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Dispute Settlement System under World Trade Organisation

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FOREWORD

The World Trade Organisation has emerged as a powerful international body. It is aiming at a rule-based free multilateral trade regime in the world. The strength that the WTO derives, in promoting its objectives, stems primarily from the Dispute Settlement System (DSS) embodied in the charter of the WTO. The Dispute Settlement System is a lynchpin of the WTO.

The GATT-47 had a week Dispute Settlement System and was power-oriented. Therefore, a large number of contracting parties, especially developing countries, were not happy with this system. They were searching for a rule-based Dispute Settlement System. In the WTO it is believed by many that they have achieved this objective of establishing a rule-based system reasonably well.

The Dispute Settlement System as formulated under the WTO charter has been functioning over the last six years. It is time to take stock of the performance of the WTO's Dispute Settlement System, especially in the context of the expectations of the developing countries. For, the functioning of the system would undoubtedly reveal the strengths and weaknesses of the system. Moreover, it would also reveal how the powerful countries use the system to their own advantage and very often at the cost of weaker nations. Such an analysis would enable one to identify the areas wherein reforms have to be undertaken in the Dispute Settlement System with special reference to the developing countries.

The present study has aimed at achieving the above objective. In the first part, the historical evolution of dispute settlement under the GATT-47 has been studied for these elements which constitute an important part of the Dispute Settlement System of the WTO. The second part deals comprehensively with the various clauses of the DSS. The third part focuses attention on the DSS and the developing countries. The fourth part gives a quantitative profile of disputes before the WTO over the last five years. The fifth part deals with various issues that have come up during the functioning of the DSS. In the final section, recommendations to improve the DSS have been made, especially from the perspective of the developing countries.

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A FREE and fair multilateral trading (economic) system can function effectively only when there is a working dispute settlement mechanism governing it. This is because dispute settlement facilitates legal certainty and acts as an incentive for decision-makers to move resources from protective to productive uses. It has been noted by many observers that international obligations are known, respected and understood not only by governments but also by private traders, producers, investors and consumers. Parties engaged in international trade do not have adequate confidence in the ability of international law to promote their national and individual self-interests and any obligations they owe may not be honoured, it is feared. Consequently, it is felt, the obligations must be set in a framework of an effective legal system of dispute settlement. If no such system exists, then the parties are basically left to rely upon their respective "power situations" tempered by the goodwill, if it exists, and good faith of the more powerful country/ countries. Hence the need for an efficient, speedy, impartial dispute settlement mechanism that is a *sine qua non* to build an equitable and predictable world trading order.

There are two types of dispute settlement methods internationally: (a) rule-oriented technique, and (b) power-oriented technique. A rule-based peaceful settlement of dispute takes recourse to negotiations and arguments with reference to norms or rules to which both parties have previously agreed. The power-oriented technique refers to negotiations and agreements arrived at, because of explicit and implicit differences in the power/status of the negotiating parties.

The purposes of this theme paper are six-fold. In Section I, an attempt has been made to briefly describe the dispute settlement system evolved under the General Agreement on Tariffs and Trade (GATT-47). Section II is devoted to the presentation of various provisions of the Dispute Settlement Understanding (DSU) of the World Trade Organisation (WTO). A detailed analysis of the developing countries

and dispute settlement in the GATT-47 and the WTO has been made in Section III. A quantitative profile of disputes tackled by the DSU over the last five years, since the WTO came into existence in 1995, has been presented in Section IV. It also gives an idea of disputes in which India has been involved. Section V provides an evaluation of the issues arising out of DSU's provisions and working of the DSU over five years. They have been detailed out and specific problems arising out of the working of the DSU for the developing countries have also been highlighted. The last section, Section VI, deals with the areas of reforms in the DSU.

I

GENERAL AGREEMENT ON TARIFFS AND TRADE–1947: DISPUTE SETTLEMENT

It has been considered relevant and necessary to briefly review the dispute settlement provisions under the GATT-47. The reasons for this approach are two-fold. *First,* this review is expected to provide an understanding of the working of the dispute settlement system over the 47 years of its existence and would highlight some of the issues that led to the development of the dispute settlement system of the WTO. *Secondly,* some of the elements of this system have been incorporated into the WTO dispute settlement system. In fact, Article 3.1 of the DSU states: "Members affirm their adherence to the principles for the management of dispute heretofore applied under Articles XXII and XXIII of GATT-47, and the rules and procedures as further elaborated and modified herein."

The GATT Articles XXII and XXIII (Appendix I) dealing respectively with consultation and with "nullification or impairment", a phrase that was basic to the jurisprudence of the GATT-47 is now basic to the jurisprudence of the WTO. It may be noted here that the clauses are very sketchy and the "birth defects" of the GATT-47 have troubled ever since. In this context, it is useful to observe that the lack of well-framed rules in the GATT-47 relates to the fact that they were well-framed under the unborn International Trade Organisation.

Article XXII merely provided for consultation, on any matter regarding the GATT, when any contracting party requested. Thus it provides for bilateral consultation with respect to any matter affecting

the operations of this Agreement and, at the request of a contracting party, for subsequent multilateral consultations.[1]

The core provision of the GATT concerning dispute settlement was continued in Article XXIII. It used the phrase "nullification or impairment" and not a "breach" of the legal obligations in the Agreement. In fact, some argue that the GATT never had the expression "dispute settlement".

A little more details on these Articles of the GATT-47 and subsequent developments would be appropriate.

It is argued that provisions of Article XXII have no direct consequences. Article XXII:1 simply requires each contracting party to afford other parties adequate opportunity for consultation with respect to any matter affecting the operation of the Agreement. Article XXII:2 authorises the Contracting Parties acting jointly, at the request of a contracting party, to consult with other parties on matters which were not resolved through Article XXII:1 consultations. "Eventually, these consultations became a basis for the generation of GATT's dispute settlement process which was grounded in Article XXIII."

Article XXIII:1 provides that if any contracting party considers that any benefit directly or indirectly accruing to it under the Agreement was being nullified or impaired by another party, it can make written representations or proposals to that other party. If this does not lead to a satisfactory adjustment, the complaining party is authorised by Article XXIII:2 to refer the matter to the Contracting Parties, who are required to investigate and make appropriate recommendations. In an appropriate case, Article XXIII:2 permitted the Contracting Parties to authorise the complaining party to suspend the application of tariff concessions or other GATT obligations to the party found to be acting inconsistent with its obligations under the Agreement.

Neither Article contains any specific procedures. These evolved over time. Some formality was added at the conclusion of the Tokyo Round with the adoption of the Understanding on Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979, which included an annex setting out an Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement. This Description noted, in part, that:

"Panels set up their own working procedures. The practice for the panels has been to hold two or three formal meetings with the parties concerned. The panel invited the parties to present their views either in writing and/or orally in the presence of each other. The panel can question both parties on any matter which it considers relevant to the dispute. Panels have also heard the views of any contracting party having a substantial interest in the matter, which is not directly party to the dispute, but which has expressed in the Council a desire to present its views. Written memoranda submitted to the panel have been considered confidential, but are made available to the parties to the dispute. Panels often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter. Panels may seek advice or assistance from the secretariat in its capacity as guardian of the General Agreement, especially on historical or procedural aspects. The secretariat provides the secretary and technical services for panels."

At a Ministerial Conference of the GATT the Contracting Parties reaffirmed the 1979 Understanding, and added more detail, including a requirement that, "The contracting party to which such a recommendation [i.e., to bring a challenged measure into conformity with GATT] has been addressed, shall report within a reasonable specified period on action taken or on its reasons for not implementing the recommendation or ruling by the Contracting Parties." Further minor steps were taken in a Decision on Dispute Settlement Procedures on 30 November 1984.

"Dispute settlement under the GATT was handicapped, however, by the requirements of Article XXII that all matters be decided, and all actions be approved, by the Contracting Parties. The GATT, in legal form, was a contract – a multi-party contract – and any decision to amend, modify, or interpret that contract required the consent of all the parties. In practice, this means that the losing party in a dispute settlement proceeding not only could refuse to agree, and therefore 'block' the adoption of an adverse report, it even could refuse to agree to the very establishment of a panel, thereby avoiding the embarrassment of an adopted adverse report altogether."

Very often adverse GATT panel reports indeed were blocked by losing parties. In fact, parties who anticipated losing sometimes even blocked the establishment of a panel. "It is a tribute to the system and the degree to which the parties valued it that blocking of both the establishment of panels and the adoption of their reports did not occur more often than they did. In fact, a study shows that from 1947 to 1992, the losing party eventually accepted the results of an adverse panel report in approximately 90 per cent of the cases. Still, blocking was a problem, and seemed in the 1980s to be occurring with increasing frequency. A significant step towards alleviating the blockage – at least at the stage of establishing a panel – was taken with the adoption of the "Montreal Rules". These grew out of a December 1988 Ministerial Meeting which reviewed the progress of the Uruguay Round and to reap an "early harvest" of any completed results of the Round. "Following further consideration in early 1989 in Geneva, the Montreal Rules were adopted by the Contracting Parties in April 1989. They formed the basis of what eventually became the WTO's Understanding on Rules and Procedures Governing Settlement of Disputes."

"The Contracting Parties agreed to apply the Montreal Rules on a trial basis from 1 May 1989 to the end of the Uruguay Round in respect of complaints brought during that period under Article XXII or XXIII. The most significant portions of the rules were those that placed time limits on consultations and that provided further for the automatic establishment of a panel. Parties to which a request for consultations had been made under either Article XXII:1 or XXIII:1 would be required to reply to that request within 10 days, and to agree to enter into consultations in good faith in no less than 30 days. In the absence of an agreement to consult and the holding of timely consultations, the complaining party could proceed directly to request the establishment of a panel. If consultations failed to settle the dispute within 60 days of the request, the complaining party then could request the establishment of a panel."

The Montreal Rules provided that, "If the complaining party so requests, a decision to establish a panel or a working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an item on the Council's regular agenda, unless at that meeting the Council decides otherwise." What this meant was that a panel would be established, without fail, at the second

meeting of the GATT Council after the request was put on the agenda, unless the Council decided otherwise. For the Council to decide "otherwise" under the GATT's process of decision by consensus, however, all parties – including the complaining party – would have to decide "otherwise". In other words, the system had changed from one that required consensus – "positive consensus" – to establish a panel to a system of "negative consensus" – a system that required consensus not to establish a panel.[2]

II

DISPUTE SETTLEMENT UNDERSTANDING (DSU) OF THE WTO

The Dispute Settlement Understanding (DSU) is the most significant achievement of the Uruguay Round of Negotiations. It is the unique aspect of public international law, as it confers compulsory jurisdiction on the Dispute Settlement Board for purposes of resolving disputes.

Article 3.2 of DSU states clearly: "The dispute settlement system of the WTO is central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules and interpretations of public international law. Recommendations and rulings DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Article 3 also states: "Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of the GATT-47 and the rules and procedures as further elaborated and modified" (as has already been noted).

The DSU sets out the basic institutional and jurisdictional scope of the WTO dispute settlement, and also contains the rules of procedures for dispute settlement panels. The Appellate Body has its own working procedures for Appellate Review.

Jurisdiction

The jurisdiction of the DSU is the covered agreements which are listed in Appendix I of the Agreement Establishing World Trade

Organisation. There are 13 individual multilateral agreements on Trade in Goods; General Agreement on Trade in Services; Trade Related Intellectual Property Rights and the two plurilateral agreements. It encompasses "measures affecting the operation of any covered agreement taken within the territory" of a member at the state and local levels. It may be noted here that if any new agreement is signed under the auspices of the WTO, it may also be brought under the DSU, for the discussion of new areas such as trade and environment, labour standards and trade, and multilateral investment agreement envisages the use of effective dispute settlement under the WTO.

Administration

Article 2 of the DSU elaborates the administrative set-up of the DSU. Under this Article, the Dispute Settlement Body (DSB) was established. It consists of representatives of every WTO member. The DSB has the authority to establish panels, adopt panel and Appellate Body Reports, maintain surveillance of implementation of rulings and recommendations, and authorise suspension of concessions and other obligations under covered agreements. It is expected to inform the relevant WTO Councils and Committees. The DSB shall meet as often as necessary to carry out its functions within the time frames provided in the understanding.

Consultation, Conciliation and Mediation

The DSU expects that the parties to a dispute will use an approach of consultation, conciliation and mediation before bringing the matter formally and seek establishment of a panel. Article 3 enunciates this objective: "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute." (Article 3.7)

Article 4 emphasises the importance of consultation. A detailed time frame is set out as to how the member which seeks consultation will proceed. Article 4(4) states that all such requests for consultation shall be notified to the DSB and the relevant Councils and Committees by the member which requests consultations. Consultations shall be confidential. If the consultations fail to settle a dispute within 60 days after the date of the receipt of the request the complaining party may request the establishment of a panel.

The DSB also aims at using good offices, conciliation and mediation as stated under Article 5.

According to Article 5.1 good offices, conciliation or mediation are undertaken voluntarily or may be requested at any time by any party to a dispute and be terminated at any time. Sixty days must be permitted before the complaining party seeks the establishment of a panel. If the parties to a dispute agree, procedures for good office, conciliation or mediation may continue while the panel process proceeds. Article 5(6) also envisages that the Director-General may act in an ex-officio capacity, offer good office, conciliation or mediation with a view to assisting members to settle a dispute.

Panels, Their Establishment, Working Procedure and Reports

Article 6(1) provides for the establishment of a panel: "If the complaining party so requests, a panel shall be established at the latest at the DSB meeting ...." Article 6(2) makes it clear that request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held.

Article 7 elaborates the scope of the work of the panel. A panel shall address the relevant provision in any covered agreement(s) cited by the parties to the dispute. The panel shall assist the DSB by its findings in making rulings. The DSB may authorise its chairman to draw up the terms of the panel with the parties to the dispute.

In Appendices 3.2 and 3.3, the rules governing the working of the panels are elaborated. Panels meet in closed sessions and the parties, including interested third parties, attend only by invitation of the panel. A panel's deliberations as well as documents submitted are kept confidential. The parties may make their own submissions public. Parties are required to provide to the panel written versions of their oral presentation. All submissions are made available to all parties.

The complaining party presents its case first. A series of meetings are held by the panel. The DSU asks panels normally to issue their final report to the parties within six months from the date of the composition of the panel [Article 12(8) and (9)]. "In no case should the period from the establishment of the panel to the circulation of the report to the members exceed nine months."

Article 8(1) states that panels shall be composed of well qualified governmental and/or non-governmental individuals. They are expected

to be independent. Article 8(4) details out how the secretariat will assist the DSB by maintaining an indicative list of governmental and non-governmental individuals possessing the required qualifications.

The panels are expected to be consisting of three panelists unless the parties to the dispute want a five-member panel provided they do so within 10 days of the establishment of the panel by the DSB. The secretariat's list of panels which is submitted will not be opposed except for compelling reasons. Further, if there is no agreement on the panelists within 20 days after the date of establishment of a panel, the Director-General in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel. The panelists are expected to serve in their individual capacities.

Article 12 provides for panel procedures which have been detailed out in Appendix 3 unless the panel decides otherwise after consulting the parties.

Article 9 deals with the issue of multiple complaints when more than one member request the establishment of a panel related to the same matter; a single panel may be established to examine these complaints taking into account the rights of all the members concerned.

In the event more than one panel are established to examine the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the time-table for the panel process in such disputes shall be harmonised.

Third Party and DSU

Article 10 refers to the interest of third parties. Article 10(2) states that any member having a substantial interest in a matter before a panel and having notified its interest to the DSB shall have an opportunity to be heard by the panel and to make submission to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel reports. Third parties shall also receive submissions of the parties to the dispute.

Right to Seek Information

Article 13 elaborates "the right to seek information" according to which the panel shall have the right to seek information and technical

advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a member it shall inform the authorities of that member. Panels may seek information from any relevant source and may consult experts to obtain their opinion.

Panel deliberations shall be confidential and shall be drafted without the presence of the parties [Article 14 (1&2)]. Opinions expressed in the panel report by individual panelists shall be anonymous. Article 15 provides for the Interim Review stage when the panel receives the reports, hearings, etc.

Article 16 states the procedures and time limit for adoption of the report of the panel by the DSB. The DSB will not consider the report before 20 days after the date they have been circulated to members. The report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB its decision to appeal or the DSB decides by consensus not to adopt the report.

Appellate Review

The DSU provides for an appeal by the parties to the dispute. Hence an Appellate Body's review of the decisions of the panels is envisaged.

Article 17 provides for the establishment of a Standing Appellate Body. It shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on one case. Persons serving on the Appellate Body will do so by rotation. The Appellate Body will determine the working procedure.

There would be seven persons appointed to the Appellate Body by the DSB. They will be persons of authority in international law, trade and the subject matter covered by the Agreement. They will hold the office for a period of four years.

Significantly, only parties to the dispute can appeal and no third party can do so (Article 17.4).

The proceedings shall not exceed 60 days. If the Appellate Body considers that it cannot give the report within 60 days, it shall inform the DSB in writing of the reasons for delay together with the estimate of the period within which it will submit the report.

The Appellate.Body will draw up its procedure in consultation with the Chairman of the DSB and the Director-General.

The proceedings of the Appellate Body shall be kept confidential.

The Appellate Body shall be available at all times and on short notice and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. The Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties.

Decisions relating to an appeal are taken only by Members of the division. If a division cannot reach consensus, the decision will be made by a majority vote. The DSU specifies that opinions of the Appellate Body shall be anonymous.

To further collegiality, all members of the Appellate Body receive all documents filed in all appeals, including those Members not serving on the division deciding the case.

Time Frame for DSB Decisions

Article 20 details out the time frame. The period from the date of establishment of the panel by the DSB until the date on which the DSB considers the panel or Appellate Body report for adoption shall, as a general rule, not exceed nine months where the panel report is not appealed or 12 months where the report is appealed.

Surveillance of Implementation of Recommendations and Rulings

Article 21 expects prompt compliance of DSB's rulings. If it is impracticable the member concerned will be given "a reasonable period of time in which to do so." Further, the period of time proposed by the member concerned is approved by the DSB. Alternatively, it is mutually agreed to by the parties. The DSB shall keep under surveillance the implementation of the recommendations or rulings. "The issue of implementation of the recommendations or rulings may be raised at the DSB by any member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time".

Compensation and the Suspension of Concession

It is ardently believed that the suspension of concession or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time (Article 22). There is also a provision for negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory conclusion is arrived at, the complaining member may request authorisation from the DSB to suspend the application to the member concerned of concession or other obligations. Here the principle of cross retaliation is accepted. It is always recommended that the suspended concession would be within the sector. A detailed definition of sectors is provided. "If that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement." [Article 22(3.C)]

In Article 23 emphasis has been laid that to strengthen multilateral trading system members take actions only by taking recourse to dispute settlement in accordance with the rules and procedures of the Dispute Settlement Understanding.

Arbitration

Article 25.1 provides for arbitration as an alternative means of dispute settlement. It can facilitate a solution of certain disputes that concern issues that are clearly defined by both parties. Article 25.2 states clearly that resort to arbitration shall be subject to mutual agreement of the parties and resort to arbitration shall be notified to all members sufficiently in advance of the actual commencement of the arbitration process.

Responsibility of the Secretariat

Article 26 deals with measures which do not conflict with the covered agreements. "However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment..." 26(b). Article 27 details out the responsibilities of the secretariat of the WTO such as assisting panels

especially in the legal, historical and procedural aspects of the matters dealt with and of providing secretarial and technical support.

Article 27 gives the details regarding the responsibilities of the secretariat. Article 27(1) states that the secretariat shall have the responsibility of assisting panels, especially on legal, historical and procedural aspects of the matter dealt with, and providing secretarial and technical support. It may also provide additional legal advice and assistance to the developing country members. The secretariat shall conduct special training to the developing country members which so requests. The experts are also provided at the request of the developing country. They will function ensuring impartiality of the secretariat.[3]

In the above summary, the provisions affecting the developing countries have not been covered. In Section III, this subject will be discussed in detail.

III

SPECIAL AND DIFFERENTIAL TREATMENT TO DEVELOPING COUNTRIES UNDER THE DISPUTE SETTLEMENT SYSTEM OF THE WORLD TRADE ORGANISATION

The Special and Differential Treatment (S&D) to the developing countries by the developed countries has become an integral part of international economic relations since the sixties. It was conceived as a strategy to improve the status of the developing countries in the world economy. Under the unequal system of international relations, S&D Treatment to the developing countries was expected to reduce, on the one hand, the burden of international obligations on them, and develop a more favourable trading and economic environment for their development, on the other. This acceptance of the principle was steadily introduced in agreements and the institutional functioning. This culminated in the Enabling Clause of the GATT 1979, requiring that the developing countries be provided a "differential and more favourable treatment". On account of this, there has been serious criticism in some influential quarters to the effect that the developing countries are "free riders" in international relations. There were, therefore, pressures to either eliminate or reduce the S&D facilities accorded to the developing countries. Consequently, there are efforts to introduce

a graduation principle in according S&D facilities. In defence of this policy, it was argued by many that the developed among the developing countries should be graduated out of the S&D facilities. In fact, such a graduation principle has been applied in various areas of international economic relations, viz. aid, trade and technology transfer. Further, the United Nations has classified 48 countries among the developing countries as the "least developed".[4]

The Uruguay Round of Multilateral Trade Agreements had two important aspects. *First,* declaring that the results of the Uruguay Round should be treated as a single undertaking, from the option that the developing countries had so far been accepting internationally, negotiated agreements were removed. *Secondly,* the final results of the Uruguay Round as embodied in the Marrakesh Agreement envisaged that the developed among the developing countries were given only the extended transition period to implement the agreements. *Thirdly,* the graduation principle was fully accepted. Thus, the least developed countries have been given special concessions.

It is important in the context of dispute settlement to know as to how the developing countries have been treated under the GATT-47. In fact, in drafting many provisions of the dispute settlement system of the WTO, the developing countries took active part. This was due to the fact that they were searching for a more effective and a rule-based system. It is in order, therefore, to briefly discuss the role of the developing countries in the context of the dispute settlement system under the GATT.

The developing countries had been considerably concerned about the flaws in the GATT- 47 dispute settlement procedure. Their concern can be summarised as follows:

First, the developing countries were deeply concerned about the lack of adequate trained personnel in international law and other related subjects. *Secondly,* they felt that they would suffer either by unusual delays caused in arriving at a solution or by deliberate blocking tactics of the developed countries which were too familiar in the context of dispute settlement under the GATT. Consequently, during the course of dispute settlement procedures the harmful practices may continue thus adversely affecting the fragile trade interests of the developing countries. *Thirdly,* many developing countries were apprehensive

that if a developing country tries to make a claim against a developed country, it could lead to reduction of their benefits either under the Generalised System of Preferences (GSP) or through retaliatory measures by the concerned developed countries. Since the developed countries had the power to block the eventual findings the whole exercise was considered to be frustrating. *Fourthly,* the developing countries would be forced to accept non-GATT voluntary export restraints in the event the verdict goes in their favour. *Fifthly,* if the verdict of the dispute settlement panel goes in favour of the developing country, and if the developed country does not accept the verdict, the complainant developing country could not afford to retaliate for want of adequate resources.[5]

The developing countries consequently lost interest in the dispute settlement system of the GATT- 47 which they had in the years of the fifties. The loss of confidence is reflected in the number of disputes with the developing countries as complaints under the GATT are examined. Out of 250 disputes, as has been noted, only 40 were from the developing countries. Lack of trust in the system was by far the most important factor.

In 1961, Uruguay filed a case under Article XXIII of the GATT against fifteen developed countries, listing 576 trade restrictions. The purpose of this complaint, in the words of Robert Hudec, is stated below:

"The Uruguayan complaint was showpiece litigation – an effort to dramatise a larger problem by framing it as a lawsuit. The complaint was making two points. *One* was to draw attention to the commercial barriers facing exports from the developing countries and the fact that, whether or not these barriers were legal, the GATT was not working if it could not do better than this. *Secondly,* although Uruguay carefully avoided any claim or illegality, the fact that many of the restrictions were obviously illegal would, Uruguay hoped, dramatise the GATT's ineffectiveness in protecting the legal rights of the developing countries."[6]

While the Uruguayan complaint may have been successful in highlighting what it considered to be commercial barriers, legal or otherwise, to developing countries' exports, it failed to achieve any significant reduction in these barriers through its legal action. Hudec

concludes: "At the conclusion of the proceedings, Uruguay noted the removal of certain restrictions, but said that others have been added in the meanwhile and that consequently Uruguay's overall position was no better than before. The lesson to be drawn from the case, according to Uruguay, was that GATT law did not protect developing countries."[7]

However, although they had less recourse to the GATT dispute settlement system after this turn of event, developing countries still tried to improve the system in their favour by introducing formal changes to it. In 1965, Brazil and Uruguay tabled a proposal for amending Article XXIII of the GATT. Their proposal had four elements: (i) the present arrangement for action under paragraph 2 of Article XXIII should be elaborated in a way which would give developing countries invoking the Article the option of employing certain additional measures; (ii) where it has been established that measures complained of have adversely affected the trade and economic prospects of the developing countries and it has not been possible to eliminate the measure or obtain adequate commercial remedy, compensation in the form of an indemnity of a financial character would be in order; (iii) in cases where the import capacity of a developing country has been impaired by the maintenance of measures by a developed country contrary to the provisions of the GATT, the developing country concerned shall be automatically released from its obligations under the General Agreement towards the developed country complained of, pending examination of the matter in the GATT; and (iv) in the event that a recommendation by the Contracting Parties to a developed country is not carried out within a given time-limit, the Contracting Parties shall consider what collective action they could take to obtain compliance with their recommendation.

The proposal was not accepted by the Contracting Parties to the GATT- 47. However, it led to a modest change in the GATT dispute settlement procedure providing for a shorter time frame for complaints initiated by the developing countries, known as the 1966 Decision, which is still in effect (DSU, Article 3.12), though rarely used. The developing countries remained disillusioned about the efficacy of the GATT dispute settlement mechanism.[8]

The DSU has incorporated a number of provisions according to Special and Differential Treatment to developing countries and the least developed countries. They have been summarised here:

According to Article 3.12 of the DSU, if a complaint is brought by a developing country member, it may choose to apply the provisions of the GATT Decision of 5 April 1966, which entitles the developing countries to the good offices of the Director-General and a panel procedure with shorter time limits, as a partial alternative to the DSU.

According to Article 4.10, members should give special attention to the particular problems and interests of developing countries during consultations.

According to Article 8.10, in a dispute between a developing country and a developed country, the panel shall, if the developing country member so requests, include at least one panelist from a developing country member.

According to Article 12.10, the periods for consultations involving a measure taken by a developing country may be extended. In addition, a panel examining a complaint against a developing country shall afford sufficient time for the developing country to prepare and present its arguments.

Article 12.11 of the DSU requires that, in disputes involving a developing country, the panel's report shall explicitly indicate how special and differential provisions raised by the developing country have been taken into account.

When keeping the implementation of adopted recommendations and rulings under surveillance, particular attention should be paid to matters affecting the interests of developing countries (cf. Article 21.2). If the case has been brought by a developing country, the Dispute Settlement Body (DSB) shall consider what further action might be taken, taking into account not only the trade coverage of measures complained of, but also their impact on the economy of the developing country member (Article 21.7 and 21.8).

If the dispute involves a least-developed country, particular consideration shall be given to the special situation of that country. The complaining members are to exercise due restraint in raising matters under the dispute settlement procedures, asking for compensation, seeking authorisation for retaliation or other obligations pursuant to these procedures (Article 24.1). If consultations involving

a least-developed country fail, such country may request the Director-General or the DSB Chairman to offer his good offices before a request for a panel is made (Article 24.2).

The WTO shall make available a qualified legal expert to provide legal advice and assistance for the developing countries in the WTO Dispute Settlement proceedings (Article 27.2 of the DSU).[9]

IV

QUANTITATIVE PROFILE OF DISPUTES UNDER THE DISPUTE SETTLEMENT UNDERSTANDING (1995-2000)

The member governments of the WTO brought a large number of disputes as can be seen in Table 1.

TABLE 1

ANNUAL PROGRESS OF DISPUTES

Year	*Cases filed*
1995	25
1996	39
1997	47
1998	44
1999	30
2000 (1 Jan.-30 May)	9
Total	**194**

Source: WTO, *WTO's Unique System of Settling Disputes Nears 200 Cases in 2000,* Press Release, 5 June 2000.

The Director-General of the WTO, Mr. Mike Moore considered this issue as stated below: "It is a resounding vote of confidence in the WTO dispute settlement system that the 136 member governments, both large and small, have so often sought solutions to difficult problems through an organisation."

The confidence is well placed in a qualified manner. In a period of five years the WTO had as many as nearly 200 disputes while the GATT- 47 had only 250 disputes in the entire period of more than 45 years of its existence. The WTO had disputes annually numbering more than 30 while the GATT- 47's annual average was approximately six.

Another significant feature of this dispute settlement system is that a large number of disputes have been resolved without going to adjudication.

Settlement, of course, is the key principle there. During the period 1995-1999, for example, 77 disputes were resolved of which 41 were resolved without going to adjudication. "Without this system, it would be virtually impossible to maintain a delicate balance of international rights and obligations. Disputes would drag on much longer, have a

TABLE 2

BREAKDOWN OF COMPLAINTS

Disputes involving	*As complainants*	*As respondents*	*With developing countries*	
			US/EC/Japan as complainants	*US/EC/Japan as respondents*
	No.	*No.*	*No.*	*No.*
United States	60	42	22	15
EC	50	28	23	11
Japan	8	12	3	0
Developing countries	50	67	-	-

Source: Ibid

TABLE 3

SELECT WTO AGREEMENTS CITED IN THE DISPUTE

ASP/TBT	*Agriculture*	*Textiles*	*TRIMS*	*TRIPS*	*GATS*
26	25	13	15	21	9

Source: Ibid.

destabilising effect on international trade, which, in turn, poison international relations in general. The system's emphasis on negotiating a settlement could serve the same governments equally well in other areas of international relations."[10]

Developing countries have registered a large number of complaints. As a group they have registered 50 of the 194 disputes as seen in Table 2. It means that nearly 25 per cent of complaints have been from the developing countries. However, as respondents the number involving developing countries is large. Thirtyfour per cent of all complaints are against the developing countries. This is a large number viewed from the point of view of their share in world exports and also the fact that these countries are expected to be supported. Leading developing countries taking recourse to Dispute Settlement Understanding are Brazil, India, Mexico and Thailand.

India and Dispute Settlement System

India has been a party to a number of disputes either as a defendant or a complainant and also as a third party to the dispute.

As A Complainant

1. India complained about the measures affecting imports of woven wool shirts and blouses regarding various restrictions. The US announced that the measures were withdrawn by the US before the panel had concluded its work.

India was not satisfied by the panel's verdict. India filed an appeal despite the fact that the US had removed its restrictions which were contested. The grounds of appeal included issues regarding: (i) which party bears the burden of proof concerning the legality of trade restrictive measures; (ii) what role the Textile Monitoring Board should play in the dispute settlement process in the textile sector; and (iii) whether a panel is required to make findings on all legal claims made by the complaining party.

The Appellate Body issued its report upholding legal findings and conclusions of the panel. As to the burden of proof, the Appellate Body agreed with the panel that it was up to India to present evidence and arguments sufficient to establish a presumption. It was up to the US to bring forth evidence and argument to rebut the presumption.

India had appealed in this case despite the fact that the US had withdrawn the measures which were disputed. It is considered that India did it for systemic reasons. It is significant to note that in response, the Appellate Body came up with clear cut rulings on the issues of the burden of proof and judicial economy which may not have necessarily satisfied India, but nevertheless greatly influenced the later practice in the WTO. The Appellate Body Report on shirts and blouses became an important precedent regarding these two issues, often cited by later panels and the Appellate Body.

The emphasis on judicial restraint by the panel and the Appellate Body, has made it clear that one can seek certain clarifications about rules by panels or the Appellate Body, "they will never be able to substitute to the role of resolving systemic issues."

2. *US: Import Prohibition of Shrimp and Certain Shrimp Products:* India, Malaysia, Pakistan and Thailand complained against the US on a ban the US had imposed on importation of shrimp and shrimp products from these countries under Section 609 of the US Public Law 101-62. First, Malaysia and Thailand requested the establishment of a panel on 30 January 1997. Pakistan also requested the establishment of a panel. India along with other developing countries reserved its third party right. In February 1997, India also requested the establishment of a panel.

This was the first WTO dispute that reached the panel/Appellate Body stage. "This case is symbolic of the changing environment in that both complainants were developing countries and the respondent was the US. It is also significant that this case raised the issue of trade and environment, an unsettled question with politically sensitive applications."

In this case the issue of *amicus curiae* became important which would be discussed later regarding the rights of NGOs and the governments.

The US removed the objected measures.

3. On 14 March 1996, India requested the establishment of a panel claiming that the transitional safeguard measures on these products by the US were inconsistent. India requested the termination of the panel since the US removed these measures in April 1996.

4. *EC and Anti-Dumping Investigations Regarding Unbleached Cotton Fabrics:* India was a complainant. India complained about the anti-dumping duties levied by the EC. It was a request for consultation.

5. *India has also complained against Turkey on restrictions on imports of Textile and Clothing Products:* At the DSB meeting of 19 November 1999, Turkey stated its intention to comply with the recommendations and rulings of the DSB. On 7 January 2000, the parties informed the DSB that they had agreed that the reasonable period of time for Turkey would expire on 19 February 2001. Pursuant to this agreement, Turkey is also to refrain from repeating this policy.

6. India complained against South Africa on anti-dumping duties on the import of certain pharmaceutical products from India. The request was dated 1 April 1999. India also claimed that the South African authorities had not taken into account India's special situation as a developing country.

As A Defendant

1. *India: Patent Protection for Pharmaceuticals and Agricultural Chemical Products:* The US complained against India on 21 October 1998. Similarly, the European Community also complained on this subject.

The period of implementation was agreed by the parties to be 15 months from the date of adoption of the report which expired on 16 April 1999. India presented its final status report on implementation.

India agreed with the EC that the implementation period in this dispute would correspond to the implementation period enjoyed by the US in a similar dispute. This dispute was the first WTO case where a panel or the Appellate Body made the ruling on the TRIPs Agreement.

This also raised a systemic issue, that is, consecutive panel requests regarding the same subject matter by a WTO member which was a third party in the original panel process. In this particular case, the EC took the position that it was entitled to have a full panel review by virtue of Article 10.4 of the DSU, because it was a third party in the original panel, and filed a new panel request. India considered this

action to be abusive and submitted procedural objections, requesting the panel to reject the EC complaint. The panel consisting of two panelists who served in the original panel and a different chairperson nevertheless went ahead and issued its report, largely reaffirming the results of the previous case. India strongly objected to this recurrent litigation.

2. *India: Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products: Complaint by the US:* This was an important case because of the two reasons. *First,* under Article XVIII of the GATT-94 India was to get a longer period to eliminate balance of payments restrictions arising out of India's status as a developing country. *Secondly,* the International Monetary Fund had participated in the decision-making.

On 28 December 1999, the parties informed the DSB that they had reached an agreement on the reasonable period of time which was to expire on 1 April 2000. Pursuant to the agreement reached, India also is to treat the US no less favourably than any other member with respect to the elimination of or modification of quantitative restrictions affecting any product covered by the agreement.

The same subject became an issue of dispute between India and New Zealand which was a complainant. Similarly, Canada and Australia also complained.

3. *EC also complained on Indian measures affecting export of certain commodities:* This was in respect of India's EXIM Policy (1997-2002). The EC had alleged that under this policy raw hides and skins were listed as products the export of which required an export licence and these licences were systematically refused. The EC concludes that this is in effect an export embargo and violates Article XI of the GATT-94.

4. The EC had complained against India on measures affecting customs duties. The EC contends that the aggregate value of tariffs resulting from the addition of the different duties applied by India exceeds India's WTO bound rate.

5. The United States had complained against India regarding measures relating to trade and investment in motor vehicle sector on 1 May 1999 such as : (i) achieve specified levels of local content; (ii) achieve neutralisation of foreign exchange by balancing the value

of imports. Consultations appear to have failed. The United States, it is reported, has sought the establishment of a panel.

In another complaint the EC has also raised the same issue.

India as A Third Party

India has been active as a third party in the following cases:

1. In the case of US – Section 301-310 of the Trade Act of 1974 – India with a number of developed and developing countries has been a third party.

2. In the case of complaint by the EC on Canada's patent protection of pharmaceutical products, India has been a third party along with Australia, the US and some developing countries.

3. With regard to the complaint by the US on Australia's measures affecting the importation of salmonids, India had reserved third party rights.

4. Japan had complained on US Anti-Dumping Act 1916.II. The EC and India reserved the third party rights.

5. The US complained against Argentina on certain measures affecting imports of footwear, textiles, apparel and other items. India has reserved the third party rights.

IV

ISSUES

In this section, two types of issues pertaining to the DSU will be discussed. One set of issues arise out of the provisions of the DSU as such. The other set of issues deal with those which have arisen from the interpretation of the provisions of the DSU by the panels and the Appellate Body. It must be stated here that issues which are of particular importance to the developing countries will be discussed along with the general issues. A qualification has to be made here. Attention has been focused only on important issues.

There has been a general appreciation of the DSU as such. It is believed that its provisions reflect, to a large extent, the expectations of the WTO members who formulated them. Yet some of the provisions have been considered because of the need for some revaluation.

Anti-Dumping Duties

One of the major areas of comment is the limited jurisdiction of the DSU with regard to disputes pertaining to the anti-dumping duties.

The Agreement on Anti-Dumping has severely limited the functions of the panels in anti-dumping cases. According to Article 11 of the DSU, a panel should make an objective assessment of the matter before including the objective assessment of facts of the case and applicability of and conformity with the relevant covered agreements and make such other findings as will assist the DSB in making the recommendations or in giving rulings provided for in covered agreements. Further, Article 19 of the DSU where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the member concerned bring the measure in conformity with the agreement.

But in the case of disputes covering issues of anti-dumping, the role of the panel is extremely restricted. Article 17 of the Agreement on Implementation of Article VI of the GATT-94 states in clause 17.6 that the panel shall determine whether the establishment of facts by the authorities was proper and whether the evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned. Section 11 of clause 17.6 states that the panel shall find the authorities' measure to be in conformity with the agreement if it rests upon one of those permissible interpretations.

Thus a panel is debarred from giving its findings as to whether or not an action is inconsistent with the provisions of the relevant agreement. This provision was expected to be reviewed. In fact, the review has taken place in 1998 and 1999. There has not been any final decision on this yet.[12]

The interpretations of the panels in the context of anti-dumping duties have raised some issues which will be discussed later.

Decision-Making in the DSB

Before discussing other issues, it is important to focus attention on the nature of decision-making in the DSB. It is done on the basis of "negative consensus". It means that the consensus in the WTO is

required to reject, rather than to adopt, the report. It is considered that the party which has won its case will not be a party to this. Hence, there is no question of getting the consensus required to reject the proposal. Entitlement to a panel at the DSB meeting at which it first appears on the agenda means, in practice, that the party complained against can "block" the establishment of a panel for the DSB meeting. The party may also agree to do it.

Article 7.1 instructs the panel: "To examine, in light of the relevant provisions (name of covered agreements) cited by the parties to the dispute, the matter referred to the DSB by (name of the party) in document(s) cited by the parties to the dispute, the matter referred to the DSB by (name of the party) in document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

Experts argue that some ambiguity surrounds the reference to the relevant provisions "cited by the parties" since it is only one party, the complainant, that provides the document to the DSB requesting the establishment of a panel. Provisions of the WTO agreements cited by the other party in defence are not likely to be included in the complainant's request for a panel.

Computation of time for the panel's report is also called into question. As has been seen, the DSU requires the panels normally to issue their final reports to the parties within six months from the date of the composition of the panel. "In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months." It appears to be an unrealistic expectation. Therefore, the secretariat has considered it not mandatory but hortatory.

Third Party Interest

The DSU provides for third party interest in panel proceedings. Any member having substantial interest in a dispute, and having notified the DSB of that interest, may be heard by a panel and may make a written submission to the panel. Third parties receive the first written submissions of the parties to the first meeting of the panel, but no provision is made for them to receive the second or any subsequent submission. Third parties may not appeal a panel report; if a party appeals third party may participate. These procedural rights of a third party before the WTO panel are considerably more limited than those

of an intervener before the International Court of Justice under which a third party has: (a) access to the pleadings of the disputing parties; (b) opportunity to make written submissions, and have the parties respond to it in writing; (c) opportunity to attend all hearings, which is not the case with the third party provision under the DSU.[13]

With regard to the developing countries, the Special and Differential Treatment is accorded in very vague terms.

Article 3.12 provides that a developing country may invoke the decision of 5 April 1966, which makes, as has been seen, the availability of expedited dispute settlement. Surprisingly, no developing country so far has had recourse to this provision under the WTO.

Article 4.10 provides for "special attention" to be given to the particular problems and interests of the developing countries during consultation and hence there are no means to assess the level of compliance by the WTO members with this provision. It may be noted here that this is a part of a wider problem in the sense that S&D provisions in the covered agreements are rather declaratory in nature and in the absence of implementation modalities, these clauses have little practical use.

Issues that Have Become Prominent during the Course of Dispute Settlement Process

As has already been noted, the DSU had a large number of disputes from many member governments, developed as well as developing countries. In the course of settling disputes, a large number of problems pertaining to interpretations and clauses of the DSU, role of various organisations, the extent to which the panels and the Appellate Body limit their decision-making, have come up.

Legal Interest: The dispute between the EC and the banana producing and exporting countries of Latin America and the US has been going on over a period of six years. Apart from other issues this case between two giants has brought into focus a significant issue in a situation when a member country has legal intent in the dispute. This issue arises when a member country of the WTO which has presently no exporting interest in a particular product/service seeks the settlement of a dispute on barriers to imports of a specific produce contrary to the WTO's agreements and seeks elimination of those barriers to be

consistent with WTO's agreements and aims at exercising retaliation power as well.

This issue really came up before the DSB when, Regime for Importation, Sale and Distribution of Bananas by the EC was a subject of complaint by Ecuador, Guatemala, Honduras, Mexico and the United States. (A number of banana producing exporting developing countries have been third parties).

The joining of the US as a complainant to this dispute along with banana exporting countries, has raised two important questions. The US is not an exporter of banana. The US was actually defending the rights of its transnational corporation engaged in the production of bananas in Latin American countries and their exports to the EC. Chiquita banana, which is produced in Latin America is being exported by this US TNC.

The Appellate Body held that the US has a legal interest in this case. The WTO rules in principle are not concerned, according to some, with actual trade, but rather competitive opportunities. Accordingly, a member's potential trade interest and its interest in determination of its WTO rights and obligations are each sufficient to obtain the establishment of a dispute settlement panel. It is, therefore, not necessary that a member to have a "legal" interest, it must have current trade interest as a prerequisite. This has raised an issue that it is necessary to define which WTO members have the right to bring up disputes before the DSB. But allowing the United States to bring up this case before the DSB also opens the door for disputes in future that are filed not in defence of the country's own exports, but in order to open markets for the exports of its TNCs, no matter where the export items have been produced.[14]

Panels, their Establishment, their Procedures, their Workload and their Verdicts

Panels are the core of the DSU, although a substantial number of disputes have been settled through consultation.

Over five years, composition of panels, working procedures and their bias have been discussed.

Selection: The increased number of disputes that panels are dealing

with has complicated the process by which panels are selected. In the last few years the necessary requirement of agreement on panelists has not been easily forthcoming. The reasons for this can be identified: First, as the stakes in dispute settlement have gone up, the contending parties are increasingly concerned about who the panelists are. This is particularly the case with a number of developing countries. They fear the panelists may not be friendly to them or they may be ideologically associated with the achievement of the objective of free multilateral trade and also believers in the existence of free-rider problems.

As has been seen if there is no agreement regarding the selection of panelists, the only way to constitute a panel is to let the Director-General appoint the panelists if he is requested to do so. The decision by the Director-General has become more common. Sometimes roughly half of the panels were chosen by the Director-General. "This is very undesirable. It risks the political capital of the Director-General which should be reserved for brokering compromises among Members on more important issues. The involvement of the Director-General in disputes should be minimised. Moreover, anytime the parties do not agree on the panelists, there is an increased risk that they will complain later about biased panelists, which undermines the legitimacy of the system and of the Director-General."

Workload: There has been a significant rise in the workload compared to earlier years. This is because of four reasons apart from the growth in the number of disputes: (i) cases tend to be now more complex, often they involve more than one agreement; (ii) more difficult procedural issues are raised; (iii) experts have to be often used; (iv) parties tend to send much more extensive argumentation than in the past. Combined with the need to prevent an adequate report for purpose of appeal, these factors lead to much longer reports – both factual and legal parts. In addition, implementation disputes take further time of the panels. It is feared that the workload of the panels may make this assignment less attractive. This will ultimately make it harder to find suitable and competent panelists.[15]

The dominant role of the secretariat in selecting the panelists has also been criticised on the ground that it may not always result in giving due consideration to equal representation of members and the

bias of the secretariat, and it may play for some interested groups behind the scenes.[16]

There are also questions raised on the working of panels stating that they are tending to go beyond their briefs and powers. The panel had gone to the extent of identifying errors in treaty negotiations in the case of Korea and the US government public procurement. "The panel has said that it sees no reason why the question of error in treaty negotiations cannot be addressed under the DSU." "The panel goes on to say that it is necessary that negotiations in the government procurement agreement be conducted on a particularly open and forthcoming basis." But this is not for the panel to suggest as has been argued by some.[17]

It appears that developing countries have exercised their right under Article 10 to select a panel member of their choice.

The Appellate Body

The role of the Appellate Body in the DSU has become very important. *First,* in almost all disputes the parties make an appeal be it the defending party or the complainant. *Secondly,* the Appellate Body as it has functioned, has perhaps gone beyond its briefs more often.

The Appellate Body is not a court of record and it is feared that it is gradually being made into one, that is, its rulings become precedents as a statement of law to be followed by panels in future.

The Appellate Body has not been given the right to interpret the agreements for "the right of authoritative interpretation is vested exclusively in the Ministerial Conference and/or the General Council." But the Appellate Body seems to exercise this right.

The appointment of members to the Appellate Body is also questioned. "The selection of the Appellate Body in 1995 was largely done in such a way that only after the United States cleared the seven names for appointment were they presented to others, in effect, daring them to withhold the consensus."

The Appellate Body has not been given remand authority in view of the time bound character of dispute settlement envisaged under the DSU. According to Article 17.13 of the DSU, the Appellate Body

may only uphold, modify or reverse the legal findings and conclusions of the panel.

In this context Palmeter and Mavroidis have pointed out that the Appellate Body has gone beyond by not confining to issues in the panel report. "By completing the analysis, the Appellate Body effectively denies WTO members their two step adjudication, as it decides some issues at first and last resort."[18]

The Appellate Body has engaged in appraisal of facts (which is shown in the case of periodicals between the US, the complainant and Canada, the defendant) while it is expected to deal only with the legality aspect.

There is also some confusion with regard to the burden of proof. In the case of textiles (India), the Appellate Body argued that the burden of proof is with the defendant. In other words, the complainant has only to establish a *prima facie* case of violation. It is useful to note that Jackson had established that the GATT contract knows of a particularity. For a claim to be admitted the complainant had to show nullification and impairment of its rights as a violation by another member. The complainant has to show that violation has occurred. The Appellate Body's approach seems to be the contrary.[19]

There is also a question of neutrality of the Appellate Body. Due to its active participation not confining to purely legal aspects there are apprehensions that the Appellate Body might not have been objective and neutral in some cases. The case of shrimp and turtle is quoted very often by experts, where the neutrality of the Appellate Body is not beyond doubt.

Participation by *Amicus Curiae*

The WTO is one of the intergovernmental organisations which has given importance to NGOs. The Agreement which established the WTO stipulated that "the General Council may make appropriate arrangements for consultations concerned with matters related to those of the WTO." In fact, NGOs have been increasingly attending the Inter-Ministerial Conferences of the WTO. At the Singapore Inter-Ministerial Meeting, 108 NGOs participated. This figure increased to 128 in the meeting at Geneva. In the Seattle meeting, 738 NGOs participated, of which 314 NGOs belonged to the United States.[20]

The Appellate Body's decision in the case of the United States – Import Prohibition of Certain Shrimps and Shrimp Products — regarding *amicus curiae* is worth discussing.[21] The environmental organisations such as Sierra Club and WWF filed briefs *amicus curiae* with the panel dealing with this matter. The panel declined to consider it under Article 13 of the DSU stating that the panel had the authority to seek information from any source. Since it had not sought any information from the concerned organisations, it shall not take it into consideration, while declaring the US measures are inconsistent with the WTO's agreement. The Appellate Body ruled that the panels had a "discretionary authority" to consider or reject non-solicited material. An opposite view is held that while Article 13 allows the panels to seek information, it implicitly bars them from considering unsought material submitted by NGOs and other organisations and this has in effect interpreted an Article, a matter clearly reserved for members. "In the absence of a firm action by WTO members, this trend may continue and may eventually lead to a situation where the Appellate Body takes upon itself the role of interpretation of Multilateral Trade Agreements, something that can upset the balance of rights and obligations in the Agreements envisaged by the negotiators."

This fear appears to have been substantiated in the latest case when the Appellate Body has moved to make *amicus curiae* – the case of European Union's measures regarding the import of asbestos. India and other developing countries have opposed this move. India is opposed to the WTO bodies trying to hobnob with private individuals and NGOs on basically two counts: (i) it threatens to alter the basic character of the WTO as a purely intergovernmental organisation; and (ii) it puts developing countries such as India at a disadvantage, as their NGOs are not financially and otherwise as equipped as those of the developed countries to influence the course of action at the WTO.

India is of the view that the Appellate Body's action is not procedural. It is a substantial issue not mandated by the membership of the WTO. The approach to accept unsolicited briefs as well as to invite submissions from sources other than the governments is particularly a serious matter since it is concerned with the most sensitive dispute settlement mechanism of the WTO. Since the compliance of decisions has to be done by the governments, this uninvited information would

create problems. India has argued that accepting *amicus curiae* briefs is not mandated.[22]

Bringing New Issues through DSU: A Case of Trade and Environment

The issue of linking trade and environment has been one of the most contentious issues in multilateral trade negotiations. The developing countries apprehend that this would lead to a different kind of protectionism. Hence they opposed inclusion of this subject for negotiations under the Uruguay Round of Trade Negotiations. However, a compromise was made when a Committee on Trade and Environment was established under the Marrakesh Agreement.

In addition, in the objectives of the WTO the achievement of sustainable development as a goal has been incorporated.

The Appellate Body, according to some, has taken a step forward in addressing the relationship between environment and trade. In the cases such as the United States – Import Prohibition of Certain Shrimps and Shrimp Products and the EC Measures Concerning Meat and Meat Products (Hormones), 1998 (EC – Hormones Case), this has been seen.

While the Appellate Body found the impugned measures of the GATT illegal, it took several important steps to integrate trade and environment objectives. The Appellate Body not only clarified that the WTO would not stand in the way of environment protection, it also provided certain latitude in the context of sanitary and phyto-sanitary measures. In fact, in certain cases the ruling of the Appellate Body was such that it would uphold the unilateral measures to protect environment. "... Our findings regarding Article XX do not imply that recourse to unilateral measures is always excluded, particularly after serious attempts have been made at negotiation." Article XX of the GATT deals with certain measures necessary to protect human, animal or plant life or health and relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

It is observed that issues which are not negotiated between developed and developing countries are brought into consideration and

implementation through the dispute settlement mechanism. In this context, the *amicus curiae* issue discussed before should be taken up for consideration.[23]

It is also argued by some: "No presumption of sovereignty is permitted at the international plane." It is noted, "... that WTO members did not give up their right to pursue autonomous environmental policies by accepting a harmonised multilateral agreement in this respect, and should not be interpreted as such. The GATT can only impose limits on the exercise of governmental discretion to the extent that such limits have been agreed upon by the sovereign governments."[24]

Implementation and the Right to Retaliate under the WTO Agreement

The WTO allows a complaining party to suspend concessions (or retaliation) where a defending party has failed to comply with the decision of a dispute settlement panel or the Appellate Body. In fact, it has been hailed as a very important aspect which gives WTO the teeth to implement the agreed measures, and a success of the DSU.

The Banana case between the US and the EU has raised two important questions in this regard: (i) who determines whether a defending party has failed to comply; and (ii) when the right to retaliate arises. These two issues have been central to the dispute between the United States and the EC. The United States claimed that the EC had not implemented the Banana rulings and recommendations and, therefore, sought WTO's authorisation to suspend concessions. The EC argued strongly that the US had not followed "sequencing" required by the WTO Agreement. In the EC's view, a multilateral determination of non-conformity had to precede any request to suspend concessions. According to some experts, "The sharp US-EC disagreement on this issue posed a serious threat to the institutional integrity of the WTO." Soon after the Banana dispute, four more cases arose, in which there was disagreement between the parties over implementation: Canada-Australia dispute over salmon, the US-Australia dispute over leather subsidies, and the two cases between Canada and Brazil on aircraft subsidies. It is feared that in future more cases on the implementation issue will arise.

In fact, late in 1999, a number of countries made a proposal to the Ministerial Conference in Seattle to provide a permanent solution to

the sequencing problem by amending the WTO's DSU. There was no success. Hence, the precedents established in the cases are likely to provide important guidance to manage implementation disputes in the future.

Article 21.5 of the DSU provides an expedited procedure to determine compliance. "Where there is disagreement as to the existence or consistency with covered agreement of measures taken to comply with the recommendations and rulings such disputes shall be through recourse to these dispute settlement procedures including, wherever possible, resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it shall submit the report."

There are considered to be some problems with this clause. They are identified as:

(i) Article 21 makes no reference to the right to retaliate under Article 22 and Article 22 similarly makes no reference to Article 21.5.

(ii) The phrase "recourse to dispute settlement procedures" is ambiguous.

(iii) The question when the panel process begins, whether it is after reasonable period of time, for implementation or after is unclear. Article 21.5 simply states within 90 days after the referral.

(iv) The mandate of an Article 21.5 panel extends to disputes over the existence of WTO consistency of "measures taken to comply". What happens to replacement measures?

(v) Similarly, a number of interpretative problems have arisen regarding compensation and retaliation:

(a) Who determines the non-compliance of the recommendation of the DSB?

(b) Article 22.4 requires that the level of suspension to be authorised by the DSB must be "equivalent to the level of the nullification or impairment". It is not clear how or when such a determination of "equivalence" is made. This is the problem with the US retaliation.

(c) What criteria should apply to determine if the use of cross retaliation is justified?

(d) There are a lot of issues of time arising out of arbitration.[25]

In this case another important aspect has come to the fore. Equador, a complaining party in the Banana case is a developing country. While it was seeking permission from the DSB to retaliate against the EC, it also pleaded for positive compensation.[26] The harm done in the case of a developing country by violating the agreements are much more than mere trade interests. In a number of developing countries, the role of export produce is not only to provide some foreign exchange but it also provides a large part of employment and income. Mere retaliation may not achieve amelioration resulting in adverse conditions of developing countries out of the loss of market consequent to trade restrictions. Equador also considered using cross retaliation by withholding TRIPs benefits.

Very often it is argued that the developing countries may not be in a position to retaliate for a number of considerations. *First,* retaliation by a developing country will not harm the developed country in a significant manner. *Secondly,* a developing country is apprehensive of the fact that the developed country can use other measures to penalise any developing country, which takes recourse to retaliation. *Thirdly,* the unknown implication to a developing country about its act of retaliation preempts any steps towards retaliation.

The relief granted by the system in terms of implementation particularly affects adversely the developing countries. To effect the relief granted by the system it takes nearly up to 30 months from the time the dispute settlement process is started. This delay would be quite detrimental to the developing countries who have weak trade linkages and fragile trade. As has already been discussed, there are severe limitations to them for exercising the option of retaliation. Further, there are no retrospective compensations.

These issues need to be resolved.

Politicisation and Panel's Verdict

It is known that the United States has tremendous capacity to use unilateralism to achieve its national goals. In fact, it was considered

by many that the establishment of the WTO was expected to limit, if not eliminate, the unilateralism of the US.

The panel's verdict on Super 301 and Special 301 clause of the 1974 Act and the US Trade and Competitiveness Act of 1988 when this matter was brought by the EC in January 1999 is worth examining. The panel observed in its ruling that the US law might be a violation, but the WTO members and trading community could be satisfied with the US Administration's "Statement of Administrative Action" to the Congress and a congressional approval of the Marrakesh Agreement in 1994. Assurance and statements were given by the United States before the panel on assuring trade security. This has led to comments as: "This ruling is blatantly based on politics rather than a legal interpretation of rules that it strengthens the view of critics that the WTO, behind its outward veneer of being a "rule-based organisation" with a credible dispute settlement system upholding the rights of the weak as much as those of the strong, is basically a power-based institution, in terms of not only its negotiated agreements but also their administration. "This verdict of the panel is in contrast to its verdict in the case of the dispute raised by the US against India over the latter's TRIPs obligations. The panel and the Appellate Body ruled out the expressed intention of the Indian Government to implement the transition provisions "through administrative orders". Both the panel and Appellate Body insisted that only provision of law could be considered adequate. The decision went against India for there was no new law whereas the US assurance was enough for the panel to envisage "trade security" in the context of unilateralism.[27]

Anti-Dumping Duties and the DSU

One of the major criticisms against the DSU has been regarding its powers to examine and give verdict on disputes pertaining to anti-dumping duties. It is argued, as has already been seen, that the DSU has limited scope in deciding about the correctness or otherwise of anti-dumping duties because of the importance given to domestic laws. In view of the fact that they have been used extensively by member governments to protect their industries/agriculture, this issue has acquired great importance.

Lately, however, it has been found that the WTO panels and the Appellate Body have dealt with this subject effectively. The EC and

Japan complained about the US Anti-Dumping Act of 1916. India and Mexico were the third parties to the dispute. The main issue before the WTO panel and the Appellate Body was to decide as to whether the Anti-Dumping Act of 1916 of the US violated the WTO discipline. This law envisaged two courses of action against dumping: (a) criminal prosecution by the State leading to imposition of fine and imprisonment and, (b) civil proceedings in a district court to claim three-fold damages by an affected person. However, it requires predatory intent.

The WTO panel and the Appellate Body ruled unequivocally that the 1916 Act of the US which provides for specific action against dumping in the form of civil and criminal proceedings and penalties is clearly inconsistent with Article VI of the GATT-94 and the Anti-Dumping Agreement as well as Article XVI:(4) of the WTO Agreement. The Appellate Body recommended to the DSB and DSB has adopted the said recommendation (26 September 2000) to bring United States' 86-year old law into conformity with the WTO discipline on anti-dumping to some extent.

Similarly, India's complaint against the EC on anti-dumping on imports of bed-linen from India again reinforced the fact that the DSU has taken steps to extend its jurisdiction on anti-dumping to some extent.[28]

Special Provision for Developing Countries Including Least Developed Countries and the DSU

As has been noted most of the provisions incorporating Special and Differential Treatment under the DSU are expressions of goodwill and no effective mechanisms to achieve the goals are instituted. It has been found that many developing countries that have been involved in disputes under the WTO have not taken recourse to Special and Differential Treatment under Articles 12.10, 12.11, 21.7 and 21.8. "The continuing non-recourse by developing countries to these provisions suggests that there may be 'systemic' reasons for this." The apparent reason is that the developing countries do not find that these provisions are of any help for most of them are couched in general terms.

Article 24 which provides special provisions for least developed countries has not so far been invoked by them for they have not got involved in any dispute either as a complainant or as a defendant. Contrarily, balance of rights and obligations negotiated under the

Marrakesh Agreement are upset by the results of the DSU leading to increased obligations for the developing countries.[29]

The Cost of Dispute Settlement

The cost of dispute settlement has been very high for the WTO as an organisation, in financial and human resources. In fact, it is affecting sometimes the efficiency of the DSU's functioning.[30]

For the members, the cost of taking recourse to dispute settlement is high especially for the developing countries. The developed countries are not constrained by the financial or human resources and costs.

VI

REFORMING THE DISPUTE SETTLEMENT SYSTEM

The initial years of functioning of the dispute settlement system of the WTO led to a euphoria regarding its rule-based nature and therefore it was felt that all members – stronger and weaker — would get the benefit out of this system. This is particularly so in the context of the power-oriented dispute settlement system of the GATT wherein it was obvious that the weaker party would not get justice. Some of the developing countries like Brazil and Mexico had, in fact, been very active in framing the rules for the DSU. The fixed time frame scheduled to resolve disputes and elimination of blocking either at the level of establishment of a panel or blocking of acceptance of decisions of the panels as had been in the case in the Council of contracting parties of the GATT have been as significant features. Therefore, it is believed, the dispute settlement in the WTO is the best as one could imagine in any inter-governmental international organisation.

A large number of disputes that have been brought before the DSB are considered to be the testimony to the fact that all member governments have confidence in the system. In addition, a significant number of disputes that the developing countries have brought before the DSB are viewed as yet another indicator to reinforce the faith in the system to the effect that it would cater equally to all ensuring justice in the system.

While one may not question the fundamental soundness of the dispute settlement system of the WTO, a large number of issues have

come up during the course of the functioning of the DSU, which call for reforming the system if it were to function as was expected by the architects of the system as well as the member governments. Some of the issues are of particular significance to the developing countries. In the following pages these issues will be discussed and the proposed reforms wherever they have been mooted will be indicated.

It has been noted that a large number of countries have used consultation. Out of 77 disputes settled during the period 1995-2000, 41 have been settled without taking recourse to adjudication. This, as has already been noted, enables the DSB to discharge its functions effectively.

It is, therefore, important to remove any limitation in the consultation process. Further, in order to avoid heavy expenditure to be incurred by the contending parties, especially the developing ones, the obstacles for its use have to be removed.

It is proposed that the following areas may be reviewed and examined thoroughly in the context of consultations under the DSU:

(1) Time notification to the DSB by the parties to a dispute for a mutually agreed solution (Art. 3.6) needs to be studied and problems such as deliberate delays taken recourse to by some contending parties, especially the developed countries, must be removed.

(2) Greater discipline, on the part of the complaining party, at the consultation must be made mandatory.

(3) It has been rightly suggested that there is need for the elimination of the requirement of a "trade" interest for joining in consultation (Art. 4.11) so that WTO members who have a "systemic interest" rather than trade interest can also join as third parties.

It is also useful to make a study as to why some efforts towards consultation failed and the parties sought the establishment of panels.

The Panels

Selection of panelists should be from a fixed pool of candidates to ensure that the panelists have the necessary knowledge and expertise. Choice of panelists has most often been made from the developed

countries. This can be partly mitigated by not emphasising that the qualifications must be strictly adhered to. Since a representation required from the developing countries has been envisaged and also the WTO has a large number of developing countries as members, this reality must be reflected in various institutions of the WTO. Panels of the DSU are an important institutional mechanism to implement the agreements that member states have signed. Experts from the developing countries must be selected, if need be trained, and put on the Secretariat's panels in adequate numbers. The panel body should have, in exceptional circumstances, the right to co-opt an outside panelist if a developing country finds that the existing panelists may not give confidence to it for getting an objective hearing on the dispute.

In view of the increased panel activity, 65 panels have been established since 1995 and they are asked to look into multiple complaints and come back in the context of implementation. There are questions regarding selection procedures for panelists.

There is a suggestion to establish a permanent Panel Body which has a pre-set selection process as has been in the case of the Appellate Body. This would make the panelists work harder. It may be ensured that they would be paid members like the members of the Appellate Body. This can be examined. However, as we see there are questions about the desirability of such a standing Appellate Body.

It is also suggested that panelists must observe a high level of ethical standards so as to avoid conflict of interests.

With regard to the time frame given to the panel, it is suggested that time limit may be exceeded with the consent of the parties in dispute.

The Appellate Body

There are fears that the Appellate Body is exceeding its jurisdiction by doing a number of things of which there are three important aspects:

(i) The Appellate Body went beyond its jurisdiction by stating that voluntary submissions by NGOs should be accepted.

(ii) Allowing the US to become a complaining party when it is not an exporter as in the case of Bananas, was a questionable step.

(iii) However, there is no agreement whether the standing Appellate Body has been a good thing. There are questions regarding the desirability of having a standing Appellate Body. It is feared that a continuing body of this type is bound to develop and perpetuate certain leanings and orientations, which may not be a healthy practice, given the fact that its recommendations are in the nature of final pronouncements on the issues in question.

Articles dealing with the Appellate Body may be so amended that the Appellate Body does not become a court by itself.

In this respect the question of remand authority arises. It is suggested that a procedure can be created for remand of the case to the panel if it is found that the panel has failed to make adequate findings on facts, to ensure that the Appellate Body does not become a fact finding body and its review, as intended, is restricted to legal questions only.

A few suggestions to improve the working of the Appellate Body have been made in a South Centre study to overcome these problems:

(i) The respective roles of the panels and the Appellate Body should be clearly defined and any ambiguity that still exists in this respect should be removed.

(ii) The role of the Appellate Body should be limited to reviewing the questions of law and there should be a provision for remanding the case back to the original panel if the issues of fact have not been adequately addressed by the panel in its original ruling.

(iii) The panels and the Appellate Body should in no circumstances be allowed to take upon themselves the role reserved for the WTO members.

(iv) The panels and the Appellate Body should be directed to give, to the extent possible, clear rulings that are less prone to conflicting interpretations. They should also be advised not to attempt to make "politically correct" rulings.

The Implementation Issue

The issue has assumed considerable importance from the points of view of the developed as well as the developing countries. This fact was highlighted in the implementation issue between the EC and the

US with regard to banana imports into the EC and the salmonid case involving Australia and Canada which had to deal with a multiplicity of procedures. In some cases even the consent of both the parties was envisaged. There is also the sequencing problem as has been discussed. It is suggested that Article 21.5 and Article 22 need to be amended to eliminate drafting ambiguities and provide conclusively for the necessary sequencing.

Reconsidering the provision regarding cross-retaliation that allows for retaliation in one sector (goods) for a perceived lapse by the losing party in another sector (service or intellectual property) is also suggested as this provision is more likely to work against the developing countries. The S&D provision must be effectively incorporated. It may be noted here that there is no reference to the developing countries in this clause. It is suggested that the whole question of retaliation should be reconsidered. Instead, emphasis should be given on implementation.

It is felt in the context of the developing countries that they may not be in a position to retaliate for fear of offending the developed country when it is a defendant. In this context, it is suggested that Article 22 may be amended by providing for either of the following against the developed countries:

(i) Joint retaliatory action by all WTO members against an offending member which has refused to either remove the offending measure or pay compensation; or

(ii) Mandatory removal of the measure violative of the WTO rules.

Operationalisation of All Provisions Regarding S&D Treatment to Developing Countries

The reform process should lead to the establishment of an implementation mechanism wherever such mechanism is missing in the present provisions. For example, the "special attention" mentioned in Article 4.10 may be interpreted to mean *inter alia* that consultations initiated against a developing country by a developed country are held at a place convenient to the developing country concerned. This would improve the situation where, due to financial constraints, developing countries are often unable to bring experts from their country during the consultation period.

There is need to study the reasons why some S&D treatment provision such as Articles 12.10, 12.11, 21.7 and 21.8 have not been invoked by the developing countries. Such an analysis will enable improvements to be designed that lead to a more effective use of these provisions by the developing countries.

The developing countries which are in a majority in the WTO must use the General Council more effectively. They should ask the Council to limit the scope of the verdicts of panels and Appellate Body strictly to the issue of dispute. The developing countries should endeavour to undo the harm done so far by the substantive interpretation of the panels and the Appellate Body. It may be necessary that the General Council must be requested to pronounce that the interpretations will not guide the future work of the dispute settlement process.[31]

NOTES

1. GATT Art. XXII and Art. XXIII. See for discussion, John H. Jackson, *The Jurisprudence of GATT and the WTO* (Cambridge University Press, Cambridge, 1991); Ernst Ulrich Petersman, *The GATT/WTO Dispute Settlement System* (Kluwer Law International, London, 1998).

2. Extracts from David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organisation, Practice and Procedure* (Kluwer Law International, The Hague, 1999).

3 GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations: Legal Texts*, Appendix 2 (GATT Secretariat, Geneva, 1994).

4. Sumitra Chishti, *Restructuring of International Economic Relations* (Concept Publishing Co., New Delhi, 1990).

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7. Hudec, *Developing Countries in the GATT Legal System*, p. 49.

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14. South Centre, *op. cit.*

15. William J. Davey, "Supporting the World Trade Organisation Dispute Settlement System", *Journal of World Trade*, 34(1), 2000.

16. South Centre, *op. cit.*; and Chakravarty Raghavan, *The World Trade Organisation and its Dispute Settlement System: Tilting the Balance against the South* (Trade and Development Series No. 9), Third World Network.

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20. Jayati Srivastava, "Emerging Role of NGOs in the WTO", *Mainstream*, New Delhi, 8 July 2000.

21. David Palmeter and Petros Mavroidis, *op. cit.*; Chakravorty Raghavan, *op.cit.*

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29. South Centre, *op. cit.*; Bhagirath Lal, *op. cit.*

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31. South Centre, *op. cit.*; Raghavan, *op.cit.*; Bhagirath Lal Das, *op. cit.*; and Discussions with experts and various other articles cited above.

APPENDIX I

GATT-47 ARTICLES ON DISPUTE SETTLEMENT

ARTICLE 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.

ARTICLE XXIII

NULLIFICATION OR IMPAIRMENT

1. If any contracting party 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 as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement; or (b) the application by another contracting party of any measure, whether or not its conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the Contracting Parties. The Contracting Parties shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The Contracting Parties may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organisation in cases where they consider such consultation necessary.

If the Contracting Parties consider that the circumstances are serious

enough to justify such action, they may authorise a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligations is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this agreement and such withdrawals shall take effect.

APPENDIX II

WORKING PROCEDURES

(PANEL)

1. In its proceedings the panel shall follow the relevant provisions of this Understanding. In addition, the following working procedures shall apply.

2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meeting only when invited by the panel to appear before it.

3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

6. All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

9. The parties to the dispute and any third party invited to present its views in accordance with Article 10 shall make available to the panel a written version of their oral statements.

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

11. Any additional procedures specific to the panel.

12. Proposed timetable for panel work.

    (a) Receipt of first written submissions of the parties.

    (l) Complaining Party: 3-6 weeks

    (b) Date, time and place of first substantive meeting with the parties; third party session: 1-2 weeks

    (c) Receipt of written rebuttals of the parties: 2-3 weeks

    (d) Date, time and place of second substantive meeting with the parties: 1-2 weeks

    (e) Issuance of descriptive part of the report to the parties: 2-4 weeks

    (f) Receipt of comments by the parties on the descriptive part of the report: 2 weeks

    (g) Issuance of the interim report, including the findings and conclusions, to the parties: 2-4 weeks

    (h) Deadline for party to request review of part(s) of report: 1 week

    (i) Period of review by panel, including possible additional meeting with parties: 2 weeks

    (j) Issuance of final report to parties to dispute: 2 weeks

    (k) Circulation of the final report to the Members: 3 weeks.

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.

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1. Aneel Karnani, "Competing for the Indian Market: Local Firms vs. MNCs" (January 1996)
2. B. Bhattacharyya and Satinder Palaha, "Foreign Direct Investment in India: Facts and Issues" (January 1996)
3. B. Bhattacharyya and Vijaya Katti, "Regional Trade Enhancement: SAPTA and Beyond" (February 1996)
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5. B. Bhattacharyya and Somasri Mukhopadhyay, "Duty Free Access to India within SAPTA Framework" (July 1996)
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10. H.A.C. Prasad, "India's Competitiveness in Export of Garments in the MFA Phase-Out and Post-MFA Phase-Out Periods" (September 1997)
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