reports without obtaining consent from the disputing parties;
2. Permitting outgoing members to continue adjudicating cases after their terms had expired;
3. Providing legal opinions on matters not necessary to resolve a specific dispute;
4. Engaging in review of factual findings by panels, especially regarding interpretations of a respondent's domestic law; and
5. Treating its past rulings as binding precedent.

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[260] International Organizations, 114 The American Journal of International Law 3, (2020).
[261] Id at 518.
[262] United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process, 113 The American Journal of International Law 4, (2019).
[263] International Organizations, *supra* note 260 at 518.

6. The issuance of advisory opinions, which are not necessary to solve disputes but could be perceived as law-making in the abstract.[264]

Many of these criticisms were also voiced during the administrations of President Obama and George W. Bush.[265] The Biden administration's stance also prolonged the crisis. However, it was only under President Trump that the U.S. allowed these concerns to escalate into an outright institutional crisis.

4.3.4 Responses to the crisis

In response to the Appellate Body's looming paralysis, WTO Members initiated several reform efforts beginning in late 2018 and continuing till date. On 26 November 2018, a coalition including the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Korea, Iceland, Singapore, and Mexico submitted a proposal (WT/GC/W/752) to the WTO General Council with recommendations to improve appellate review.[266] That same day, another communication (WT/GC/W/753) from the EU, China, and India proposed further institutional reforms.[267]

However, at the 12 December 2018 General Council meeting, the United States rejected these proposals outright, claiming they failed to address its specific concerns.[268] Additional reform submissions followed in early 2019 from several other members, including Honduras (WT/GC/W/758–761), Chinese Taipei (WT/GC/W/763 & Rev.), Brazil, Paraguay, Uruguay (WT/GC/W/767 & Rev.), Japan, Australia, and Chile (WT/GC/W/768 & Rev.), Thailand (WT/GC/W/769), and the African Group (WT/GC/W/776).[269] These proposals varied in content but were all aimed at preserving and reforming the appellate process.

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[264] Office Of The U.S. Trade Representative, Report On The Appellate Body Of The World Trade Organization (2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf

[265] Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 822, 823–27 (2019).

[266] Communication From The European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic Of Korea, Iceland, Singapore And Mexico To The General Council, World Trade Organization, (Nov 26.2018), https://www.southcentre.int/wp-content/uploads/2018/12/EU-Proposal.pdf

[267] Communication From The European Union, China And India To The General Council, World Trade Organization, (Nov 26.2018), https://www.southcentre.int/wp-content/uploads/2018/12/EU-Proposal-2.pdf

[268] Peter Van den Bossche, *supra* note 237.

[269] Id.

For the US, the disagreement is less about the basic criteria that should guide the interpretation of WTO law, but more about the application of these criteria.[270] For example, when it first announced its blocking of all appointments to the Appellate Body in August 2018, the US invoked, "concerns that appellate reports have gone far beyond the text setting out WTO rules in varied areas".[271] And in 2019, the US argued in a General Council meeting, after a brief summary of its overreach allegations, "that the Appellate Body had been acting contrary to the unambiguous text of the DSU." [272]

In parallel, informal consultations had taken place in 2019 under the leadership of New Zealand's Ambassador David Walker, then Chair of the WTO Dispute Settlement Body.[273] Despite these efforts, the United States refrained from participating meaningfully in the talks and never submitted its own concrete reform proposal. These discussions culminated in a draft General Council Decision on the Functioning of the Appellate Body in October 2019, which was intended as a balanced compromise addressing U.S. grievances while preserving core features of appellate review. Ambassador Walker described the draft as an attempt to find workable and mutually acceptable solutions.

However, the United States rejected the proposal as insufficient during the General Council meeting on October 15, 2019. This refusal finalized the deadlock, making the paralysis of the Appellate Body from 11 December 2019 onwards unavoidable.[274]

In the years that followed, particularly during 2020 and 2021, no substantial progress was made in reviving appellate review. Many members, including the EU, China, India, and Canada, did not agree with the U.S. allegations of systemic judicial overreach or wilful procedural violations by the Appellate Body. During this time, over 120 WTO Members submitted draft decisions urging the Dispute Settlement Body to restart the appointment process for Appellate Body members[275]. Nevertheless, the United States continued to block any such efforts. The Biden administration has upheld this policy, prolonging the paralysis.

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[270] Jens Lehne, *supra* note 251.
[271] Id at 5.
[272] Dmitry Grozoubinski, The World Trade Organization: An Optimistic Pre-Mortem in Hopes of Resurrection, Lowy Institute for International Policy (2020).
[273] Id at 20.
[274] Umberto Celli Jr., The WTO Dispute Settlement System: Which Reform? 63 Boletim Ciencias Economicas 215 (2020).
[275] Id.

Since the 2022 WTO Ministerial Conference (MC12), members have committed to restoring a fully functioning dispute settlement system by 2024, not just fixing the Appellate Body (AB), but reforming the entire system.[276] This broader reform effort, known as the "Molina Process" (led by Guatemala's Marco Molina until early 2024), differs from earlier efforts in three ways: it covers the full system, includes active US participation, and keeps proposals confidential. Despite negotiations on procedural improvements and potential appeal mechanisms, no agreement was reached at the 2024 Ministerial Conference.[277]

Hence, 2024 saw no major breakthrough in resolving the Appellate Body crisis. Although countries worked on reforms through the "Molina Process" and other talks, they could not agree on key issues. Political challenges like the U.S. election year and the sudden removal of Guatemala's representative who led the process also slowed things down. Now, with Donald Trump returning to the U.S. presidency in 2025, the future of the WTO's dispute system is even more uncertain. His earlier administration strongly opposed the Appellate Body, so it may be even harder to find a solution to this crisis now.

4.5 STRUCTURAL FLAWS BEHIND SYSTEMIC COLLAPSE

The crisis that befell the WTO Appellate Body did not occur in a vacuum. Rather, it was the result of a series of long-standing governance weaknesses within the WTO's appellate review system and procedural failures that accumulated and eventually led to a full institutional breakdown.

4.5.1 The Blockage of the Appointment and Reappointment of Appellate Body Members

The most immediate and visible symptom of the crisis was the sustained blockage by the United States of the appointment and reappointment of Appellate Body members. According to WTO procedures, appointments require a consensus decision by the Dispute Settlement Body, which includes all WTO Members. Since 2017, the United States has exercised its right to block consensus, thereby stalling all new appointments

[276] Gisela Grieger, International Trade Dispute Settlement: World Trade Organisation Appellate Body Crisis and the Multi-Party Interim Appeal Arbitration Arrangement, European Parliamentary Research Service, PE 762.342 (2024), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690521/EPRS_BRI(2021)690521_EN.pdf

[277] Id.

and reappointments. This left the appellate body with no members, pushing the appeal system under the WTO into the biggest crisis in its 30 years.

The United States has argued that this obstruction was necessary to compel institutional reform and considered it as leverage to drive broader changes to WTO rules.[278] However, this tactic has revealed a profound vulnerability in the WTO's governance structure.

4.5.2 Consensus

Unlike other international institutions such as the International Court of Justice, where appointments can proceed by majority vote, the WTO's consensus-based model enables a single member to indefinitely delay appointments.[279] Despite the accommodation of voting as a decision rule in some provisions of the WTO Agreements, consensus is an entrenched practice at the WTO, and it is also required under the DSU. This means that, as the current impasse illustrates, a single member can block an appointment, and the other members are left with no remedy.

Although some legal scholars and member states have proposed referring the appointment process to the WTO General Council or the Ministerial Conference, where decisions could, in theory, be made by majority vote, such alternatives have been politically unviable, especially in the face of strong U.S. opposition.[280] The failure to resolve this procedural deadlock constitutes a central governance failure and is an example of the WTO's institutional fragility.

4.5.3 Judicial Overreach

Another major contributor to the crisis has been the repeated and often unsubstantiated allegations by the United States that the Appellate Body has engaged in judicial overreach. The U.S. has contended that the Appellate Body, through its interpretations of WTO law, created new obligations not found in the texts of the WTO agreements, thereby exceeding its legal mandate under the Dispute Settlement Understanding.[281]

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[278] Kenneth Holland, *supra* note 259.
[279] Peter Van den Bossche, *supra* note 237.
[280] Id.
[281] United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process, *supra* note 262.

This accusation of so-called "judicial activism" has primarily been directed at Appellate Body rulings on issues such as anti-dumping (notably the zeroing methodology), the definition of "public body" under subsidy rules, the interpretation of "unforeseen developments" under safeguards law, and the principle of "legitimate regulatory distinctions" in the context of technical barriers to trade.[282]

The DSU, particularly Article 3.2, explicitly provides that the dispute settlement mechanism is tasked with clarifying WTO provisions and rules in accordance with customary rules of interpretation under public international law. The Appellate Body has generally adhered to this directive, prioritizing a "text-first" approach to interpretation.[283] As the Appellate Body emphasized in Chile – Alcoholic Beverages,[284] it is difficult to envision a situation where a panel or the Appellate Body could be accused of overreach if their conclusions are based on a faithful interpretation of the relevant treaty text.

While it is common for losing parties to express dissatisfaction with decisions, in most cases, such objections are short-lived, but the United States has maintained a long-term, strongly worded campaign against the Appellate Body's jurisprudence, framing it as a structural failure.[285] However, it has largely failed to substantiate these claims through legal evidence.[286]

4.5.4 Rule 15 of the Appellate Body's Working Procedures

Rule 15 of the working procedures has attracted significant attention and controversy due to its potential implications for the appointment and authority of the Appellate Body (A.B.) within the WTO's dispute settlement mechanism.[287] The United States objects to the application of this provision.

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[282] Bernard Hoekman and Petros Mavroidis, Dispute Settlement at the WTO: Now What? Centre for International Governance Innovation (2020).

[283] Marion Panizzon, Good Faith in the Jurisprudence of the WTO; The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement, (1st ed. Hart Publishing,2006).

[284] DS87: Chile — Taxes on Alcoholic Beverages, World Trade Organization, (March 29.2025) https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds87_e.htm

[285] Kristen Hopewell, Trump & Trade: The Crisis in the Multilateral Trading System, 26 New Political Economy 83, (2020).

[286] Umberto Celli Jr., *supra* note 274.

[287] Mohamed Salah Adawi Ahmed, Zhang Junxiang, Basel Khaled Alsaeed & Muhammad Zeeshan Ajmal, MPIA as Solution to the WTO Appellate Body Dilemma: An Examination of the WTO Innovative Dispute Settlement Mechanism, 12 IJSRM 5, (2024).

A former Appellate Body member may still be involved in the resolution of an appeal case they were assigned to when they were still a member of the Appellate Body, according to Rule 15 of the A.B.'s Working Procedures. In other words, individuals can continue to participate in ongoing cases after their time as a member has ended, but only with the Appellate Body's approval and after informing the Dispute Settlement Body.[288] The former Member is regarded as continuing to be a Member of the Appellate Body for the express purpose of finishing the disposition of the appeal to which they were assigned, but only for that specific case. The Working Procedures of the Appellate Body, including Rule 15, are established based on Article 17.9 of the DSU. According to Article 17.9 of the DSU, the Appellate Body must consult with the Director-General of the WTO and the Chairman of the DSB when developing its working processes. The WTO members are informed of these procedures for their information.[289]

The United States has raised concerns about the use of Rule 15 in WTO dispute settlement. Although Rule 15 had been used many times in the past without any objections, the U.S. now argues that it may not be compatible with Article 17.2 of the WTO's Dispute Settlement Understanding. According to Article 17.2, only the Dispute Settlement Body has the authority to appoint Appellate Body members for a fixed term of four years, which can be renewed once. The U.S. claims that letting members continue after their term ends, without a formal reappointment by the DSB, violates this rule.[290]

4.5.5 Inadequate Protection of the Independence and Impartiality of the Appellate Body

The WTO appellate framework's inadequate safeguard for judicial independence is another structural flaw. Members of the Appellate Body have four-year renewable mandates. Members may be subject to political pressure from strong powers because of the short term and the chance of reappointment. Because reappointment also requires consensus in the DSB, any WTO Member can effectively veto a judge's second term.[291]

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[288] Jens Lehne, *supra* note 251.
[289] Id.
[290] Henry Gao**,** Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis, SSRN (July 18, 2019), https://ssrn.com/abstract=3422025.
[291] Bernard Hoekman and Petros Mavroidis, *supra* note 282.

This system allows a member to retaliate against a judge based on their participation in decisions that the Member found unfavourable.

The United States has exercised this power on multiple occasions. In 2011, it blocked the reappointment of its own national, Jennifer Hillman, allegedly because her rulings were not sufficiently supportive of U.S. positions.[292]

In 2016, it blocked the reappointment of Seung Wha Chang, a Korean national, due to his involvement in rulings that were against the US interests.[293] These decisions were criticized by other WTO Members for undermining judicial independence. Despite recognition of these risks, no permanent procedures were established to protect members from such politically motivated moves in the WTO.

4.5.6 Failure to comply with the Timeframes for Appellate Review

The DSU requires the Appellate Body to issue reports within 90 days of an appeal being filed.[294] This timeframe was feasible in the early years of the WTO, when disputes were relatively simple and fewer in number. Over time, however, both the complexity and the volume of disputes increased significantly without a corresponding increase in resources or flexibility in procedures. The 90-day deadline became progressively unrealistic, especially in multi-party disputes or cases involving voluminous records and politically sensitive issues.

In practice, the Appellate Body often failed to meet this deadline. In many instances, the disputing parties agreed to the delay in the hope of getting a comprehensive decision. However, the United States used this as a chance to highlight the Body's repeated inability to meet the deadline as a systemic failure of the appellate body. Although resource limitations led the Body to continue producing late reports, the absence of a formal mechanism for extending the deadline or formal member assent has allowed this issue to fester and ultimately become another point of dissatisfaction exploited in the broader crisis. The United States took a stand that any appellate report issued after the time frame without the agreement of the parties is no longer a report that can be adopted through reverse consensus. According to United States, such reports

[292] Robert Howse, Appointment with Destiny: Selecting WTO Judges in the Future, 12 Global Policy 71, (2021).
[293] Id.
[294] Art. 17.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

require adoption by normal consensus. But the problem in such adoption is that any party especially the losing party may block the report's adoption.[295]

4.5.7 Inadequate members in the Appellate Body and Its Secretariat

Finally, a significant and often overlooked aspect of misgovernance in the WTO appellate body has been the structural under-resourcing of the Appellate Body and its Secretariat. The Body was originally composed of only seven part-time members.[296] This number is low when compared to similar international judicial bodies such as the ICJ, which has 15 members, or ITLOS, which has 21 judges.

The Appellate Body's small size was based on the expectation of limited appeals, but demand quickly increased. Despite this, membership was never expanded. Some WTO members (China, the EU, India, and Montenegro) had proposed increasing the number of members to nine to boost efficiency, improve geographic balance, and shift from part-time to full-time roles.[297] While expansion could ease workload pressures, full-time status may not significantly bring a change since members already work near full-time due to mandatory availability under DSU Article 17.2. However, past attempts to alter employment terms faced resistance, notably from the U.S., which opposes strengthening the Appellate Body's judicial role.

Similarly, the Appellate Body Secretariat, responsible for providing legal and administrative support, remained understaffed for much of its history.[298] Though the number of legal officers increased over the years, the level of support never matched the growing demands. Some WTO members, especially the U.S., have opposed expanding the Appellate Body Secretariat as a way to voice discontent with its functioning and certain rulings. The U.S. argues that limiting staff resources would curb perceived judicial overreach.[299]

4.6 IMPACT OF THE APPELLATE BODY CRISIS

One of the major strengths of the WTO's dispute settlement system has been its compulsory jurisdiction, meaning that disputes are automatically taken up without

[295] Peter Van Den Bossche, *supra* note 237.
[296] Mervyn Martin, *supra* note 48.
[297] Peter Van Den Bossche, *supra* note 237.
[298] Joost Pauwelyn & Krzysztof Pelc, Who Guards The Guardians Of The System? The Role Of The Secretariat In WTO Dispute Settlement, 116 The American Journal Of International Law 3, (2022).
[299] Peter Van Den Bossche, *supra* note 237.

needing both parties to agree in advance and the fact that its rulings are binding. This process has been further strengthened by the "negative consensus" rule, which ensures that panel decisions and appellate reports are adopted automatically unless all WTO members agree not to adopt them.[300] As a result, once a dispute was launched, the respondent had very little power to stop the process unless it reached a mutual agreement with the complainant.

However, this has significantly changed after 2019 due to the ongoing crisis that created a gap between the WTO rules and reality. Now, any country that loses a panel case can simply “appeal into the void,” which effectively pauses the dispute indefinitely. Not only respondents but even losing complainants can now use this loophole to delay or block the enforcement of rulings.[301]

This breakdown is already having visible consequences. For example, in the year 2024, there were only 10 requests for consultation. A dramatic drop from the fifty filed in 1997, when the system was trusted and fully functional.[302] In the year 2018, the consultation requests went up to 38, and in 2019, 20 consultation requests came up, but in the years after the appellate body collapse, the number of consultations has not gone over 10.[303] While the COVID-19 pandemic may have played a part, the sharp decline suggests that WTO members are starting to lose faith in the dispute system. Many members are now asking what the use is of investing time and resources in a case when the final ruling can be easily blocked through an appeal that reaches nowhere. As a result, complainants are increasingly hesitant to bring cases forward. This is not only costly and time-consuming for governments, but also hard to justify to their domestic industries, who expect a resolution.

Currently, there are thirty-two unresolved appeals.[304] In some cases brought by the United States, the U.S. has merely issued short statements saying no appeal can proceed and that it will speak with the other party to decide next steps without giving any legal

[300] Kathleen Claussen, Cherise Valles & Geraldo Vidigal, International Trade Dispute Settlement 2.0, 115 American Society of International Law (2021).
[301] Id.
[302] Dispute settlement activity — some figures, World Trade Organization, (March 28.2025), https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm
[303] Id.
[304] Appellate Body, World Trade Organization, (March 28.2025), https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm#fntext-1

reasons. In contrast, other countries like Korea have submitted full, detailed appeals, even though no Appellate Body exists to hear them.[305]

The US appears to have disabled the Appellate Body in order to free itself to pursue WTO-illegal policies without external legal constraints. In the absence of a functional Appellate Body, the US can simply block rulings against it by appealing into the void.[306] Indeed, the US has now appealed into the void in nine out of eleven cases in which WTO dispute panels found its policies to be in violation of the rules.[307] In these cases, the tariffs imposed by the US were found to be a violation of WTO rules and not justified under the WTO's national security exception and hence the US appealed into the void to continue the illegal tariffs. The only two cases in which the US chose not to appeal into the void, instead allowing the panel report to be adopted, were one in which the measures in question had already expired (safeguard measures on South Korean washing machines—case DS546) and another that was a mixed ruling, wherein the findings were partly in favour of the US (anti-dumping and countervailing duties on Spanish olives, case DS577).[308]

Despite President Biden's professed commitment to multilateralism and international cooperation, the US continued to block Appellate Body appointments and appeal into the void under his administration. Under the second Trump administration which took office in January 2025, such policies are expected to continue.

Looking ahead, even if efforts to restore the Appellate Body begin soon, it could take several years to reach a political agreement and appoint new members. By then, there may be a large backlog of unresolved cases waiting to be reviewed. This raises serious questions about how a future Appellate Body would be able to deal with that backlog effectively.

4.7 APPEALS IN TRIPS DISPUTES

[305] Kathleen Claussen, Cherise Valles and Geraldo Vidigal, *supra* note 300.
[306] Kristen Hopewell, Unravelling of the trade legal order: enforcement, defection and the crisis of the WTO dispute settlement system, International Affairs, (2025).
[307] DS597: Origin Marking Requirement, DS564: Measures on Steel and Aluminium Products Turkey DS556: Measures on Steel and Aluminium Products Switzerland, DS552: Measures on Steel and Aluminium Products, DS544: Measures on Steel and Aluminium Products, DS539: Anti-Dumping and Countervailing Duties, DS543: Tariff Measures on Certain Goods, DS533: Countervailing Measures on Softwood Lumber, DS436: Countervailing Measures on Hot-Rolled Carbon Steel Flat Products.
[308] Kristen Hopewell, *supra* note 306.

The role of the appellate body when it comes to the TRIPS disputes has been limited.[309] Out of the 44 TRIPS disputes under WTO DSM till date, only 6 cases have been appealed[310]. Two of these cases were brought by the United States successfully, and one was brought against the United States successfully. Disputes brought by Honduras and the Dominican Republic against Australia were unsuccessful and resulted in a joint appellate body report issued on June 9, 2020, even though the term of the panelists had expired.[311] In both of these cases, the US was a third party. The appellate decision wasn't given within the time frame due to the complexity of the matter at hand, as well as the huge backlog of cases in the AB and insufficient members. The panel decision was appealed in July 2018, and the Appellate Body ultimately issued its report only on 9 June 2020.[312]

Another dispute, which Qatar brought against Saudi Arabia, was appealed but was later withdrawn. In the appealed cases that involved the US, such as the India - Patents (1998) and Canada - Patent Terms (2000), the appellate report was circulated within the time frame provided, as these were relatively small appeals. In the United States, the Section 211 Omnibus Appropriations Act of 1998 case, which was brought by EC against the US, even though some findings were against the US, it has not cited this case as an example of its judicial overreach claim against the Appellate Body.

The United States has often cited specific cases as examples of judicial overreach or procedural violations.[313] These include the AB's failure to comply with the mandatory 90-day deadline for issuing appeal reports, notably after DS399 US – Tyres (China)

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[309] Matthew Kennedy, WTO Dispute Settlement and the TRIPS Agreement: Applying Intellectual Property Standards In A Trade Law Framework, (1st ed. Cambridge University Press, 2016).

[310] DS567: Saudi Arabia — Measures Concerning the Protection of Intellectual Property Rights, (Qatar v. Saudi Arabia), DS441 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging(Dominican Republic v. Australia), DS435 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Honduras v. Australia), , DS176 United States — Section 211 Omnibus Appropriations Act of 1998 (EC v. USA), , DS170 Canada — Term of Patent Protection(US v. Canada), , DS50 India — Patent Protection for Pharmaceutical and Agricultural Chemical Products (US v. India).

[311] Sue Ann Ganske, Trips And Dispute Settlement At The WTO: The TRIPS Disputes And Current Issues Under Trips And The DSU,62 IDEA 1 (2022).

[312] DS441 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging(Dominican Republic v. Australia).

[313] United States Trade Representative: Report on the Appellate Body of the World Trade Organization, (February 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf

(2011), and its controversial use of Rule 15, which allowed outgoing members to continue adjudicating appeals, a move the U.S. sees as conflicting with Article 17.2 of the DSU.[314] The U.S. has also criticized the AB for treating its past rulings as binding precedents, especially after DS268: US – OCTG Sunset Reviews (2004) and DS344: US – Stainless Steel (Mexico) (2008), where the AB established the "absent cogent reasons" standard.[315] In the U.S.'s view, this effectively created new legal obligations outside of WTO Members' consent. Other grievances include the AB's issuance of advisory opinions or obiter dicta, as seen in DS321: Canada – Continued Suspension and DS320: US – Continued Suspension (2008), and its review of domestic laws, which the U.S. asserts is a factual matter beyond the AB's mandate, as exemplified in DS26: EC – Hormones and DS33: US – Wool Shirts and Blouses.[316]

However, as could be seen through the examples, the cases cited by the US largely fell within the Anti-dumping agreement, SCM agreement, SPS, and TBT agreements. Despite this extensive list of complaints, it is notable that the United States has never cited any disputes under the TRIPS Agreement as an example of its dissatisfaction with the functioning of the appellate body.

4.7.1 Impact of the Crisis

While the Appellate Body crisis has undeniably shaken the foundations of the WTO's dispute settlement system, its specific impact on TRIPS-related disputes remains more subtle and less direct, at least for now. Unlike in disputes under the General Agreement on Tariffs and Trade (GATT) or the Anti-Dumping agreement, where numerous appeals are currently pending "in the void", there are no TRIPS disputes among the pending appeals before the WTO as of now. This absence of pending TRIPS appeals might suggest a lesser impact.

However, the lack of new TRIPS-related disputes entering the dispute settlement system over the past two years is noteworthy. The most recent request for consultations in a TRIPS case was filed on 12 December 2022, and since then, there have been no TRIPS disputes initiated in 2023 or 2024.[317] This silence contrasts with earlier years,

[314] Shuai Guo & Qingjiang Kong, A Holistic Approach for WTO Dispute Settlement Mechanism Reforms: US Demands and the Restoration of the Appellate Body, 19 ASIAN J. WTO & INT'l HEALTH L & POL'y 315 (2024).
[315] USTR Report on the Appellate Body at 58.
[316] Id.
[317] Disputes by agreement, *supra* note 109.

where even if few in number, TRIPS disputes were consistently part of the WTO DSM.[318]

While it is not possible to definitively attribute this disappearance of TRIPS litigation to the Appellate Body impasse, the timing suggests a correlation. The absence of a functioning appellate mechanism may be discouraging members from initiating IP-related disputes, particularly when the resolution of such cases requires legal clarity and enforcement, both of which are compromised by the AB crisis. In many TRIPS disputes, the stakes involve complex interpretations of domestic and international intellectual property laws. Without the availability of appellate review, member states may see little incentive in pursuing lengthy and resource-intensive litigation that could ultimately be stalled indefinitely if appealed.

4.8 ALTERNATE MECHANISMS: WORKAROUNDS TO THE CRISIS

The appellate body crisis necessitated creative solutions to ensure the continued functioning of the WTO dispute settlement mechanism.

4.8.1 Multi-Party Interim Appeal Arbitration Arrangement (MPIA)

The MPIA was designed in response to the U.S. obstruction of Appellate Body appointments, which left the AB non-functional since December 2019. The MPIA was established under Article 25 of the WTO's Dispute Settlement Understanding and came into effect on 30 April 2020, initiated by 19 WTO Members, including the EU, China, Canada, and Brazil.[319] The arrangement is not a binding treaty but rather a plurilateral procedural agreement intended to preserve the WTO's two-tier dispute settlement system during the Appellate Body impasse.

With an emphasis on independence and impartiality, the MPIA seeks to maintain both the substantive and procedural elements of the WTO's appeal arbitration process.[320] By informing the Dispute Settlement Body, any WTO member may become a member of

[318] Joost Pauwelyn & Weiwei Zhang, Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload, 21 J. INT'L. ECON. L. 461, 473 (2018).

[319] Communication from Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala, Hong Kong, China, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay, Statement on a mechanism for developing, documenting and sharing practices and procedures in the conduct of WTO disputes, JOB/DSB/1/Add.12 (30 Apr. 2020) ('MPIA')., https://www.hketogeneva.gov.hk/doc/1A12.pdf

[320] Mohamed Salah Adawi Ahmed, Zhang Junxiang, Basel Khaled Alsaeed & Muhammad Zeeshan Ajmal, *supra* note 287.

the MPIA. The MPIA is an interim arrangement that is open to all WTO members, with an aim of ensuring that a functioning dispute settlement system, including an appeal stage, is available to its parties.[321] In order to use the MPIA to settle a disagreement at the appellate stage, parties to an MPIA dispute must jointly notify the MPIA. The substantive and procedural elements of Article 17 of the DSU serve as the foundation for the MPIA's arbitration process. Its goal is to increase process efficiency. Through the legal text, the MPIA participants have made it clear that the DSU's articles, as well as other Appellate Review-related norms and processes, shall govern the arbitration. Although the panel's report lays the groundwork for this new process, it mandates that the disputing parties operate outside of the WTO's purview. The MPIA participants must maintain an organizational structure distinct from the established WTO procedure to ensure this happens.[322]

- **Legal Basis of the MPIA**

The MPIA members intentionally referred to the term 'arrangement' rather than 'agreement'. The MPIA is not a legally binding treaty but rather a political declaration of the intention to resort to appeal arbitration instead of the Appellate Body review under Article 17 of the DSU. Theoretically, the respondent may reject entering an arbitration agreement with respect to the specific dispute. In such situations, the DSB would not be in the position to enforce the MPIA.[323] However, MPIA is similar to agreements such as 'not to appeal' and 'sequencing understandings', and is not a covered agreement within the meaning of Article 1 of the DSU; consequently, the DSB will have very limited authority to consider it.[324]

Procedurally, the MPIA introduces several innovations. It features a standing pool of ten arbitrators, from which three are selected for each dispute. Additionally, this number may be raised with the consent of all involved parties. This clause highlights the adaptability of the MPIA.[325] These arbitrators are drawn from a diverse set of WTO members, including the EU, China, Brazil, and others. The ten MPIA arbitrators have

[321] Id at 481.
[322] Olga Starshinova, Is the MPIA a Solution to the WTO Appellate Body Crisis? 55 Journal of World Trade 5 787-804 (2021).
[323] Id at 797.
[324] Id.
[325] Frank Altemöller, WTO Appellate Body without Legitimacy? The Criticism of the Dispute Settlement System and the Response of the WTO Member States, 16 Global Trade and Customs Journal 4 ,(2021).

the ability to review and discuss the appeals together, which enhances collegiality and consistency in contrast to the Appellate Body, where a panel of three members would only handle a case.

- **Advantages and limitations of the MPIA**

The MPIA has been seen by some WTO members as a temporary but useful arrangement for the crisis caused by the Appellate Body's collapse.[326] It helps preserve the WTO's two-step dispute process, allowing members to appeal decisions instead of leaving cases unresolved or appealing to a body that is non-existent at present. This prevents disputes from being stuck without any legal outcome, as has already happened in several cases, including ones involving the U.S., Saudi Arabia, Korea, and the EU, where the parties have appealed into the void.[327]

The MPIA also promotes fairness in global trade by preventing countries from using protective trade barriers without oversight, making trade more stable and predictable. It allows errors made by WTO panels to be corrected, which is important, like in the Korea–Radionuclides (Japan) case[328] where the Appellate Body found that the panel had made serious legal mistakes. In this case, the appellate body had reversed most of the panel's findings. So, in the absence of the appellate body, MPIA can carry out the functions of the appellate body and review the panel decisions and avoid mistakes.

Another benefit is that the MPIA tries to overcome the issues that were raised about the old Appellate Body, such as missing deadlines. It aims to stick to the 90-day limit for appeals, while also allowing extensions if both sides agree. It also streamlines the process by setting page and time limits, making it more efficient. Politically, some countries support the MPIA as a way to push back against the U.S. stance that caused the Appellate Body's shutdown. However, the arbitration decisions under the MPIA don't go through the same WTO approval process as Appellate Body reports, which weakens their legitimacy in the eyes of some members.

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[326] Shi Jingxia & Bai Fangyan, A Practical Response to the WTO Appellate Body Crisis: Utilizing Arbitration to Resolve Trade Disputes, 9 J. WTO & CHINA 35 (2019).
[327] Olga Starshinova, *supra* note 322.
[328] DS495: Korea — Import Bans, and Testing and Certification Requirements for Radionuclides, World Trade Organization, (March 29.2025), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds495_e.htm

Despite its strengths, the MPIA has several serious limitations. First, only a small number of WTO members have joined, and there are very few active disputes under its system.[329] To date, only one case has been solved and finalized through this mechanism.[330] In this case, the appeal arbitrators circulated their award in 74 days and thus within the 90-day deadline. Moreover, the award is based on a report of 39 pages, a fraction of the length of past AB reports. However, experts have warned that DS591 was a dispute of comparatively limited complexity, and it remains to be seen whether the procedural innovations applied to this case will also work for appeals involving greater legal complexity and political sensitivity. In June 2024, the EU has challenged Colombia's compliance with the award [331] and eight more disputes are currently in the process of adjudication.[332]Second, the MPIA is not a legally binding treaty, so members can walk away or refuse to follow its process at any time. There is no enforcement mechanism to hold parties accountable.[333]

Third, the MPIA does not solve many of the issues the U.S. raised about the Appellate Body. For example, while it says appeals should focus only on legal issues, it doesn't guarantee that arbitrators will follow this rule. So, the original concern remains. Also, the MPIA emphasizes "consistency" in rulings, unlike the WTO's DSU, which focuses on "security and predictability." This suggests a push towards developing case law, which the U.S. strongly opposes. Additionally, all MPIA arbitrators can access and discuss previous cases, making it more likely that rulings will follow earlier decisions again, raising concerns about precedent.

Finally, decisions made under MPIA may lack the legitimacy of Appellate Body reports, because the arbitrators are not selected by all WTO members. Without broader agreement, these awards may not carry the same weight or global acceptance.

4.8.2 Ad hoc appeal arbitration

[329] Matteo Fiorini et al., WTO Dispute Settlement and the Appellate Body: Insider Perceptions and Members' Revealed Preferences, 54 J. World Trade 667, 680 (2020).
[330] DS591: Colombia – Anti-Dumping on Frozen Fries from Belgium, Germany, and the Netherlands, World Trade Organization
,(March29.2025)https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds591_e.htm
[331] Gisela Grieger, *supra* note 276.
[332] Maria Angelica Suarez, The Appellate Body Impasse: How To Make The WTO Great Again? 56 International Law And Politics, (2024).
[333] Olga Starshinova, *supra* note 322.

Outside of the MPIA, some WTO members have attempted to avoid 'appealing into the void' by setting up ad hoc agreements not to appeal panel reports at the beginning of a dispute.[334] For example, Indonesia and Taiwan agreed not to appeal in Indonesia – Safeguards on certain iron and steel products (DS490) if the AB were still not operational on the date the panel issued its report. Appeal arbitration on an ad hoc basis is available under Article 25 DSU in disputes involving one or more WTO members that have not joined the MPIA.

Similarly, in EU – Steel Safeguard Measures (DS595) and Turkey – Pharmaceutical Products (DS583), the EU and Türkiye, which is not a MPIA member, agreed that they would not appeal the panel reports but would instead resort to ad hoc appeal arbitration in the event of an appeal. Both disputes were settled through the adoption of a panel report of May 2022 in DS595 and through an arbitration award of July 2022 in DS583.[335]

4.8.3 Reforms to the Appellate Body

To overcome the crisis of the WTO Appellate Body, a series of targeted reforms must be pursued to restore both the functionality and legitimacy of the dispute settlement system.

First, it is essential to decide whether AB has the authority to declare that its decisions create binding precedents. It is one of the key concerns for members like the United States.[336] The role of the AB should be limited strictly to correcting legal errors, avoiding re-interpretation of facts or expansive interpretations that go beyond the treaty text, restoring its original 1995 mandate.[337] It is necessary to specify that the AB should only address issues necessary to resolve the dispute, i.e, without resorting to "obiter dicta" or advisory opinions.[338]

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[334] Gisela Grieger, *supra* note 276.
[335] DS595: European Union — Safeguard Measures on Certain Steel Products ,World Trade Organization , (March 29.2025), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds595_e.htm, DS583: Turkey — Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products, World Trade Organization , (March 29.2025), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds583_e.htm
[336] Geraldo Vidigal, Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis, 20 J. World Inv. Trade 862, 876 (2019).
[337] Bernard M. Hoekman & Petros C. Mavroidis, *supra* note 258.
[338] Umberto Celli Jr., *supra* note 274.

Institutional reform is equally critical, including restructuring the AB Secretariat to reduce the influence of entrenched legal staff by adopting a system of rotating or temporary legal clerks.[339] In the absence of a functional AB, mechanisms like the Multi-Party Interim Appeal Arbitration Arrangement under DSU Article 25 should be strengthened and institutionalized to provide temporary appellate review. [340] Procedural improvements are also necessary, such as enforcing the 90-day appeal timeline, limiting the scope of submissions, and allowing parties to opt out of factual appeals. Reforms should also include the appointment of full-time, professional panelists to improve the first instance stage of dispute resolution. These reforms can be operationalized through agreed interpretations or formal amendments to the DSU, ensuring legal stability while addressing the political deadlock.

4.9 CONCLUSION

WTO members should continue working to resolve the Appellate Body crisis without delay. Reaching an agreement on reforms is vital not just to restore a key part of the WTO dispute system, but also to rebuild trust in the organization's ability to act collectively, especially as it faces various future challenges. In light of the renewed Trump presidency and the deepening U.S.–China trade tensions, WTO members must not delay in tackling the ongoing Appellate Body crisis. Members should pursue both temporary solutions and long-term reforms.

The continued paralysis of the WTO Appellate Body poses significant risks to the effective enforcement of the TRIPS Agreement. One of the central pillars of the TRIPS regime, being included under the WTO framework, is its reliance on the WTO dispute settlement system to ensure member compliance with international IP standards.

Without a functioning appellate mechanism, there is no finality to the WTO decisions. In the absence of authoritative appellate rulings, legal uncertainty increases, especially in areas of TRIPS that require nuanced interpretation, such as patent exceptions, geographical indications, and enforcement obligations.[341] Countries may begin to interpret and apply TRIPS provisions inconsistently, weakening the global IP system and potentially harming trade flows involving pharmaceuticals, digital content, and

[339] Kathleen Claussen, Cherise Valles and Geraldo Vidigal *supra* note 300.
[340] Gonzalez, A.M., & Sakhi, A. (2022). The Multi-Party Interim Appeal Arbitration Arrangement: An Update. 17 Global Trade and Customs Journal 7, (2022).
[341] Paul Vandoren, *supra* note 36.

technology. If the crisis is prolonged, the WTO may lose its role as the primary forum for resolving international IP disputes.

Also, the ongoing paralysis of the WTO Appellate Body has made it clear just how much influence a single powerful country like the United States can exert over the multilateral trading system. Despite broad agreement among most WTO members on the need to restore the AB, the United States, especially under administrations like that of Donald Trump, has been able to unilaterally block the appointment of new judges, bringing the appellate mechanism to a halt. This demonstrates a key weakness in the WTO's consensus rule, which allows one member to effectively veto reform or block progress, even when a vast majority supports action.

In the long term, if consensus continues to be abused by dominant actors to stall institutional functioning, the WTO may drift further into irrelevance, with members increasingly turning to bilateral or regional trade agreements.

CHAPTER- V

CONCLUSION AND SUGGESTIONS

5.1 CONCLUSION

In 1995, the World Trade Organization came into existence to ensure the smooth flow of trade through a rules-based system that is fair, transparent, and predictable. It plays a central role in regulating international trade by providing a legal and institutional framework for negotiating and enforcing trade agreements among member states. The WTO has 166 members representing 98 per cent of world trade.[342]

Among the various WTO agreements, TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) stands out as a significant development in global trade governance. Minimum standards are set forth among the WTO members for the protection and enforcement of intellectual property rights in the TRIPS Agreement These requirements cover topics including trade secrets, copyrights, patents, trade-marks and geographical indications. It represents the convergence of trade and IP law within the multilateral trading system.

All the agreements under the WTO regime are enforced through the Dispute settlement mechanism of the WTO, including the TRIPS agreement. One of the primary reasons for the WTO's significance and credibility is its Dispute Settlement Mechanism, which distinguishes it from previous trade regimes. Hence, the WTO not only puts forth a set of rules and obligations to its member countries, but also, through the DSM, the WTO provides a mechanism to enforce and implement these rules.

The WTO DSM, through the Dispute Settlement Understanding, provides a structured, binding mechanism to adjudicate violations of WTO agreements, including TRIPS. It incorporates a two-tier system involving initial adjudication by panels and appellate review by the Appellate Body. Despite the formal availability of the DSM for all WTO agreements, the number of disputes initiated under TRIPS has remained disproportionately low when compared to other areas such as anti-dumping and subsidies (SCM).

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[342] The WTO, World Trade Organization, (March28,2025), https://www.wto.org/english/thewto_e/thewto_e.htm

However, the WTO Dispute Settlement Mechanism (DSM) is now facing the biggest crisis ever in its 30 years of existence. Its foundational two-tier structure, comprising both panel proceedings and an appellate review, has been effectively dismantled. The Appellate Body has been completely non-functional since December 2019, leaving the panel stage as the only working tier, undermining the finality and enforceability of dispute outcomes.

This study's major focus lies in the broader question of why the WTO Dispute Settlement Mechanism, despite being a well-established and functional legal forum, has seen only a limited number of disputes under the TRIPS Agreement. In order to analyse this aspect, a comparison is made with agreements such as Anti-Dumping and Subsidies and Countervailing Measures, which dominate the WTO's dispute settlement system. The research also looked into the legal, economic, and procedural factors that contribute to this disparity. In doing so, the study explores how economic standing affects a country's ability to engage in TRIPS disputes, examines India's strategic engagement with the DSM in shaping its intellectual property framework, and evaluates the impact of the Appellate Body crisis on the enforcement of TRIPS obligations. The focus is not only on the frequency of TRIPS disputes but also on the systemic barriers such as financial constraints, legal complexity, and institutional breakdown that discourage members, especially developing countries, from pursuing IP-related claims.

5.2 FINDINGS

5.2.1. On the limited number of TRIPS disputes compared to Anti-Dumping and SCM disputes

- There have been only 44 disputes initiated under the WTO Dispute Settlement Mechanism (DSM) alleging violations of the TRIPS agreement.
- In contrast, the Anti-Dumping Agreement accounted for 144 cases under the WTO DSM, and the Subsidies and Countervailing Measures Agreement accounted for 141 cases.
- A significant portion of TRIPS disputes (14 out of 44, or 32%) have been resolved through mutually agreed solutions, whereas this figure is lower for AD (17 out of 144, or 12%) and SCM (19 out of 141, or 13%) cases.

- While the WTO Dispute Settlement Body (DSB) has adopted reports for 10 AD, 9 SCM, and 5 TRIPS cases, the overall number of TRIPS disputes reaching the ruling stage remains low. Similarly, implementation was notified by the respondent in only 8 TRIPS cases.
- About 5% (2 out of 44 cases) of TRIPS disputes have been withdrawn or terminated.
- The last case brought before the WTO DSM citing the TRIPS Agreement was on December 12, 2022, without any cases coming up in 2023 or 2024.
- While the WTO Dispute Settlement Body has adopted reports for 10 AD, 9 SCM, and 5 TRIPS cases, the overall number of TRIPS disputes reaching the ruling stage remains low.
- Implementation was notified by the respondent in only 8 TRIPS cases, compared to 25 AD and 29 SCM cases, further reflecting the lower frequency and enforcement of TRIPS rulings.
- The longest period to reach the final report adoption stage is taken by the TRIPS dispute when compared with the anti-dumping and SCM agreements.
- In DS441, consultations were requested on 18 July 2012, and the appellate body report was circulated only on 9th June 2020 to the members and finally adopted by the DSB on 29th June 2020, taking about 8 years to reach a binding decision in this case.
- TRIPS disputes are inherently complex due to their legal nature, requiring an extensive interpretation of domestic intellectual property laws and their compatibility with international obligations under TRIPS. This contrasts with AD and SCM disputes, which primarily focus on technical and quantifiable trade measures such as tariff rates, countervailing duties, and anti-dumping margins, making them easier to litigate at the WTO.
- Only WTO Members, not intellectual property holders themselves, are authorized to file TRIPS disputes with the WTO. While IP holders may attempt to persuade a WTO Member to take action on their behalf, these efforts often prove unsuccessful.
- Only actions taken by a WTO Member, or those attributable to it, can be challenged through WTO dispute settlement procedures; private sector IP infringements, which are likely the primary concern for IP holders, cannot be contested.

- The remedies offered under the Dispute Settlement Understanding provide limited relief to the victorious complainant, as they apply only to future actions.
- Moreover, implementing WTO rulings on TRIPS often requires legislative amendments or judicial intervention within a country's domestic legal system, whereas AD and SCM cases usually lead to direct modifications in trade measures, such as lifting duties or adjusting trade policies, which are administratively simpler.

5.2.2 On the role of economic disparities in accessing the WTO DSM

- A thorough analysis of the complainants in these TRIPS disputes shows that developed nations, especially the US and the EU, initiate the majority of the cases.
- Together, they are responsible for 28 out of 44 cases, with the US accounting for 18 and the EU for 10.
- In rare cases, South Korea, Australia, and Canada have initiated disputes. On the other hand, developing nations have filed comparatively fewer TRIPS disputes.
- They include four complaints from Qatar, two from Brazil, and one each from India, China, Indonesia, Cuba, the Dominican Republic, Honduras, and Ukraine.
- On the respondent side, the data indicate that both developed and developing countries have been targeted in TRIPS complaints.
- Developed countries such as the European Union emerged as the most frequent respondents, with a total of seven disputes.
- The United States and China each appear as respondents in five disputes. Australia follows closely, also appearing in five disputes.
- Developing countries have also been respondents in a noticeable number of cases, including India (2), Argentina (2), and Saudi Arabia (2). Turkey, Brazil, Indonesia, Bahrain, the United Arab Emirates, Pakistan, Portugal, Greece, Sweden, Denmark, and Ireland have each been respondents in one case.
- The developed countries' broad representation in the WTO DSM demonstrates their exceptional legal capabilities, technical know-how, and tactical engagement in defending intellectual property rights globally. These countries have the institutional structure required to monitor compliance in other

countries and the resources to bring an action against other member countries when violations are suspected.

- Twenty-four, or 80%, of the thirty cases that developed nations initiated have been resolved.
- The analysis of these disputes shows a clear success rate for the complainants. In ten of these cases, the complainant won the dispute before the WTO DSM.
- The remaining 14 cases have been resolved through mutually agreed solutions. Out of these 14 cases initiated by a developed country, which were resolved through a mutually agreed solution, only 6 of them were against developing countries, indicating that when the other party is a developing nation, developed nations might be more likely to pursue litigation as opposed to settlement, as the developed nations have higher chances of winning.
- The developing countries initiated 14 TRIPS disputes, out of which 8 cases can be said to have culminated, ie, only 57.14%. However, the trend in cases raised by developing countries is different from that of developed countries. Out of the 8 cases, 3 cases have been withdrawn/terminated of which 2 cases were against developed countries. Authority for the panel lapsed in 1 case. WTO DSM ruled against the complainants in 4 cases, which were all against developed nations.
- None of the cases initiated by developing countries have been resolved through a mutually agreed-upon solution. This demonstrates the systemic difficulties that developing nations face in utilizing the DSM. This pattern could be explained by a number of interrelated variables. Because they are not major players in international trade, developing nations frequently lack the bargaining capital, both in terms of economic leverage and diplomatic influence, to persuade or coerce the developed nations to participate in substantive settlement discussions.
- Various efforts have been taken in the WTO to ensure every member is equal under the WTO system through special and differential treatment provisions, but however the problem of financial strength is a crucial issue that impedes developing countries from making use of the DSM effectively and ensuring their rights are protected., given the large transaction costs of settling disputes.

5.2.3 On India's experience with TRIPS disputes

- India has been one of the most engaged developing countries in the WTO DSM, participating actively both as a complainant and a respondent.
- Within the TRIPS framework, India's most significant involvement came as a respondent in the twin disputes: India – Patent case (India- Patent Protection for Pharmaceutical and Agricultural Chemical Products; WT/DS50 and WT/DS79). The disputes were initiated by the United States and the European Communities, who challenged India's implementation of its transitional obligations under TRIPS Articles 70.8(a) and 70.9.
- India exercised its right to defer product patent protection in certain sectors until 2005, as allowed under Article 65 of TRIPS. However, the panel and Appellate Body found that India failed to provide a legally adequate mailbox system and EMRs, holding that administrative instructions did not meet the requirement of a "sound legal basis."
- This outcome set a strict precedent on how transitional flexibilities under TRIPS are to be implemented. This had a chilling effect on the implementation flexibility that TRIPS Article 1.1 theoretically allows for developing countries.
- As a result of the ruling, India amended its Patents Act in 1999 to include a formal mailbox system and to provide for EMRs, demonstrating India's willingness to comply with WTO rulings, even though it had strong legal and policy arguments in its defense.

5.2.4 On the impact of the Appellate Body crisis

- One of the most significant institutional challenges to the WTO DSM has been the ongoing Appellate Body (AB) crisis, which culminated in a complete paralysis of the appellate tier since December 2019, and as of November 2020, it is a judicial body with no active members.
- As the Appellate Body is essential for ensuring legal finality to WTO DSM's decisions, its non-functioning has had a particularly adverse impact on the trust and credibility of the dispute settlement mechanism.
- There were just ten requests for consultation to the WTO DSM in the year 2024, a sharp decline from the fifty that were filed in 1997, when the system was reliable and operational. The number of consultation requests increased in 2018 to 38, and 20 consultation requests were made in 2019.

- The number of consultations has not exceeded 10 in the years after the appellate body's demise.
- While the COVID-19 pandemic may have contributed to the earlier decline in dispute activity, the increase in requests for consultations from 6 in 2023 to 10 in 2024 suggests that WTO members still view the dispute settlement system as a relevant mechanism for resolving trade conflicts.
- However, it is equally important to note that even with this rise, the total number of consultation requests remains below 10, which is significantly lower than pre-crisis averages.
- The role of the appellate body when it comes to the TRIPS disputes has been limited.
- Out of the 44 TRIPS disputes under WTO DSM till date, only 6 cases have been appealed.
- Two of the TRIPS appeals were brought by the United States successfully, and one was brought against the United States successfully.
- Appeals brought by Honduras and the Dominican Republic against Australia were unsuccessful. In both of these cases, the US was a third party. The appellate decision wasn't given within the time frame due to the complexity of the matter at hand, as well as the huge backlog of cases in the AB and insufficient members.
- Despite its vocal criticism of the Appellate Body's conduct and alleged judicial overreach, the United States has never cited any TRIPS-related dispute to justify its claims. Instead, its grievances have consistently referenced disputes under other WTO agreements, particularly those involving the Anti-Dumping Agreement, the Subsidies and Countervailing Measures (SCM) Agreement, the Safeguards Agreement, and the General Agreement on Tariffs and Trade (GATT).
- While the Appellate Body crisis has clearly disrupted the WTO's dispute settlement system, its effect on TRIPS-related disputes has been less obvious and not as direct, at least for now. Unlike disputes under GATT or the Anti-Dumping Agreement, where many cases are appealed into the void, there are currently no TRIPS disputes waiting for appeal. This could mean that the crisis has had less of an impact on TRIPS cases so far.

- However, it's important to note that no new TRIPS disputes have been brought to the WTO dispute system in the last two years. The last request for consultations in a TRIPS case was made on 12 December 2022, and nothing has been filed before the WTO DSM under the TRIPS agreements in the last 2 years, ie., 2023 and 2024. This is unusual, especially when compared to previous years, where, even though TRIPS cases were few, they were still regularly part of the WTO DSM.
- This drop and disappearance in TRIPS disputes cannot be linked with certainty to the Appellate Body being non-functional, but the timing suggests a possible link. Since the appeals process isn't working, countries may be hesitant to start TRIPS-related disputes, particularly because these cases often need strong legal interpretation and enforceable decisions, both of which are weakened by the ongoing crisis.

5.3 SUGGESTIONS

- ✓ **Strengthen Legal and Institutional Support for Developing Countries in TRIPS Disputes**

Despite the WTO Dispute Settlement Mechanism being formally accessible to all members, developing countries remain underrepresented, as analysed in this study through the disputes involving the TRIPS Agreement.

- Expand the role and resources of the Advisory Centre on WTO Law (ACWL) to offer specialized support in complex TRIPS-related litigation. Many developing countries lack in-house legal expertise and financial resources, making ACWL's enhanced role critical.
- Increase funding and resources for the ACWL to enhance its capacity to assist a greater number of developing countries.
- In order to specifically address the particular difficulties that developing nations encounter in the implementation and dispute resolution of TRIPS, the WTO's Trade-Related Technical Assistance (TRTA) programs ought to be updated and reinforced. This means creating specialized training materials on TRIPS litigation, evidence management, and dispute resolution tactics. To improve practical comprehension, region-specific training that incorporates local legal

frameworks and real-world case studies should be facilitated. Additionally, to ensure accessibility and contextual relevance, collaborations between the WTO, the Advisory Centre on WTO Law (ACWL), and regional institutions should be promoted in order to provide TRIPS-focused legal capacity-building in local languages.

- ✓ **Strengthen Article 27 of the DSU: Mandate Proactive and Continuous Secretariat Support for Developing Country Members**

Article 27 of the Dispute Settlement Understanding (DSU) provides for Secretariat assistance to the developing member countries "in a manner that ensures the Secretariat's continued impartiality." In the present environment, there is a compelling need to strengthen and operationalize this provision. The existing support, often ad hoc and insufficient, does not adequately address the procedural and technical challenges faced by the developing countries in the dispute settlement proceedings.

- Article 27 should be amended to formally require the WTO Secretariat to deliver comprehensive, proactive, and continuous support to developing and least-developed countries at all stages of the dispute process. This expanded mandate should include pre-dispute assistance, in-dispute support, and post-ruling guidance.

Such an amendment would give practical meaning to the principle of special and differential treatment under the DSU. It would also strengthen the legitimacy and inclusiveness of the dispute settlement system by ensuring that developing and least-developed countries with limited resources can participate more effectively and equitably.

- ✓ **Mandatory IP Expertise on TRIPS Dispute Panels**

To improve the quality and credibility of rulings in TRIPS-related disputes, Article 8 of the WTO Dispute Settlement Understanding (DSU) Working Procedures can be amended to require that at least one panelist on any TRIPS dispute panel possess prior professional experience in intellectual property law. This could include former patent

office officials, IP litigators, or legal academics who have expertise in international IP law.

- While panelists are generally selected for their legal expertise and neutrality, there is currently no requirement that they possess subject-matter knowledge in IP law, despite the complexity and technical nature of TRIPS disputes.
- Introducing a mandatory IP-specialist slot would close this expertise gap and ensure that panel rulings are grounded in a deeper understanding of legal and technical aspects.

✓ **Establishing SPS-Style Technical Expert Groups for TRIPS Disputes**

To enhance the technical and contextual quality of TRIPS dispute rulings, the WTO may adopt a mechanism similar to Article 11.2 of the SPS Agreement by establishing "Technical IP Expert Groups" within the TRIPS dispute framework. These expert panels would be empowered to provide non-binding advisory opinions on complex issues such as patent examination standards, compulsory licensing procedures, and public health-related flexibilities under TRIPS.

- In sanitary and phytosanitary (SPS) disputes, WTO panels routinely consult scientific experts to inform their rulings. TRIPS disputes, which often involve similarly technical or policy-sensitive issues, would benefit from a structured expert advisory process.
- Although the DSU currently permits panels to seek expert input under Article 13 of the DSU, this remains entirely discretionary and is rarely used in practice. Codifying such a mechanism in the TRIPS context would standardize expert engagement, leading to better-informed outcomes.

This reform would ensure that the TRIPS disputes are adjudicated with the depth of understanding necessary to respect both the legal complexity and socio-economic implications of IP enforcement, particularly in areas involving access to medicines and technology transfer, encouraging members to effectively use the DSM for solving TRIPS-related disputes.

✓ **Procedural Timelines in TRIPS Disputes to Support Developing Countries**

While the DSU already outlines procedural timeframes for each stage of dispute settlement (e.g., Article 12.8 for panel reports, Article 21.3 for implementation), these timelines are frequently exceeded in practice, especially in complex TRIPS disputes. Such prolonged legal proceedings, which frequently extend for many years, pose serious obstacles for developing and least-developed nations and deter them from pursuing TRIPS-related claims because of the high expenses and their limited capacity. This delay is frequently exploited by developed countries as a tactic to evade timely compliance.

- Amend DSU procedures to introduce mandatory expedited timelines for TRIPS disputes initiated by or involving developing countries, including fast-tracked panel composition, time-bound submissions and hearings, and strict deadlines for compliance enforcement.

✓ **Monetary Compensation as a Remedy**

For enhancing compliance and to deter prolonged violations, the WTO should explore introducing compensation, particularly monetary, as a more effective remedy within the dispute settlement system. In terms of remedies, there are no retrospective damages within the WTO dispute settlement system. Any compensation is prospective only, with the aim of inducing the party to comply. The lack of retroactive compensation may aggravate the delay, since the parties do not have any incentive to act more quickly. During both the GATT and the WTO eras, developing countries have put forward proposals for introducing compulsory monetary compensation as a remedy, which could act as a deterrent. This may not, however, be realistic in the short term, but could nonetheless be investigated further.

✓ **Increasing Transparency of the Procedure**

Improving transparency in WTO dispute settlement procedures is essential to build trust in the system, particularly in sensitive and technically complex areas like TRIPS. To this end, it is recommended that all written statements and other documents made

by the panel and Appellate Body during trials, other than those involving national or commercial secrets, should be made public on the relevant websites. Secondly, the application of the amicus curiae system should be promoted to enhance the scrutiny of the case trial through the participation of non-interested third parties.

- ✓ **Multi-Party Interim Appeal Arbitration Arrangement (MPIA) as an interim solution**

With the continued deadlock in Appellate Body appointments and the return of Donald Trump, a vocal critic of the WTO, the chances of a quick, consensus-based resolution to the crisis remain slim and politically challenging. In such a scenario, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) offers a practical and legally grounded interim solution to preserve the appellate review function. Operated under Article 25 of the DSU, the MPIA replicates core procedural elements of the Appellate Body while functioning independently of the U.S. veto.

- It should be actively sought to expand the MPIA's membership to include developing nations like Brazil, Indonesia, and India, which are active players in WTO DSM, in order to increase its efficacy. Increased participation would lessen the possibility of fragmented jurisprudence across WTO members while also enhancing the legitimacy of the system.
- Furthermore, procedural innovations like creating a standing pool of arbitrators with IP law experience and offering technical support to developing nations, so they can use the MPIA mechanism, could improve its use and accessibility.

- ✓ **Article 5 DSU Mechanisms: Mediation and Good Offices as a Complementary Dispute Resolution Tool**

In the current environment of appellate paralysis, Article 5 of the WTO Dispute Settlement Understanding, which permits the use of good offices, conciliation, and mediation, can serve as a flexible, cost-effective, and expedient alternative for resolving disputes. These mechanisms can be initiated voluntarily at any stage of the dispute

process, and it aligns with the broader objective of the DSU to prioritize mutually agreed solutions over formal adjudication.

- WTO members should support the formal introduction of a neutral, professional pool of mediators who are independent of the WTO Secretariat or the Director-General (DG). This is particularly important for ensuring neutrality in disputes involving major powers.
- For countries like India, where a significant portion of disputes involve major economies (e.g., the U.S. and EU), Article 5 mechanisms may be more viable for resolving disputes with developing or smaller trading partners, especially where power asymmetries are less stark.
- In practice, most disputes move directly from consultations to litigation. Mediation should be promoted as an intermediate stage, allowing space for cooperative resolution without the costs and adversarial nature of formal panels.
- Due to past concerns of bias and geopolitical influence, especially regarding disputes involving the Global South, the role of the DG in Article 5 proceedings should be reconsidered or replaced with neutral facilitators to preserve trust and impartiality.

While Article 5 mechanisms have rarely been invoked, they remain a valuable but underexplored tool. Strengthening this provision would not only offer procedural flexibility but also an alternative dispute resolution method, particularly when formal adjudication is blocked or politically unviable.

- ✓ **Agreement to 'not appeal' Panel reports**

WTO members may adopt "no appeal agreements" as a temporary measure to preserve the enforceability of panel decisions in the absence of a functioning Appellate Body. Under this arrangement, the parties agree in advance not to appeal a panel report, thereby treating the panel report as final and binding. This method has already been used in disputes such as Indonesia -Vietnam (steel safeguards), South Korea–U.S. (anti-dumping), and Indonesia and Chinese Taipei (safeguard measures).

- It preserves access to the full dispute settlement framework (consultations, panels, implementation).

- It ensures decisions are made within the WTO legal structure, maintaining impartiality.
- It is particularly beneficial for developing countries, as it retains eligibility for special and differential treatment and legal assistance from the Advisory Centre on WTO Law (ACWL).

These "no appeal" agreements allow countries to maintain the integrity of the WTO's dispute settlement process despite the non-functioning Appellate Body.

- ✓ **Utilizing Dispute Resolution Mechanisms under Regional Trade Agreements (RTAs) as an Alternative Path**

Given the prolonged paralysis of the WTO Appellate Body, Regional Trade Agreements (RTAs) may offer a viable alternative for dispute resolution in the interim. With over 490 RTA notifications in force as of 2020, many contain independent and well-defined dispute settlement mechanisms. In cases where WTO processes are stalled due to appeals into the void, RTA forums can provide legal certainty and finality.

- In the absence of a functioning WTO appellate process, RTA dispute systems can prevent panel rulings from entering legal limbo, especially where fork-in-the-road provisions limit forum switching after initial filing.
- Where RTAs include their own enforcement mechanisms, they may prove more effective than a crippled WTO enforcement regime, which cannot proceed beyond unresolved appeals.

However, RTAs can only serve as a temporary or partial solution, since their utility depends on several factors: the number of RTAs a country has negotiated, whether they are with likely trade dispute counterparts, and whether those RTAs include a functional and enforceable dispute settlement mechanism. Thus, while helpful in specific contexts, RTA-based dispute resolution cannot fully replace the WTO’s multilateral and universally accessible system.

- ✓ **Establishment of a WTO Permanent Panel**

During the DSU Review negotiations, the European Union suggested the establishment of a permanent panel body, i.e., a true first instance court for WTO disputes. This body would consist of standing panelists appointed for fixed terms. This initiative was withdrawn by the EU due to insufficient support. Concerns were raised about the "over-independence" of permanent panelists, and preference was instead given to proposals for permanent chairs with ad hoc panelist appointments.

- In retrospect, the appellate crisis might have been avoided entirely if a permanent panel system had been implemented. The Appellate Body might have experienced less systemic strain if the reform had improved the quality and credibility of the first-instance reports.
- A WTO Permanent First-Instance Court could be established, composed of judges with fixed tenures, drawn from diverse legal systems and economic standings. It would enhance legal certainty, reduce political interference, and provide a more efficient framework for complex disputes, including disputes under the TRIPS agreement.
- By having a readily available, pre-designated panel structure in place, the time currently spent on the nomination, vetting, and agreement process for each dispute can be significantly reduced.
- The International Tribunal for the Law of the Sea (ITLOS) serves as a prominent example of a permanent international judicial body with a structured composition and mandate. ITLOS comprises 21 independent judges elected by the States Parties to UNCLOS.[343] Each judge serves a nine-year term and may be re-elected. The election process ensures equitable geographical representation and the inclusion of the principal legal systems of the world.
- The European Union's initiative to establish a Multilateral Investment Court (MIC) for investment arbitration presents a forward-looking institutional template for reforming international dispute resolution from which the WTO can draw inspiration. It is designed to replace the existing investor-state dispute settlement (ISDS) mechanisms. The MIC aims to introduce a more structured, transparent, and impartial system. The first-instance tribunal of the MIC is envisioned to comprise a set number of judges appointed for fixed terms.

[343] Art. 2, Statute of the International Tribunal for the Law of the Sea, Dec. 10, 1982.

- Both the International Court of Justice (ICJ) and the International Criminal Court (ICC) also provides clear examples of international judicial bodies structured with permanent benches to ensure continuity, and legal consistency, The ICJ, consists of 15 permanent judges elected for a term of nine-years by the UN General Assembly and Security Council.[344] Similarly, the ICC operates with a Pre-Trial Chamber, Trial Chamber, and Appeals Chamber, each staffed by elected, full-time judges.[345] This standing composition enables the ICC to manage complex legal matters efficiently, without the instability associated with ad hoc judicial appointments.

Introducing a standing first-instance court within the WTO would represent a meaningful step toward modernizing its dispute settlement framework. This model can be introduced either as an independent reform or as part of a broader restructuring alongside the revival of the Appellate Body. A permanent dispute resolution body offers significant advantages over ad hoc panels. These include greater consistency in decision-making, enhanced legal expertise, and stronger institutional independence.

✓ **Restore and Reform the WTO Appellate Body for Credible Enforcement**

The U.S. has continued to block the appointment of new members, effectively paralysing the Appellate Body since 2019. Because consensus is required under WTO rules for these appointments, this unilateral obstruction has held the entire appellate process stalled. To break this deadlock, it is essential to carry out targeted and balanced reforms that can address these concerns.

- The adoption of the **"**Walker Principles**"** which recommend adherence to the 90-day rule, limits on advisory opinions, non-binding precedent, and prohibitions on expanding rights and obligations offers a viable compromise model for restoring trust in the appellate process. To address concerns about Rule 15, as Ambassador Walker proposed, clarifying that Appellate Body members should not be assigned new cases near the end of their term can be a solution.

[344] Arts. 3–15, Statute of the International Court of Justice, June 26, 1945.
[345] Arts. 34–39, Rome Statute of the International Criminal Court, July 17, 1998.

- Another important reform is to expand the Appellate Body from seven to nine members, reflecting the increasing workload observed in recent years. Since the AB has not been operational for many years now, a huge pending worklog is also waiting for the appellate body when it becomes operational again, and hence, increasing the number of members becomes even more necessary. Similar to the panel stage, appeals would be heard by divisions of three members, with rulings based on majority voting. Dissenting opinions would be published, and the principle of collegiality among the members would be preserved.
- The WTO Members may form an independent commission made up of distinguished professionals, such as attorneys, economists, and seasoned WTO practitioners, to guarantee that the panel and appellate body members are highly qualified. This commission would be responsible for evaluating the eligibility of all nominees for both panelist and Appellate Body positions, ensuring that only individuals with sufficient expertise in GATT/WTO dispute settlement are appointed.
- Also, the present centralized secretariat system can be replaced with a clerk-based assistance model in order to improve the WTO Appellate Body's independence and efficacy while guaranteeing that it is in line with the WTO's larger culture and expectations. Each member of the Appellate Body would be allocated one or more clerks who work directly under their direction and supervision.
- These clerks could be seconded from the WTO Secretariat for one- or two-year terms, ensuring a steady flow of legal support that is both technically competent and institutionally grounded. Selection could be made either by senior WTO secretariat officials or by the AB members themselves from a vetted pool. This reform would restore the balance of decision-making authority to the adjudicators while ensuring that the legal advice they receive is informed by a practical understanding of how WTO agreements are negotiated and how members expect adjudicators to interpret and apply the law.
- One lesson that is to be learnt from the recent events is that more oversight and interaction between WTO members and a reconstituted AB is needed. The Dispute Settlement Body (DSB), in collaboration with the Appellate Body,

should consider organizing an annual meeting or dialogue to discuss recent developments. This initiative has the potential to improve understanding between WTO members and members of the Appellate Body. A meeting of this kind might also be used to discuss procedural matters and, if required, look into possible changes to the Appellate Body's Working Procedures or the Dispute Settlement Understanding (DSU).

- However, bringing about such changes needs approval from the WTO membership. i.e., the DSB. Before such suggestions can be put on the DSB agenda for a decision, a great deal of preparation work will be needed. Since these issues pertain to how the WTO operates, the Director-General should actively participate in setting the stage. According to Art. IX WTO, voting may be used if necessary, provided that the majority of the membership supports such procedural adjustments. But the need for voting can be limited if these procedural changes are well prepared and supported by the key players under the WTO. If WTO Members are willing to take decisive action and implement proposals of this nature, there may finally be a path toward meaningful progress and resolution.

While the WTO has, at times, managed to overcome deep divisions through pragmatic compromise, the prospect of reaching consensus on restoring a fully functional and universally accessible two-tier dispute settlement system remains uncertain in the near term.

- ✓ **Reconsidering the Two-Tier System**

In this prolonged state of institutional paralysis, it becomes important to ensure that the core dispute settlement mechanism of the WTO does not collapse entirely. As efforts to reach consensus on reviving the Appellate Body remain politically stalled, abolishing the two-tier system entirely may emerge as a necessary last-resort measure to prevent the complete dismantling of the WTO's rules-based dispute settlement system and to prevent "appeals into the void". It may be the only viable option to maintain legal finality and preserve confidence in WTO adjudication.

- This structural reform would involve eliminating the second appellate tier and enabling final and binding decisions at the panel stage. However, this would

require strengthening the quality panel stage through permanent or professionalized panelists and enhanced transparency in legal reasoning.

- A useful comparative example is provided by the International Tribunal for the Law of the Sea. ITLOS functions effectively with a single-tier structure, issuing binding decisions at first instance without any further option for the parties to prefer an appeal. ITLOS consists of 21 elected judges with a nine-year tenure.
- But it's also important to acknowledge the important distinctions between ITLOS and the WTO. While the WTO's jurisdiction covers a broad range of politically delicate and economically significant problems, from trade remedies and subsidies to intellectual property and public health, ITLOS largely deals with interstate maritime disputes involving a very restricted field of law. Furthermore, the WTO functions within a larger multilateral trading system, and decisions made in disputes may have a systemic impact on both domestic and international trade relations.

These distinctions suggest that while the ITLOS model provides a conceptual foundation, the WTO would need to complement a single-tier system with additional safeguards such as transparent reasoning, reasoned dissent, and professionalism. The two-tier structure offers important advantages, such as an added layer of legal scrutiny, improved quality of decisions, and a formal opportunity to correct errors; therefore, abolishing it should only be considered as a last resort when no other options remain workable.

- ✓ **A dispute settlement system without the US**

Several scholars and trade law experts have observed that the United States' longstanding dissatisfaction with the WTO Appellate Body (AB) stems not from procedural inefficiencies or doctrinal concerns alone, but from perceived threats to U.S. strategic and commercial interests. Additionally, China's rise as a global trading power has increased U.S mistrust in the WTO dispute system. As a result, the opposition from the United States can be increasingly perceived as geopolitical, representing more than just legal concerns, as a result of which an effort from the U.S side to solve the crisis cannot be reasonably expected any time soon. This situation calls for the establishment of a parallel dispute resolution system without the U.S.

- Professor Pieter Jan Kuijper had suggested the formation of a coalition referred to as the “Real Friends of Dispute Settlement” to negotiate a treaty that replicates key elements of the WTO's dispute settlement procedures, particularly for appellate review.
- This mechanism could involve existing Appellate Body members, allow for the appointment of new ones, and could potentially be expanded to include disputes under regional trade agreements.
- However, such a mechanism lacks enforceability under WTO law and may be viewed as a political protest rather than a binding multilateral structure.
- Moreover, there is a possibility that the U.S. would benefit from others adhering to WTO rules, while remaining outside binding enforcement, essentially becoming a free rider in the global trade system.

While such a solution may appear feasible, particularly as it seeks to bypass the very member responsible for the current impasse, it is confronted with significant political, legal, and practical hurdles that make its successful implementation highly uncertain. Only a few countries may be willing to openly challenge U.S. interests, given the economic weight of the U.S. market, its geopolitical influence, and the high stakes involved in maintaining favourable trade relations.

The world has undergone a tremendous transformation since the establishment of the WTO. The "Quad," a small group of strong nations, used to make decisions, but this method is no longer appropriate for the multipolar world order of today. It is now challenging for nations to come to an agreement due to escalating geopolitical tensions and strategic competitiveness. The WTO's dispute settlement system, which was once praised for bringing a legal structure replacing the diplomacy-driven GATT system, is now facing serious challenges. Yet, in this moment of institutional crisis lies a potential turning point, a chance to adapt the system to the complex political realities of the 21st century if the global community can rise to the challenge. Let the WTO not be remembered as a monument to what was, but as a mirror reflecting what global governance can still become.

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