Cours 1 – The Law and practice of the WTO

* 1919 : Peace Treaty of Versailles

As a member of the treaty economic delegation, Keynes participated to the Versailles peace treaty negociations. According to him the main reason for the WWI was too much protectionnism and inegality in trade.

And wrote the Economic consequences of the Peace, in which he criticizes the Versailles Peace Treaty and in this very book he says there will be another war as the treaty isolates too much Germany. And a few years later, war started and now the economists agree on the fact the reasons of the war were too much protectionnism and inegality in trade.

So after the WWII , UK and US realized that without an open, transparent and non discriminatory system, a long lasting peace was not possible.

* August 1941 : the Atlantic Charter

A very important at the time but our system today was already contained in that

Principle 4 : economic pillar of peace : both the UK and the US said that

* + « the endeavor to further the enjoyment by all nations, great or small, victor or vainquish, of access an equal terms to trade and the raw materials that would be needed to recover from the war »
  + Idea that the new system would have to be non discriminatory => major idea : to have a non discriminatory system
* 1944 : Bretton Woods
  + Development pillar : developpement of the World Bank “international bank for reconstruction and development”
  + Monetary supervision with the establishment of the IMF
  + However States were unable to agree in Bretton Woods on an institution that would be charge of trade : the third pillar of a stable international system

Without a working economic system, peace cannot remain.

* November 1945:
  + US: leading force
  + Versy soon after the establishment of the UN, a very document was circulated within the ECOSOC (Economic and social council of the UN)
    - “proposals for expansion of world trade and employment”
      * for the first time a state came with a proposal to do two things :
        + multilateral trade rules: before that the rules were bilateral, explaining the discrimination
        + and need to have an institution to supervise to watch compliance for these multilateral rules
    - When the proposals were circulated in ECOSOC: they decided to prepare a negotiation committee to negotiate how to formulate international rules and to establish an institution that would control the compliance
    - But the US are not always patient, so while the negotiations were going on, they invited 33 states and offered to negotiate tariffs “droit de douanes”
      * In 1946, all the states accepted the invitation (except USSR) and joined in Geneva
        + From that day they decided to agree through successful rounds of negotiation: the practice was launch at that time
        + At the end, in October 1947, they realized they had no insurance of the commitment of the participating states: need to be certain that all would apply them in a non discriminatory way to all the states

That is why they decided to formally agree and ensure compliance to tariff cuts they created the GATT

* + - * The GATT was born on 30 October 1947: they had another great idea : the GATT should entry into force asap
        + Therefore they decided that from January 1948: the GATT would start have effects even not ratified.

“provisional entry into force”

* + But at the same time, the UN was still working and they decided to convene a conference in La Havanne in Cuba
    - The Havanna conference on trade and employment (conformely to the US proposal on trade and employment) on November 1947 (so a month after the GATT)
    - This conference was pioneer because at the end the states concluded the International Trade Organisation Charter ITO March 1948
      * Therefore on paper the ITO was created (it was supposed to be the first multi trade organization ever)
        + The conference was therefore a success as they created an organization
        + But the Havanna charter never entered into force and faded away (“tombé en desuetude”) because the US decided to oppose to the ITO charter as some congressman thought it was not liberal enough
        + And therefore the other states refused to ratified
        + The ITO was therefore born dead
  + However, it was not the end of the system as the GATT was enforced and already producing legal effects : the GATT, which was supposed to be an additional protocol to the charter, survived by accident, because there was nothing the GATT became the epicenter.
    - States said they could not go back on nothing: they had realized something was necessary to insure a minimum of liberalism
      * Provisional agreement that survived for more that 47 years
        + Only trade can put state to accept legal situation like that
        + The GATT was just a secretariat facilitating the meeting of the GATT contracting parties
  + The GATT was a club of 23 states with quite homogeneous trade and economic power : “birth of the GATT Club”
    - And in the club they continued to have rounds of discussion
      * 1949 Geneva
      * 1931 Annecy
      * 1950’s
      * 1960/61 : Dillon Round
  + The 60’s were a turning point in the history :
    - Starting from the 60’s things started to change, to be more complicated in the club “complexity in the club” because of the change of paradigm at three levels:
      * A political change of paradigm
        + Until the beginning of the system, the US were the leading force
        + But at the end of the 50’s : conclusion of the Rome Treaty establishing the European Community

Europe is a new political club within the club with different objectives and visions that the US

* + - * + Also Japan was back on its feet
        + The US started to have competitors with different agendas
      * A sociological change of paradigm
        + Until the Dillon Round, never more than 26 states involved in the trade negotiations in the club
        + But then in the 60’s : it’s the decade of decolonization : new states acceding to sovereignty : and one of the main manifestation of statehood is to join the club

But these states were developing states : “underdeveloped”

These was going to change the old picture of the club as the previous members of the club were quite homogeneous

Poor states wanted to join but they could not have the same agendas

Therefore the things became more complicated

* + - * A technical/economic change of paradigm
        + The main objective was tariffs when created but then in the 60s the problem was technical barriers to trade
        + Tariffs were no longer the problem but states were using different obstacles to obstruct importation

Ex: new sanitary regulations “non tariff measures”

* + - * + Vicious measures that are not transparent : states disguised them in order to restrict international trade
    - So it was not surprising that the big round held from 1964 to 1967 “the round Kennedy” : the duration of the round is already a change before it was only a year and with the Kennedy round we reach 3 years and also it is the only round that did not come to an end
      * Part 4 of the GATT: the new states said they wanted to be refered to so they added a soft part : “the part 4”
    - They started to have more disputes and realized that even though the GATT was better than nothing it was not working so well
    - 1973: the Tokyo Round: it lasted 6 years from 1973 to 1979, 102 states were participating, but at the end the very idea of multilateral trade was in danger
      * “the worse round ever” : they were unable to find any agreement and decided to implement the Tokyo “codes”
      * The Tokyo round threatened the very idea of multilateralism as the fundamental idea was non discrimination and the Tokyo implemented fragmentation in the club as the states were deciding whether they wanted or not to implement the rules
        + The “GATT à la carte”
        + You had a fragmented system in a club which was to be based on legal predictability, transparency,… but with the GATT à la carte it was no longer clear who was bound by what
        + Threatened the very idea of multilateralism: the GATT à la carte could allowed a discriminatory system

It became a power based system

The US decided on the sanction: unilateralism

* + - * + It became a power based system where the powerful were imposing their views: could lead nations to war
    - They decided to go for the long of the last chance: save or not save and it will lead to something new as the GATT was no longer working
  + In 1986 they launched the Uruguay Round: the round of the last chance “biggest negotiation round”: on loads of subjects with a new dispute settlement system and a new international organization.
    - They found a deal: Dunkan saved the conference
    - 15th april 1994: they concluded the Marrakech Agreements: the World Trade Organization was born at that date
  + Since January 1995 the WTO entered: most achieved model of multeralism
    - They needed to have a deal on everything or no deal at all: “un pari fou”

The only requirement:

* bring the documents
* open book exam: case studies and a QCM: 70%
* active participation : 30%

Cours 2 – The WTO as an institution

1. **Identify the objectives of the organization:**

* negative picture on that organization
* When you want to identify the objectives of the WTO: need to check at the Preamble of the agreement establishing the WTO.
  + Very important agreement
* The Preamble should not be underestimated: object and purpose of a treaty
  + “in accordance with the objectives of sustainable development”
    - development that uses at the same time: economic employment, social development and environmental protection
      * first treaty with an explicit reference to sustainable development
        + the WTO is not about free trade, anti environmental protection…
  + Free trade? No!
    - Free trade concerns do not prevail other other concerns
      * Importance of the words
        + Les mots, Sartres
* In 1997, judges at the WTO said the Preamble adds “ color, texture, color and shading to the interpretation of the rights and obligations contained in the WTO agreement”
  + Ordonnance, éclaire et nuance
* The US bringing protected turtles by restricting the shrimp fishing:
  + And if refuse to use these methods, the products with this shrimps would not cross the US frontier
    - Violation of the GATT?
    - Article 20G: allows a WTO member to restrict importation
      * At that time: exhaustible natural resources did not comprehend biological resources
        + But, since 1947, something had changed

The WTO make an explicit reference to sustainable development

So in order to decide regarding exhaustible resources: need to refer to the international law of sustainable development and look into it to determine what is its treatment of biological resources

Convention on maritime resources of the UN: protection of the maritime resources

Washington CITS: and in the convention, 3 annexes with list of species that are endangered.

An inside Marine turtles are included

So in modern international law: exhaustible resources reference has be read in an evolutionary manner

* + The US won on that: natural resources: guided by the explicit reference in the preamble. If there was nothing in the Preamble, they would not have read that.
    - New legal interpretation of the system thanks to the Preamble
      * It has real legal implication in the system
        + The WTO does not prevent the members to implement a certain level of sanitary protection: not possible to use the WTO as an explanation, it’s a manipulation of the law
* A treaty starts from the title:
  + Be very careful of the preamble as well
  + Preambles of treaties often don’t contain obligations, nor objectives
    - But in the context of the WTO, important example of an institution who’s message is in the constitution
      * They conscientiously added the objective of sustainable development
      * The US lost the case because they came with an unilateral perspective
        + “Restrictions déguisées au commerce”
* Treaties need to be read as a whole: the Preamble often contains the objectives of the treaties
  + Until today, nobody has contested the importance of the Preamble of the WTO
  + The preamble reflexes the ratio legis of the system
    - You can never do something in the system
    - The WTO is an organization
* Need to know what can or cannot be done in the system

1. **The functions of the WTO**

How multilateral is the WTO:

* the vision of the US
  + the multilateral trading system
    - the main objective of the club is multilateralism
      * put a system of multilateral surveillance
* La raison d’être of the system is to establish a system of multilateral surveillance
  + Subject to multilateralism: constant surveillance
    - WTO: most advanced model of multilateralism
    - Article 3 of the WTO: “facilitates”
  + Issues for the entire system: multilateralism
* Article 3.2: forum of negotiations -> negotiations shall be conducted within the walls of the WTO
  + Every member of the WTO shall have the right to participate and to be part
    - In the UN things are not that multilateral
  + In the WTO impossible to isolate one member
    - Enforcement: when you have strong multilateralism, enforcement follows
    - The model of multilateralism in terms of supervision is unique I the system
* Article 3.3: event dispute settlement is managed multilaterally
  + Dispute settlement is used to build multilateralism

1. **The decision making process, Article 9**

* decision making progress: consensus
  + consensus: when nobody agrees
  + They don’t want to abandon that practice: never a single time they proceeded to a vote
    - If no consensus they should go for a vote, but no state has ever tried to go for a vote
      * They like consensus because each has a veto power
* Everybody is happy to decide though consensus
  + But does it make sense today with more that 150 members to base decision making on consensus?
    - Allows the weaker countries to veto the decisions
    - Allows the powerful states to block a direction
  + The WTO: an organization which adopt the least number of decisions
* Consensus: no objection in the room, while unanimity is a voting room.
* WTO: trade, so generally taken seriously
  + One state, one vote (if they decide to vote)
    - The voting power is not function to your shares or your contributions
  + The European Union is a member as such: EU as exclusive competence on trade, so the EU member
    - Each delegate of the countries, but they vote as one country

1. **Institutions**

* The ministerial conference: body deciding of the policy
  + Ministers of trades or delegates
    - Meets every two years
      * Now in “safer states”
  + General Counsel: decision making body between ministerial conferences
    - Trade delegate or ministers are seating there
      * Decision is made
    - General can have two different aspects: general counsel when broad but it can become two other institutions:

1. Trade policy review body:
   * + when discussing a new policy
2. Dispute settlement body:
   * + Most powerful adjudication mechanism in the system Article 3.3:
     + Dispute control
   * GATT Council
   * GATS Council
   * TRIPS Council (intellectual property)
     + And under each of these councils: subcommittees

Cours 3 – The legal structure/architecture of the WTO

Objective of the system: multilateral system of surveillance

* Make sure everything is control multilaterally: raison d’être du system
  + Impossible escape for the members: negotiations, decisions…
* Integrated system of law: not possible to have multilateralism if several agreements
* The multilateralism is not only the one of the system but also a legal multilateralism
* In the context of the WTO, since will to ensure multilateralism, make sure to have an integrated system of law.

The Legal structure of the WTO: only one agreement to implement this multilateralism

* There is only ONE WTO agreement: no “s”

At the very top: institutional agreement: at the very top of the system

All the other agreements are just annexes to this agreement.

Even if it is true that there are several agreements in the systems, they are annexes.

* **The structure of the WTO**
* **Institutional agreement**
* **Annexe 1**:
  + **GATT** 1994, international agreement trade in goods
    - GATT 1947 incorporated
    - New Rules negociated during the Uruguay Rounds
    - Decisions and practices adopted during the GATT 1947 era
      * Legally wrong to speak about GATT 1994
      * *Cf. p 8 Textbook*
  + **GATS**: services
  + Intellectual property, **TRIPS**: trade related intellectual property rights
    - TRIPS agreements: limitation for some developing countries to get medicines.
  + In the 80/90’s: trade limited to trade and goods, so with the conference, expansion to services and intellectual property during the Uruguay Round.
* **Annex 2:** **DSU**, Dispute Settlement Understanding, the “jewel of the system”
* **Annex 3:** **TPRM**: Trade policy review mechanism council: mechanism implementing transparency in the system.
  + States have to expose the measures and the organ gives the state its opinion.
  + Sort of a second chance for a state which want to implement an illegal measure to think it twice
    - Not a real organ with rules, but implement transparency
  + Multilateral control: ex ante multilateral control: allows WTO’s members to start controlling at the very beginning a measure before any dispute occurs and actually in order to prevent disputes
* **Annex 4**: survival of the Tokyo “**à la carte**”, Plurilateral trade agreements: not binding for all WTO members, only for the one who have accepted to be bind by them.
  + Four agreement before 2000
    - Bovine meat agreement
    - On dairy products
    - Government procurement (marches publics)
    - Civil Aircraft
  + **Today only**: on government procurement and Civil Aircraft.
    - Idea as well that more countries like China should be bound by those two agreements but cannot be forced on these countries as it is “pluralism” and not multilateralism.

**Single undertaking**: The WTO Agreement (the Marakech agreement): take it all or leave it from the institutional agreement, the Annex 1, 2 and 3.

International Public Law: Reservation: technic that allows a state of taking or excluding a provision in a treaty

* Here it is a single undertaking, no reservation is possible, in principle take it all or leave it all.
* Integrated system of law

Does it still make sense? Today, with more than 100 states… In the Doha round, certain aspects of the negotiation were successful, but as the acceptation must be on everything, could not go further.

The WTO agreement: but inside, there is a set of agreements: therefore, might be some contradictions.

* The single undertaking system implies that lawyers should always start with a presumption of non-conflict
  + EU/Canada Inuit case
* Need to try first an harmonious meaning: need to give effet utile.
  + Every single provisions needs to be meaningful.
* Harmonious reading, presumption of non conflict of the different rules contain in the agreement.
  + It’s not because two agreements appear to be contradictory or to go in two different directions, that they are contradictory:
    - US Scotland Up land case: cotton market
      * US has been subsidizing production of cotton
      * Subsidies to producers who use US products: African producers could not afford this material
    - Brazil brought the case: they were also affected by the US
      * Africa did not go because at the time US was giving money to some African states
    - Cotton: agricultural product: govern on the agreement of agriculture: local content subsidies: give on the condition to use local products
      * Only prohibits export subsidies: not possible to give subsidies to the producers to export, but local content subsidies are allowed
    - But the judge at the WTO said: single undertaking, so need to have an harmonious reading, the judge told the US that the agreement on subsidies prohibited local subsidies: even if the agreement on agriculture is silent, as the agreement on subsidies forbid these subsidies, then the subsidies are prohibited
      * Creative and courageous position of the judge
        + The message that the judge was sending to the is was to say that the WTO is an integrated system of laws: treaty shopping is not possible
        + The notion of single undertaking is concrete
  + Conflicts: two provisions or agreements are mutually exclusive and cannot be reconciled
    - When situation of conflict: **3 hypothesis of conflict**
      * *Between the constitutional agreement and any of the annexes’ agreements*
        + Institutional agreement v GATT: which should prevail?

The institutional agreement prevails: special rule in the Institutional agreement stating that if conflict between the institutional agreement and one of the Annex: the institutional agreement prevail

Article 16 of the Institutional agreement

* + - * *Between a general agreement in an annex and another agreement contained of the same annex?*

Ex: GATT 1994 and agreement on subsidies?

If there is no special rules, it’s lex specialis

Lex specialis lex generates

The more specific agreement would prevail

The agreements are generally developing elements contained of the GATT

* + - * *Conflict between two elements contained in the same agreement within the same annex?* 
        + Ex: agreement on agriculture and agreement on textiles

Which sector of the market is being affected by the measure?

When looking at the measure need to determine, what element is being affected

Ex: tee shirts produced with cotton coming from distinguished place: even if the government is doing that under the textile umbrella, it is the agricultural sector that is affected

Allows to determine which agreement is targeted

The measure targets the tee shirt, not the process of production: should we look at the production process?

Ex of the bottle of water produced in compliance with labor provisions and the other with child labor

Should we not look more often on the process?

The WTO: want to look on the economic side of things

The process of production as such is not enough for discrimination from the WTO’s point of view

WTO and non trade value

Cours 4 – The dispute settlement system

The WTO Dispute settlement system

* During the GATT Era: club
  + In the club, allergy to dispute settlement: to any adjudicatory elements or words
    - Even the word “dispute could not be found
      * **GATT, Art XXII “Consultation”**

1. Each contracting party shall accord **sympathetic consideration to**, and shall afford adequate opportunity for consultation regarding, **such representations as may be made by another contracting party** with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

* + - * + Accorder de la sympathie: sympathetic consideration

Consultation: more formal approach to dispute settlement, very specific word

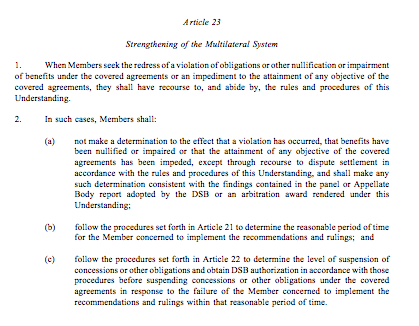
* + When disagreement: **working party group**
    - First parties developed in the 50’s: parties asked to sit down and solve the dispute
    - Not effective because people were sitting and writing a report
  + Then **panels** were implemented: “groupes spéciaux” (not arbitration)
    - Panels were created to solve the disputes: looked like arbitration, but never did that
    - At the beginning were playing the game: writing reports
      * Reports: nothing adjudicatory
    - For the panel to be establish: need for consensus
      * As the establishment of the panel was a decision: need consensus
        + Consensus: when nobody objects in the room
      * In the GATT era: when a country wanted a panel to discuss something and settle the dispute, the party who would have lost would have objected:
        + Everything was coming back to the contracting parties: against the adjudicatory aspect: so could not defend their case when they had one

The loosing parties were objecting: lost of panel reports have never been adopted

* + - * + Panel were too weak

GATT was a power based system because of the weakness of the dispute settlement system

* In the Uruguay round: dispute settlement was therefore one of the important subject tackled: strong and efficient dispute settlement system
  + - First time that dispute resolution was used to strengthen, to foster, multilateralism
      * New vision because traditionally dispute settlement is perceive
  + The WTO Dispute Settlement system: **WTO Convention Art 23 :**



**The WTO DSS Characteristics**:

* First characteristic: **compulsory dimension** of the WTO Dispute Settlement System: “shall”
  + No possible to bring the conflict somewhere else, it has to be brought under the WTO settlement system.
  + Compulsory character.
    - The principle in the International system is facultative.
* Second character: **automaticity:** WTO DSS is automatic
  + Makane: greatest legal invention of the 21st Century
    - Under the GATT: the dispute settlement system was ruled by consensus
      * They came out with negative consensus or reverse consensus
        + Everybody objects

To have the dispute resolution not to happen you have to have everybody to disagree: including you

Non-sense

* + - * It is the same regarding the adoption of the report: not to adopt it, you need now a reverse consensus
        + And therefore, the winning party can have the report only by not objecting to it
* Third: **exclusive character:** c’est le seul qui peut appliquer WTO
  + When members seek redress of a violation,… or an impediment of the covered agreement (single undertaking): exclusive
    - Whenever what is at stake is an agreement that is within the single undertaking, then the WTO has the exclusive competence
* Fourth: it is also a **specialized jurisdiction**, specialized system that just settle dispute with regards to the WTO law as it is what as been negotiated
  + Can only deal with WTO laws
    - Covered agreement: the only body of law that can be applied is WTO: it is a constitutional mandate
      * Application is not interpretation
    - It is not because a dispute has a trade aspect that it is covered by the WTO: there is a constitutional limit: it is the law
      * However: possible to interpret WTO law by referring to non WTO law
        + Shrimp/turtles
    - US Gasoline Case, p.15 of the French report: “*the WTO agreement cannot be read in clinical isolation of the rest of public international law*”
      * “*L’accord sur l’OMC ne peut êyre lu en isolation Clinique du reste du droit international public*”
        + it does not mean that you apply non WTO law in the system
* Strengthen the multilateral system
* In the new system it is therefore not possible to proceed to unilateral determination whether or not a member is complying with the law: no more possibility to apply sanctions
  + Multilateral surveillance
* This is the implications of the caracteristics: no more unilateralism in the system, no matter who you are
  + (reference to the US who present itself as a judge at the beginning)

**The scope of the WTO Dispute Settlement System**:

* they made everything to make sure there would be any excuse to get out: broad spectrum
* They came out with three types of complains contain in **WTO Art 23**:
  + ***Type 1: Violation complains***
    - “*When members seek the redress of a violation of obligations*”
    - First type of complains
      * “inconsistency” or “inconsistent actions” rather than violations or breaches
  + ***Type 2: Non-violation complains***
    - “*or as a nullification or impairment of the benefits*”
    - Annulation ou reduction d’avanatges
      * Once you will be in the Club, you will get advantages: the law is there so your advantages are not impaired. And the members accept you because you give them concessions.
        + The club is about advantages and concessions.
      * Example: Canada protecting Maple Syrup and Bulgaria Yoghurt
        + Reduction of the taxation: but subsidize the Canadian producers

Then Bulgaria is able to use the WTO

This in order to prevent the state to act unilaterally

* + ***Type 3: Situation complaint***
    - “*Or the impediment to the attainment of any objective*”
      * Preamble: “Objective and sustainable development”
        + Even if the complain of a member is about an objective, the member has to complain

There is no room left for unilateralism

* + - * Never happened, never used: it has been implemented to make sure no violation of the multilateralism occur
* No matter the action you want to use: you will need to go to the Dispute Settlement System
  + New type of disputes on the law that is still a bit blurry
    - Ex: Marshall Island and Nuclear proliferation
    - Ex: Chile and Bolivia

**The procedure in front of the dispute settlement system**

How do you settle a dispute in the WTO?

* Three main phases
  + ***Phase 1: Pre compliance phase***
  + ***Phase 2: the compliance phase as such***
  + ***Phase 3: the post-compliance***
* Compliance is part as such of the dispute settlement procedure: it is part of the process
  + Another example of the advance of the WTO system
* Generally compliance is not part of the international system
  + Here it is integrated in the dispute settlement system

**Shrimp Turtles: §1.21 to 1.34**

**US-Shrimps**

**EC-Biotech**

**China- Rare eatb**

**Japan-apples**

**EU-bananas**

**Australia-Salmon**

Cours 5 – The dispute settlement system

* Three main phases:
  + ***Phase 1: Pre compliance phase***:
    - To determine whether or not there is consistency with the WTO law
      * “Consistency” not to say violation
    - Consistency or inconsistency is going to be determined
    - **First step:** **consultation Art 4 of the DSU**
      * In the WTO DSS: consultation is compulsory, there is no dispute as long as there is no consultation
        + The wording “consultation” is derogatory to International law
        + Derogatory to international law: no need to have negotiations
        + In investment arbitration: cooling off period, that is not compulsory de facto
      * In WTO you cannot proceed with the DSS in you don’t proceed to consultation and respect the deadline : you have 2 months of consultations
        + If after 2 months no amicable settlement, then you can go ahead
        + Obligation to consultation and to exhaust consultation

No obligation for the responding state not to participate,

* + - * Moreover, when you request consultation, your request needs to be send to the other country and to all the DSB members: Dispute settlement body
        + Not regular in International Law: not the case in the CIJ
        + In the WTO website: the request of consultation is not only public but also distributed to all the other states:

In the WTO you can have multiparty proceedings

To ensure multilateral control of the dfispute (other element of multilateralism)

* + - * *Consultation: condition sine qua non*
      * If no mutually agreed solution after 60 days, then you can move to the second step
    - **Second step: request for the establishment of a panel** **Art 6 of the DSU**
      * Request to the DSB to establish a panel:
        + **Article 6.1**: negative consensus: it won’t be establish only if all the members refuse
      * The panel decides on law and on facts: it does not only decide on the basis of the law but also proceeds to an assessment of the facts
        + Often economic disputes with factual information : influence on the **composition of the panel**:

**Art 8.1 of the DSU**: government officials, people who have been representing the government in trade, … focus on people who know about trade policy

Not lawyers

They don’t want to see it as pure litigation, however, in almost every panel there is a lawyer because it has become very legal

However the wording translates the spirit of the WTO

Also the panelist cannot have the nationality of the disputing parties

It guaranties impartiality

On the contrary at the ICJ, if there is no judge of your nationality, then you have the right to appoint a judge of your nationality

Not good for the good administration of the justice: la bonne administration de la justice

Often : Suisse and New Zealand people

Each party can appoint a panelist and then they agree on the president, and if disagreement the DSB appoint it

Regarding developing countries ? The WTO follows the list made by the UN

Which is a country: in the economic system they are not developing countries anymore

* + - * The panels has 3 to 6 months to issue its report
        + Diplomatic language “report”

However the disputes are becoming more and more complex

EC-Biotech case: 2 or 3 years to issue the report because many scientific complexities

90 days is therefore the principle but it can takes more time

this is one of the weakness of the system : they thought it would go fast but it does not

* + - * Once the report is issued it has to be adopted by the DSB
        + Without adoption the report is not binding

Continuity of the gap heritage

The report will be adopted unless consensus not to adopt it

Usualy one state will want the report as it won something

The adoption is actually de facto automatic as because of the reverse consensus principle, the report will be adopted

* + - **Third step: Appellate Art 17 “Appellate review” of the DSU** 
      * If one of the party is not happy with the report: they have introduced the possibility to make an appeal before “Appellate body”
        + *Organe d’appel de l’OMC*
        + Panels are ad hoc, just constituted for a case, the Appellate body is a sort of permanent court
      * The US wanted the Appellate body: makes it more acceptable
        + Retrospectively: the Appellate body would have not been accepted if the parties knew what it was going to become
        + Raison d’être of the Appellate body: the US was opposed to negative consensus, therefore, they asked to have the chance to make an appeal if they lose in front of the panel: chance to argue again in front of an appellate body

That is why “after thought” according to an author

* + - * Appellate body has only a mandate to reevaluate the interpretation of law:
        + The facts are examined as established by the panel, cannot be examined “*de novo*”

Except if there is an evidence that the panel has exceeded its powers

* + - * + The limitation of the Appellate body of question of law is very important:

**Art 17.3 of the DSB**: “expertise in law”

Difference in the language with the Article 8 on the panels “trade diplomats” and in the Appellate body: “expertise in law”

New balance operating in the WTO settlement system

* + - * + The Appellate body has an adjudicatory approach, and, the panel has a diplomatic approach

Appointed for 4 years renewable once : an appellate member cannot stay more than 4 years: good administration of the justice

(counter example of the CIJ and the Japanese judge)

the Appellate body has 3 months to render its report

The report need to be adopted by the DSB

And it will be adopted because of the negative consensus

* + ***Phase 2: the compliance phase as such***
    - Compliance is an integral part: need to make sure that the state comply
      * What is wanted in the system is that the state act in accordance with the law
      * Not complying is bad for the entire system
    - **Article 21 of the DSU** contain the main provision for compliance
      * En principe : “**prompt compliance**”
        + principle: obligation to promptly comply: immediate compliance

“should not even think”

need to withdraw your measure “promptly”

* + - * However in many cases, it might be impracticable for the loosing state to promptly comply: **Article 21.3 of the DSU**
        + And when it is impracticable: the member state can benefit from a “reasonable period of time to comply”

“*délai raisonnable de mise en oeuvre*”

* + - * + How do you determine the reasonable period of time?

**First option** **21.3a of the DSU**: the loosing party propose a reasonable period of time

If the winning party believe it is not reasonable: not negative consensus anymore: it is positive consensus

Therefore the winning state can object

Therefore : the way of deciding is still consensus : therefore only need to object if the period of time is not reasonable

**Second option** **21.3b of the DSU**: a mutual agreement between the parties over the reasonable period of time

Most of the time they don’t agree

**Third option** **21.3c of the DSU**:

Dispute about compliance can also be a subject of dispute: that is why considered as an amazing dispute settlement system: to determine reasonable period of time to comply

They go under an arbitration under the **Art 21.3c**: it is one member of the Appellate body who issues a decision regarding the reasonable period of time:

They called it “arbitration” because another idea, but the idea was not to have an arbitration in the system

Parenthesis: multistate disputes

it is possible to have multi party complains, however, you need to require consultation from day 1

It is possible also to be a third party in a dispute Art 10: they don’t have to request consultations: the party will give his legal point of view: it is another example of multilateralism: give others the chance to share their views : “every member who has a substantial interest”: can enter, however, de facto : never checked

Amicus curiae ? not possible, but it happened once in EC-Sardines : Marocco submitted an amicus brief and the DSB said it was possible, but usually it is only open to non-state actors

Usually it goes from 3 months to 15 months: very rare that they go beyond

* + - * + Then they have the discretion to comply, however if they don’t: dispute on whether or not the loosing state has complied
    - And this dispute has a solution in **Article 21.5 DSU**: dispute on how to comply : whether the state has complied
      * A panel is going to be establish to determine whether or not the loosing party complied or not: usually it is the same panel, they tried to bring back the first panel who knows the case:
        + This panel has 3 months to comply, and if one of the party is not happy,

They can make an appeal again

* + - * + One of the criticism: if now we add all the delays : can be beyond 2 years : and in some country can kill some branches
        + If the Appellate body days they not have complied: then post compliance phase
      * Ex: Shrimp/Turtles: the US won on the fact turtles were exhaustive resources, however, as it was clear the US was targeting some countries:
        + Not able to reach an agreement

Malaysia brought a case: but if obligation to negotiate, no obligation to conclude: the US has complied with the compliance phase: as the US cooperated in good faith

The US lost at the pre-compliance case, but won at the compliance phase.

* + - **Art 21.6 of the DSU** allows any WTO member to raise issues of compliance: whether or not party to the dispute, but any WTO member: another example of multilateralism
      * The possibility for any WTO member to raise a question of compliance in front of the DSB: not only the 2 disputing parties,
      * If the Appellate Body decides the Party is not complying, then go to the post compliance phase
  + ***Phase 3: the post-compliance***
    - **Art 22 of the DSU** applicable provisions for the post compliance phase with two options:
      * **The first option is compensation**: possibility to negotiate a compensation
        + It means that you are going to reduce some trade advantages on some of its products, it is not about paying money to the other state, it is about making trade concession to the other state

However, it does not work because before giving compensation you need an agreement with the wining state: not agreeing, because the winning state generally wants you to stop the measure because destruction of one of the branch of production in its country

Second reason for compensation not being so much use is that it is supposed to be temporary

* + - * **The second option is suspension of concessions:** (sanctions, countermeasures…): most of the time when the second party is stubborn, (not using the word sanctions).
        + You entered in the club to get concessions
        + Therefore, if you don’t comply with the law, going to suspend the concessions

Need for an authorization from the DSB to suspend the concessions

Negative consensus: authorize unless consensus not to authorize it

* + - * + Everything is made for the loosing party to go for compliance Art 22§6 of the DSB
        + Last kind of dispute under the DSB: if the loosing party disagree on the appropriate level of suspension on concession, they can go for arbitration under art 22.6 but only to determine the appropriate level of suspension of concessions and obligations

And it is the first panel that exists

Dispute until the very end of the process: dispute procedure to make sure everything is controlled multilaterally

Most exhaustive system of dispute resolution in today’s international system

Not perfect: too long, no provisional measures/…but in terms of coverage: the most complete

* + - * + Suspension of concessions and obligations:

Annex 1: goods, services and IP

If not compelling in the goods, therefore they can target IP:

Cross retaliation: it is possible to target another sector.

Ex: Ecuador and the EU because the EU forget about cross retaliation, so when Ecuador threatened the EU to suspend concessions on IP, EU reacted immediately

**Regional dispute settlement system**

* Trade agreement: today qualified as the“Spaghetti ball” of free trade agreemen
  + Trade agreement: Area in which you liberalize trade, the most famous one is the Nafta, the Mercosur,…
* When negotiating the GATT: it was agreed to leave space to state to implement regional trade liberalization, because they thought at some point it would be generalized to te world
  + However, they never thought dispute settlement mechanism would be incorporated in these agreements
    - Most of them they have the same rules as the WTO
    - Today the problem: some states try to escape the WTO DS system by bringing their dispute in the regional dispute settlement system
    - Not possible: the rule ART XXX is that if you have a dispute with another member, need to settle it within the WTO system
  + Dangerous for the states
    - Ex: Mexico Soft Drinks - Case No.7 in the course reader:
      * Provision in the NAFTA that guarantees that each NAFTA member will have access to the market of other NAFTA member states: “market access”
        + Mexico produces a lot of sugar from sugar cane, and, wanted to export to the US
        + However, the US produces high fructose sugar
        + But the sugar coming from Mexico is cheaper and better for health
        + Mexico tried to negotiate, US refused
        + So Mexico went into the NAFTA commission to obtain a panel, but the US objected because they knew they were going to loose.
        + So Mexico answered with countermeasures : higher taxes on US soft drinks

Then the US ran at the WTO to ask for consultation: violation of the GATT claiming Mexico cannot treat less favorably imported treaties compared to domestic products

“slap in the face of Mexico”: they won because, the only defense of Mexico was saying that WTO had no jurisdiction as it was under NAFTA

WTO: the US invoked violation of WTO, and therefore, under **Art 23 of DSU**: not only obligaton of the dispute to submit its dispute to the WTO, but also a right for every WTO member to have its dispute being settled in the WTO

* + - * + the EU is an exception: as it has exclusive jurisdiction
  + However, the WTO is not likely to escape the Art 23
  + Furthermore, Mexico Soft Drink Case §54: “mindful of the precise cup of Mexico... could exist that would preclude a panel from ruling on the merits of a case”
    - Sometimes there might be some legal impediments that might preclude a panel to examine the merits of a case: in certain cases, and for instance, the “existence of an exclusion clause”
      * To roads: you cannot go back once you chose a road “fork in the road”
        + If you choose NAFTA you stay in NAFTA, if you choose WTO, you stay in WTO if there is an excluding clause
    - Appellate body: if same parties and same dispute: might be an impediment
      * In the Mexico case, same parties but different disputes$
  + Therefore they opened the door when they say there might be some impediments, some limits to Article 23 of the DSU
    - Sofwood lumber: particular wood in Canada, Canadian government provides subsidies for the production of this wood, which therefore had an impact on US producers
      * Sofwood lumber: they took the agreement that they would not refer to the DSB but to arbitrators at the LCIA: pure violation of the multilateral agreement

Cours 6 – The principles

The fundamental principle of the GATT

The main principles that govern International Trade Law

* The principle of non discrimination: “*raison d’être du système*”:
  + Objective that is in **the Preamble**

“*Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations*,”

* + Important to understand what is non-discrimination and what kind of non-discrimination:
    - Both discrimination against origin and destination of product is prohibited
    - Two types of discrimination are prohibited:
      * First, *discrimination de jure*: discrimination in law, that is to say when the law itself organizes discrimination
        + The discrimination is organized by the law

The best example is the Case called Korea Beef: imported beef could only be sold in specialized store or in very isolated section of the supermarket

But most of the time, states are more vicious and go for the second type

* + - * Secondly, *discrimination de facto*: discrimination in facts.
        + The best example is Japan alcohol case

Imported alcohol will be subject to taxes to 7% taxes, Japanese strong alcohol will be also submitted to 7% VAT, and imported Shoshu will be subject to 4% VAT and Japanese Shoshu will also be subject to 4% VAT

But there is discrimination, but, when when actually looking at the market: the reality is that there is only exported alcohol and Japanese Shoshu.

Need to be a trade operator in the Japanese market to understand that the policy is actually affecting the foreign importers

“charité bien ordonnée”

Exam : three types of question

* theoretical question in one page: for u what are the main aspects of multilaterslism ? is WTO really compulsory ?
* Case study: on procedures
* Multipled choice: “true or false” and justification in two lines : (is WTO anti sustainable development”