Chapter I
INTRODUCTION

1. Introduction

International trade is highly complex, and is more complex than domestic trade. International trade involves more than one national law, rules and policies. There are over 200 countries in the world trading with other countries in a large number of goods and services. No country can be self-sufficient, whatever may be its size and resources. Every country, whether small or big, wants to gain through trade with other countries through the mechanism of international trade rather than by remaining closed economies. Besides, international trade plays multifarious functions, such as high production, increased market share, high profit, acquisition of modern technology, increase in standard of living, socio economic welfare, division of labour, large scale economies, optimum and proper utilization of rare economic resources etc. It is estimated that the entire world trade exceeds 7000 billion dollars per annum. The Indian share in the total export is about 0.7%, which comes to only 44.8 billion dollars. At present India is exporting about 7500 commodities to 290 countries and importing about 600 commodities from 140 countries of the world.\(^1\)

W.T.O is an international body dealing with the rules and regulations of trade among nations. The main object of W.T.O. is to liberalise trade among nations. It tends to move towards the goal of free and fair trade. However, the Uruguay Round

Agreement, and the ultimate setting up of the W.T.O. are expected to bring about substantial gains in world trade, and to increase income from liberalization, improved market access and greater export opportunity, besides greater predictability of the trading environment.

“Our objectives is to anchor these countries in the ideal of freedom; economic as well as political. And so we are striving for free trade not just because it is good for America, but because it is good for all mankind.”

The Bretton Woods Conference of 1944 suggested the necessity for the creation of institutional arrangements for post war reconstruction of global economy. As the result of the Conference two world institutions have been chartered out to function at the global level. These are:

1. International Bank for Reconstruction and Development (World Bank), and
2. International Monetary Fund (IMF)

These institutions were founded with a view to promoting monetary stability and providing resources for the post war reconstruction needs.

The Conference was not, however, satisfied with the establishment of these two global institutions. It also felt the need for establishing another institution to unify world trade, and suggested the formation of an International Trade

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2 Devender Sharma, GATT and India; The politics of Agricultural by Devinder Sharma, p.3.
Organisation, with the hope that it would oversee the liberalization of world trade, and also settle disputes among the trading countries.

The first major attempt to restore order and to normalize international trade was made through the Havana Charter held in Havana in 1948 under the aegis of the United Nations. The Havana Charter thus provided for the establishment of International Trade Organization (ITO) as a specialized agency of the United Nations. But unfortunately all efforts to set up ITO, however, proved abortive in the hands of US Congress which failed to ratify Havana Charter involving ITO’s formal structure. The US congress, instead of ratifying the Charter, favoured an ad-hoc arrangement like General Agreement on Tariffs and Trade (GATT) which has been concluded, after, negotiations on the Havana Charter and which had been envisaged as part of ITO. Later it was signed in 1947 at Geneva by 23 countries including India.

The year 1948 marked the formation of the General Agreement on Tariff and Trade with 110 countries as contracting parties. It was the forum for discussion and negotiations on international trade issues. Since then, there had been eight Rounds of Multilateral Trade Negotiation. The eighth Round, named Uruguay Round, has given birth to the Dunkel Draft. Mr. Arthur Dunkel, Director General of GATT and Chairman of the Trade Negotiation Committee (TNC) had drawn up proposals for

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consideration of the governments of the countries who participated in the negotiations on 20 October, 1991. Dunkel Draft was formulated under the premise of Uruguay Round.

“Real competition is too often seen for largely protectionist reasons-as an external balancing act”. The Draft was a serious attempt to narrow down the differences between the participating countries regarding the extent of liberalization of world trade. Drunkel Draft has been a very legal and highly technical document. The economic reforms launched by the Government of India since 1991 have to be viewed in the background of the Dunkel Draft. In this respect a commentator has observed that the economic reforms undertaken by the Government provide a congenial frame work for accelerating the pace of growth of India’s international trade. Reforms have been initiated in trade policies. Many of these reforms are in keeping with the spirit of the Dunkel Proposals. As such, while India may continue to negotiate for more concessions, it ultimately has to fall in line with other countries of the world.”

The Final Act was found difficult to have a satisfactory conclusion of the 8th round of negotiations. Mr. Arthur Dunkel, the Director General of GATT, gave a proposal for solving the problem to break the deadlock in GATT negotiations in December 1991. After the hectic negotiations for several years, consensus was arrived at in the form of Final Act. The Final Act

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6 Surpra note. 3 at p.27.
of GATT embodies agreement establishing the World Trade Organisation (WTO).8

There has been a great deal of debate and discussions on the Dunkel Proposals. In India the views expressed on Dunkel Proposals was supported by the ruling party and opposed by the opposition parties. Supporters of the Dunkel Proposals argue that removal of barriers in international trade will be for the benefits of all countries.9 It will increase the global income, provide wider choice to the consumers and create confidence for investment in business and industry. The opponents of Dunkel Proposal apprehend that there will be adverse effect on the economy of the developing countries, particularly on the weaker nations.

There are major agreements arrived at the Uruguay Round of negotiation10, particularly in Agriculture. Tariff on agricultural products is to be reduced over a period of six years by an average of sixteen per cent in the case of developing countries.11

Countries signing agreement moved gradually towards reduction and/or elimination of barriers in international trade including barriers in trade in service. India, meanwhile, has taken a

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8 Ibid at p. 25.
9 Supra note.7 at p.26.
10 Trade in Agricultural Commodities and trade related policies affecting agriculture, textile and clothing, technical barriers to trade related aspects of investment measures (TRIMS), trade in services, trade related aspects of intellectual property rights (TRIPS).
number of measures for reduction of import duty and opened up many of the service sectors to foreign competition, even before the signing of the GATT.

GATT has favourable impact on the textile and clothing sectors, particularly in the garment manufacturing sector. This happened consequent on the removal of restrictive measures used by the developed countries under multifiber agreements.

In the middle of April 1993, Government of India signed the Dunkel Final Draft under the Prime Ministership of Sri. P.V. Narasimha Rao. This had been predicted by some critics as the predicated death-Knell of Indian economic independence.12

According to Dunkel, “The moment a country signs the Draft Negotiation, it gets a ‘new status’ in the world trade automatically”. The status is known as Most Favoured Nation (MFN) status.13

The Uruguay Round discussions of GATT was completed in December 199314 and signed by 117 countries at Marrakesh on 15th April 1994.15 On that date it was also decided to transform GATT into World Trade Organisation (WTO).16

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15 Ibid at p.21.
Unfortunately, the Dunkel proposal seems to have generated many myths. The third world nations fear that some of these proposals would go against their long term interests. At the same time, there are some Utopian dreams in the text which held out the promise that some thing would turn up.

Dunkel proposals have generated intense debate and discussions. The attitudes and opinions expressed in such debate and discussions are based on the individual perception of the critics. Dunkel proposals will influence the economy of nations in many ways. Yet the economy will be directed by the WTO, IMF and the World Bank. All these international economic institution have their own implications. Though the developing countries are Members of WTO the developed countries like the USA, Japan, and European Union have the upper hand and their interests are always protected by these institutions. GATT 1994 may help to increase the volumes of international trade, create confidence for investments in industry and business and thereby promote the emergence of a new world order. At the same time, it may also face intense competition due to the market access given to transnational companies. Hence the sector has to adjust accordingly. As is said, ‘the proof of the pudding is in the eating.’ This is true of Dunkel Draft also. Its impact will be known only in due course. However, it is true that there are many good results of the Dunkel proposals. In the Dunkel’s proposals there are both negative and positive features. Governments see the positive ones only, while it disregards the negative aspects. But the recent history of the past decades proves that the negative aspects in relation to developing countries are more powerful than the positive aspects. So all the developing country governments should keep in mind the likely
adverse effects of Dunkel Proposals and if, nothing is done in this regard, it may jeopardise the larger interest of nations.

The former commerce secretary of the government of India Sri. S.P. Shukla, who was a negotiator at the Uruguay Round, conveyed that “the question is not whether we live within or outside GATT, but it is whether we have a vision of a self-reliant economy for a dignified existence, not necessarily a filthy rich existence in the country of nations for a place on the planet where we shape our society and our lives in accordance with our dreams.” Those who feel such excruciating pain at the very thought of charting our own course can never aspire to such a vision.

Since then the post war international trade was almost done by the rules and regulations of GATT. Thereafter, GATT evolved and functioned as the single entity that lays down a number of multilaterally agreed principle governing world trade. Thus GATT functions as an intended forum for negotiations on trade policy issues. By virtue of its being an international forum for trade disputes, GATT emerged as an international code also, wherein member countries can resolve trade disputes with other GATT members. Thus GATT became a forum for trade disputes settlement as well as the maker of rules for international trade.

The GATT aims at reducing tariff and formulating trade rules to protect tariff concession. So far eight rounds of tariff negotiations have been conducted under the GATT system inter alia.

World Trade Organisation (WTO) is an organisation of Member states of the universe for settling international trade
disputes between Members of the WTO. It aims at setting disputes through negotiation, consultation, adjudication, arbitration, expert opinion and use of WTO. Good offices as speedily as possible.

In the past, international trade disputes were settled through diplomatic exercises rather than legalistic context. In the words of Robert E. Hudec, “It seems that the trade disputes have shifted over the years from diplomatic exercises to more legalistic contests.”

The modern history of world trading system and in particular international trade agreements is evidenced by shift among bilaterism, regionalism and multilaterism.

In the late 19th century and early 20th century bilaterism was clearly dominant. Trade agreements were negotiated on a bilateral basis between industrial countries.

In the 1860s and 1870s England initiated much of this activity, pursuing its trading partners to sign trade agreements that reciprocally lowered tariff rates. In the 1930s it was the United States that made a big push in this area, through its Reciprocal Trade Agreements Programme, although a number of other countries were also active in negotiating bilateral

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18 Simon Lester and Bryan Mecurio, Bilateral and Regional Trade Agreements, Cambridge University Press, p.3.

19 Ibid, p.3.

20 Ibid, p.3.
agreements to lower tariff rates.\textsuperscript{21}

Even before the founding of the United Nations in 1945 there was a proposal to organize an international organisation to develop and organize international trade in 1944 at a conference on economic matters held in Bretton Woods, New Hampshire. But fortunately or unfortunately the proposal to organize an international Trade Organisation (ITO) was not materialised due to some political reasons; and in that place the General Agreements on Tariff and Trade (GATT) came into being, even though it was not intended to be an international organisation. But it so happened that the GATT administration involved in international trade dispute matters and continued as such until the World Trade Organisation (WTO) came into being and started functioning on 1\textsuperscript{st} January 1995.

On the same day the WTO Dispute Settlement System came into operation with necessary modifications of GATT system. It is to be noted that the strength of the WTO is the dispute settlement system. This system has speedily become the most important international tribunal. The WTO dispute settlement system/mechanism functions like a court of judicature of international trade; it has compulsory jurisdiction, disputes are settled mostly by applying rules of law, decisions are binding on the parties to the disputes and sanction may be imposed if decisions are not complied with.

The dispute settlement mechanism is considerably judicial in nature. The General Council of the WTO works as Dispute Settlement Body (DSB) and the Panel works like a Trial Court in

\textsuperscript{21} Ibid, p.3.
the national context. While on the course of implementation of recommendation or ruling, if disagreement appears between the concerned parties, with a mutual agreement Arbitration may be a recourse which acts as a quasi-judicial authority. For example, in Japan-Taxes on Alcoholic Beverages case, Japan sought for arbitration.22

Rules of law referred to above are the rules contained in the Dispute Settlement Understanding (DSU) i.e., Understanding on Rules and Procedures Governing the Settlement of Dispute. It offers a means for the settlement of dispute among Members of the WTO, that is unique in international agreements.23 The debate over the role of the law and adjudication in international affairs has a special dimension in the field of economic relations. International economic law, unlike classical international law, finds its foundation not on the concept of state’s sovereignty but on the notion of economic interdependence.24 It is also said that all politics is local and all economics is international.

The agreements of World Trade Organisation (WTO) established an autonomous body for settlement of disputes among Member countries of the WTO in trade matters at the governmental level. This body or institution is known by the name Dispute Settlement Body (DSB). This system of dispute


23 WTO Singapore ministerial declaration adopted on 13, December 1996; WT/MIN/96/December.

24 See Petersmann, Ernst-Ulrich, Settlement of International and National Trade Desputes through the GATT, the case of antidumping law, in Petersmann and Jacmicke (ed) Adjudication of International Trade Dispute in International and economic law, Debler, her, Dicke at 77, 78 (1992).
settlement of WTO is considered as the best international agreement on matters of trade disputes at the international level.

Settlement of dispute on time and structured basis is important. This system helps to prevent the detrimental effects of unresolved international trade conflicts, and mitigate the imbalances between the economically rich and poor Members of the WTO, by having their disputes settled on the basis of rules rather than power determine the outcome. After its commencement the dispute settlement system soon gained practical importance as its Members increasingly resorted to using the dispute settlement system for settlement of their trade disputes. It provides a forum for continued trade negotiations and a super legal authority of the global trading system. The WTO oversees and administers a complex matrix of international treaty law. It operates and carries out the most complex and perhaps the most important international dispute settlement mechanism the world over.

1.1 Statement of the Problem

WTO has become one of the most interesting and important global trade organisations of the time at the intergovernmental level. It not only acts as a forum for continued trade negotiations highlighting the importance of global economy, but it also oversees and administers a complex matrix of international treaty law. It operates as the most important global dispute settlement system.

In spite of the importance and prominence in trade dispute settlements, WTO is poorly understood by many. Hence there arises a need for an explanation on the basis of the WTO and
how it functions as an organisation, and the scope of its authority and powers. It also requires to explain the role of the dispute settlement mechanism under the WTO, which will be discussed in the fourth chapter.

1.2 Hypothesis

The following hypotheses are framed for analysis and interpretation.

(i) The dispute settlement system of the WTO functions relatively faster, and in any event much faster than many domestic judicial systems.

(ii) It is said that the new trade rules of the WTO generally favour the developed countries despite the legal merits of the developed countries.

(iii) It is reported that the WTO Panel Reports and Appellate Body decisions exceed their authority and are legislated through their interpretation of WTO Rules.

(iv) WTO Dispute Settlement Mechanism would be one of the most important developments of international economic relations of the 20th century. It is also the strength of the WTO.

1.3 Significance of the study

Developing countries have played only a small role in the founding of the GATT. Out of the 23 original GATT contracting
parties ten has been from developing countries.\textsuperscript{25} The minority position of the developing countries in the GATT continued until the late 1960s. By May 1970 the position changed, and membership of developing countries in the GATT Contracting Parties increased to 52 out of 77. The proportion of developing countries continued to increase, and now constitutes a large majority of WTO Membership. But the trade of less developed countries was deplorably low. The Ministerial Conference of May 1957 described the “failure of the trade of the less developed countries to develop as rapidly as that of the industrialized countries as a major problem”,\textsuperscript{26} supporting the perception that export earnings of developing countries were not satisfactory. A subsequent study called Haberler Report\textsuperscript{27} stated Therefore, suitable changes in the WTO Agreement should be made through the appropriate forum so as to enable the trade of the developing countries to increase on par with the industrialized countries.\textsuperscript{’}

At present, the majority of the Members of the WTO are from developing countries, if they feel that the WTO is not considering their views, there is a likelihood that the majority Members might form a separate organisation to materialize their international economic views. Hence the study is taken up for analysis.

\textsuperscript{25} Ten original members in the GATT contracting parties were Brazil, Burma, Chaina, Cylon, Chili; Cuba, India, Pakistan, Syria and Lebanon.

\textsuperscript{26} Trends in International Trade 29 Nov. 1957. GATT, BISD (6th Supp) at 18 2d recital in preamble (1958).

\textsuperscript{27} GOTTFRIED HABERLER et al, contracting parties to the GATT, Trends in International Trade (1958).
1.4 Aims and Objectives of the Study

(i) To study the existing system of settlement of international trade disputes and suggest measures for improvements.

(ii) To ascertain the major differences between GATT and WTO in the trade dispute settlement process.

(iii) To identify lacuna, if any, in the existing legal system (DSU) in solving international trade disputes.

(iv) To identify interference, if any, on the part of the developed countries in the process of adjudication of international trade disputes.

(vi) To suggest measures for avoiding inordinate delay, if any, in the adjudicative process of decision making.

1.5 Scope of the Study

One of the striking features of the present world is the process of economic globalization, a process characterized by high levels of international trade and foreign direct investment. Economists and policy makers are of opinion that economic globalization in general and international trade and foreign direct investment in particular offers an unprecedented opportunity to reduce poverty world over in a very significant manner.

Nobel Peace Prize winner Muhammad Yunus, founder of Grameen Bank for the poor and stated in his Nobel Lecture in December 2006 as follows “World’s income distribution gives a
very telling story. Ninety four percent of the world income goes to 40 percent of the population, while sixty percent of people live on only 6 percent of world income. Half of the world population lives on two dollars a day. Over one billion people live on less than a dollar a day. This is no formula for peace. Poverty is the absence of all human rights. The frustrations, hostility and anger generated by abject poverty cannot sustain peace in any society. For building up stable peace we must find ways to provide opportunities for people to live decent lives.”

The ultimate objectives of the WTO are raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objectives of sustainable development.

1.6 Research Methodology

The present study is confined to the ‘Role of Dispute Settlement Body’ (DSB) within the orbit of the world trade. Of course, the scope of the study is very vast, but this research does not intend to have an extensive study on the topic but an indepth study is aimed at with respect to the role of DSB within the frame work of the WTO.

The researcher mainly adopted the doctrinal method of research by way of analyzing the existing statutory provisions and cases. The researcher has collected primary and secondary data to substantiate his findings. Primary data has been collected by examining statutory provisions, case laws, persons who have direct knowledge about WTO/GATT and National
Trade Associations, Chamber of commerce etc.

Secondary data has been collected from reported statements of WTO, Trade Policy Review Report, Magazines, News papers, Journals, Web site, WTO Ministerial Conference etc.

The researcher has visited important national libraries of this country, law schools and research centres in Kerala, Karnataka, Tamil Nadu and Delhi for collection of primary and secondary data.

The researcher contacted knowledgeable persons in the field of judiciary, business and industry, University, Higher education and economics for the purpose of making qualitative evaluation. He also met top ranking officials in government and trade associations at random and collected their views and guidance about WTO Dispute Settlement Mechanism. A quantitative evaluation of the Dispute Settlement Body of the WTO also held on the basis of the Panels and Appellate Body report during the past ten years.

1.7 Period of Study

The period of study is limited to ten years, for analytical work, from 2001 to 2010.

1.8 Limitations

There are a few limitations experienced by the researcher during the course of the collection of data such as -
1. Literature insufficiency in the subject in most of the libraries has made extensive travel necessary for collection of data.

2. Some of the professionals generally considered to be experts in the subject were found unconcerned about the WTO. Hence the researcher had to spend more time to educate them before eliciting their views on the Dispute Settlement System of the WTO.

1.9 Scheme of Reporting

The research work is divided into nine chapters including introductory chapter.

Chapter one introduction highlights the Statement of the Problem, Hypothesis, Significance of the Study, Objectives of the Study, Scope of the Study, Research Methodology, Period of Study, Limitations and Scheme of Reporting.

Chapter two explains the Origin and History of GATT/WTO and its Associates (IMF & World Bank). It contains History of the General Agreement on Tariff and Trade and its transformation into the World Trade Organisation. This chapter elaborate the changes taken place from time to time consequent on the multilateral negotiations held at different places.

Chapter three examines the Evolution of Dispute Settlement Mechanism in the World Trade Organisation. It elaborates the changes taking place from time to time consequent on the multilateral negotiations at different places.
Chapter four probes into the Role and Principles of the WTO Dispute Settlement. It explains the Role and Principles of Dispute Settlement System, Objects and Purpose, Methods, Jurisdiction, Use of Good Offices, Consultation and Mediation, Access to WTO Dispute Settlement System, Measures to WTO Dispute Settlement, The Amicus Curiae brief, Dispute Settlement Process, Rules of Interpretation, Burden of Proof, Remedies for Breach, Reported cases etc.

Chapter five deals with the existing Machinery of the WTO Dispute Settlement. This section comprises the Functions of Dispute Settlement Body, Composition of Panel, Appellate Body and other bodies involved in the Dispute Settlement and their functions, Structure and Composition and improvement, Reported cases during the period under consideration.


Chapter seven contains a Critical Appraisal of WTO’s Appellate Body Reports over a period of ten years (2001-2010). This part discusses the Dispute Settlement Frame work, Settled Cases, Analysis relating to Developed, Developing and Least Developed Countries, Findings and Conclusions of each case separately.

Chapter eight highlights the views and operations of persons in different walks of life such as Advocates, Judicial Officers,
Faculty Members of Universities and Colleges of Higher Education, Economists and Tradesman, Conversion of collected data into different tables, and conclusions drawn therefrom.

Chapter nine envisages the conclusion of the study and suggestions for the modification of the present law and practice of the role of the dispute settlement proceedings of the WTO.
Chapter II

ORIGIN AND HISTORY OF GATT/
WTO AND ITS ASSOCIATES
(IMF & WORLD BANK)