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The Concept of Locus Standi under Dispute Settlement Understanding

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ABSTRACT

This research paper aims to examine the applicability of the concept of locus standi or 'standing' on the World Trade Organization's (WTO) Dispute Settlement Understanding (DSU). Locus standi, a legal term which refers to the right of an individual or organization to bring a case before a court or tribunal, has become a crucial concept in the field of international trade law. The DSU, which serves as the cornerstone of the WTO's dispute resolution system, which is still unclear and up for debate. This paper will now go on to discuss and analyse this issue, something which is very significant for the dispute settlement process. Overall, this paper aims to contribute to the ongoing debate on the effectiveness of the WTO's dispute settlement system by examining the role of standing in ensuring access to justice for all stakeholders and finally clear up the confusion lingering with respect to the same.

***Keywords**: Locus Standi, World Trade Organization, Dispute Settlement Understanding, International Trade Law.*

I. INTRODUCTION

The world economy as a whole has today come a long way from the post-World War II times which had left everything in shambles. With the development of GATT and then the WTO world trade has now grown into one of the most crucial functions performed by each and every country to ensure its survival and development. Now when such a function is performed at such levels with a significant amount of assets involved there is bound to disputes of some kinds between the member countries of the WTO. Now such a situation presents the need for a dispute settlement process under the organisation which clarifies, applies, adjudicates and decides the legal framework governing the concerned parties as well as international law provisions to the satisfaction of its members and ensuring the growth and development of trade as well as upholding the principles of equity, justice and good conscience.

The World Trade Organisation (WTO) settlement system constitutes the pillar of the multilateral trade system, which is important in assisting on how to best interpret and apply the

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associated agreements. The aim and object of the dispute settlement system is to achieve "a satisfactory settlement" of disputes between and/or amongst the WTO Members. The WTO dispute settlement system is one of the unique innovations and results of the Uruguay Round. It comprises of the DSB, which operates through the panels and the Appellate Body to adjudicate disputes. The administration of the dispute settlement rules and procedures (DSU) is the responsibility of the DSB. Reports from the Appellate Body and Panel can be issued by the DSB. Additionally, it approves the necessary relief measures and supervises the application of decisions and recommendations. Now moving on to the Scope of the Dispute Settlement Body, Article 1.1 of the DSU establishes "an integrated dispute settlement system" which applies to all the covered agreements. Therefore, the DSU's application is not limited to the GATT 1994's rules. However, for the purposes of consistency in WTO disputes settlement, the DSU is generally applicable except where otherwise provided by "special or additional rules and procedures on dispute settlement' contained in associated (covered) agreements." The DSU, thus, provides a basic framework and binding procedures for the settlement of disputes.

In the large field of contemporary international tribunals and bodies, the WTO dispute settlement system is regarded as one of the most efficient and reliable systems of adjudication. It went into operation on 1 January 1995. The system's awards have a binding nature, which is what makes it enforceable. Although the present system has made a number of additions and improvements to the previous one, it is GATT 1947 that is primarily responsible for its inception. Article 3.1 of the Dispute Settlement Understanding (DSU) is applicable in this situation. The provision states that: "Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XVII and XVIII of GATT, 1947, and the rules and procedures as further elaborated and modified herein." Thus this is the process through which disputes between concerned member parties are resolved in a satisfactory manner, but, how do we know who has the right to appear before the WTO in case such a dispute arises which essentially has an impact on various parties. This issue is usually resolved by a general principle of law which is known as 'standing' or *locus standi* of a party.

The Latin words locus (plural loci) and locus standi (plural locus standi) mean "place" and "place to stand," respectively—in law, the right to institute an action. To establish their involvement in the case, a party must be able to convince the court that they have sufficient nexus to and impact from the legislation or activity being challenged. This principle is crucial to ensure that justice is made available to the people who need the same, if a plaintiff having a good case is not allowed maintaining the same before the court of law, it would certainly be against public interest and harm the justice delivery system as a whole. The system which is

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present for the people would not be able to achieve the aim it was essentially established for. Thus, this principle is crucial and indispensable in the present legal scenario. Now, while this principle is said to apply in international law wherein the parties who satisfy the criterion for *locus standi* can legitimately be party to a case or have 'standing' in law, the applicability of *locus standi* in the WTO Dispute Settlement Understanding is something which is still unclear and up for debate. This paper will now go on to discuss and analyse this issue, something which is very crucial for the dispute settlement process and essentially decides the validity of each and every case bought before them for deliberation. It is then important for us to understand the whole concept, the WTO dispute settlement process and its applicability to try and finally clear up the confusion lingering with respect to the same.

(A) Review of literature

The literature referred to arrive at the paper is given below: -

1. **The Basic Idea of Locus Standi.**

SSRN Research Paper by Mahesh R. Halde

This paper discusses the concept of *locus standi* or 'standing' in law, its significance, applicability and how it has evolved into the concept it is today, impacting the changing role of courts along with the development of welfare state and its added public interest functions.

2. **Locus Standi in the Dispute Settlement Procedure before the World Trade Organization.**[2]

Research Paper by Uroš Zdravković

This paper discusses the applicability of the concept of *locus standi* or 'standing' on the WTO dispute settlement process along with analysing the legal framework provided for with respect to the same.

3. **Principles of International Law in the WTO Dispute Settlement Body.**[3]

JSTOR Journal Article by James Cameron and Kevin R. Gray

This article discusses the WTO Dispute Settlement process and the Dispute Settlement understanding in detail as well as the applicability of the various international law principles applicable on the same.

[2] Uroš Zdravković, *Locus Standi in the Dispute Settlement Procedure Before the World Trade Organization*, 57 Zbornik radova Pravnog fakulteta Nis 415-427 (2018).
[3] James Cameron & Kevin R Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 Cambridge University Press 248-298 (2001).

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4. **The Need for a GATT Doctrine of Locus Standi: Why the United States Cannot Stand the European Community 's Banana Import.**[4]

Paper by Regime Rodrigo Bustamante in Minnesota Journal of International Law

This paper discusses the applicability of the concept of *locus standi* or 'standing' on the WTO dispute settlement process along with analysing the legal framework provided for with respect to the same. It further goes on to explain the need for a GATT Doctrine on *locus standi* with respect to the Bananas case and the issues faced, shortcomings and providing recommendations for the same.

5. **A Critical Analysis of the WTO Dispute Settlement Mechanism: Its Contemporary Functionality and Prospects**[5]

Article by Cezary Fudali in Netherlands International Law Review

This article discusses the WTO Dispute Settlement process in detail as well as its applicability, functionality and other aspects in the contemporary times.

6. **Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System**[6]

Article by John P. Gaffney in American University International Law Review

This article discusses the need for due process as well as a procedural justice system in the WTO dispute settlement process along with analysing the legal framework provided for with respect to the same. It further goes on to showcase the issues faced, shortcomings and providing recommendations for the same.

7. **Dispute Settlement under the WTO**

International Trade Law Research Module by MHRD, Govt. of India

This module discusses the WTO Dispute Settlement process in detail as well as its applicability, functionality and the applicability of various principles of laws on the same.

(B) **Statement of problem**

The paper aims to analyse the applicability of the concept of locus standi or 'standing' on the WTO's Dispute Settlement Understanding. Such a crucial topic has not been discussed at length

[4] Rodrigo Bustamante, *The Need for a GATT Doctrine of Locus Standi: Why the United States Cannot Stand the European Community's Banana Import Regime*, 6 Minnesota Journal of International Law 533 (1997).
[5] Cezary Fudali, *A Critical Analysis of the WTO Dispute Settlement Mechanism: Its Contemporary Functionality and Prospects*, 49 Netherlands International Law Review 39-80 (2002).
[6] John P Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 4 American University International Law Review 1173-1221 (1999).

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in the context of international law, where a country or countries may try to misuse this dispute settlement process to interfere in matters where it is not a party. Further, locus standi becomes an important concept in terms of implementation or enforcement of the decisions given as part of the dispute settlement process. The implementation of international laws has always been a sticking point and this paper will also aim to highlight the reasons for the same in light of the concept of locus standi.

(C) Research objectives

1. To analyse and discuss the concept of *locus standi* or 'standing' in law.
2. To analyse and discuss the WTO's dispute settlement process as well as cover a brief history into its evolution.
3. To analyse and discuss the applicability of the concept of *locus standi* or 'standing' in the WTO's dispute settlement process.
4. To point out the shortcomings/issues present with the dispute settlement process, its legal framework, aim to provide clarity with respect to the aforementioned concepts and recommend any necessary changes which the researcher deems fit in the current scenario.

(D) Hypotheses

The concept of *locus standi* or 'standing' in law is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. The applicability of *locus standi* in the WTO Dispute Settlement Understanding is still unclear and up for debate, something which is very crucial for the dispute settlement process and essentially decides the validity of each and every case bought before them for deliberation. It is thus important for us to understand the whole concept, the WTO dispute settlement process and its applicability to try and finally clear up the confusion lingering with respect to the same as well as highlight any of its shortcomings/issues with, showcase what they are and how they function, their effects and present the various viewpoints available on this matter.

(E) Research questions

1. What is the concept of *locus standi* or 'standing' in law?
2. What is the WTO's dispute settlement process?
3. Is the concept of *locus standi* or 'standing' applicable in the WTO's dispute settlement process?

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4. What are the shortcomings/issues present with the dispute settlement process, its legal framework and is the same satisfactory?

II. THE CONCEPT OF LOCUS STANDI IN LAW

The term locus (plural loci) is a Latin word for "place" and “Locus standi” is Latin for ‘place to stand’- in law, the ability to file a lawsuit. To justify their involvement in the case, a party must be able to convince the court of their relevance to and harm caused by the legislation or conduct being contested. According to the Supreme Court of the United States, the topic of locus standi in American law essentially concerns whether the plaintiff has a right to request that the court judge on the merits of their case or of specific issues.

For the same, there are three constitutional standing requirements:

- Injury: The plaintiff must have experienced or soon will experience harm—an infringement of a legally protected interest that is specific and concrete. The harm must be real or impending, clear and tangible, not abstract. Both economic and non-economic damages may result from this injury.
- Causation: In order for the injury to be adequately traceable to the defendant's challenged behaviour and not the outcome of an independent action by some third party who is not in front of the court, there must be a causal relationship between the injury and the conduct that is complained of.
- Redressability: A beneficial court ruling must be more likely than just theoretically possible to be able to make up for the harm experienced.

In *Dr. George Mampilly v. State of Kerala*, a DB of the High Court of Kerala made a clear statement about the concept and evolution of the Locus Standi rule. Naturally, our understanding of locus standi has been evolving as well. According to the conventional understanding of locus standi, a person may seek judicial relief if they have been injured legally as a result of the State or a public authority acting in violation of their legal rights or interests, or if they are likely to do so. In recent years, courts have developed several exceptions to this rule. In cases where a person's constitutional or legal rights have been violated but they are unable to seek judicial redress because of their social or economic disadvantage, courts have now recognised that a member of the public can approach the court to enforce those rights. In appropriate circumstances, members of the public are allowed to intervene to defend the rights of a person or persons belonging to a particular class who are unable to seek redress from the court due to social or economic disadvantage, poverty, helplessness, or disabilities.

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This principle has been expanded to include situations in which a State or public authority's act or omission simply harms the public interest and does not specifically violate the legal rights of a specific individual, class of individuals, or group of individuals. Any member of the public with a significant interest may maintain an action to prevent or correct a public wrong or public injury caused by an act or omission by the State or a public authority that is against the Constitution or any law. Courts are starting to understand that their purpose is to uphold public rights as well as individual rights, thus they are allowing citizens to advocate for these rights. Any member of the public with a sufficient interest may bring a lawsuit to seek judicial redress for harm to the public brought on by a violation of a constitutional or legal provision or of a public duty, and to have the violation of the duty punished. Certainly, it must be confirmed that the person coming forward is acting honestly and not for their own benefit, for their own profit, or out of the political drive.

Standing or locus standi is the right that can be distinguished from the substantive right for the infringement of which the person can sue or seek relief in a court of law. The litigant is qualified to challenge an unlawful administrative or legislative act or governmental tyranny owing to this right of standing. The idea of locus standi has been said to be based on two principles. The first is that the petitioner must have a legitimate complaint. He is not allowed to base his claim on someone else's complaint. However, this is not necessary in writs of habeas corpus or quo warranto because first, it is acknowledged that personal liberty and usurpation of public office are issues of general public interest, and second, no one may bring a purely academic disagreement before a court. In order for the issue that the petitioner brought before the court to be centred on his specific complaint and interest, on which the court can rule, some legal right or interest of the petitioner must have been violated, threatened, or obscured.

At present a trend away from the restrictive and highly technical approach to Locus standi is clearly discernible. When someone is said to be "aggrieved," it is often meant that they have a legitimate complaint about a decision that negatively impacts their interests. The statutory remedy is available not only to those with a statutory right to appear at the inquiry but also those who have, in the discretion of the inspector, been permitted to make representations. The constitution is undergoing significant modifications as an outcome of the welfare state. In the past, the courts were the traditional forums for solving conflicts and addressing grievances among people. With the rise of the welfare state and the death of laissez-faire, many issues that were once seen as completely private matters that were not acceptable for government intervention have now gained public attention and are being addressed. Both the legal system and the idea of access to justice were impacted by the change of the ever-expanding functions

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and powers of state agencies and authorities in resolving disputes between individuals and between individuals and the state. And this has been achieved by expanding the rule of standing which is actually inimical for a healthy system of Administrative law. If a plaintiff having a good case is not allowed maintaining his case before the court of law just for the reason that he is not personally affected by the legal injury he is seeking the redressal for, then that will be like giving the government agency a license to freely violate the law. It would certainly be against the public interest.[789] Thus, this principle is also said to apply in international law wherein the parties who satisfy the criterion for locus standi can legitimately be party to a case or have standing in law.

III. THE DISPUTE SETTLEMENT UNDERSTANDING

One of the distinctive innovations and outcomes of the Uruguay Round is the WTO dispute settlement mechanism. It comprises of the DSB, which operates through the panels and the Appellate Body to adjudicate disputes. The administration of the dispute settlement rules and procedures (DSU) is the responsibility of the DSB. The DSB has the authority to issue Panel reports and Appellate Body reports. Additionally, it approves the necessary relief measures and supervises the application of decisions and recommendations. Now moving on to the Scope of the Dispute Settlement Body, Article 1.1 of the DSU[10] establishes "an integrated dispute settlement system" which applies to all the covered agreements. Therefore, the DSU's application is not limited to the GATT regulations. However, for the purposes of consistency in WTO disputes settlement, the DSU is generally applicable except where otherwise provided by "special or mual rules and procedures on dispute settlement' contained in associated (covered) agreements." The DSU, thus, provides a basic framework and binding procedures for the settlement of disputes.

The contemporary WTO dispute resolution system has incorporated fifty years of experience with the GATT, 1947, trade dispute resolution system. Although the present system has made a number of additions and improvements to the previous one, it is GATT 1947 that is primarily responsible for its inception. Article 3.1 of the Dispute Settlement Understanding (DSU) is applicable in this situation. The provision specifies that: "*Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XVII and XVIII of GATT, 1947, and the rules and procedures as further elaborated and modified herein."*

[7] S.P. Gupta v. President of India and Ors, AIR 149 (SC 1982).
[8] People's Union for Democratic Rights and Ors v. Union of India and Ors, 3 SCC 235 (SC 1982).
[9] D.S. Nakara v. Union of India, 1 AIR 130 (SC 1983)
[10] Article 1.1, WTO Dispute Settlement Understanding

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IV. ANALYSING THE CONCEPT OF LOCUS STANDI IN DISPUTE SETTLEMENT UNDERSTANDING

As per the clarifications released by the WTO on the legal issues that concern the DSU, on the point of locus standi which exists with respect to the Understanding it is stated that there is no DSU requirement for a complainant to have a "legal interest" as a prerequisite for requesting the establishment of a panel in a dispute.[11] Additionally, it mentions that although these violations were harmful to other Members, complainants have been given the right to file complaints against WTO Agreement violations in the past.[12] However, none of those disagreements expressly addressed standing (the right to file a complaint). The Appellate Body was satisfied with the fact that the complainant was a producer and potential exporter of the in question goods in the one instance where the respondent specifically disputed the complainant's eligibility to bring a violation claim under GATT 1994. Furthermore, there were claims in that instance that were intertwined with claims made under other covered agreements, for which the complainant's standing was not contested. Due to potential direct or indirect economic repercussions of a WTO infringement, the Appellate Body also cited a Member's interest in upholding WTO regulations.[13]

As per the report in the Bananas case it was stated that[14]: -

Para 132: "We agree with the Panel that "neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting a panel". We do not accept that the need for a "legal interest" is implied in the DSU or in any other provision of the WTO Agreement. It is true that under Article 4.11 of the DSU, a Member wishing to join in multiple consultations must have "a substantial trade interest", and that under Article 10.2 of the DSU, a third party must have "a substantial interest" in the matter before a panel. But neither of these provisions in the DSU, nor anything else in the WTO Agreement, provides a basis for asserting that parties to the dispute have to meet any similar standard. Yet, we do not believe that this is dispositive of whether, in this case, the United States has "standing" to bring claims under the GATT 1994."

Para 133: "The participants in this appeal have referred to certain judgments of the International Court of Justice and the Permanent Court of International Justice relating to

[11] Appellate Body Report, EC — Bananas III, para. 132.
[12] Appellate Body Report, US — Section 211 Omnibus Appropriations Act, paras. 275-281, 309; Appellate Body Report, US — Line Pipe, paras. 120-122, 130-133.
[13] Appellate Body Report, EC — Bananas III, para. 136-138.
[14] Appellate Body Report, EC — Bananas III

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whether there is a requirement, in international law, of a legal interest to bring a case. We do not read any of these judgments as establishing a general rule that in all international litigation, a complaining party must have a "legal interest" in order to bring a case. Nor do these judgments deny the need to consider the question of standing under the dispute settlement provisions of any multilateral treaty, by referring to the terms of that treaty."

Para 134: "This leads us to examine Article XXIII of the GATT 1994, which is the dispute settlement provision for disputes brought pursuant to the GATT 1994, most other Annex 1A agreements and the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs"). The chapeau of Article XXIII:1 of the GATT 1994 provides: If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded ... Of special importance for determining the issue of standing, in our view, are the words "[i]f any Member should consider ...". This provision in Article XXIII is consistent with Article 3.7 of the DSU, which states: Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. ... "

Para 135: "Accordingly, we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful."

Para 136: "We are satisfied that the United States was justified in bringing its claims under the GATT 1994 in this case. The United States is a producer of bananas, and a potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas. We also agree with the Panel's statement that: ... with the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly."

Para 137: "We note, too, that there is no challenge here to the standing of the United States under the GATS, and that the claims under the GATS and the GATT 1994 relating to the EC import licensing regime are inextricably interwoven in this case."

Para 138: "Taken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under the GATT 1994. This does not mean, though, that one or more of the factors we have noted in this case would necessarily

be dispositive in another case. We therefore uphold the Panel's conclusion that the United States had standing to bring claims under the GATT 1994."

Thus, the adjudicating body has clearly communicated its views on the issue of standing or locus standi as per the Dispute Settlement Understanding in these paragraphs of their aforementioned report. We'll now expand on the same.

As a result, we have noted that the DSU does not specifically state that a Member must have a legal stake in order to use the WTO dispute settlement system. According to reports from the Panel and the Appellate Body, neither the DSU nor any other provision of the WTO Agreement make any reference to such a need.[15] In EC – Bananas III, the Appellate Body held: *"... we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, hat a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful.*

Further, the Appellate Body explicitly agreed with the statement of the Panel in EC – Bananas III stating that: *"... with the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly."* In EC – Bananas III, the Appellate Body considered in deciding whether the United States could bring a claim under the GATT 1994, the fact that the United States is a producer and a potential exporter of bananas, the effects of the EC banana regime on the United States internal market for bananas and the fact that the United States claims under the GATS and the GATT 1994 were inextricable interwoven. The Appellate Body subsequently concluded that*—taken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under the GATT 1994.* The Appellate Body added, however, that *—this does not mean though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case.*

Therefore, ***EC-Bananas III*** stands for the proposition that member states even with a hypothetical trade interest can institute claims before the WTO. The issue of locus standi has invoked much controversy within the WTO. Some scholars claim that it creates an inherent bias in the system as all claims must be espoused by the government. Since the government is more vigorous in countries such as the US and Europe to address claims of their domestic trading

[15] APPELLATE BODY REPORT, EUROPEAN COMMUNITIES — REGIME FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS,WT/DS27/AB/R, ADOPTED 25 SEPTEMBER 1997, DSR 1997:II, 591.

organisations, many small countries owing to lack of such economic and legal capacity may lose out in the process. Therefore, *locus standi* inevitably determines the inequalities amongst the nations which in turn determine the nature and type of disputes proceed before international tribunals for adjudication. At present, the issue of *locus standi* also raises interesting questions in the light of the on-going plain packaging dispute against Australia which have been instituted by countries such as Honduras, Dominican Republic and Ukraine.[16] Neither of these states contribute towards Australia's imports as facts and statistics demonstrate that Australia only remains a minor market for tobacco export for the three countries. Thus, these three complainants have very little economic interest to engage in a financially cumbersome dispute at the WTO. In this light, it is perceived that corporate entities such Phillip Morris by virtue of their monetary and legal resources are able to influence small countries in instituting claims on their behalf.

With respect to the use of *locus standi* as a sword, the practice and procedure of the ICJ and other international arbitral tribunals do not provide very much guidance on the question of a State's entitlement to bring a dispute before a competent court or tribunal. This may be largely attributed to the fact that their jurisdiction is based almost wholly on the consent of the litigant States.[17] Specifically, Article 36(1) of the ICJ Statute provides that "the jurisdiction of the Court comprises all cases which the parties refer to it," implying from the use of the word "parties" plural that all disputants must agree that the case should be referred to the Court. Hence, it is more likely that in the case of a dispute concerning the locus standi of a plaintiff State, the Court will usually lack the jurisdiction to determine a preliminary matter such as this. The Court of Justice of the EC, which like the WTO dispute settlement system enjoys compulsory jurisdiction, provides a more meaningful precedent.'[18] Article 170 of the EC Treaty provides the means by which any Member State can initiate an action against another Member State which it considers to be in breach of the Treaty, but its use is rare because of the degree of political ill will such legal action generates between States.[19]

The practice and procedure of the ICJ provides some important guidance with respect to the use

[16] AUSTRALIA — CERTAIN MEASURES CONCERNING TRADEMARKS AND OTHER PLAIN PACKAGING REQUIREMENTS APPLICABLE TO TOBACCO PRODUCTS AND PACKAGING (DS434), 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 (DS 441).

[17] ICJ Statute, June 26, 1945, art. 36(1)

[18]Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 182, 298 U.N.T.S. 11

[19] Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 170, U.N.T.S. 11

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of *locus standi* as a shield against the institution of proceedings and the claim that in the absence of other States the court or tribunal cannot properly proceed. The ICJ has been willing to discontinue proceedings or to decline jurisdiction, provided that the absent party is found to be "truly indispensable to the pursuance of the proceedings."[20] This situation arises where the interests of a State party not party to the proceedings would be both affected by the decision and provide the basis for the subject matter of that decision.[21]

An example of the use of the indispensable party shield is provided by the Case Concerning *Certain Phosphate Lands in Nauru*.[22] In that case, Australia argued that because Britain and New Zealand also made up the Administering Trusteeship Agreement, the subject of the litigation, it was only fair that a claim be brought either against all three States jointly or not at all.' The Court, however, rejected Australia's plea on the basis that the State's duties under the Agreement were severable from those of the other States, such that the Court did not need to have Britain and New Zealand before it to make a determination as to whether Australia had breached its trusteeship obligation. ' The Court explained further that neither Britain's nor New Zealand's interests constituted the "subject-matter of the judgement to be rendered on the merits of Nauru's case." The Court did, however, add that "'a finding by the Court regarding the existence or the content of the responsibilities attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned' thus opening the door for those states to seek to intervene on their own motion."

The question then becomes, when and upon what principle of fairness has the ICJ approved such interventions? Article 62 of the ICJ Statute authorizes any State which considers "that it has an interest of a legal nature which may be affected by the decision in the case [to] submit a request to the Court to be permitted to intervene."[23] Pursuant to Article 62(2) the Court's disposition of the request is discretionary and the Statute gives the judges no guidance as to the applicable principles. In response to the few requests for intervention, the ICJ has generally adopted a "parsimonious" approach and has set a high standard for those seeking to intervene. For instance, the Court found Malta's claim to an interest in shelf demarcation dispute between Tunisia and Libya insufficient because Malta only had an interest in the legal principles and rules for determining the boundaries of its continental shelf."[24] If such an interest was held to be sufficient, it would permit intervention to the extent of transforming two party litigation into

[20] Observations made in Nicaragua case
[21] Citing Monetary Gold Removed from Rome in 1943, (Italy v. Fr., U.K, and U.S.) 1954 I.C.J. 19, 32
[22] Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Austl.), 1992 I.C.J. 240
[23] ICJ Statute, June 26, 1945, art. 62(1)
[24] Case Concerning the Continental Shelf Tunisia/Libyan Arab Jamahiriya (Tunis v. Libiyan Arab Jimahiriya, 3 para 13 (ICJ 1981))

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a "judicially sponsored global legislative enterprise." The Court's approach, therefore, has the advantage of contributing to the observance of separation of powers within the international legal system. Yet, the judges' preference for resolving disputes one at a time and in a "binary adversarial mode," as opposed to sorting multiple parties' claims in a single action, may raise fairness concerns in litigation which bars interested parties.' The decision to accede to a request is influenced by issues of principle and policy, creating problematic choices for the Court.

Now moving on to WTO Proceedings, both the panel and appellate levels have considered the right of a WTO Member to bring a dispute settlement claim under the GATT.' In one case, the WTO Appellate Body found that international law leaves this issue to the terms of the treaty that establishes the relevant dispute settlement mechanism.' It also noted that there is no explicit provision in the DSU requiring that a Member have a "legal interest" in order to request a panel, nor was any such a requirement implied in the understanding or any other provision of the WTO Agreement. Further, the Appellate Body, the GATT, and the DSU, clearly indicate that "a Member has broad discretion in deciding whether to bring a case against another Member under the DSU" although it is expected to be largely self-regulating in deciding whether it would be prudent to bring such action. In arriving at this conclusion, the Appellate Body noted the increasing interdependence of the global economy as a result of which this broad discretion is widening.' The Appellate Body also observed that WTO rules are concerned with competitive opportunities rather than actual trade and that generally "it would be difficult to conclude that a Member had no possibility of competing in respect of a product or service." Moreover, the panel acknowledged that all Members have an interest in ensuring that other Members comply with their obligations.

When looking comparatively at international procedural jurisprudence, the Appellate Body of the WTO has, correctly, not read decisions of the ICJ and PCIJ as establishing a general principle or rule that in all international litigation a complaining party must have a legal interest in order to bring a case. This result is supported by the ICJ's extreme concern with keeping the issues and the facts of a case within manageable proportions and the ICJ's desire to avoid engaging in a legislative exercise where the interest demonstrated by the State seeking to intervene is essentially theoretical and indistinguishable from that of other States. Further, Article 170 of the EC Treaty, which resembles Article 3(7) of the DSU, leaves it to the discretion of the Member State as to whether to bring a case against another Member State, for failure to fulfil its treaty obligations, before the appropriate dispute settlement mechanism.'[25] In the event

[25] Article 3(7), WTO Dispute Settlement Understanding

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that the complainant or a domestic constituency has a lot to gain from a favourable decision, the institution of proceedings may very well be rewarding. In this instance, one may justifiably argue that the complainant has a "legal interest" in bringing such a case. On the other hand, the initiation of proceedings by a complainant that does not have any such trade interest-e.g., the position of the United States in the EC Bananas case-may be said to be useful if it confers a "systemic" benefit of ensuring the enforcement of the negotiated rules." An argument based on the possibility of a Member competing for a product or service, however, would not be convincing. This type of an interest is simply a fiction that ignores the political considerations that motivate a Member to bring such a case.' It should therefore be ignored by future panels as an unacceptable justification for the approach to locus standi evolved to date in WTO dispute settlement.

From the DSU requirement that an action be "fruitful," one can imply that a panel could justifiably decline jurisdiction or order the discontinuance of proceedings where it considered the use of the dispute settlement procedures to be pointless or vexatious. The panels and Appellate Body, however, are more likely to afford Members an appreciable margin of latitude in exercising their discretion and will be inclined to hear proceedings. Still, these bodies are constrained by the right of the respondent State to proceedings free from fraud, which in the international procedural arena amounts "to what is known in municipal legal terminology as 'the abuse of the process of the Court." In most situations, this type of fraud involves one party's abuse of the diverse procedural rights to the material disadvantage of the other party, thereby nullifying all judicial proceedings. These rights of process are not only an expression of a tenet of procedural justice, namely the juridical equality of the parties, but are good also based on a fundamental principle of treaty interpretation, good faith . In the context of the DSU, this principle appears to require a Member not to bring an action under its procedures if to do so would be vexatious or an abuse of process. A panel should thus feel obliged to decline to hear all proceedings that are tainted in this way.

(A) Third Party Intervention in WTO Proceedings

Article 10 of the DSU governs the rights of third parties in respect to WTO panel proceedings.[26] It provides that the position of third parties must be fully taken into account during the panel process. A Member that has a "substantial interest" in a matter before a panel and has notified the DSB, "shall have an opportunity to be heard by the panel and to make written submissions to the panel." Though third parties themselves have no direct right of appeal, if a panel report is

[26] Article 10, WTO Dispute Settlement Understanding

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appealed the third parties do have full rights to participate inter alia, including the right to be heard by and make submissions to the Appellate Body. Dispute settlement in the WTO, therefore, does not allow for full intervention by third parties, rather they are limited to the right to be heard.

It is evident, however, that the right of intervention afforded to third parties in the WTO system is as generous, if not more, than those accorded, for example, under the practice and procedure of the ICJ. The language used in Article 10 of the DSU is mandatory in contrast to that of Article 62 of the ICJ Statute, which affords the Court wide discretion in determining whether to grant a right of intervention. Further, although the substantial interest standard appears to pitch a high level of directness of interest similar to that required by the ICJ, a reading of this term in the context of Article 4 of the DSU indicates otherwise." The latter provision requires that in order to join a consultation, a third party must demonstrate a "substantial trade interest. In practice, panels have interpreted the distinction between the substantial interest and the substantial trade interest standards to permit Members to become third parties if they too have a systemic interest, meaning a systemic concern for the enforcement of the negotiated rules, in the issue before the panel." Further, as previously mentioned, the judicial policy supporting third party intervention is based on the idea that it is preferable to settle one complex issue at a time rather than reconcile the competing claims of various parties in a single action. This stands in stark contrast to the policy that underlies the rules and procedures for "Multiple Complaints" found in Article 9 of the DSU, which shows a clear preference for the resolution of multiple complaints concerning the same matter by a single panel and, if this is not possible, that "to the greatest extent possible the same persons shall serve as panellists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonised.[27]

(B) The Indispensable Party Shield in WTO Proceedings

The question of whether a party to WTO proceedings is entitled to raise the indispensable party shield is both an intriguing and topical one. A respondent Member could, for example, claim as a defence that the allegedly offending measures resulted from its obligations under documents like a bilateral treaty with another Member not joined as a party to the dispute. Similarly, a Member State of the EC might argue that the measures in dispute resulted from its obligations under Community law and hence the EC should be joined to the dispute. In either situation, the third party Member may be said to be an indispensable party in the sense envisioned by the ICJ, that its interests would not only be affected by the decision of the panel but would form its very

[27] Article 9, WTO Dispute Settlement Understanding

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subject matter.

For a number of reasons, however, the DSB should be generally disinclined to entertain arguments that favour the discontinuance of proceedings. First, to do so would seem at odds with the broad discretion of Members to initiate proceedings under Article 3(7) of the DSU, and thus would create an unwarranted interference with their sovereign choice to take on one Member at a time. Second, the relative ease with which a third party may intervene demonstrates that the door is open for those Members who seek intervention in exercise of their fundamental procedural rights and on their own motion. Hence, the risk of impairing the perceived fairness and legitimacy of the dispute settlement system far outweighs the risk of breaching the procedural rights of a third party.

Under the WTO dispute settlement system only governments have the locus standi to litigate anti-dumping issues before the DSB institutions as applicants or respondents.[28] Any other Member of the WTO with a "substantial interest in the matter"[29] may be given an opportunity as a 'third party' to be heard by the panel, and to make any recommendation to the panel. However, third party participation is limited. For example, third parties have the right to receive only the first written submission of the parties to the dispute, and to attend the first substantive meeting of the parties to the dispute.

Private parties have no *locus standi* at DSB proceedings, despite the fact that dumping is occasioned by private parties. Neither the ADA nor the DSU expressly allow direct access to the WTO dispute settlement procedures by private individuals. The interests of private individuals are represented and their cause argued before the DSB by their governments. The approach is to lobby their governments to launch a formal complaint to the WTO on their behalf.

However, private parties may be indirectly involved in the anti-dumping proceedings before the WTO in at least two ways. Firstly, industry representatives may play a role in the proceedings as part of the WTO delegation. This is permissible since the WTO Members have the right to compose their own delegation. Secondly, private individuals or industry representatives may play a role through *amicus curiae briefs*. The WTO rules permitting, private parties may indirectly be involved in the proceedings through amicus curiae briefs. Note, however, that the amicus curiae approach by private individuals and/or industry representatives is generally uncertain in the WTO, and has been a subject of several conflicting decisions by the panels and the Appellate Body.

[28] Article 6, WTO Dispute Settlement Understanding
[29] Article 10, WTO Dispute Settlement Understanding

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The private parties' participation before the DSB institutions through amicus curiae briefs came before the Appellate Body review case in ***United States – Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp Turtles (AB)).***[30] *The Shrimp-Turtles (AB) case*, initiated by Malaysia, India, Thailand and Pakistan against the United States, involved environmental regulation on the part of the United States through the Marine Mammals Protection Act (MMPA) of 1972, which required commercial shrimp trawlers operating in sea turtle habitat to use turtle excluder devices that would allow turtles to escape from the net before drowning. Moreover, this legislation banned the importation of shrimps harvested contrary to the MMPA regulation or harvested by methods harmful to certain sea turtle species.

In ***Shrimp-Turtles AB*** the Appellate Body took an unprecedented step of receiving unsolicited amicus curiae briefs from non-governmental organizations (NGOs) that included environmentalists and other interested parties. In this case the Appellate Body rejected assertion by the Panel that it would be incompatible with the DSU provisions to accept unsolicited amicus curiae briefs. The Panel held:

We had not requested such information as was contained in the abovementioned documents. We note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information vests with the Panel. In any other situations, only parties and third parties are entitled to submit information directly to the Panel. Accepting non-requested information from non-governmental sources would be incompatible with the DSU provisions currently applied…[I] f any party in the present dispute wanted to put forward these documents as part of their own submissions to the Panel, they were free to do so.

The Appellate Body held that a "Panel has the discretionary authority either to accept and consider information and advice to it (even made by a private party) whether requested by a Panel or not." This was the beginning of a series of decisions whereby the Appellate Body asserted that it has a discretionary authority in terms of Article 13 read with Article 17.9 of the DSU and Article 16.1 of the Working Procedures for Appellate Review to accept and consider/ or solicit amicus briefs. In terms of Article 13 of the DSU, the DSB can "seek information and technical advice from any individual or body which it deems appropriate" or "from any relevant source."

Notable cases that followed the *Shrimp-Turtles AB* decision, and that attracted considerable criticism from the General Council of the WTO, were the *European Communities – Measures*

[30] United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (12 Oct. 1998)

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Affecting Asbestos-Containing Products[31] *(EC- Asbestos)*, and the *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*[32] *(British Steel (AB)), Thailand- Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland (Thailand- Steel (AB)) cases*.[33]

V. SHORTCOMINGS OF THE DISPUTE SETTLEMENT UNDERSTANDING AND THE NEED OF LOCUS STANDI

From the observations made in the aforementioned sections one thing can be concluded in utmost certainty, the WTO dispute settlement mechanism needs a formal procedure incorporating the various settled general principles of law like *locus standi* in the same. The current provisions and the observations made on standing as well as locus standi still remain unclear till this date and thus the WTO needs to formulate a clear, well laid out set of provisions that settles the position of the applicability of these general principles of law in the WTO mechanism as well as lays out the principles and the procedure for the implementation of the same. This issue has been existing since the inception of this mechanism and it is high time the WTO takes action to clarify and settle the same.

Furthermore, after centuries of discussion the problems surrounding the nullity of judicial decisions and arbitral awards in international law still remain unsettled. It may be said that material abrogation of the fundamental procedural rights may engender an aggrieved party's claim to nullity of the tribunal's decision and "every such claim may, if established, lead to vacating the decision."-" The Second Preliminary Draft on Arbitral Procedure submitted to the International Law Commission in 1952, for example, impliedly recognized that the procedural equality of the parties is the underlying principle of any arbitral jurisdiction. Furthermore, the Draft revealed that a party injured by a violation of the equality principle may invoke this failure to the principle as a reason for voiding an award." ' Not all procedural irregularities, however, can serve as the basis for a party's claim of nullity. Rather, many breaches of the procedural rules, such as those concerning time limits, are treated as irregularities that can be cured. The grounds for nullity will vary according to the procedural rights or duties at issue, whereby making it difficult to prescribe a rule of thumb as to what sort of breaches shall lead to vacating

[31] European Communities – Measures Affecting Asbestos-Containing Products, WT/DS135/8 (12 March 2001)
[32] United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R (10 May 2000)
[33] Thailand- Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland, WT/DS122/AB/R (adopted 5 April 2001)

a tribunal's decision. There does appear though to be a consensus in international arbitral practice that essential errors in law that are material to the decision may constitute a ground for reversing a judgement. Arguably, one may broaden this test to include manifest breaches that have resulted in the material impairment of the exercise of any of the fundamental procedural rights."

WTO members are not yet prepared to change the WTO dispute settlement procedures into a more effective judicial system with more effective legal remedies, such as reparation of injury in accordance with the general international law rules on state responsibility for violations of international law, so the Doha Round negotiations may not be able to address all of the WTO dispute settlement procedures' flaws. There are several illustrative examples.

First, despite the fact that most WTO panellists are becoming less and less familiar with the hundreds of GATT and WTO dispute settlement reports and that their legal autonomy and independence from the WTO Secretariat are no longer adequately secured, WTO members don't seem eager to replace the ad hoc dispute settlement panels, which are primarily made up of and with WTO diplomats.

Second, the dispute prevention capacity of the WTO dispute settlement mechanisms is still not strong enough to result in the termination of obviously illegal trade measures or the imposition of sanctions after the passing of a reasonable period of time, as is the case with import restrictions on bananas by the EC and steel safeguard measures by the US.

Third, throughout WTO dispute resolution processes, there is no temporary relief.

Fourthly, the DSU does not cover damages from the past or the winning party's legal costs when they prevail in a dispute.

Fifth, LDCs frequently continue to be at a disadvantage in WTO dispute resolution proceedings as a result of a lack of financial resources, legal resources, legal rights under the Generalised System of Preferences, among other things, and effective sanctioning power.

Sixth, despite the fact that more effective legal and judicial remedies in domestic courts could prevent many intergovernmental WTO disputes—over private intellectual property rights and administrative trade restrictions—most WTO governments continue to prevent their domestic courts from applying WTO rules, enforcing WTO dispute settlement findings, and exercising effective judicial control over trade policymaking.

VI. FUTURE CHALLENGES FOR WTO JURISPRUDENCE

Future WTO dispute settlement attempts will face a number of difficulties, including these and

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other shortcomings of the dispute resolution processes. Only a select handful are likely to be addressed by WTO members through agreements on new amendments to the WTO's rules and processes for resolving disputes. Despite the Doha Round's DSU reform negotiations having a separate track, there is a glaring lack of vision and leadership in these member-driven deliberations. As a result, the final result might only be a practical compromise on a select few fundamental reforms suggested by the main trading countries and LDCs. These could include changes to panel composition, improved panel proceedings transparency, more effective special and differential treatment of LDCs, more third-party rights, shortened deadlines for safeguard dispute resolution procedures, remand procedures, clarification of the "sequencing" issue, and new methods for terminating retaliation authority. WTO dispute settlement bodies will continue to face demands to clarify the frequently disputed meaning of various other WTO regulations, even if such enhancements are made available during the Doha Round negotiations. In order to preserve the rights and obligations of Members under the covered agreements without "adding to or diminishing the rights and obligations provided in the covered agreements," the "judicial function" may, for instance, require the clarification of "gaps" in WTO dispute settlement procedures, such as on preliminary rulings."[34]

VII. RECOMMENDATIONS AND CONCLUSION

After analysing the WTO dispute settlement mechanism, we can conclude that modern mechanism under the WTO has far progressed from its predecessor during the GATT era. The same has been well incorporated in the facets of International Law and is thus is a very significant body which has helped resolved various trade issues and curb malpractices in the economy and helped its members to arrive at settlements which are lawful as well as fair to both the parties in a peaceful manner. Thus, the WTO has helped create a safe, equal and just environment for all its members, where all the countries can conduct businesses and participate to the growth of the world economy in a positive manner, one which aims at a collective world and one not separated or ridden with wars as it used to be.

To conclude, we can state that the WTO settlement system constitutes the pillar of the multilateral trade system, which is important in assisting on how to best interpret and apply the associated agreements. The aim and object of the dispute settlement system is to achieve "a satisfactory settlement" of disputes between and/or amongst the WTO Members. The WTO dispute settlement system is one of the unique innovations and results of the Uruguay Round. It comprises of the DSB, which operates through the panels and the Appellate Body to

[34] Article 3.2, WTO Dispute Settlement Understanding

adjudicate disputes. The administration of the dispute settlement rules and procedures (DSU) is the responsibility of the DSB. The DSB has the authority to issue Panel reports and Appellate Body reports. It also oversees the implementation of rulings and recommendations and authorizes appropriate relief measures. Now moving on to the Scope of the Dispute Settlement Body, Article 1.1 of the DSU establishes "an integrated dispute settlement system" which applies to all the covered agreements. The scope of the DSU, therefore, is not restricted to the provisions of the GATT 1994. However, for the purposes of consistency in WTO disputes settlement, the DSU is generally applicable except where otherwise provided by "special or additional rules and procedures on dispute settlement' contained in associated (covered) agreements." The DSU, thus, provides a basic framework and binding procedures for the settlement of disputes.

While situation complaints, non-violation claims, and other acceptable claims still dominate under the modern DSU, the latter regime strives to increase credibility and enforceability by bolstering procedures like reverse consensus in decision-making. In adjudication, panels and appellate bodies are essential, and the legal significance of ideas like the standard of review and applicable law is always changing. Researcher has provided full list of criticisms/shortcomings which need to be resolved along with some recommendations for the same which may be considered by the authorities. Similarly, locus-standi and amicus curiae standings before the WTO dispute settlement body are some issues which still raise questions for further clarity by both panels and appellate body.

The principle of *Locus standi* is crucial to ensure that justice is made available to the people who need the same, if a plaintiff having a good case is not allowed maintaining the same before the court of law and as per the clarifications released by the WTO on the legal issues that concern the DSU, on the point of locus standi which exists with respect to the Understanding it is stated that there is no DSU requirement for a complainant to have a "legal interest" as a prerequisite for requesting the establishment of a panel in a dispute. However, till this date the applicability of the same is still unclear and as stated above, there needs to be a formal mechanism formulated by the WTO which is incorporated into the current existing provisions which lays down the principles for these general principles of law finally settling the issue once and for all.

Up until this point, the administration of GATT dispute settlement has not significantly suffered from the lack of a principled standing doctrine under the GATT. The Banana Case, however, highlights the challenge GATT panels can face in deciding whether claimants have the proper stake in the debate to decide their claims before the GATT without the assistance of specific

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rules. The demands placed on contracting parties and the WTO dispute settlement body by the political and economic context of the GATT must be taken into account as an operational GATT standing doctrine. Given that the DSB tends to be legalistic, the WTO should design tools that will allow it to carry out its tasks in accordance with its revised philosophy. The DSB protects the integrity of the system by separating parties whose rights were violated from parties who are only interested in the resolution of a dispute, allowing panels to concentrate on addressing the concerns raised by the appropriate disputants and, more importantly, on recommending equitable relief that realigns the imbalanced distribution of concessions.

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