

## INTRODUCTION

The institutionalisation of General Agreement on Trade and Tariff (GATT) and its transformation into the World Trade Organization (WTO) in 1994 brought about a greater clarity of law in trade dispute settlement system. This improvement in the dispute settlement system gave birth to a belief that 'right perseveres over might'.<sup>1</sup> Many scholars also hailed this transformation of the dispute settlement system as a victory for 'legalist' over 'pragmatist'.<sup>2</sup>

The optimism about the WTO coincided with the numerical increase of the developing countries' participation in dispute settlement system. After the creation of the WTO, the developing countries lodged 149 complaints out of the total 262 during 1995-2002.<sup>3</sup> Impressed by the increasing participation of the developing countries, Renata Ruggiero, the former Director General of the WTO, commented:

One success that stands out above all the rest is the strengthening of the *dispute settlement* mechanisms... [d]eveloping countries have become major users of the system, a sign of their confidence in it which was not so apparent under the old system.<sup>4</sup>

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<sup>1</sup> Julio Lacarte-Muro, and Petina Gappah, 'Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench', *Journal of International Economic Law*, Vol. 3, Issue. 3, 2000, p. 401.

<sup>2</sup> G.R. Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization', in Robert Howse, ed., *The World Trading System: Critical Perspectives on the World Economy, Volume II*, London: Routledge, 1998, p. 340. [herein after Shell, 'Trade Legalism and International Relations Theory'.]

<sup>3</sup> Calculation from World Trade organization (WTO), *Disputes Chronologically*, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm), (accessed on 15 January 2003).

<sup>4</sup> *WTO Focus*, August-September 1996, p. 7, quoted by John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence*, London: The Royal Institution of International Affairs, 1998, p. 59.

As opposed to such optimism with respect to the transformation of the international trade regime, the paper argues that the difficulties and weakness of the developing countries to participate in the dispute settlement system of the WTO still exist along with diverse form of newly emerged complexities and challenges.

In fact, Bernard M. Hoekman and Petros C. Mavroidis<sup>5</sup>, Henry Horn and Petros C. Mavroidis<sup>6</sup>, E. Vermulst and B. Dreissen<sup>7</sup>, and South Centre<sup>9</sup> have already dealt with the new realities, emerged after the establishment of the WTO. They criticised the dispute settlement system, mostly from the legal point of view with the major concentration on remedy and implementation issues. In effect, political economy aspect of the international trade regime was ignored in the analysis. Also, the existing literatures do not analyse

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<sup>5</sup> Bernard M. Hoekman and Petros C. Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance*, [www1.worldbank.org/wbiep/trade/papers\\_2000/BPdisput.PDF](http://www1.worldbank.org/wbiep/trade/papers_2000/BPdisput.PDF), (accessed on 2 December 2002), pp. 1-22. [herein after Hoekman and Mavroidis, *WTO Dispute Settlement*]; Also Hoekman, Bernard M. and Petros C. Mavroidis, *Enforcing WTO Commitments: Dispute Settlement and Developing Countries- Something Happened on the Way to Heaven*, 2000, <http://www.cepr.org/meets/wkcn/2/2300/papers/Hoekman.pdf>, (accessed on 2 December 2002), pp. 1-19. [herein after Hoekman and Mavroidis, *Enforcing WTO Commitments*]

<sup>6</sup> Henry Horn and Petros C. Mavroidis, *Remedies in the WTO: Dispute Settlement System and Developing Country Interest*, [www1.worldbank.org/wbiep/trade/papers\\_2000BPdispute.PDF](http://www1.worldbank.org/wbiep/trade/papers_2000BPdispute.PDF), (accessed on 2 December 2002). [herein after Horn and Mavroidis, *Remedies in the WTO*]

<sup>7</sup> Vermulst, E. and B. Dreissen, 'An Overview of the WTO Dispute Settlement System and Its Relationship with the Uruguay Round Agreements: Nice on Paper but Too Much Stress for the System?', in Howse, ed., *The World Trading System, Volume II*, pp. 417-452. [herein after Vermulst and Dreissen, 'An Overview of the WTO Dispute Settlement System']

<sup>9</sup> South Center, *Issues Regarding the Review of the WTO Dispute Settlement Mechanisms*, Trade Related Agenda and Equity (T.R.A.D.E) Working Paper, 1999. [www.southcenter.org/publications/trade/toc.html](http://www.southcenter.org/publications/trade/toc.html), (accessed on 5 June 2003), pp. 1-36. [herein after South Centre, *Issues Regarding the Review of the WTO Dispute Settlement Mechanism*]



the dispute settlement system from any theoretical perspective. However, thanks to Gregory Shaffer for touching upon the non-legal issues including political bargaining, role of power, knowledge efficiency, networks etc. in one of his articles.<sup>10</sup> His article also lacks any theoretical orientation in its argument. In this regard, the paper is an endeavour to compliment the existing literatures by offering a theoretical framework.

The argument in this paper is put forward in the light of neorealist theory on international regimes. The objective behind the argument is to trace out some major elements, which hindered the transformation of dispute settlement procedures into 'a neutral technocratic process' within GATT/WTO regime.<sup>11</sup> Toward this end, the concepts like 'relational power' and 'structural power', as employed by Susan Strange for analysing the role of power in the global political economy, has been used. Susan Strange describes 'relational power' as visible or discernible power, directly employed by powerful countries, and 'structural power' as the power to shape and resolve the structures of global political economy within which other countries, their political institutions, their economic schemes and their scientists and their professional people require to function.<sup>11</sup> The recent US invasion in Afghanistan and Iraq to topple the regimes in power is an example of relational power of the USA while Nuclear Non-proliferation Treaty (NPT) regime, which seeks to prevent the diffusion of nuclear weapons among non-nuclear states, reflects the idea of structural power.

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<sup>10</sup> Shaffer, Gregory, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, ICSTD Discussion Paper No.5, March 2003, [http://www.ictsd.org/pubs/ictsd\\_series/resource\\_papers/DSU\\_2003.pdf](http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf) (accessed on 7 June 2003), pp. 5-62. [herein after Shaffer, *How to Make the WTO Dispute Settlement System Work*]

<sup>11</sup> Shaffer, *How to Make the WTO Dispute Settlement System Work*, p.5.

<sup>11</sup> Susan Strange, *States and Markets*, London: Pinter, 1994, pp. 24-25. [hereinafter Strange, *States and Markets*]

## METHODOLOGY

The methodology of the paper is based on a theoretical framework in combination with empirical investigations to analyse the dispute settlement system of the WTO from a developing country perspective.

The theoretical framework offers an eclectic approach, which is based on neorealist views on international regime in the light of the concepts of 'relational power' and 'structural power'. In using these concepts, the ideas of Susan Strange have occupied the centre stage of the paper. Other theoretical views on international regimes have also come into the discussion to examine why states form regimes, and which states gain most. The argument of the paper has also been supported by an empirical investigation into certain well publicised international trade disputes, having implications for the developing countries.

Research resources from books, international journals, various cases, websites, and publications and documents of the WTO were extensively utilised to write the paper.

## STRUCTURE OF THE PAPER

The paper is divided into four chapters. Each chapter contains few sections. **Chapter I** of the paper examines various theoretical perspectives on international regimes and recognises GATT/WTO as a given reality in the global political economy. Also, it aims at revealing the theoretical arguments over why states form international regimes to co-operate with each other and which states gain most. However, there remains a paradox in applying the concepts of 'relational power' and 'structural power'. The paradox emanates from the fact that Susan Strange totally abandoned the existing theories of international regimes in bringing her concepts of 'relational power' and 'structural power' into use. But the paper follows an eclectic



approach to buy the neorealist perspective on international regimes in combination with the two concepts of power to critically analyse the dispute settlement system. **Chapter-I** also tackles this paradox. **Chapter-II**, taking cues from the previous chapter, analyses the relevance of power in GATT dispute settlement system and in its role in the transformation into a more legalised system under the WTO. Then **Chapter-III** concentrates on the WTO dispute settlement mechanisms to examine the existing and newly emerged difficulties and challenges of the developing countries. Finally, **Chapter-IV** offers some major empirical evidence to demonstrate the relevance of structural power of the developed countries, which has probably put the developing countries in a difficult position in fairly utilising the dispute settlement system.

## *Chapter I*

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### **THEORETICAL PERSPECTIVES ON INTERNATIONAL REGIMES, THEIR CRITIQUE AND THE ECLECTIC APPROACH: A THEORETICAL FRAMEWORK**

The chapter deals with international regime theories, their critique and the eclectic approach in three sections to analyse the dispute settlement system of the WTO. **Section-I** of the chapter focuses on how major theoretical perspectives of International Political Economy (IPE) including neorealism, neoliberalism, and institutionalism view the formation of international regimes and cooperation among states. While doing so, this section examines how these perspectives treat the issues of power, role and interests of states. The main reason for picking these three major theoretical perspectives is very simple. These theories have certain distinct features in explaining international regimes for which they are very different from each other. **Section-II** sheds light on the criticisms made by Susan Strange with regard to international regimes and also on the context to analyse what prompted her to put 'relational power' and 'structural power' into use. **Section-III** analyses the relevance of relational power and structural power in the context of the dispute settlement system of the GATT/WTO.

The principal purpose of **Chapter-I** is to offer a theoretical framework upon which subsequent chapters can establish the argument of the paper.

## Section-I

### Theoretical Perspectives on International Regimes

#### Neorealist perspective

The neorealists accept international regimes as short-term alliances for mobilising international cooperation in order to maintain balance of power for peace and stability. However, to explain relatively prolonged interstate cooperation and continuous existence of international regimes, this approach relies on 'hegemonic stability theory' (HST), which reflects the understanding that states are status maximiser and concerned with relative gains.<sup>12</sup>

In essence, the HST suggests that a militarily and economically dominant state forms international regimes for maintaining its supremacy. In doing so, the hegemon offers public goods like liberal economic order, security etc. to the dominated states. It also recognises that international regimes sustain as far as the cost of offering public goods does not supersede the cost of benefit.<sup>13</sup> The neorealists, therefore, accept law, rules, or procedures of international regimes as 'something of an epiphenomenon, dependent on power...' and reflect 'the frequently asymmetrical character of inter-State power relationship'.<sup>14</sup> Their views, however, reflect the traditional

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- 12 Fred Gale, 'Cave 'Cave! Hic dragones': a neo-Gramscian deconstruction and reconstruction of international regime theory', *Review of International Political Economy*, Vol. 5, No. 3, 1998, p. 257. [herein after Gale, 'Cave 'Cave! Hic dragones']
  - 13 G. R. D. Underhill, 'Conceptualizing the Changing Global Order', , in R. Stubbs and G. R. D. Underhill, eds., *Political Economy and the Changing Global Order*, Oxford: Oxford University Press, 2000, p. 29. [herein after Underhill, 'Conceptualizing the Changing Global Order']
  - 14 Joseph M. Grieco, 'Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism', in Charles Lipson and Benjamin J. Cohen, eds., *Theory and Structure in International Political*



Marxist belief that international regimes reproduce class interests of a particular group or a group of states.<sup>15</sup>

The neorealist approach, which accepts momentary existence of international regimes, is mainly based on two major assumptions. Firstly, the neorealists or structural realists assume that state is a unitary actor, consistently struggling for power and survival in international system. Anarchy and principle of self-help guide states to interact with each other, since there is no overarching sovereign in international system.<sup>16</sup> Secondly, the neorealists recognise that the distribution of power in such anarchic international system determines outcomes for states in 'their quest for self-preservation and security...'.<sup>17</sup> They take account of economic resources and productivity along with military and political strength of states while making reference to capability or power.<sup>18</sup>

### Neoliberal perspective

The neoliberals embrace the similar positivist epistemology and statist ontological assumptions about international regimes as the neorealists do. But the exclusiveness of the neoliberals lie in their assumption that mutual cooperation among states can be ensured by creating international regimes. This assumption emanates from the

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*Economy*, London: The MIT Press, 1999, pp. 25-26. [herein after Grieco, 'Anarchy and the Limits of Cooperation']

- 15 Andrew Hurrell, 'International Society and the Study of Regimes: A Reflective Approach', in Volker Rittberger, ed., *Regime Theory and International Relations*, Oxford: Clarendon Press, 1993, p. 52. [herein after Harrell, 'International Society and Regimes']
- 16 Andrew Linklater, 'Neo-realism in Theory and Practice', in Ken Booth and Steve Smith, eds., *International Relations Theory Today*, Cambridge: Polity Press, 1995, p. 244.
- 17 Underhill, 'Conceptualizing the Changing Global Order', p. 29.
- 18 Kenneth N. Waltz, *Theory of International Politics*, Reading, Mass: Addison-Wesley, 1979, p. 98.

belief that international regimes 'reduce states' fears of other state's defection by enhancing the transparency of interstate agreements, rewarding a good reputation, and monitoring compliance'.<sup>19</sup>

Influenced by game theoretical model of Prisoner's Dilemma, the neoliberals also accept international cooperation within international regimes as 'coordinated mutual adjustment of state's policies yielding benefits to participants'.<sup>20</sup> Such innocent views of the neoliberals about international regimes engender from the assumption that states are utility maximizer as they concentrate more on absolute gain than anything else. In other words, states are not concerned with each other's relative gains as far as states can reap benefit from international regimes. But such perspective overlooks the issue of equitable distribution of benefit within a regime. In effect, the neoliberals overwhelmingly recognise that law, rules, institutions and other formal arrangements are functional requirements in overcoming market failures and harnessing benefits of cooperation for all states, irrespective of their difference in power and status in international system.

### **Institutionalist perspective**

The institutionalist theory of international regime is based on certain distinct assumptions. To examine the relevance of international regimes, the institutionalists do not look for any objective structures. They believe that international regimes do not exist independently of the states, which actually create them.<sup>21</sup> However, they rely on the pattern or institutionalisation of state behaviour. This reliance is basically founded on the principle that

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19 Gale, 'Cave 'Cave! Hic dragons'', p. 258.

20 Robert O. Keohane, 'The Analysis of International Regimes: Towards a European-American Research Programmes', in Rittberger, ed., *Regime Theory and International Relations*, p. 23.

21 Gale, 'Cave 'Cave! Hic dragones'', p. 259.

objective rights and duties do not exist in the international arena, because 'no one is entitled to anything and nothing can be expected of anyone'.<sup>22</sup> In this regard, Ruggie argued,

...[T]he area of unpredictability of state behaviour is limited, complex relations are pursued within sets of mutual expectations, and jurisdictional competencies are allocated to a variety of actors other than states. In other words, international behaviour is institutionalized. Institutionalization, as sociologists have defined it, is said to co-ordinate and pattern behaviour, to set boundaries which channel behaviour in one direction as against all others which are theoretically and empirically possible.<sup>23</sup>

Similarly, Oran Young treats international regimes as social institutions with 'patterns of behaviour or practice around which expectations converge'.<sup>24</sup> The institutionalists, therefore, recognise international regime as a naturally emerged human artefact, which addresses problems of coordination, emerging from the struggle of individuals to achieve their narrow interests.<sup>25</sup> They also understand that international regimes occupy 'an ontological space intermediate between the structure of the overall interstate system and the independent states of which that system is composed... constraining, conditioning and channelling state actions in distinct ways'.<sup>26</sup> In other words, the institutionalists give emphasis on the institutionalised behaviour and practices that do not necessarily emerge from formal

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22 J. G. Ruggie, 'International responses to technology: Concepts and trends', *International Organization*, Vol 29, No. 3, 1975, p. 559.

23 *Ibid.*

24 Oran R. Young, 'Regime dynamics: the rise and fall of international regimes', in Stephen D. Krasner, ed., *International Regimes*, Ithaca and London: Cornell University Press, 1989, p. 93. [herein after Young, 'Regime dynamics']

25 *Ibid.*, pp. 96-97.

26 Gale, 'Cave 'Cave! Hic dragones'', p. 259.



agreements and international organisations, rather independently appear from patterned behaviour. As a result, they discover social institutions in spontaneous, negotiated and imposed orders, and take regimes as filtering variables or intervening structures for systemic adjustment. As Young argued:

[A] regime exists in every substantive issue-area in international relations where there is discernibly patterned behaviour. Wherever there is regularity in behaviour some kinds of principles, norms or rules must exist to account for it.<sup>27</sup>

International regimes based on patterned behaviour, therefore, could produce 'the voluntary law of nations', 'deducible from the natural liberty of nations, from the attention due to their common safety, from the nature of their mutual correspondence....'<sup>28</sup> They, however, agree that regime can never be power-neutral and acknowledge that international regime experiences constant influence of power and changes in the distribution of power.<sup>29</sup>

## Section-II

### Critique of Susan Strange, Concepts of Relational Power and Structural Power, and the Eclectic Approach

#### Critique of Susan Strange

In criticising international regime theories, Susan Strange focused on those theories that recognise and accept international

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27 Donald J. Puchala and Raymond F. Hopkins, 'International regimes: lessons from inductive analysis', in Krasner, ed., *International Regimes*, p. 63.

28 E. de Vattel, *The Law of Nations*, (trans. and ed., J. Chitty) New York, 1758, p. xiv, quoted by Hurrell, 'International Society and Regimes', in Rittberger, ed., *Regime Theory and International Relations*, p. 56.

29 Young, 'Regime dynamics', pp. 98-113.

regimes as intervening variables or mediating structures, and the fact that the rules and arrangements agreed between governments are principal determinants, of what basically takes place. For her, such theoretical approaches to international regimes imply 'an exaggerated measure of predictability and order in the system as it is'.<sup>30</sup> In turn, these theories do not take bargaining power of states into account in examining the process of regime creation as they focus only on 'better regimes', 'greater order and managed interdependence'.<sup>31</sup> According to Susan Strange, the theories of international regimes bring only the issue of 'order' in the foreground, instead of 'justice' or 'moral values', and thus ignore underlying interests of the powerful states as well.<sup>32</sup>

However, the debate over regime theories is mainly centred on the argument that international regimes are status quo supportive, and deprived of moral values. This argument can, however, be traced out in neoliberal and institutionalist theories of international regime. The neoliberals and the institutionalists mainly concentrate on the orderly character of international arrangements, recognising them as the outcomes of international bargain, which are not exclusively influenced by powerful states. They presume that weak states are also capable of utilising regimes to their advantage because patterned behaviour of states emerges to adjust themselves to power and change in the distribution of power.<sup>33</sup> They do not, therefore, seriously take the role of underlying interests of the powerful states in creating international regimes into cognisance.

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30 Susan Strange, 'Cave! hic dragones: a critique of regime analysis', in Krasner, ed., *International Regimes*, p. 345. [herein after Strange, 'Cave! hic dragones']

31 *Ibid.*

32 *Ibid.*, p. 346.

33 Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton N.J.: Princeton University Press, 1984, p. 256.

In contrast to neoliberal and institutionalist perspectives, the neorealist version of HST explains why a dominant state forms international regimes and offers public goods to other states. It also predicts that decline in hegemon brings disorder in the existing order causing collapse of the regimes.

However, criticisms of Susan Strange with regard to neorealist approach highlight a different aspect of international regimes. According to her, neorealist approach to international regimes 'accords to governments far too much of the right to define the agenda of academic study and directs the attention of scholars to those issues that government officials find significant and important'.<sup>34</sup>

Strange also ridiculed the HST as it emerged in IPE in the context of relative decline of US hegemonic power. This is due to the fact that decline of the US in the 1970s did not produce any anarchy or total disorder in international monetary system as the HST predicted. In this respect, Strange observes that United States government and its corporations have actually changed their method of using power in and over the global political economic system, but have not lost its power.<sup>35</sup> On the basis of her observation, Strange further criticises that international regime theories are not capable of understanding rules and arrangements that form 'complex and interlocking network of bargains'.<sup>36</sup> Thus, she discarded the concept of international regimes and brought two kinds of power- relational and structural powers into use to recognise the influence of non-state economic enterprises in the overall concept of power.

As used by Strange, the concept of relational power, in effect, reflects the view of Stephen Krasner who defined it as capacity of a

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34 Strange, '*Cave! hic dragones*' p. 349.

35 Strange, *States and Markets*, p. 28.

36 Strange, '*Cave! hic dragones*', p. 345.



state to openly change other states' behaviour in accordance with its wish.<sup>37</sup> Stephen Gill and David Law also introduced a similar kind of power as 'overt power'.<sup>38</sup> Also, Strange introduced the idea of structural power to simply indicate the 'global reach of a transnational empire with the United States at its centre'.<sup>39</sup> This structural power refers to the expansion of power by means of structure, which reflects similarity with Krasner's 'metapower', and Gill's and Law's 'second dimensional covert power' and 'third dimensional structural power' as well.<sup>40</sup> Such concepts all together refer to the power of a state by which it sets agenda and creates systemic patterns of incentives and constraints for those who are not capable of doing so. An example, cited by Susan Strange in connection with women's position in society, would be relevant to understand the concepts of 'relational power' and 'structural power' more clearly. She described:

[M]an has power in relation to [this] woman because he can knock her down, ignoring the fact of structural power in a masculine dominated social structure that gives man social status, legal rights and control over the family money that makes it unnecessary even to threaten to knock her down...<sup>41</sup>  
[inverted comma deleted]

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- 37 Stephen D. Krasner, *Structural Conflict: The Third World Against Global Liberalism*, London: University of California Press, 1985, p. 14. [herein after Krasner, *Structural Conflict*]
- 38 Stephen Gill and David Law, *The Global Political Economy: Perspectives, Problems and Policies*, Baltimore: John Hopkins University, 1988, p. 73. [herein after Gill and Law, *The Global Political Economy*]
- 39 Stefano Guzzini, 'Structural power: the limits of neorealist power analysis', *International Organization*, Vol.47, No. 3, 1993, p. 456. [herein after Guzzini, 'Structural power']
- 40 Gill and Law, *The Global Political Economy*, p. 73; Krasner, *Structural Conflict*, p. 14.
- 41 Strange, *States and Markets*, p. 37.

In other words, if powerful states create a regime that preserves their interests and dominance by means of the agreed framework for mutual interaction, they do not prefer to use direct or covert power.

However, Susan Strange's rejection of international regime theories as fad, imprecise and woolly, value-bias, or state centric is not well justified in all respects on the ground that close observation of regimes helps theorists to unmask the underlying bargains upon which regime creation process evolves.<sup>42</sup> In this regard, Fred Gale dismissed Strange's critique of international regime theories. He argued that the ever-surviving international regimes and its growing importance in international system offer opportunities for systemic investigation of the processes that promote and prevent the emergence of institutionalised behaviour. Not only so, according to him, regime concept is meaningful when it is employed in a theoretical framework and without it regime concept is, in fact, devoid of any objective connotation.<sup>43</sup> In other words, concepts like power, state, international regime etc. are 'woolly', if they are not backed up by any theoretical framework. Also for Gale, value-bias of regime towards an inevitable order in international system is not an inherent feature of international regime itself, but certain dominant theoretical frameworks reflect such value-bias.<sup>44</sup>

The rejection of international regime theories by Strange, therefore, can be explained by the fact that she endeavoured to explore the reasons, which have ensured relative consistency of US dominance and strong influence of its multinational corporations in the global political economy. Her focus was, in fact, on a macro-level understanding of structural power to disclose the indirect institutional and intangible power of the USA and its multinational companies.<sup>45</sup>

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42 Gale, 'Cave 'Cave! Hic dragones'', p. 261.

43 *Ibid*, p. 254.

44 *Ibid*.

45 Guzzini, 'Structural power', pp. 448- 450.

In this regard, she discovered four inseparable elements of structural power indicating the capacity to establish control over security, production, credit and knowledge. One's dominance in the global political economy depends on how one establishes its simultaneous control over these four structures.<sup>46</sup>

Strange's approach to structural power is, however, very different from Marxist and Coxian views. Marxist and Coxian approaches solely concentrate on the structure of production to examine the global political economy. According to those views, structural power consists of production layer, world order, and states. The states respond to the changes that take place in production layer and world order.<sup>47</sup>

### **The eclectic approach**

The argument in the paper revolves around the related rules and regulations of trade dispute resolution system of the WTO, which provides an institutionalised framework to negotiate trade liberalisation. Yet, this paper does not consider the neoliberal and institutionalist approaches to international regimes, since its objective is to examine dispute settlement procedures of the WTO from a developing country perspective. This is due to the fact that the neoliberals and institutionalists recognise international regimes as benefit providers and look for techniques on how states can reach Pareto Optimal Frontier to ensure global welfare. Also, they do not examine the interests and influence of the powerful developed countries that play a pivotal role in creating international regimes. Moreover, without taking the role of power into account, the institutionalists recognise that international regimes automatically impose restraints on states' power-driven behaviour in the anarchical international system.

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46 Strange, *States and Markets*, pp. 26-32.

47 *Ibid.*



Marxist tradition, however, interprets international regimes and their existing rules as the manifestations and instruments of the developed capitalist countries in exercising their power and influence over others. But such perspective on international regimes demands a class analysis of the global political economy in the context of production relation or exchange relation to examine how dominant capitalist countries employ power to uphold their class or group interests. Since the purpose of this paper is to examine the dispute settlement procedures of a transformed international trade regime, where only states have legal standing, it does not take class based Marxist understanding into consideration.

The paper in establishing its argument, in fact, follows state-centric neorealist assumptions of regime creation and the rules, which largely reflect power asymmetry and interests of the powerful states. Yet, it is not based on HST's prediction about decline in regime since the GATT/WTO is still in operation. Moreover, the transformation of the GATT into a rule based formal institution of international trade confirms that it has assumed a life of its own.<sup>48</sup> However, it does not mean that the WTO has created a condition or structure in which less powerful countries can interact with the powerful developed countries on equal footing. This is because, in the words of Krasner, 'state power and interest condition both regime structures and related behaviour' of the actors.<sup>49</sup> In this regard, one can observe that most of the programmes, proposals, before getting approval during formal trade round, usually come to surface as a result of the informal discussions in Brussels and Washington between the EU and the USA. Only after getting nod from the US and the EU, the proposals find place in larger caucuses like Quad countries<sup>50</sup>, G-7,<sup>51</sup>

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48 Stephen D. Krasner, 'Regimes and the limits of realism: regimes as autonomous variables', in Krasner, ed., *International Regimes*, p. 357. [herein after 'Krasner, 'Regimes and the limits of Realism']

49 *Ibid.*, p. 357.

50 It includes Canada, the EU, Japan and the United States.

Organization for Economic Cooperation and Development (OECD)<sup>52</sup> and eventually in the 'Green Room'caucus<sup>53</sup> during formal trade rounds.

Thanks to the practice of informal agenda setting in terms of repeated reproduction of interactions between powerful states in the GATT/WTO for breeding asymmetries. This undemocratic practice contributes to the failure in dealing with the 'divergence between the formal principle of sovereign equality on which the legal system of the WTO is based and the realistic asymmetries in actual economic capabilities and state power of its Members and the interdependence that characterizes their relations *vis-a-vis* each other'.<sup>54</sup>

Moreover, when the powerful countries foresee shift in power or change in the distribution of power in international system, they adjust themselves as long as they do not need to abandon the already existing scope of exercising their dominance within a regime. Although this kind of adjustment sometimes causes transformation or restructuring of a regime, it fails to deal with all existing sources of power so that all states can be equally benefited. It is due to the fact

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51 Basically includes Canada, France, Germany, Italy, Japan, the United Kingdom and the United States

52 The members are Austria, Australia, Belgium, Canada, Czech Republic, Denmark, Finland France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States

53 Green Room caucus consists of 20-25 countries and the most senior members of the organisation and is represented by the diplomats from the relatively rich developing countries, which are interested in the specific text being discussed and are also able to maintain representation in informal meetings of the GATT/WTO.

54 Naboth van den Broek, 'Power Paradoxes in Enforcement and Implementation of World Trade Organization Dispute Settlement Reports: Interdisciplinary Approaches and New Proposals', *Journal of World Trade*, Vol. 37, No. 1, 2003, p. 134. [herein after Broek, 'Power Paradoxes']



that powerful countries depend more on their capacity to change the rules of the game for preserving and advancing their own interests. For example, the provision of Special and Differential Treatment of the developing countries were incorporated in the GATT regime in the 1960s under the influence of latter's increased membership and their Import Substitute Industrialisation (ISI) policy. But the norms like free market, non-discrimination and competition were never scrapped off from the GATT agreements that were basically propagated by the USA and the UK to create the international trade regime. In this regard, it is notable that during the establishment of GATT, the USA was an emerging hegemon, while the UK's influence and power was already in decline.

However, since this paper accepts the GATT/WTO as a given reality to analyse its dispute settlement system, question obviously arises- what are the constituent elements of structural power by which the actors establish dominance, while they take part in the GATT/WTO dispute settlement system?

Dispute settlement regime in the GATT/WTO, in fact, came into operation by means of formal agreements, constituting a two-dimensional structure involving the concepts of upstream and downstream.<sup>55</sup> Upstream dimension of GATT/WTO dispute settlement procedures is related to the capacity of a state to mobilise human resources, financial resources, and information gathering networks in identifying violations of the agreement. It even includes adequate knowledge about the rules of the game and domestic enforcement mechanisms. Downstream dimension indicates how dispute settlement procedures have accommodated the issues of implementation capacity, certainty in compliance of rulings, and

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<sup>55</sup> These concepts of upstream and downstream levels of dispute settlement procedures have been taken from, Hoekman and Mavroidis, *Enforcing WTO Commitments*, p. 8.



remedy provisions to level the playing field in the game of international trade.

If asymmetry between member states exists, either at downstream level or at upstream level, dispute settlement system becomes the sources of structural power for some countries and structural weakness for some other countries. Structural weakness emanates mainly from the shortage of human and financial resources, which sometimes get exposed in many forms. These mainly include: i. weakness in acquiring proper advice on procedural and substantive aspects of law and measuring the prospects of success; ii. lack of necessary support on technical or evidentiary aspects to ensure that all actors involved in or affected by the litigation participate appropriately; iii. weakness in managing the team responsible, for the conduct of litigation, and of course the inability to pay the costs involved and to implement the judgement.<sup>56</sup>

Also, interpretation of law and even rulings delivered for settling disputes become the sources of structural power. Structural power, in fact, indicates unintentional power, i.e. indirect use of power by an actor in international system. To be more precise, the powerful countries derive structural power from the framework of agreements of the GATT/WTO.

The sources of structural power inherent within dispute settlement procedures, therefore, reflect some of the elements like economic and financial capacity, and knowledge efficiency, which Susan Strange suggests to indicate a hegemon's structural power in the global political economy. In this regard, given the sustenance of

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56 Cesare P.R. Romano 'International Justice And Developing Countries (Continued): A Qualitative Analysis', *The Law and Practice of International Courts and Tribunals*, Vol.1, 2002, [http://www.pict-pcti.org/publications/PICT\\_articles/Devlp\\_Coutrs/Developing\\_Countries\\_Par t2.pdf](http://www.pict-pcti.org/publications/PICT_articles/Devlp_Coutrs/Developing_Countries_Par t2.pdf), (accessed on 2 June 2003), pp. 551-568. [herein after Romano, 'International Justice']

GATT/WTO trade regime, the power struggle between the developed countries and the developing countries provide a strong theoretical framework to analyse the GATT/WTO dispute settlement procedures in the light of Susan Strange's 'two power' approach by wrapping it in a 'neorealist blanket'.<sup>57</sup>

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57 Guzzini, 'Structural power', p. 464.

## *Chapter II*

### **CHANGES AND THE TRANSFORMATION OF THE DISPUTE SETTLEMENT SYSTEM: RELEVANCE OF NEOREALIST PERSPECTIVE**

The chapter purports to explore the context of state-centric neorealist view that international regimes and its framework reflect power asymmetry and interests of the powerful actors. Also, it seeks to amalgamate the neorealist perspective on international regimes with Susan Strange's approach to power in analysing the GATT/WTO dispute settlement mechanisms. This chapter, therefore, offers a brief theoretical analysis of changes and the ultimate transformation of dispute settlement mechanisms that took place at the fag end of GATT regime. To this end, firstly, it uncovers the power dimension of the dispute settlement system in the light of GATT agreements involving *Procedures on Conciliation under Article XXIII* of 1966, the *Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance* of 1979, *Decision on Improvements to GATT Dispute Settlement Rules and Procedures* of 1989, the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)* of 1994 and analyses the factors that brought about transformation in the dispute settlement system. Secondly, it highlights the improved components of the legalist model of the dispute settlement system of the WTO and examines the role of power in transforming the system from the GATT to the WTO. In brief, the chapter provides the theoretical framework for examining the relevance of structural power that the developed powerful countries basically derive from the dispute settlement system of the WTO.



## Section-I

### Power Dimension and Changes in the GATT Dispute Settlement Procedures

#### Power dimension

On the outset, it should be noted that the GATT did not initially designate any specific body for settling disputes, as it was not an institution. Also, there were no precise formal procedures for imposing legally binding obligations on the parties. Even the term 'dispute settlement' was not clearly mentioned anywhere.<sup>58</sup> It relied on the Articles- XXII and XXIII for the conciliation of trade dispute, if 'satisfactory solution' could not be reached.<sup>59</sup>

The purpose of the Articles was to seek consensus of contracting parties<sup>60</sup> for ensuring compliance with the rules of the agreement. The consensus seeking process followed bilateral consultation first and then multilateral consultation at the request of disputant parties in case of their failure to reach any consensus-based solution. But the two-stage process of dispute resolution mechanisms under the GATT earned a reputation for 'the flexibility of the procedures, the control over the dispute by the parties, their freedom to accept or reject a proposed settlement...'<sup>61</sup>.

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58 Ernst-Ulrich Petersmann, 'International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction', in Ernst-Ulrich Petersmann, ed., *International Trade Law and the GATT/WTO Dispute Settlement System*, London: Kluwer Law International, 1999, p. 33. [herein after, Petersmann, ed., 'International Trade Law and the GATT/WTO'].

59 See Annex:I.

60 Formally, the GATT was not an international organisation for which it had contracting parties instead of member countries.

61 Petersmann, 'International Trade Law and the GATT/WTO', p. 33.

The power-based solution of trade dispute was reflected in many cases, particularly if the dispute was between a developing country and a developed country. For instance, Malawi once failed to mutually settle a tobacco export subsidy dispute with the US in 1967 and thus earned an automatic right to make legal claim before a panel. Yet Malawi could not do and had to call again for a panel for consultation at the insistence of the USA.<sup>62</sup>

Although it is true that GATT dispute settlement procedures obviously underwent some changes in its evolution, it happened purely for overcoming practical difficulties in assembling all contracting parties to investigate and settle disputes. As part of the improvement of the dispute settlement mechanisms, new provision was incorporated in GATT agreement to settle disputes by a three to five member *ad hoc* panel to be formed by contracting parties to investigate and arrange hearing. But three major aspects of the dispute settlement procedures restricted the operational capacity of the Panel:

i. ***Soft recommendations:*** The panel could only make non-binding soft recommendations to the party in dispute for withdrawal of the measure in question. If the disputant parties failed to reach any mutual settlement, this panel could deliver ruling in the form of a draft report. The draft report was subject to modification on the basis of comments submitted by the disputant parties<sup>63</sup>;

ii. ***Uncertainty in implementation and recourse to retaliation:*** When the issues were of serious concern, the contracting parties could authorise the aggrieved party to seek recourse to retaliation. Yet, the absence of any certainty in implementing recommendations of the panel and recourse to retaliation failed to put the economically weak developing countries on equal footing, compared to the position of

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62 Robert E. Hudec, *The GATT Legal System and World Diplomacy*, New York: Praeger, 1975, p. 224. [herein after Hudec, *The GATT Legal System*]

63 K. R. Gupta, *GATT and Underdeveloped Countries*, Atma: Ram and Sons, 1976, pp. 267-268.

economically strong countries. It was due to the fact that recourse to retaliation required adequate market capacity on the part of a complaining country to injure the country whose measure was in question.<sup>64</sup>

iii. **Veto:** The consensus-based ruling adoption procedures provided contracting parties a scope for casting negative vote to block panel ruling. The requirement of positive consensus for the adoption of panel ruling offered the powerful countries a legal right to exercise direct power over dispute settlement procedures. However, the weak developing countries did not have formidable economic capacity and significant political influence which could permit them to cast negative vote for rejecting panel recommendations, if the recommendations did not go in their favour.

### **The changes and the improvement**

The transformation of the GATT dispute settlement mechanisms was the result of the constant demand of the developing countries to have a legalist model of dispute resolution, which would incorporate an effective enforcement mechanisms and compliance of the powerful countries with panel rulings.<sup>65</sup> In raising such demand, the developing countries were, in fact, motivated by the belief that the rule of law ensures fairness for all and also puts restriction on unilateral actions of the powerful developed countries.<sup>66</sup> It was manifested in the proposals of Brazil and Uruguay<sup>67</sup> to incorporate the issues like

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64 Robert E. Hudec, *Developing Countries in the GATT Legal System*, Brookfield VT: Gower, 1987, p. 48.

65 Hudec, *The GATT Legal System* p. 208.

66 Shell, 'Trade Legalism and International Relations Theory', pp. 334-339.

67 Brazil and Uruguay tabled a series of reform proposal in 1965. They demanded- a. greater technical assistance to developing countries during disputes; b. third party participation to prosecute GATT related complaints on their behalf; c. stronger remedies including collective retaliation, financial



collective retaliation, third party participation etc. emanating from the need to strengthen the downstream dimension of GATT dispute settlement procedures.<sup>68</sup>

The reform proposals of Brazil and Uruguay were, in fact, never fully acknowledged in the GATT. But the need of the developing countries to be specially treated in the GATT was eventually recognised as the *Procedures on Conciliation under Article XXIII* of 1966 was adopted. The 1966 *Procedures* came into being as an extension of Part IV<sup>69</sup>, which was incorporated in the development oriented GATT Articles- XXXVI, XXXVII and XXXVIII<sup>70</sup>. It called upon panels to take account of the developing countries' economic dimension and legal implications for taking part in dispute settlement procedures. It also offered an opportunity to the developing countries to utilise good offices of the Director General of the GATT, if bilateral consultations failed. Moreover, it introduced a timeframe for the formation of panel, submission of panel report, implementation and compliance of panel rulings.<sup>71</sup>

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compensation for wrong actions of developed countries taken against developing countries.

68 Hudec, *The GATT Legal System*, p. 222.

69 Part IV included a series of provisions designed to accommodate some of the concerns of developing countries over the principles of Most Favoured Nation (MFN), reciprocity and non-discrimination.

70 Article XXVI sets out principles and objectives of the General Agreement referring to the development objectives of developing countries; Article XXXVII outlines measures that developing countries might on a best endeavour basis undertake in the trade area to promote development; Article XXVIII provides for joint collaboration of the Members to further the objectives sets out in Article XXXVI.

71 Pretty Elizabeth Kuruvila, 'Developing Countries and the GATT/WTO Dispute Settlement Mechanisms', *Journal of World Trade*, Vol. 31, No. 6, 1997, p. 172. [herein after Kuruvila, 'Developing Countries and the GATT/WTO']

Yet, the *1966 Procedures* could not ensure that the developing countries could enjoy preferential treatment in the GATT without the exercise of dominance or influence by the powerful countries. It was evident in *Brazil vs EC case* (1978). In the case, the GATT Panel gave a ruling that refusal of the EC to endorse International Sugar Agreement (ISA) constituted a failure to work together to advance GATT objectives of Part IV, but it did not indicate that the EC had violated the GATT.<sup>72</sup>

The *1966 Procedures* basically provided the framework for adopting the *1979 Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance* during the Tokyo Round Trade Negotiations for the improvement of GATT dispute settlement procedures. The *Understanding* codified the existing customary practices which were required for settling trade disputes and also offered a systemically much improved and better-structured dispute settlement system from a developing country perspective. As a result, the *1979 Understanding* offered - i. regular and systemic review of the trading system in relation to the matters which affects interest of the less developing countries; ii. participation of third parties having substantial interest in panel hearing; iii. recognition of the practice of appointing a panellist from developing countries, when dispute is between a developed and a developing member; and iv. provision for technical assistance of the GATT Secretariat at the request of a least developed country.<sup>73</sup>

However, the developing countries demand for automatic establishment of panel remained overlooked in the *1979*

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72 Robert E. Hudec, *Enforcing International Trade Law: the Evolution of the Modern Legal System: The Evolution of the Modern GATT Legal System*, Surrey: Butterworths, 1993, p. 474.

73 Kofi Oteng Kufuor, 'From the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Disputes', *Journal of World Trade*, Vol. 31, Issue 5, 1997 p. 129. [herein after Kufuor, 'From the GATT to the WTO']

*Understanding* since the developed powerful countries like the EC, the USA preferred bilateral negotiation to settle trade disputes.<sup>74</sup> Unwillingness of the major powers to remove their reliance on using direct power was evident during the Tokyo Round Negotiation as the EEC blocked US proposal of incorporating strict deadlines for settling international trade disputes.<sup>75</sup> In this regard, principle of State Sovereignty was used as a pretext to uphold the scope of the powerful contracting parties to exercise their dominance over others.<sup>76</sup> In effect, it implies that fair conciliation of trade dispute could take place only between parties who relatively enjoy equal economic and political clout over each other.<sup>77</sup>

### **Underlying factors behind the improvement**

The shift that took place in terms of distribution of political and economic power in the global political economy during the 1960s and 1970s brought about the improvement in GATT dispute settlement procedures. At least, three of such shifts were discernible in the global political economy. These were: i. the emergence of the United Nations Conference on Trade and Development (UNCTAD)<sup>78</sup> which provided the developing countries with an alternative forum for discussion and consensus building under the influence of the former Soviet Union during the Cold War;<sup>79</sup> ii. the relative decline of the US economy and recovery of Japan and the EEC for which economic

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74 *Ibid*, p. 126.

75 Shell, 'Trade Legalism and International Relations Theory', p. 339

76 Kufuor, 'From the GATT to the WTO' p. 127.

77 A. Yusuf, *Legal Aspects of Trade Preferences for Developing States: A Study in the Influence of Development Needs on the Evolution of International Law*, Dordrecht: Martinus Nijhoff Publishers. 1982, p. 74.

78 UNCTAD supported commodity-price stabilization schemes, import substitution policies, and increased market access of developing countries in developed countries and preferential treatment in trade agreements

79 Romano, 'International Justice', pp. 556-558.



power gap between them continued to decrease; iii. the emergence of some Newly Industrialised Countries (NICs) like South Korea, Brazil, Malaysia, Taiwan etc.<sup>80</sup>

Most of the changes, however, remained declaratory in nature, because they did not address the major sources of power. Rather, the changes were designed for improving the procedural aspects of the system without levelling the playing field. As a result, some major sources of power utilisation remained inherent. The sources included: i. absence of provision for automatic formation of a panel; ii. uncertainty in adopting panel ruling as the improved dispute settlement mechanisms required consensus of both defendant and complaining parties in doing so; iii. opportunity for delaying the implementation of panel ruling; d. scope of non-compliance of panel ruling; iv. absence of clear guidelines for ensuring compensation or imposing sanctions against non-compliance; v. unsuitability of retaliation provisions for economically and politically weak countries.<sup>81</sup>

## Section-II

### Legalist Model of WTO Dispute Settlement System: The Remnants of the Past or Not?

#### The legalist model

The adoption of *1989 Decision on Improvements to GATT Dispute Settlement Rules and Procedures* (also known as *Montreal Rules*) during the Uruguay Round Trade Negotiation transformed the GATT dispute settlement procedures into a much acclaimed legalist

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80 Kufuor, 'From the GATT to the WTO', p. 132

81 Michael J. Trebilcock and Robert Howse, *The Regulations of International Trade*, London: Routledge, 1999. p. 56. [herein after, Trebilcock and Howse, *The Regulations of International Trade*]

model. This is mainly due to the fact that the contracting parties agreed to notify the mutually settled solution to the GATT General Council to ensure legal coherence and consistency in the settlement mechanisms.<sup>82</sup> Also, as part of the judicialisation process, the *1989 Decision on Improvements* removed the scope of using 'blocking power' by the relatively powerful countries to reject panel ruling, if the ruling contradicts their interest. The *Montreal Rules* reads:

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.<sup>83</sup>

Besides, it formalised the previous commitments of the GATT to offer technical assistance to the developing countries and incorporate specific time frame for resolving disputes.<sup>84</sup> This formalisation of the commitments provided the necessary cornerstone for a legalist model. As a result, when the *Final Act of the Uruguay Round* and so, of the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*<sup>85</sup> were signed by 124

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82 Kufuor, 'From the GATT to the WTO', p. 130.

83 Extracts originally from David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, London: Kluwer Law International, 1999

84 The text reads, "If a request is made under Article XXII:1, the Contracting Party to which the request is made shall, unless otherwise mutually agreed, reply to the request within ten days after its receipt and shall enter into consultations into good faith, within period of no more than thirty days from the date of request with a view to reaching mutually satisfactory solution. If the Contracting Party does not respond within ten days, or does not enter into consultations within a period of no more than thirty days, or a period otherwise mutually agreed, from the date of the request, then Contracting Party that requested the holding of consultations may proceed directly to request the establishment of a panel or a working party.'

85 See Annex: II.

countries on 15 April 1994, it transformed the GATT into the WTO with a stronger and legally binding third party adjudication system. In this regard, the *DSU* establishes 'Dispute Settlement Body' (DSB) to supervise dispute resolution process and also provides for Appellate Body (AB) with a permanent appellate review system to ensure legal coherence in the dispute settlement procedures under the WTO. AB's decision is also made binding unless DSB unanimously votes to reject it.<sup>86</sup>

With regard to compliance and implementation of panel ruling and compensation for the affected country, the *DSU* has also witnessed a marked improvement as it has addressed the issues of: i. obligation of the defending country to comply with the DSB's final decision;<sup>87</sup> ii. active WTO surveillance of compliance measures of the defendant;<sup>88</sup> iii. binding arbitration, in case of failure of the parties to decide on 'reasonable period of time';<sup>89</sup> iv. bilateral negotiation to settle the amount of 'mutually acceptable compensation';<sup>90</sup> v. authorisation from the DSB to withdraw concessions, in case of failure of the defendant to comply with rulings within a reasonable period of time;<sup>91</sup> and vi. prohibition of making any unilateral conclusion by any member country that treaty violations have occurred.<sup>92</sup> Some other provisions that have been incorporated in the *DSU* include terms of

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86 Article 17 of the *DSU*.

87 Articles 7 and 21 (3) of the *DSU*.

88 Article 21 of the *DSU*.

89 *Ibid.*

90 Article 22 (2) of the *DSU*.

91 However, according to Article 22 (6) of the *DSU*, withdrawal of concession under WTO obligations is subject to the right of the defendant to demand arbitration regarding the appropriate level of retaliation, if no agreement reaches on compensation.

92 Article 23 (2) of the *DSU*.



references of panels, 'Special and Differential' treatment of the developing countries.<sup>93</sup>

### **The role of power**

The transformation of diplomacy oriented GATT dispute settlement procedures into a legalistic system under the WTO raised confusions due to the fact that the developed countries never preferred a legalistic model of dispute settlement. Few pertinent questions, therefore, arise. Firstly, does the transformation of the dispute settlement mechanisms indicate that developing countries became capable of exploiting international trade regime to convince the developed and powerful countries to set up a legalist model? Secondly, did the developed countries all of a sudden become generous enough to level the playing field in the game of international trade?

In fact, like the earlier changes of dispute settlement mechanisms that had appeared during the GATT years, the ultimate transformation of the dispute settlement mechanisms took place in response to delaying tactics of the developing countries in holding new round of trade negotiation, on the one hand and their opposition to the US's insistence on the inclusion of new issues like trade in services, trade related intellectual property rights (TRIPS), trade related investment measures (TRIMS) during the Uruguay Round, on the other.

Also, the beginning of Uruguay Round negotiations witnessed frequent use of 'blocking power', mainly by few economically and politically dominating developed countries to reject panel reports. Either the USA or the EC used 'blocking power' under GATT dispute settlement procedures. Particularly in the 1980s, blocking of panel reports became an alarming concern, as 10 out of 47 panel reports

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93 Shaffer 'How to Make the WTO Dispute Settlement System Work', p. 9.

were blocked.<sup>94</sup> But earlier, almost all panel reports presented to the GATT Council were adopted without any difficulty under Article XXIII: 2.<sup>95</sup>

### **Fig.: Stipulated Time Frame to Settle a Dispute**

These stipulated periods for each stage of a dispute settlement procedure are target figures, although the countries can settle their dispute themselves at any stage and these are also flexible.

Consultations, mediation	: 60 days
Panel formation and appointment of its members	: 45 days
Final panel reports to parties	: 6 months
Final panel report to WTO members	: 3 weeks
Adoption of report by Dispute Settlement Body	: 60 days
<b>Total</b>	<b>: 1 year (if no party Appeals)</b>
Appeals report	: 60-90 days
Dispute Settlement Body adopts appeals report	: 30 days
<b>Total</b>	<b>: 1 year 3 months (if losing party appeals)</b>

Source: Based on the *Dispute Settlement Understanding (DSU)*

Apart from the use of 'blocking power', there was also a growing use of unilateral measures by the USA under Section 301 of 1974<sup>96</sup> and

94 Vermulst and Dreissen, 'An Overview of the WTO Dispute Settlement System', p. 431.

95 Petersmann, 'International Trade Law and the GATT/WTO Dispute Settlement', p. 51.

96 Under Section 301 private business groups in the USA has the right to submit a petition to the Office of the US Trade Representative (USTR) to conduct an investigation over protective foreign markets. If the USTR finds the complaint meritorious, the statute requires the government to undertake negotiations, file appropriate complaints, and take other actions to persuade the foreign government to change its protectionist practices. Ultimately Section 301 gives the President authority to retaliate against foreign protectionist practices by various unilateral measures including trade sanction.

Omnibus Trade and Tariff Act of 1988<sup>97</sup>. US unilateral measures targeted protective foreign markets, particularly of economically emerging developing countries like Argentina, Brazil, China, South Korea, Taiwan, Thailand etc. Unilateral measures were adopted on the ground that 'GATT dispute settlement procedures were too slow, and too weak to offer adequate protection of the United States' trade interests'.<sup>98</sup>

Not only the employment of unilateral measures of the USA and frequent use of 'blocking power', the USA and the EC were also pivotal in setting the agenda and taking decision during the Uruguay Round Trade Negotiation. For example, the Dunkel Draft,<sup>99</sup> which provided the foundation of *the final act* for creating the WTO, was basically a collection of the proposals put forward by the EC and the US. The Draft incorporated GATT Secretariat's suggested amendments to remove the issues of disagreement between the USA and the EC.<sup>100</sup> Moreover, the EC and other contracting parties accepted the recommendation of the Dunkel Draft to make panel ruling automatically binding due to their expectation that it would offset the USA's unilateral right to use Section 301.<sup>101</sup> It can, thus, be argued that binding adjudication of dispute resolution did not come into operation with the objective of levelling the playing field. Rather, it aimed at removing the scope of the USA to use certain extra legal instruments, ignoring the multilateral agreements.

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97 It is the extended version of Section 301.

98 Robert E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, <http://www.worldtradelaw.net/articles/hudecremedies.pdf>, (accessed on 15 June 2003), p. 6. [originally published in Friedl Weiss & Jochem Wiers, eds., *Improving WTO Dispute Settlement Procedures*, Cameron: May Publishers, 2000, pp. 345-376] [herein after Hudec, *Broadening the Scope of Remedies*]

99 It was named after GATT Chairman Arthur Dunkel.

100 Richard H. Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', *International Organization*, Vol. 56, No. 2, 2002, p. 354-355. [herein after Steinberg, 'In the Shadow of Law or Power?']

101 Shell, 'Trade Legalism and International Relations Theory', p. 341.



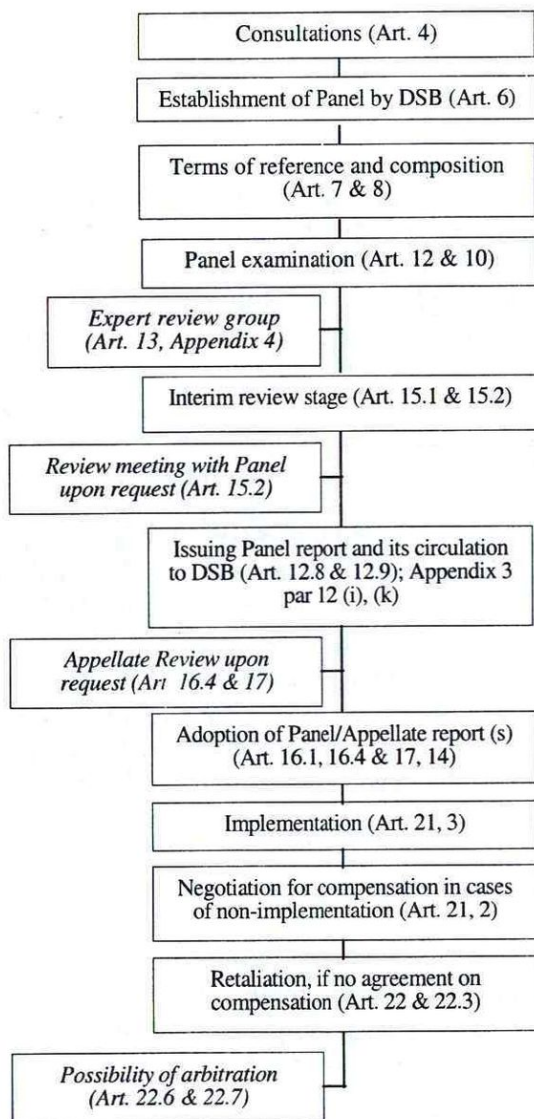
Moreover, during the Uruguay Round, the USA and the EC adopted a 'power play' tactic to bring an end to the recalcitrant approach of the developing countries for not signing the agreements on TRIPS, TRIMS and the General Agreement on Trade in Services (GATS). They resorted to a 'single undertaking approach' in signing all the agreements in one stroke. The motive behind such tactic of the US and the EC was to make sure that most of the Uruguay Round agreements had support from almost all of the countries.<sup>102</sup> For example, after signing *the Final Act of the Uruguay Round Establishing the World Trade Organization* (including the GATT 1994), the EC and the US withdrew themselves from their obligations under the GATT 1947 for the countries that had not agreed to the *Final Act*. The 'withdrawal tactic' eventually contributed to the incorporation of the GATT 1994, the GATS, the TRIPS, the TRIMS, the Subsidy Agreement, the anti-dumping agreement etc. 'as integral parts' of the WTO agreement and 'binding on all members'.

Reliance of the USA and the EC on 'power play' tactic on the one hand, and the US's adoption of domestically justified unilateral legal power under Section 301 in concluding the *DSU* on the other, demonstrate that dominant countries' exercise of their influence in setting agenda in multilateral trade negotiation played a vital role in strengthening their structural power or indirect power over other countries. The exercise of power by few developed countries and a very little role played by the developing countries in transforming the GATT into the WTO cast doubt over the much-talked about conviction that The WTO has levelled the playing field for the developed and the developing countries alike in settling international trade disputes. Thanks to the *DSU*, which, in fact, came as 'a mix of the codification of past measures on dispute settlement, institutional reform'.<sup>103</sup> As a result, many of the sources of structural weakness of the developing countries that had existed during the GATT years remained unresolved even in the legalist model of dispute settlement under the WTO.

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102 Steinberg, 'In the Shadow of Law or Power?', pp. 359-360.

103 Kufuor, 'From the GATT to the WTO', p. 132.

**Fig: Dispute settlement procedures**

Source: WTO, *Trading into Future*, Geneva, 1999, p. 42. [modified]

### *Chapter III*

## **WTO DISPUTE SETTLEMENT SYSTEM: WHITHER THE DEVELOPING COUNTRIES?**

It is undeniable that the *1994 understanding* was successful in removing some of the impediments that had previously been hindering smooth function of the GATT dispute settlement system. In this regard, the emergence of power struggles between the USA and the EC within the GATT regime on the one hand, and the employment of unilateral measures by the US on the other, played an instrumental role.

The transformation of GATT dispute settlement, therefore, obviously brought about some positive impacts, particularly with respect to initiation of legal proceeding, formation of panel, and adoption of panel report. It eventually contributed to a surge in participation of the developing countries in the WTO dispute settlement system both as complainants and defendants. Also, in terms of hard law perspective, involving binding obligation, precision of rules, delegation, the improvement apparently offered the developing countries more legal weight in the dispute settlement procedures.<sup>104</sup>

Of the total 27 Articles incorporated in the *DSU*, seven Articles accord special treatment to the developing countries and one clearly

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104 Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, 'The Concept of Legalization', *International Organization*, Vol. 54, No. 3, 2000, p. 401.



to the least developed countries (LDCs).<sup>105</sup> But a question still remains- whether the legalist model of dispute settlement procedures under the WTO has made the exercise of power by powerful countries irrelevant in settling dispute? This question, in fact, emerges from the fact that the transformation of the GATT dispute settlement system was mainly engineered by the US, and the EC, which could utilise their political influence in setting agenda and guiding decision-making process during the Uruguay Round Trade Negotiation. It is, therefore, necessary to make an assessment of how the WTO law has really shaped the capacity of the developing and weak member countries with regard to their participation in the dispute settlement system.

The capacity of the participating countries in dispute settlement procedures really depends on the substances of law and the cost to employ the law procedurally.<sup>106</sup> These costs involve not only the employment of financial resources, but also human resources and efficiency in knowledge before or after a legal proceeding starts to operate. Also, capacity of bargaining requires what remedy dispute settlement procedures offer to the countries in dispute and how it ensures compliance of panel ruling.

Apart from the capacity to participate in dispute settlement procedures, there is another important issue that the WTO agreements are a contract between governments which are capable of directly influencing private parties, and only the governments have legal standing in the WTO. As a result, only those disputes that go through the 'government filter' are raised at the WTO.

However, 'government filter' is not always useful in lodging complaints with the WTO. For example, if an industry confronts a WTO inconsistent measure in an export market for which the

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105 Kuruvila, 'Developing Countries and GATT/WTO Dispute Settlement', pp. 173-174.

106 Shaffer, 'How to Make the WTO Dispute Settlement System Work', p. 12.

legislation of its own country is responsible, the government of that country might not feel confident to bring the matter to the notice of the WTO. There might be some other reasons for not pursuing cases, which should naturally be pursued.<sup>107</sup>

Similarly, industries need to establish networks with their governments to defend their interests. Therefore, if issues involving government filter and government-industry networks are not properly addressed in a trade regime, it puts economically weak countries in a structurally disadvantageous position and economically strong industrial countries in an advantageous position. It is due to their asymmetric capacity to build industrial networks and bear litigation cost prior to and during the on-going legal proceedings.

Moreover, due to common law orientation of the WTO dispute settlement procedures, WTO panels and Appellate Body (AB) cite and depend on past WTO rulings in interpreting legal findings. In effect, the rulings become the source of generating knowledge to guide future settlement of international trade disputes. From this aspect, it can be argued that the participation in the WTO dispute settlement system is one of the essential conditions, which shapes interpretation and application of multilateral trade law in the course of time. The countries, capable of actively taking part in the WTO dispute settlement system, are in a better position to influence the law's interpretation and application to their advantage.

WTO dispute settlement procedures, however, are not only about judicialisation or making it a rule-based system of dispute resolution to ensure a level playing field, it also involves resources like financial and human capacities, market size and knowledge as well. Weakness in any one of the resources usually put a country in a disadvantageous position, if dispute settlement system itself does not adequately address these issues. Against such background, the

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107 Horn and Mavroidis, *Remedies in the WTO*, p. 31.

following sections of the chapter critically analyse, how WTO dispute settlement procedures dealt with the sources of weakness of the less powerful countries at upstream and downstream levels of the dispute settlement system.

## Section-I

### Issues at Downstream Level

#### **Technical assistance, litigation cost, and special and differential treatment**

The utilisation of dispute settlement procedures by any country depends on availability of trade law specialists and professionals and also on national administrative capacity to identify and prepare cases. Articles 27.2 and 27.3 of the *DSU* address these difficulties and provides for legal advice and assistance. They offer the service of a qualified legal expert, if a developing country requests so, while participating in the dispute settlement system. However, in practice, the WTO Secretariat has assigned only two part time experts and two junior staff for offering legal assistance that are far from being adequate.

Again, Article 27.2 of the *DSU* provides for assistance, only when a developing country participates in dispute settlement procedures as respondent.<sup>108</sup> Yet, availability of legal expertise is very much required for a country in identifying the violation of WTO rules or impairing practice of other countries and initiating legal proceedings. Also, the cost of litigation becomes very serious, if the dispute is between an industrial developed member and a developing member. This is because, in practice, industrial countries are usually capable of bearing the costs of settling dispute and providing complex

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108 *Ibid*, p. 28.



forms of subsidies to the affected industry. But the governments of the developing countries, in most cases, are not capable of doing so.<sup>109</sup>

Sometimes, it is also claimed that the special and differential treatment granted to the developing countries and the LDCs under different provisions of the *DSU* is a genuine invention.<sup>110</sup> But these provisions, to a considerable extent, were vaguely incorporated in the WTO dispute settlement procedures. For example, although Articles 21.2, 21.7 and 21.8 of the *DSU*, involving surveillance, and implementation of recommendations and rulings, acknowledge that the developing countries' interest shall be taken into consideration, the Articles do not exactly specify what is required for doing so and how this is to be done.<sup>111</sup> In many a cases, this imprecise and vague language of special and differential treatment provisions led to inconsistent and incoherent application by the Panel or Arbitrator, while delivering ruling or giving decision. For instance, in *EC-Bananas III case*,<sup>112</sup> dispute settlement panels while dealing with recourses under Article 21.5 of the *DSU*, did not refer to special and differential treatment provisions, despite the fact that Ecuador, one of the complainants is a developing member and the EC was defending its right on behalf of small and economically vulnerable banana-producing African, Caribbean and Pacific (ACP) countries under their

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109 Asoke Mukerji, 'Developed Countries and the WTO: Issues of Implementation', *Journal of World Trade*, Vol. 34, No. 6, 2000, p. 69.

110 Kuruvilla, 'Developing Countries and the GATT/WTO', p. 174.

111 Horn and Mavroidis, *Remedies in the WTO*, pp. 27-28.

112 This is known as *Banana III*, because previously there were two failed cases brought to the GATT dispute settlement in 1993 and 1994 by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela against the EC's banana import policy. However, in *Banana III case*, original complainants were Ecuador, Guatemala, Honduras, Mexico and the United States. However, only Ecuador made a request for establishing panel to deal with EC's implementation and compliance measures.

preferential ACP-Lomé Agreement.<sup>113</sup> In the same case, while granting the EC 15 months and seven days for the implementation of panel ruling, arbitrator did not consider the request of Ecuador, Guatemala, Honduras, and Mexico to grant a period shorter than the 15 months in accordance with Article 21.3 (c) of the *DSU*. However, in *Indonesia-Certain Measures Affecting the Automobile Industry* case (1996)<sup>114</sup> and in *India-Quantitative Restrictions on Agricultural, Textile and Industrial Products* case (1997),<sup>115</sup> WTO panels and arbitrators took special and differential treatment provisions into account in delivering their judgements.

Again, article 24 (1) of the *DSU* mentions that the LDCs shall be given particular attention in every stage of dispute settlement and due restraint shall be exercised. But it does not clarify what attention and what due restraint shall be followed in asking for compensation or suspension of concession from the LDCs. As a result, it is difficult to assess how other countries are needed to act in this regard. There is, therefore, the possibility that the DSB or Panels can discharge their responsibilities by adding a few paragraphs or spending a 'few more minutes' on the case.<sup>116</sup>

Moreover, Article 24(2) of the *DSU* provides for offering good offices, conciliation and mediation of the Director General of the WTO or the Chairman of the DSB at the request of a least developed country, if parties in disputes fail to reach any solution. However, the measure is not anything special for the least-developed countries as

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113 Mary E. Footer, 'Developing Country Practice in the Matter of WTO Dispute Settlement', *Journal of World Trade*, Vol. 35, No. 1, 2001, pp. 72-73.

114 WTO document WT/DS54/R, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm), (accessed on 2 May 2003).

115 WTO document WT/DS90/R, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm), (accessed on 2 May 2003).

116 Horn and Mavroidis, *Remedies in the WTO Dispute Settlement*, p. 27.



Article 5 of the *DSU* already provides, 'Good offices, conciliation or médiation may be requested at any time by any party to a dispute.'

### **Implementation of panel ruling, compensation and retaliation**

The GATT procedures did not contain provisions to prevent the powerful losing GATT parties from permanently evading ruling compliance.<sup>117</sup> Under the WTO, the provisions for implementation of panel ruling and compensation witnessed a marked improvement due to the guidelines for establishing compliance deadline, or 'reasonable period of time', compliance review procedures, and suspension of concessions, if the losing party fails to implement the WTO rulings.<sup>118</sup> Due to these improvements, the *DSU* is recognised to be the heart of legalist model of dispute settlement procedures as it has eliminated the legal provisions of the GATT that offered the dominant countries with the scope of exercising their political and economic influence. However, in granting such recognition, the existence of power paradox in the WTO regime is often overlooked. Power paradox, in fact, emanates from the fact that the WTO is an intergovernmental organisation and it still requires member states' economic power and political influence to ensure implementation and compliance of panel ruling.<sup>119</sup> The following discussion highlights the existing power paradox in the WTO dispute settlement procedures:

**a. *Cosmetic changes and the scope of delaying:*** The WTO panel can only deliver innocent recommendations for bringing the inconsistent measure at issue into compliance and as a result, defendant country remains at liberty to choose the method of compliance. Also,

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117 Carolyn B. Gleason and Pamela D. Walther, *The WTO Dispute Settlement Procedures: A System in Need of Reform*, <http://www.law.georgetown.edu/journals/lpib/symp00/gleason.pdf>, (accessed on 10 June 2003), pp. 3-4. [herein after Gleason and Walther, *The WTO Dispute Settlement Procedures*]

118 *Ibid*, pp. 3-4.

119 Broek, 'Power Paradoxes', p. 140.



defendant Member-State does not need to disclose how it would remove the measures in dispute or implement panel ruling. Moreover the defendant is not obliged to submit any specific schedule of implementation. The only intervening instrument is Article 21, which provides that member must provide regular 'status reports' at all scheduled DSB meetings, taking place in the first 6 months of each losing member's implementation period.<sup>120</sup> Nothing more than these reports are required from the losing member during its compliance period. Therefore, the scope in the *DSU* still exists for a relatively powerful respondent for confining itself to some cosmetic changes with the objective of dragging the implementation period of panel ruling.

Again, as long as the defendant undertakes changes, which on occasion may be inadequate, the complainant can not resort to counter-measures. In this regard, the aggrieved party is required to make a request to the DSB for establishing a panel in order to determine retaliation measures. But the developing countries' weak economy and political vulnerability do not permit them to wait that long for a panel's or an Appellate Body's ruling.<sup>121</sup> Such delaying tactic was adopted by the EC in *Banana Case III*. In the case, the EC from the beginning refused to be specific in implementing panel recommendations. Rather, the EC continued with its disinclination to correct the measures in dispute. At the same time, the EC Commission also issued a new proposal that certainly perpetuated the discrimination of the original banana regime. Moreover, in spite of the complaining parties' argument that the new proposal would not constitute compliance, the EC commission refused to make substantive changes to the proposal. But, in its status reports submitted to the DSB, the EC noted that 'significant progress' was being made towards implementation.<sup>122</sup>

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120 Gleason and Walther, *The WTO Dispute Settlement Procedures*, p.5.

121 Hoekman and Mavroidis, *WTO Dispute Settlement*, pp. 4-6.

122 Gleason and Walther, *The WTO Dispute Settlement Procedures*, p. 9.

**b. Retaliation and suspension of concession:** The *DSU* has accorded the ultimate sanction against a non-complying member, which is trade retaliation through suspension of equivalent concessions. But the suspension of concessions is profoundly related to a complainant's economic power. Even negotiation over temporary compensation still depends on power-based diplomatic negotiation between two or more states.<sup>123</sup> In effect, the developing and the least developed members remain at the mercy of relatively powerful members, which can obstruct the effective function of WTO dispute settlement mechanisms. The *Banana case III* provides a classical example in this regard. In the case, Ecuador had to rely on the retaliatory capacity of the US to bring pressure on the EC. Perhaps, had Ecuador brought the case on its own, it could have neither assembled nor afforded to confirm adequate sanctions. Moreover, although Ecuador received WTO authorisation to cross-retaliate against the EC by targeting European intellectual property rights and trade in services, as well as product-based tariffs, the size and vulnerability of the Ecuadorian economy made it unlikely that such retaliation would harm the EC.<sup>124</sup>

**c. Provisions for compensation:** Compensation is a temporary voluntary measure that is never to be preferred for full implementation. The *DSU* also does not enable panels to prescribe compensation for the losses already incurred by a member country. Compensation, therefore, rests on the willingness of the respondent to negotiate. The voluntary nature of determining compensation, therefore, is considered to be a major drawback of the system. Also, because of relatively narrow export base, absence of any provision for

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<sup>123</sup> Broek, 'Power Paradoxes', p. 140.

<sup>124</sup> Oxfam GB, *Institutional Reform of the WTO*, Discussion Paper, 1999, [www.field.org.uk/papers/pdf/wto7.pdf](http://www.field.org.uk/papers/pdf/wto7.pdf), (accessed on 2 December, 2002). [herein after Oxfam, *Institutional Reform*]



compensating export loss in the event of any pending case is detrimental to the interest of the developing countries.<sup>125</sup>

### Re-emergence of bilateral settlement

The implementation of the *DSU* witnessed the re-emergence of a trend of bilateralism to resolve disputes. The first trade dispute between Singapore and Malaysia over prohibition of imports on polyethylene and polypropylene under the WTO, was bilaterally settled outside the legal framework of the dispute settlement mechanisms. US complaint against the employment of shelf-life regulations by South Korea to limit packaged food imports was also settled in the same manner.<sup>126</sup> In this regard, it was observed that over two-thirds of all cases, notified to the WTO, are settled subsequent to bilateral consultations.<sup>127</sup>

However, the trend of bilateral settlement of international trade disputes ignoring the WTO procedures has become a source of concern for the developing countries. This is because, bilateralism usually offers the powerful countries opportunities to ensure favourable outcomes while they negotiate with their weaker counterparts. In this regard, the WTO is unable to oversee what occurs behind closed doors and thus rarely can find out any non-compliance. Moreover, since the enforcement of WTO obligation is decentralized and only the members can take action, affected developing countries are left with the burden to find out what really happens behind the closed doors. Such closed-door settlement of trade dispute holds the possibility that solution reached mutually is not in

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125 Horn and Mavroidis, *Remedies in the WTO*, p. 26.

126 Magda Shahin, *From Marrakesh to Singapore: The WTO and Developing Countries* [www.twinside.org.sg/title/magda-cn.htm](http://www.twinside.org.sg/title/magda-cn.htm) (accessed on 10 December 2002).

127 *Ibid.*



the best interest of the developing countries, particularly when they are in dispute with the developed countries.<sup>128</sup>

## Section-II

### Issues at Upstream Level

#### TPRM and WTO-inconsistent trade practices

The successful detection of legal claims by a complaining country determines its participation in the dispute settlement procedures. The whole process could be built on and end up in the WTO's committee and council and in trade policy review mechanisms which ensure compliance of the WTO agreements.<sup>129</sup> The identification of WTO-inconsistent foreign trade practices primarily depends on the domestic capacity of a country in obtaining information.<sup>130</sup>

The WTO members gather information on foreign trade practices through three channels: WTO Trade Policy Review Mechanisms (TPRM), state mechanisms at domestic level, and private complaints.<sup>131</sup> But given the financial requirements and legal and factual sophistication in identifying inconsistencies in trade practices and bringing complaints to the WTO dispute settlement mechanisms, the developed industrialised countries like the EU countries, the USA or Japan are structurally best positioned. For example, the United States Trade Representative Office (USTR) prepares the National Trade Barriers Report, while the European Commission (DG-I) prepares the Annual Report on US Trade

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128 Hoekman and Mavroidis, *Enforcing WTO Commitments*, p. 16.

129 Shaffer, 'How to Make the Dispute Settlement System Work', pp. 29-30.

130 Hoekman and Mavroidis, *Enforcing WTO Commitments*, pp. 2-3.

131 *Ibid.*

Barriers to Trade and Investment.<sup>132</sup> In this regard, the US government even recognised the increasing influence of private sectors, and thus has permanently set up a three-tiered network of private advisory committees.<sup>133</sup>

The developing countries, however, have general weakness in their ability to obtain information, which depends on the availability of commercial representatives and attaches stationed in Embassies abroad, and on the communication and interaction between private industries and the government. They, therefore, count more on multilateral arrangements like WTO TPRM<sup>134</sup>.

TPRM provides for reviewing of trade practices of relatively large trading countries in every 2-4 years, depending on their share in the world trade. But most of the developing countries come under the TPRM scrutiny only once in every six years or more.<sup>135</sup> Moreover, it focuses on broad trade policies only, instead of analysing the impact of trade measures of WTO members at individual product level. In this context, TPRM is of little use for the developing countries.

### **Infrastructure for trade related legal knowledge**

It is beyond a doubt that institutional capacity of a country is one of the prime conditions for generating highly competent, well-trained legal experts and this is also a functional requirement of a member for successfully pursuing a case in the WTO. But the figures relating to the academic teaching of international trade law around the world, in particular in the developing countries are alarming. The

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132 Shaffer, *How to Make the Dispute Settlement System Work*, p. 19.

133 I. M. Destler, *American Trade Politics*, Washington DC: Institute for International Economics, 2001, p. 125.

134 Trade Policy Review Mechanisms only provides information but is not authorised to make judgement regarding trade practices of any WTO member.

135 Hoekman and Mavroidis, *Enforcing WTO Commitments*, P. 2.

UNESCO *World Directory of Research and Training Institutions in International Law* of 1994 showed that 396 national institutions out of total 553 were located in 30 OECD countries. The rest 157 were in other countries of the world, which was less than one per country.<sup>136</sup>

On the whole, the WTO dispute settlement procedures with the removal of 'blocking power' proscribed direct exercise of power by the powerful developed countries, but it did not adequately address the newly emerged difficulties and challenges for the developing countries. As a result, when the WTO dispute settlement system came into operation, the disadvantages of the developing countries in participating in the system began to appear. At the same time, the apparent legalist model of the dispute settlement system put economically strong and politically influential countries in a position in which they are now able to count on the power that they derive from the upstream and downstream levels. In this regard, it is relevant to deal with few empirical evidence on how structural dimension of power, inherent at both upstream and downstream levels, is being currently reflected in the WTO dispute settlement mechanisms. The following chapter is an endeavour in that direction.

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136 Romano, 'International Justice and Developing Countries', p. 559.



### *Chapter-IV*

## **STRUCTURAL POWER IN THE DISPUTE SETTLEMENT SYSTEM: SOME EMPIRICAL EVIDENCE**

The changes and the transformation of dispute settlement procedures took place against the background of growing political influence of the developing countries because of their increased participation in international trade regime and some shifts of power distribution in the international political economic system as well.<sup>137</sup> In practice, these changes could not ensure significant participation of the developing countries in GATT dispute settlement system. During the GATT years, they accounted for only 19 per cent of the total cases as complainant and 13 per cent as defendant.<sup>138</sup> A lack of trust in GATT dispute settlement system contributed to such low participation due to the existence of uncertainties in compliance and implementation of panel rulings and the absence of genuine remedial mechanisms as well. The powerful countries were in an advantageous position, because of their relative powerful position which allowed them to exercise the right to veto in 'every step of the process, from the appointment of a panel to the adoption of the panel's legal ruling and the authorisation of trade sanctions for non-compliance'<sup>139</sup> Also,

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137 The number of developing countries reached 39 when Dillon Round of Trade Negotiations held in 1960-61. It was only 9 out of 23 contracting parties when the GATT came into operation in 1947. During Uruguay Round of Trade Negotiation it was more than 120 countries.

138 R.E Hudec, D.L.M Kennedy and M. Sgarbossa, 'A Statistical Profile of GATT Dispute Settlement Cases: 1948-89', in Howse, ed., *The World Trading System*.

it never happened in GATT's history that an economically weak developing country had been able to use the blocking power against a country like the USA or the UK.

As shown in the previous chapters, the shift in the economic power configuration with the recovery of the EC, and Japan and relative decline of the US, on the one hand, and incorporation of some of the developing countries' reform proposals, on the other, contributed to GATT dispute settlement system's progression towards growing non-utilisation in the 1970s. But change in the US strategy to put pressure on its economic competitors, particularly on the EC and Japan brought the dispute settlement system back on track. As a consequence, the US's effort to set normative rules in conducting international trade affairs by exploiting dispute settlement procedures and the EC's response to the US strategy gave way to the transformation of GATT dispute settlement procedures into a legalist model.

During the Uruguay Round Trade Negotiations, the position of the developing countries also experienced a tremendous shift as a result of the end of communist rule in Russia and Eastern Europe. Trade became more important in the economy of the developing countries. Many of such countries like Brazil, Uruguay, Mexico, Argentina etc. even changed their respective trade policies and began to adopt an outward approach to development under the influence of the so called structural adjustment and liberalisation policies of the World Bank and the International Monetary Fund. As a result, the developing countries became more concerned with trade beyond border and market access for exporting products for economic development. It eventually strengthened the global need for setting up

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139 R. E Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' *Minnesota Journal of Foreign Trade*, vol. 8, no.1, 1999, p. 9.



a strong legal regime under the WTO, which is the institutionalised form of the GATT.

However, the transformation of the dispute settlement system into a legalist model could not obliterate some major weakness of the developing countries that existed during GATT years at downstream and upstream levels of the dispute settlement mechanisms. This can be explained by the fact that WTO dispute settlement mechanisms did not come into operation without the influence of the developed countries like the US and the EC. In transforming the diplomacy oriented dispute settlement system, the US and the EC addressed only those issues that gave them an opportunity to exploit relational power or overt power against each other. For judicialising and making the system rule oriented, the international trade regime incorporated the developing countries' concerns in an ambiguous manner.

Moreover, even the text of the *DSU* particularly with regard to special and differential treatment of the developing countries remained unaltered under the transformed dispute settlement mechanisms. Therefore, all these improvements were not successful in many respects to ensure the compliance of the panel ruling and the operation of remedial mechanisms of the WTO on equal footing for all the countries, irrespective of their economic condition or market size.

Rather, the third party binding adjudication system has ensured the compliance of economically weak developing countries and resulted in decrease in their participation in dispute settlement regime. For example, with regard to all nine cases brought until October 2002 by the EU and the US against the developing countries that reached implementation stage, the compliance record of the developing countries was almost 100 per cent. But the compliance record of the USA and the EU was mixed. The US as defendant complied with panel rulings and recommendation in nine cases out of 13, while the



EU was non-compliant in two cases involving *Banana* and *Hormone* out of total four complaints.<sup>140</sup>

Also, if the change in composition of the membership in the WTO is taken into account, it can be observed that the complaints lodged by the developing countries came down from 31 per cent to 29 per cent till 2000 after the creation of the WTO, while the total cases filed by the developed countries against them went up from eight per cent to 37 per cent.<sup>141</sup> And till to date, the least developed countries including the Sub-Saharan African countries remain virtually absent. Only a few large developing countries like Brazil, India, Chile, Hong Kong, Argentina were seen to be most actively involved in dispute resolution. Moreover, due to the given structural power, deriving from dispute settlement mechanisms, the United States and the EU by far remain the most dominant users of the system. From 1948 to June 2000, the United States took part in 340 GATT/WTO disputes, either as complainant or defendant, out of total 654 disputes. It was 238 for the EU which was 36% of the total cases filed.<sup>142</sup> Therefore, in explaining their dominant involvement, one can argue that the USA and the EC have been able to successfully advance their larger systemic interests.

Also, certain powerful countries including the US and the EU took part in the dispute settlement mechanisms typically as third party to defend their trade, interests, which eventually shaped the interpretation of WTO rules in course of time.<sup>143</sup> For example, in *Banana case III*, although the US was not a major exporter of banana,

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140 Broek, 'Power Paradoxes', p. 147.

141 M. Busch and E. Reinhardt, 'Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement', in D.L.M. Kennedy and J.D. Southwick, eds., *The Political Economy of International Trade Law: Essays in Honour of Robert Hudec*, Cambridge: Cambridge University Press, 2002, pp. 457-81.

142 *Ibid.*

143 Shaffer, 'How to Make WTO Dispute Settlement System Work', pp. 10-11.

it defended the rights of its multinational companies, Chiquita and Dole and their export to the EU. It holds a long term implication for the developing countries that a country might file complaint to the DSB in order to open markets for ensuring the exports of its multinational companies, even if the country does not produce exporting items on its own soil.<sup>144</sup>

As observed, multinational companies are traditionally based in the developed industrial countries, particularly in the USA, the EU and Japan. Their interests are intimately correlated with those of their home countries. For example, the U.S. and the EC governments under the influence of their spirit industries filed complaint against Japan, Korea and Chile and thus shaped the interpretation of the term "like product" as used in GATT Article III.2. As a result, countries around the world were forced to cut their taxes on the U.S.A and the EU grain-based alcohol.<sup>145</sup>

Also, the WTO panel was alleged of delivering a politicised ruling in limiting or eliminating the prospect of using unilateral trade policies. For example, while delivering ruling on Super 301 and Special 310 clauses of the 1974 Trade Act and the US Trade and Competitiveness Act of 1988, the Panel noted 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 *1994 Marrakesh Agreement*.<sup>146</sup> But this panel ruling contradicted the earlier ruling which was delivered in *patent protection for pharmaceutical and agricultural chemical products case* (1996) brought by the USA against India over its TRIPS

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144 South Center, *Issues Regarding The Review of The WTO Dispute Settlement Mechanisms*, pp. 9-12. .

145 Shaffer, 'How to Make WTO Dispute Settlement System Work', p. 20.

146 WTO document WT/DS152/R, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm), (accessed on 2 May 2003).



obligation. Both the Panel and the Appellate Body ruled out the expressed intention of the Indian government to implement the transition provisions 'through administrative orders'. They suggested that only provision of law could be considered adequate.<sup>147</sup> *Shrimp case* (1996) is another good example in this regard. In the case, a group of Asian countries India, Malaysia, Pakistan, Thailand brought a complaint against the US. The case was brought as a protest against the latter's ban on the import of shrimp and shrimp products for the formers' failure to install a special device in the fishing nets to prevent sea turtles from being caught. Although they won the case in striking down the US measures, many of the developing countries objected to the reasoning upon which the Appellate Body implied that unilateral trade bans were justified in some circumstances.<sup>148</sup>

In fact, with the single undertaking approach of WTO regime, covering a range of approximately 20 substantive agreements,<sup>149</sup> resource constrained developing countries now confront a more complex realities, which emerge from the issues related to implementation and interpretation of the rules, scope, appropriate exceptions, and other concerns. It can be explained by the fact that the WTO dispute settlement procedures do not adequately address the developing countries' concerns. In effect, the legalist structure of the WTO has offered the developed industrialised countries an upper hand for which they can easily rely on their structural power to settle legal matters. Beneath the legalist model of dispute settlement system, there exists a power struggle reflecting the assumption of

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147 WTO document WT/DS50/AB/R, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm), (accessed on 2 May 2003).

148 Oxfam, *Institutional Reform of the WTO*.

149 Agreement Establishing the WTO, Multilateral Agreements on Trade in Goods, General Agreement on Trade in Services, Agreement on Trade related Aspect of Intellectual Property Rights (TRIPS), Understanding on Rules and Procedures Governing the Settlement of Disputes, Plurilateral Trade Agreements etc.



neorealist approach that international regimes, established by the powerful countries do not ensure equity or benign environment within which participating actors can interact on equal footing. Rather, the agenda or structure of the trade regime generates some obvious advantages for those who are relatively powerful than others and disadvantages for those who are less powerful than others. This is, perhaps, a rendition of the fact that international life, whether political or economic, is never free from the domination by the stronger ones, whatever forum it may be.

## IN LIEU OF A CONCLUSION

This paper was confronted with few limitations in analysing the dispute settlement mechanisms of the WTO from the developing country perspective:

Firstly, the theoretical framework of the paper, while analysing the political and economic weakness of the developing countries, has acknowledged the strength or influence of the developed countries for granted in accepting WTO regime as a given reality. In the process, it ignored some evidence of cooperation between the developing and the developed countries over trade and dispute settlement-related issues for which 'power dimension' probably has no role to play. For example, some developed countries like Canada, Denmark, Netherlands, Norway, Sweden, the UK, etc. made an individual contribution of USD 1 million to finance the operation of Advisory Center on WTO Law (ACWL) to provide legal training, support and advice on WTO law and dispute settlement procedures to government officials of the least developed and developing countries.<sup>150</sup> Moreover, it has not taken the fact into consideration that some of the developing countries like East Asian NICs Malaysia, Thailand, Singapore etc., and some South American countries involving Brazil, Uruguay etc. experienced change in their economic policy and began to increasingly take part in the dispute settlement procedures.

Secondly, the major limitation of the paper lies in using the terms 'developing' and 'developed' without any clear distinction. The lack of clarity of the terms has contributed to uncover the struggle over interests and power only between the developing countries and the developed countries. As a result, it could not implicitly expose the struggle that also exists within the developing countries, and so between a developing country and a LDC, and even within the

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<sup>150</sup> Advisory Centre on WTO Law (ACWL), *Report on Operations: July 2001-July 2002*, <http://www.acwl.ch/WhatIs/Report%20on%20Operations%20July%202002.pdf>, (accessed on 30 August 2003), pp. 3-6

developed countries. For instance, the capacity and the interests of China and India or India and Bangladesh to participate in the WTO dispute settlement procedures will not always be the same, although they are considered to be developing countries. However, the term 'developing country' has not been even clearly defined in the WTO agreements. The ambiguity of the term to indicate what really constitutes 'developing' provides the developed countries an opportunity to retain control over the application of preferential projects like General System of Preference (GSP), Special and Differential Treatment (S & D) and keep their international obligations minimally operative.<sup>151</sup> So, the ambiguous incorporation of the term 'developing' in WTO agreements also provides an example of how the structure of regime preserves the interests of the developed countries.

In fact, my objective in this paper was to examine how relatively strong countries because of their economic and political influence are able to exploit their status in the global political economy in materialising their aspirations and thus preserve the capacity to dominate. The paper has not, therefore, aimed to make any country specific analysis with regard to dispute settlement procedures. Strength of the paper, based on neorealist framework, lies in the fact that the recent proposals of the DSU review, submitted by the developing countries and the LDCs still focus on the structural issues like collective retaliation, financial compensation for wrong cases, clarified interpretation of Special & Differential Treatment,<sup>152</sup> withdrawal of the provisions of compensation and retaliatory

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151 Shaffer, 'How to Make WTO Dispute Settlement System Work', p. 22.

152 World Trade Organization, *Negotiations on the Dispute Settlement Understanding - Special and Differential Treatment for Developing Countries - Proposal by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe* (Document Ref. TN/ DS/ 19, Dated 9 October, 2002), [http://europa.eu.int/comm/trade/pdf/contribdsu\\_cuba.pdf](http://europa.eu.int/comm/trade/pdf/contribdsu_cuba.pdf), (accessed on 20 December 2002).



measures against the LDCs<sup>153</sup> etc. In contrast, the developed countries, particularly the EU and the USA have emphasised only on the issue of transparency in their DSU review proposals without taking other related structural issues into account.

However, despite the inherent weakness in the dispute settlement system of the WTO, it is to be remembered that this world body now exists as a vivid expression of international regime. In other words, neoliberal idea about international regimes has become an order of the day in the current asymmetric economic structure of the world mainly due to three factors:

- Technological development which is contributing to the rapid growth of international economic transactions
- The ongoing process of globalisation
- The emergence of new economic centres.

Also, all these factors have undermined the cogency of the State-centric perspective of political realism and made greater attention to transnational collaboration imperative. In particular, if the WTO in contemporary world claims itself to be a regime, then by all logical conclusions, its perspective should be to direct more attention to institutions and influence the norms and patterns of state behaviour as opposed simply to the pursuit of national interests with might, political or economic.

More importantly, the current pressures of interdependence should propel the WTO to widen the areas of international trade and facilitate states, powerful or weaker, in taking decision over their common fates.

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153 World Trade Organization, *Negotiations on the Dispute Settlement Understanding - Proposal by the LDC Group* (Document Ref. TN/DS/W/17, Dated 9 October 2002), [http://europa.eu.int/comm/trade/pdf/contribdsu\\_ldc.pdf](http://europa.eu.int/comm/trade/pdf/contribdsu_ldc.pdf) (accessed on 20 December 2002)

**Annex: I****ARTICLES XXII AND XXIII OF THE GATT****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 it 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 organization 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 authorize 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 obligation 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<sup>3</sup> to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.



**Annex: II****DISPUTE SETTLEMENT SYSTEM OF THE WTO: LEGAL  
TEXT****Understanding on rules and procedures governing the settlement  
of disputes**

Annex 2 of the WTO Agreement

**Article 1****Coverage and Application**

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.
2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the

Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

## **Article 2**

### **Administration**

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

3. The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.

4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus (1).

### **Article 3**

#### **General Provisions**

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.
2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize 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 of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.
3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.
4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.
5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those



agreements, nor impede the attainment of any objective of those agreements.

6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees where any Member may raise any point relating thereto.

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of

a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply (2).

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

## Article 4

### Consultations

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.
2. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former (3).
3. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.
4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.
5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.



6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

8. In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.

9. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

10. During consultations Members should give special attention to the particular problems and interests of developing country Members.

11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements (4), such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the

applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

## **Article 5**

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

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.
2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.
3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.
4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.
5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

6. The Director-General may, acting in an ex officio capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

## **Article 6**

### **Establishment of Panels**

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel (5).

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

## **Article 7**

### **Terms of Reference of Panels**

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

“To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of 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).”

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.



3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

## **Article 8**

### **Composition of Panels**

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.
2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.
3. Citizens of Members whose governments (6) are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.
4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of

persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, 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 by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

## **Article 9**

### **Procedures for Multiple Complainants**

1. Where more than one Member requests 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 Members concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.



3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

## **Article 10**

### **Third Parties**

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

## **Article 11**

### **Function of Panels**

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the 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 the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

## **Article 12**

### **Panel Procedures**

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.
2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.
3. After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.
4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.
5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.
6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions

simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

8. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.

9. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

10. In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the



relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

11. Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

## **Article 13**

### **Right to Seek Information**

1. Each 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. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from

the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

## **Article 14**

### **Confidentiality**

1. Panel deliberations shall be confidential.
2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.
3. Opinions expressed in the panel report by individual panelists shall be anonymous.

## **Article 15**

### **Interim Review Stage**

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.
2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set

by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

3. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.

## **Article 16**

### **Adoption of Panel Reports**

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.

2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting (7) unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the



appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

## **Article 17**

### **Appellate Review**

#### **Standing Appellate Body**

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.
2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.
3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on 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. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

#### Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of

the parties to the dispute and in the light of the information provided and the statements made.

11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

#### Adoption of Appellate Body Reports

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members (8). This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

### Article 18

#### Communications with the Panel or Appellate Body

1. There shall be no ex parte communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. 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 or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the



information contained in its written submissions that could be disclosed to the public.

## **Article 19**

### **Panel and Appellate Body Recommendations**

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned (9) bring the measure into conformity with that agreement (10). In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

## **Article 20**

### **Time-frame for DSB Decisions**

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate 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. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

## **Article 21**

### **Surveillance of Implementation of Recommendations and Rulings**

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

3. At a DSB meeting held within 30 days (11) after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings (12). In such arbitration, a guideline for the arbitrator (13) should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the

reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided 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 will submit its report.

6. The DSB shall keep under surveillance the implementation of adopted 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 pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.



8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

## **Article 22**

### **Compensation and the Suspension of Concessions**

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) 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;

(d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;

(f) for purposes of this paragraph, "sector" means:

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors; (14)

(iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

(g) for purposes of this paragraph, "agreement" means:

(i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;

(ii) with respect to services, the GATS;

(iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations



pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator (15) appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator (16) acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided

or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance (17).

## **Article 23**

### **Strengthening of the Multilateral System**

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

## **Article 24**

### **Special Procedures Involving Least-Developed Country Members**

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.



## **Article 25**

### **Arbitration**

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

## **Article 26**

1. Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that

Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;

(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;

(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

## 2. Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered

agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

(a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;

(b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

## **Article 27**

### **Responsibilities of the Secretariat**

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall



make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

**APPENDIX 1****AGREEMENTS COVERED BY THE UNDERSTANDING**

(A) Agreement Establishing the World Trade Organization

(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods

Annex 1B: General Agreement on Trade in Services

Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes

(C) Plurilateral Trade Agreements

Annex 4: Agreement on Trade in Civil Aircraft

Agreement on Government Procurement

International Dairy Agreement

International Bovine Meat Agreement

The applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB.

## APPENDIX 2

### SPECIAL OR ADDITIONAL RULES AND PROCEDURES CONTAINED IN THE COVERED AGREEMENTS

#### Agreement Rules and Procedures

Agreement on the Application of Sanitary and Phytosanitary Measures 11.2

Agreement on Textiles and Clothing 2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10; 6.11, 8.1 through 8.12

Agreement on Technical Barriers to Trade 14.2 through 14.4, Annex 2

Agreement on Implementation of Article VI of GATT 1994 17.4 through 17.7

Agreement on Implementation of Article VII of GATT 1994 19.3 through 19.5, Annex II.2(f), 3, 9, 21

Agreement on Subsidies and Countervailing Measures 4.2 through 4.12, 6.6, 7.2 through 7.10, 8.5, footnote 35, 24.4, 27.7, Annex V

General Agreement on Trade in Services XXII:3, XXIII:3

Annex on Financial Services 4

Annex on Air Transport Services 4

Decision on Certain Dispute Settlement

Procedures for the GATS 1 through 5

The list of rules and procedures in this Appendix includes provisions where only a part of the provision may be relevant in this context.

Any special or additional rules or procedures in the Plurilateral Trade Agreements as determined by the competent bodies of each agreement and as notified to the DSB.



### **APPENDIX 3**

#### **WORKING PROCEDURES**

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 meetings 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:
    - (1) complaining Party:
    - (2) Party complained against: 3-6 weeks 2-3 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.

## **APPENDIX 4**

### **EXPERT REVIEW GROUPS**

The following rules and procedures shall apply to expert review groups established in accordance with the provisions of paragraph 2 of Article 13.

1. Expert review groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.
2. Participation in expert review groups shall be restricted to persons of professional standing and experience in the field in question.



3. Citizens of parties to the dispute shall not serve on an expert review group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on an expert review group. Members of expert review groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before an expert review group.
4. Expert review groups may consult and seek information and technical advice from any source they deem appropriate. Before an expert review group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by an expert review group for such information as the expert review group considers necessary and appropriate.
5. The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.
6. The expert review group shall submit a draft report to the parties to the dispute with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be issued to the parties to the dispute when it is submitted to the panel. The final report of the expert review group shall be advisory only.

**Notes:**

1. The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.
2. This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.
3. Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.
4. The corresponding consultation provisions in the covered agreements are listed hereunder: Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14; Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

5. If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.
6. In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.
7. If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.
8. If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.
9. The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.
10. With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.
11. If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.
12. If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.
13. The expression "arbitrator" shall be interpreted as referring either to an individual or a group.
14. The list in document MTN.GNS/W/120 identifies eleven sectors.



15. The expression "arbitrator" shall be interpreted as referring either to an individual or a group.
16. The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.
17. Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

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1. WT/DS50/AB/R
2. WT/DS54/R
3. WT/DS90/R
4. WT/DS152/R