Chapter III

EVOLUTION OF DISPUTE SETTLEMENT MECHANISM IN THE WORLD TRADE ORGANISATION

3.1 Introduction

In the previous chapter, we have discussed the history and origin of WTO/GATT, IMF and World Bank. IMF and World Bank are global financial institutions, and close associates of the WTO. These two institutions are providers of funds for the growth of international trade and economic development.

In this chapter the researcher would like to throw light on the evolution of the WTO Dispute Settlement System.

The Dispute settlement mechanism of the WTO is considered to be one of the best international agreements ever made. The best international agreement is one, in which its parties to the agreements are willing to comply with such obligations due to the result of adjudication or otherwise, during the course of settlement of dispute by a competent authority. On the other hand, if one of the signatories of an international agreement fails to comply with such obligation, that agreement is not valid. An effective mechanism to settle disputes increases the practical value of the commitment undertaken by the signatories to the international agreement. The present dispute settlement system, established by the Members of the WTO during the Uruguay Round of Multilateral Trade negotiations, underscores the high importance they attach to compliance by all Members with their obligations under the WTO Agreement.
It is important that disputes should be settled timely and in a structured manner, so as to prevent the detrimental effects of unresolved international trade conflicts and to mitigate the imbalances between stronger and weaker players by allowing their disputes settled on the basis of rules rather than having power to determine the outcome. The WTO Agreement came into force by 1, January 1995. The dispute settlement system soon gained practical importance as more and more Members frequently resorted to using this system.

### 3.2 Dispute Settlement Mechanism under GATT

Dispute settlement system prior to WTO was regulated and organized under Article XXII and XXIII of GATT 1947\(^\text{83}\), and the achievements of Tokyo Round Codes.\(^\text{84}\) When the WTO came into force, it did not abrogate the Articles XXII and XXIII and the achievement of Tokyo Round codes, but removing the weakness of these previous mechanisms, reshaped them into a unified and coherent one.\(^\text{85}\) Continuity of GATTs experience is clear from the Article 3.1 of the DSU, which states that the Members of the WTO affirm their adherence to the principles for the management of disputes heretofore applied under Article XXII and XXIII of the GATT 1947, as further elaborated and modified by DSU. The international trade dispute settlement mechanism has become more and more innovative with the entry into force, on 1 January 1995, of the Understanding on Rules and

\(^{83}\) General Agreement on Tariff and Trade, Treaties and other International Agreements of the USA, vol. 4 at 639, (1946-49)

\(^{84}\) 26 BISD at 210 (1980).

Procedures Governing the Settlement of Disputes (DSU) as it has codified detailed rules and procedures for dispute settlement.

Analysts viewed dispute settlement mechanism of GATT 1947 in the light of both rule-oriented and pragmatist approaches. From the first perspective, GATT was/is both in form and practice an illuminating example, model or prototype of a rule-oriented system of international regulations.86 On the other side, the pragmatists maintain that the principal value of the GATT is that it provides a process through which trade problems are negotiated and compromised within a general framework of rules. The compromises may not always be technically in accordance with law, as a court would apply it, but most problems have in fact been diffused and the overall system held together with great success.

GATT 1947 embraced the best attempt to encourage the rule-oriented approach in its early days, but departure took place ostensibly in later days.87 The development had been especially lamented by commentators from the middle powers, who claimed that the GATT was reduced from a legalistic instrument designed to secure an open trading system to a document which, in respect of some important rules, acted only to exhort governments, not to intervene in international trade.88 The emergence of such departures came into existence, as the adjudication could not resolve the difficult and complex

86 Jackson and Davery, Law and Power in International Relations at 87 (1982).
economic and political issues that arose in trade disputes, and as it was necessary to seek pragmatic and practical solutions through trade diplomacy and negotiations. Anti-legalism was most pronounced in the 1960s and 1970s.89

But by 1975, the tide turned and the GATT returned to the task of making it’s legal machinery work more effectively. As the 1980s ended, the GATT dispute settlement was being invoked with alacrity, with contracting parties showing increased interest in sorting out their differences before a panel.90 Legalism was infused in the GATT system, during/after the Uruguay Round. The legalistic approach of the dispute settlement mechanism is evident in the two very important cases decided by the Dispute Settlement Body (DSB) as per GATT 1994 rules. The cases were (1) the Gasoline case and (2) the Alcoholic Beverage Case.

In the Gasoline case, Venezuela and Brazil had complained against the US invoking that the sections 211(K), 211(K) 2-3 and 211(K) 10 of the 1990 amendment of the ‘Clean Air Act 1963’ of US Contravene Articles I, III and XX of GATT,1994 and Article 2 of the Agreement on Technical Barriers to Trade. In this case, the WTO Appellate Body widely discussed and interpreted the Articles in issue. It found that the US measure was not consistent with the Articles in issue. This first ruling clearly supported the legalistic approach of the WTO. The rulings of the Appellate Body, adopted by the DSB, had been agreed to by both parties to the dispute.

Similarly, in Japan-Taxes on Alcoholic Beverages case, the Appellate Body found that the ‘Shochu’ and Vodka were like products, and the Japanese Liquor Tax Law 1953, by taxing imported product in excess of like domestic products, was in violation of its obligations under Article III.2 of GATT 1994. In determining the like producer, it rejected the aims and effect approach pleaded by Japan, and purpose approach pleaded by US, it adopted traditional approach of GATT as a customary rule of interpretation. The Appellate Body Report was adopted by the DSB and Japan announced its intention to implement the report.91

3.3 Dispute Settlement Procedures under GATT Rules

It was set out in Articles XXII and XXIII of GATT 1947, supplemented by the various instruments of the contracting parties and specific provisions of the Tokyo Round Agreements.

A primary problem encountered while examining the dispute settlement procedures of GATT from a legal point of view is that there exists no official definition of a GATT dispute or a GATT dispute settlement procedure.92 According to Merill “a dispute may be designed as a specific disagreement concerning a matter of fact, law, or policy in which a claim or assertion of one party meets with a refusal, counter claim, or denial by another.93

93 Merills J.G. Alternative Methods of Dispute settlements in International Economic Relations.
However, an authoritative concept is provided by PCIJ in ‘Greece V. Great Britain’ which states that a dispute is a disagreement on a point of law or fact, a conflict of legal views or interest between two persons.

Inspite of certain defects that exist in GATT Articles, Articles XXII and XXIII are relevant in a wider sense. But as Zemanek observes, more than 30 Articles of GATT are relevant to settle diverse types of disputes. Similarly, Jackson has identified 19 clauses relevant to dispute settlement. However, centrally focused Articles under GATT are XXII and XXIII, Article XXII relating to consultation and Art XXIII pertains to nullification or impairment.

According to Article XXII, “Each contracting party shall accord sympathetic consideration and shall afford adequate opportunity for consultation regarding such representations as may be made by any other contracting party with respect to the operation of customs regulations and formalities, anti-dumping and countervailing duties, quantitative and exchange regulations, subsidies, state-trading operations, sanitary laws and regulations for the protection of human, animal or plant life, or health, and generally all matters affecting the operation of this Agreement.”

According to Article XXIII, which provides amicable forum for consultation of any GATT matter irrespective of whether a benefit under GATT is denied. It provides dispute resolution in cases where a benefit accruing to contracting party under the GATT is nullified or impaired, or the attainment of any objective

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94 PCIJ Ser, A. No. 2 at 11, August 30 (1924).
under GATT is impeded. Nullification or impairment of a benefit under the GATT may follow from the following actions of a contracting party.

- the failure to carry out its obligations under the GATT by infringing specific provisions of the GATT
- the application of any measure, whether or not it conflicts with GATT provisions or
- the existence of any other situation.

Impaired party could bring two types of complaints, one a violation complaint and the other a non-violation complaint or situation complaint. In case where a contracting party’s benefit under the GATT is nullified or impaired by infringement of GATT provisions by another contracting party of GATT provisions by another contracting party, the first party may bring a violation complaint against the second party before the contracting parties. Impairment which does not infringe on the GATT Articles, and arises from any other situation may bring a non violation complaint before the contracting parties. Example, attachment of the GATT objectives. But both complaints must be preceded by consultations.

It provides that, if the consultations under Articles XXII.1 or XXIII.1 fail to settle a dispute within sixty days after the request for consultations, the complaining party or a working party may request for a panel. In this case the parties may jointly consider that the consultations have failed to settle the dispute.

Prior to this development, the contracting parties had settled their disputes within a ‘reasonable period of time’. ‘Reasonable period’ of time was in itself an ambiguous form and could not be
limited in a fixed and determined time. In the DISC Tax case\(^{95}\), it took three years for the composition of a panel. This case clearly facilitated a way to embrace major reforms in GATT dispute settlement process.

The 1989 development was, on the one hand, the aftermath of the disputing parties’ frequent obstinacies of hindrances from panel being formulated and, on the other hand, it was the result of the internal intricacies of the consultation process under Article XXII.1 and XXIII.1 of GATT. It was not clear, whether the contracting parties consultation procedures under both the Articles before referred to had to be exhausted or not. The Legal Advisor to the Director General, \underline{in the Japanese Taxes on Imported Alcohol Beverages case}\(^{96}\) observed that it was not necessary that both parties so agree before referring to the contracting parties; such a condition would mean that one party could indefinitely block the procedures, simply by saying that bilateral consultations had not yet been terminated. Prior to 1989 development, the disputing party could obstruct the panel from being formulated and the harmed party had to rely more or less upon the diplomatic channel. But after the 1989 decision, no party could hinder the referral process. Therefore, it was the first step towards a legalistic reform in the history of the GATT’s dispute settlement.\(^{97}\)

\(^{95}\) See Jackson John. H. The Jurisprudence of International Trade the Disc Cases in GATT, 72 AJIL, 4 at 747 (1978)

\(^{96}\) 34s/83; C/M/215.

It is to be noted that the GATT had neither used the word ‘panel’ nor prescribed procedures to govern panel proceedings. Rather, the initial practice of the Contracting Parties was either to have the Chairman issue a ruling on a question put to him or to refer a matter to a working party comprising the disputants and other interested parties. The Working Party would prepare a report to the Contracting Parties which recounted its discussions and finding. The use of panels in the place of working parties emerged at the seventh session of the Contracting Parties, when Norway advanced a claim of nullification or impairment against the Federal Republic of Germany.

The most remarkable aspect of dispute settlement activities during the pre-Tokyo Round period was the development of an applicable procedure through customary practice and the creation of the panel.

One of the most salient features of the post–Tokyo Round experience was a dramatic growth in the use of dispute settlement machinery. Hudee observes that in the 1980’s, the valium of GATT legal proceedings produced 300% increase. Although the two-tier system of consensus rule was a hurdle on the way of dispute settlement, the first tier was to form panel by consensus and the second tier was the adoption of the panel report by consensus of the contracting parties.

Thus, the GATT dispute settlement was more or less a trade diplomacy or quasi-adjudicative process. GATT’s panel did not have a broad jurisdiction. In this sense, they resembled

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international arbitration panels in that their jurisdiction stemmed from the instrument that constituted them. Consequently, all panels, looked in their terms of reference to discern their task and the terms of reference played the critical role in defining the groundings of the enquiry that a panel was to undertake.\textsuperscript{99}

\section*{3.4 Weakness of GATT Dispute Settlement Mechanism}

The weakness of the GATT Dispute Settlement Mechanism can be traced from adjudicate phase to implementation of panel report.

\subsection*{3.4.1 Institutional Weakness}

These two major institutional weaknesses were inherited from the GATT, such as, one, the forum-shopping manner of Dispute Settlement, and second, lack of coherent and integrated mechanism. At that time, Dispute Settlement Body was not in existence as it is now, under WTO. Instead of Article XXII and XXIII, different agreements, decisions or understandings had provisioned dispute settlement in a diversified way.\textsuperscript{100} It resulted in the root cause of uncertainty and complexity. Establishment of the Dispute Settlement Body under the WTO is an innovation, which takes up the functions of the General Council and the committees of the covered agreements with respect to the

\textsuperscript{99} Ibid at 58.

operation of the dispute settlement procedure, such as the establishment of panels or the adoption of panel reports.

The second was the lack of a permanent institution. GATT itself was an ‘interim agreement’ which worked as a mechanism for co-ordinating global trade policy as the ITO aborted and never came into existence. The General Agreement was ill-suited for this task, as it was not a treaty among nations but was, instead, a simple agreement that each country acceded to by means of the protocol of Provisional Application.101 Because there was neither an institution nor a treaty countries acceded to the General Agreement known as ‘Contracting parties’, rather than as members or signatories.

So also, the institution that evolved to administer the General Agreement existed on unsure legal ground, a problem that was often sidestepped through the pretence that the GATT secretariat was actually ‘leased’ from ‘Interim Commission’ for the International Trade Organisation.102

3.4.2 Consensus Rule

Consensus is not defined in the GATT. Before the 1989 Decision, a consensus rule applied from the formation of panel to implementation of recommendation. The benefit of the consensus rule used to go to the aggressor, and the complainant was put into a helpless position to seek grievances. The

102 NICOS, Philip M; Trade without values, 90 Nw. U.L. Rev; at 390 (1996).
respondent or aggressor could easily block the formation or establishment of a panel. Only the 1989 Decision affirmed the right of a complaining party to have panel process.

Adoption of the panel reports required consensus of the council acting for the contracting parties. Surprisingly, most of the panel reports were adopted by the council without a substantial delay. The good faith of the parties was appreciated. Yet several reports were shelved, either because of an objection by the disputing parties under the consensus rule, or for other political reasons. This fact gives the reason why critics rightly deemed the consensus rule in the council as one of the foremost defects in the GATT dispute settlement mechanism.\textsuperscript{103} The consensus rule under GATT worked as Veto Power in the UN Security Council.

From the legal and political point of view, the practice of blocking, as distinct from the practice of non-adoption, considerably weakened the functioning of the GATT dispute settlement mechanism. GATT was unable to overcome the shortcomings of consensus rule, although Article XXV.4 permitted the council to adopt panel reports by a majority vote, as provided for in the foot note of the 1989 Decision. However, there were no cases, where Article XXV.4 was applied in adopting panel reports. Hence, the 1989 Decision again confirmed the consensus rule.

\textbf{3.4.3 Withdrawal from the Agreement}

GATT had provided the right to the party, to which retaliation was dealt with, to come out of the ambit of the Agreement. It

\textsuperscript{103} Ibid.
created a paradox that the use of retaliation could result in dismantling GATT itself and reluctance in resorting it would allow the transgressor Scot-free—(See Article XXII.2 in the appendix).

3.4.4 Lack of Transparency

Transparency at the multilateral and national level is a must to reduce domestic pressures for protection and to enforce agreements. Problems may disappear, once light is thrown on them, says Prof. Bhagavati, the Dracula Principle. Transparency relates both to the action of GATT and the actions of the Contracting Parties.

Under GATT 1947, smaller trading nations often perceived a lack of transparency concerning agreements reached between the major players in either MTNs or with respect to the settlement of bilateral disputes or trade issues, while bilateral agreements regarding specific trade issues are not necessarily a matter of concern. More important, in terms of generating controversy, has been the practice on the part of large traders, of coming to an agreement between themselves, and then attempting to present the deal as a fait accompli in a negotiating group in an MTN or in the Council.

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Specially, the panel process under GATT criticised lack of transparency. Panel deliberations were confidential, and no records were made public until the report was adopted by the Contracting Parties.\textsuperscript{107} Besides, Panels often experience procedural delays due to difficulties in establishing panels, selecting panelists, negotiating special terms of reference, interpreting GATT law and adopting panel reports. Panel reports were sometimes open to the charge of bias inherent in the use of government officials as panelists\textsuperscript{108}, unless the concept of a roster of non-governmental panelists was introduced by the 1984 Decision.

\textbf{3.4.5 Lack of Judicial Quality}

GATT dispute settlement mechanism was a hybrid mechanism more close to conciliation than to judicial techniques.\textsuperscript{109} GATT dispute settlement was a trade diplomacy or quasi-adjudicative process with distinct responsibilities conferred on two different bodies. The decision to create a panel by which the Contracting Parties, hearing submissions and making findings was the panel’s responsibility, but its findings and recommendations were not binding on the disputants.\textsuperscript{110}

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\begin{itemize}
\item \textsuperscript{107} Garvery, Jack J., “Trade Law and Quality of Life’-Dispute Resolution under the NAFTA side; Accord on the Labour and the Environment, 89, AJIL, 448(1995).
\item \textsuperscript{109} I.Mora, Miquel Montana. A GATT with Teeth; Law wins over Politics on the Resolution of International Trade Disputes, 31, Colombia Journal of Translational Law 1, at 145 (1993).
\item \textsuperscript{110} Supra note 5 at 56.
\end{itemize}
As the GATT dispute settlement mechanism is established with a ‘Janus-faced’ approach to adjudication and negotiation, it is not surprising that they have been subject to endless debate regarding the two approaches.

3.4.6 Lack of Abiding Procedures

As the DSU under WTO is an exclusive source for procedure to resolve disputes falling under the coverage of covered Agreements, the GATT was not an exclusive source for the dispute settlement. Under the old regime, a customary practice evolved, according to which the Contracting Parties settled their disputes through the dispute settlement procedures provided in the GATT. But it seems that the parties, in theory, could have settled their disputes according to other conventional or customary methods of settling international disputes namely, arbitration or ICJ.

Dispute settlement mechanism becomes abiding only when it covers the following measures.

- state shall forward the dispute exclusively to the mechanism.
- the disputants maintain neutrality from influencing the procedures.
- disputants must not have access to nullify the findings and recommendations.
- unilaterism must not be practised and
- conformity of domestic legislation with the Agreement.

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111 See Article 23 of DSU.
112 Supra note 27 at 143.
GATT 1947 could not be stronger than even a single measure as mentioned above. So non-abidingness was its nemesis.

3.5 A Flashback of Dispute Settlement (1948-1995)

Prof. Kumuro made a serious study of dispute settlement cases under GATT Article. XXIII from 1948 to March 1995. He found that 195 cases were brought under the Article, of which, in 98 cases, panel reports and working party reports were circulated. In the remaining 97 cases, a matter subject to consultations was not referred to Contracting Parties under Article XXIII.2 or a complaint was withdrawn after the establishment of a panel. In 81 of the above mentioned 98 cases, the panel’s report was adopted, and in the remaining 17 cases panel reports have not yet been adopted.113

Prof. Hudee114 has divided the GATT dispute settlement process into four parts and stages, each of which roughly corresponds to a decade.

In the first stage, from 1948-59, the GATT comprised less than forty countries. Most of the representatives to the GATT had worked with one another on the negotiations for the International Trade Organisation and the ambience was thus often described as clubby.115 Fifty three complaints were filed during the period of which twenty proceeded to panels. Of the rulings issued by panels, most were drafted with an elusive diplomatic vagueness. They often expressed an intuitive sort of

113 Supra note 2. at 165.
law based on shared experiences and unspoken assumptions.\textsuperscript{116} It was during this period the use of dispute settlement panels developed.\textsuperscript{117} These were the golden years of GATT, when the dispute settlement mechanism was especially effective and it served the purpose of both interpreting the rules and focusing normative pressure on countries to respect GATT principles in their national decision making.\textsuperscript{118}

In this stage, the panels were efficient to interpret the vague and ambiguous norms of GATT. A good example is provided by a recommendation of a panel in 1958, in a case involving France and Australia. The Panel, inspite of ambiguous wording of Article XVI of GATT, was able to give meaning to the concept of ‘more than equitable shares’. Twenty four years later, in a very similar case involving the EC and the US, the panel excused its decision in the difficulties inherent in the concept of ‘more than equitable share’.\textsuperscript{119} However, Hudee points out that it is difficult to evaluate the ‘effectiveness’ of the procedure, since no data is available on how many complaints were compromised or dropped, or not even brought, because of anticipated difficulty in securing compliance.\textsuperscript{120} Yet creative Jurisprudence reaching well beyond the written rules enhanced by the presence of trusted and well developed concensus on trade policy matters satisfied

\textsuperscript{116} Supra note 30 at 11.
\textsuperscript{117} Plank; Rosine. An Unofficial Description of How a GATT Panel works and Does not. 4J. Intl. Art, at 57, December (1987).
\textsuperscript{119} Phegan, Colin, GATT Article XVI.3, Export subsidies and Equitable share 16.J. World Trade L. at 251 (1982).
\textsuperscript{120} Supra note 30, at 95.
the expectation of a judicial system, drawn to the issuance of reasoned legal opinions.\textsuperscript{121}

In the second stage, from 1960-69, known as a period of significant growth in the GATT's membership, but of stagnation in the dispute settlement process,\textsuperscript{122} which experienced a dramatic break-down in its effectiveness.\textsuperscript{123} Virtually, no complaints were filed during this period\textsuperscript{124}, which reflects more the inattention paid to the dispute settlement system. As a whole, the international community worked with a general tendency to seek political solution to disputes rather than legal ones.\textsuperscript{125}

Three major changes took place in GATT during this period. The first is that in 1955, the US obtained a waiver of its obligations under Article XI to impose quantitative restrictions on agricultural products. As one commentator noted, the Contracting Parties granted the waiver, believing that a refusal would damage the GATT system by forcing the US either to defy GATT principles openly or to withdraw from GATT altogether.\textsuperscript{126}

The second stage is the introduction of Part IV in GATT. It was the result of the increased bargaining strength of the developing

\textsuperscript{121} Ibid at 186.

\textsuperscript{122} Supra note 20 at 397.

\textsuperscript{123} Supra note 27 at 119.

\textsuperscript{124} Supra note 13 at 93.

\textsuperscript{125} See Stainberger, The International Court of Justice, in Molser. H et.al. (eds) Judicial Settlement of International Disputes at 228 (1974).

countries which led not only to a relaxation of the norms as applied to developing countries but also to the adoption of new substantive rules to provide them a more equitable treatment.\textsuperscript{127} These new rules included special provisions for dispute settlement procedures involving developing countries, which have hardly been used.

The third change took place due to the de-facto assumption by the EEC of the seats held by its member states and a substantial increase in the number of developing country members. This led to a change in the dynamics of the GATT, because the developing countries wanted flexibility for themselves and a stricter legal system to force developed countries to respect their obligations, whereas the US and EEC joined in a stand against legalism.\textsuperscript{128}

All these developments led to the flexibilisation or relaxation of GATT regime. A belief spread that since some rules were not observed anymore, enforcement of other rules was improper. This explains the sharp decrease in the number of cases during these years. Even when legal decisions were adopted, they tended to be deliberately obscure, often learning it unclear, whether, there had been a legal ruling at all.\textsuperscript{129}

The third stage was 1970-79. During that stage, the dispute settlement system was largely rebuilt and revived. This was mostly due to pressure from the U.S, which responded to the internal political pressure for a more open global economy, so

\begin{footnotesize}
\textsuperscript{127} Supra note 27 at 120. \\
\textsuperscript{128} Supra note 20, at 398, See also supra note 30. The EEC never became a Contracting Party to the GATT. The EC, however is a member of the WTO under the Article XI of the Agreement Establishing WTO. \\
\textsuperscript{129} Ibid.
\end{footnotesize}
that U.S. revised its anti-legalistic approach. Thirty two cases were filed during this decade, owing to the adoption of 1979 understanding, which established several basic guidelines with the goal of improving and refining the dispute settlement process.

EC was the first to complain in this period and the complaint was against US measure on DISC tax legislation as constituting an export subsidy contrary to Article XVI of GATT.\textsuperscript{130} This case is enough, today, as a model case to illustrate the weakness developed by the procedure during this decade. It took three years to reach an agreement on the composition of the panels and the dispute bogged down in every phase of the procedure.\textsuperscript{131} This case paved the way for the 1979 Tokyo Round reform.

The fourth stage ranges from 1980 to 90, experienced as a decade of contrast. One hundred and fifteen (115) complaints were filed yielding forty-seven decisions by panels, more than in three previous decades combined. During this period, however, the US once again began to rethink its legalistic approach to dispute settlement spurred by domestic concern over a mounting

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\textsuperscript{130} Hudec, Robert, reforming GATT Adjudication procedures. The lessons of DISC case, 72 Minn. L.Rev., at 1457 (1988). Jackson, John H. The Jurisprudence of International Trade. The Disc case in GATT, 72, AJIL, 779-81 (1978) Panel to the Council of Representatives, concluded inter alia, that the DISC legislation was an export subsidy and that there was a prima facie case of nullification or impairment of benefits which other Contracting Parties were entitled to expect under the General Agreement. Yet, the DISC and the related cases demonstrate several weaknesses of the GATT dispute resolution procedures including undue delays meager resources contributing to inadequate consideration, inadequate fact finding undefined roles of panel etc.

\textsuperscript{131} Supra note 27 and 121.
trade deficit and frustrated by the unwillingness of trading partners to open markets in a reciprocal fashion, the US often turned to unilateral means of dealing with perceived violation of the trade order. Nevertheless, the GATT refined its approach to dispute settlement. Decisions issued by GATT panels in subsequent years (i.e., 1982 and 1984) clarified the 1979 understanding and made additions to the rules. A more Comprehensive Decision, which once again included codification of extant doctrine, was issued in 1989.132

The 1990s marked a period of waiting for the conclusion of the Uruguay Round of Multilateral Trade Negotiations. Several possible complainants delayed filing reports while waiting on the results of those negotiations. Dispute settlement Panels delayed making decisions, and the Contracting Parties delayed voting as to whether to adopt the reports that panels had made.133

In the words of Nichols Philip, a careful analysis of this body of decisions reveals that dispute settlement panels decisions did not occur in violation from one another. Several discernible threads of reasoning appear throughout the entire body of decisions. These threads refer to rules laid down in prior panel report in a manner indicating that those rules were controlling in a variety of contexts. They were in other words, doctrine GATT doctrine.134

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132 Supra note 20, at 398-99.
133 Ibid.
134 Ibid.
3.6 WTO Dispute Settlement at Uruguay Round

3.6.1 Contesting Approaches

Three contesting approaches appeared during the Uruguay Round Negotiation (UR) on the issue of dispute settlement. The first was diplomatic or pragmatic approach led by EU. According to this approach, they advocated that the purpose of dispute settlement in international economic organisations is not to decide who is right and who is wrong or to determine a state’s responsibility in the matter. Instead, the aim is to proceed in such a way that even important violations are only temporary and are terminated as quickly as possible. *Thus the main objective is not to recourse to the rigorous application of law, but the adjustment of divergence between states to find equitable solutions.*\(^{135}\)

The US considered the approach forwarded by EU, inadequate and incomplete. The US proposed a more legalistic approach. Many other countries also favoured the legalistic approach because of the biases of the first approach to the superior bargaining powers. They argue that the necessity for certainty and predictability in the management of international business transactions calls for a more rule-oriented system.\(^{136}\)

The third approach adopting a completely different view, suggested that disputes relating to the WTO should be referred

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\(^{135}\) See supra note. 27 at 128-29.

to an external judicial body, preferably the International Court of Justice (ICJ) or if this were not acceptable, to the DSU.

It is surprising and interesting, while unilaterism was/is the predominant feature of the U.S trade policy, how the US could advocate legalistic approach in the Uruguay Round Multilaterism and Unilaterism as two different and antagonistic concepts which can never meet together. Multilaterism is part and parcel of legalism or rule-based approach, whereas, unilaterism embarks on arbitrariness and anti-legalism. But it does not mean that the US was not reluctant towards international adjudication. It is because of a deeply embedded distrust of international supervision in American political culture.

The text of the DSU is a product of long negotiations involving a significant balancing of interest between competing political, economic and social pressure groups and an elaboration of the experience gained under the GATT dispute settlement procedures over four decades.

The drafters of the DSU were constantly being made conscious of the need to ensure that the new dispute resolution procedure would be more responsive to contemporary needs, and would address the shortcomings of the GATT dispute settlement procedures. Dispute settlement under the GATT required not only enforce agreed rights and obligations, but at the same time

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keeping in mind the frustrating limitations imposed by political, economic and other factors.\footnote{Schede, Christian, The Strengthening of Multilateral System, 20 world Competition 1, at 24(1996).}

\subsection*{3.6.2 Package Deal}

Ultimately, the negotiating parties agreed on the New Zealand’s proposal of ‘Package deal’ system of dispute resolution accepting multilateralism towards a more legalistic approach, which incorporated paragraph 1.1 of the DSU.\footnote{DSU Articles1.1 states that “the rules had procedures of the understanding shall apply disputes brought pursuant to the consultation and dispute settlement rules and procedures of the agreement listed in Appendix 1 to this. Understanding, herein after referred to as the ‘Covered agreements’} Yet some doubt if this is the best system.\footnote{Supra note 54 at 27.}

Package deal as incorporated in paragraph 1.1 of the DSU demands that any dispute falling under the ambit of the ‘Covered Agreements’\footnote{Covered Agreement denotes the Agreements incorporated in Annex 1 of the Agreement Establishing WTO. These are (1) Agreement on Trade in Goods (2) Agreement on Trade in Services and (3) Agreement on TRIPS.} is to be settled in accordance with the procedures laid down in DSU under GATT 1947, and improving Declarations on integrated dispute settlement mechanism, like the DSU, was absent and every dispute under the GATT 1947 did not necessarily fall under the Articles XXII and XIII, rather, the specific agreements had developed their own procedures prevailing over the Articles XII and XIII.

Unlike the previous priority approach, the DSU retains uniform procedures for settling any disputes arising on the Covered
Agreements. It becomes clear, after reading the Article 19 of the Agreement on Agriculture, Paragraph 36 of the Agreement on the application of Sanitary and Phytosanitary Measures, Article 14 of the Agreement on Technical Barriers to Trade, Art. 8 of the Agreement on Trade Related Investment Measures, Art. 7 of the Agreement on Rules of Origin, Art. 6 of the Agreement on Pre-shipment Inspection, Art. 9 of the Agreement on Safeguard Measures and Art 23 of the General Agreement on Trade in Services\textsuperscript{142}, Art. 1.2 of the DSU states that rules and procedures of DSU apply subject to the special and additional rules and procedures contained in the ‘Covered Agreements’.

3.7 Agreements with Articles XXII and XXIII of GATT 1947

The GATT experience continues to be relevant. Article 3.1 of the DSU states that Members affirm their adherence to the principles for the management of disputes so far applied under Articles XXII and XXIII of GATT 1947 and the rules and procedures further elaborated and modified by the DSU.

The dispute settlement mechanism was developed at the Uruguay Round in S and T text.\textsuperscript{143} The above mentioned concept carried out in Article 3.1 of the DSU was embraced in paragraph

\textsuperscript{142} All these Agreements have used more or less the same language which is such as “The Provisions of Art. XXII and XXII of GATT 1994 as elaborated and applied by the understanding on Rules and Procedures Governing the Settlement of Disputes shall apply to consultations and the settlement of disputes under this Agreement.

1.1 of the S. text.\textsuperscript{144} The reasons behind retaining paragraph 1.1 of the S. text in Article 3.1 of the DSU are the following.\textsuperscript{145}

- A historical and established reference to the basis of the new dispute settlement system which is familiar to the Members of the GATT and
- the Jurisprudence built up over the years on the basis of the Articles XXII and XXIII can continue to be useful, particularly the intricate procedures and rights and obligations which have evolved on the basis of these Articles.

Not only the experience but also the GATT doctrine is transposed into the DSU. Moreover, the relevant jurisprudence built up by a series of panel rulings continues to be useful even in the framework of WTO dispute settlement mechanism. This is corroborated by Article XVI.1 of the Agreement establishing WTO, which provides.

“Except as otherwise provided for under this Agreement of Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to the GATT 1947 and the bodies established in the framework of GATT 1947.”

The Article XVI.1 of the WTO mandates the GATT Jurisprudence to guide the jurisprudence and practice of the WTO.\textsuperscript{146} This jurisprudence guidance clause was clearly the desire of some negotiators to deal explicitly with this subject to the Uruguay

\textsuperscript{144} Ibid at 27.
\textsuperscript{145} Ibid.
\textsuperscript{146} Croley, Steven P. and Jackson, John H: WTO Dispute Procedures, Standard of Review, and Deference to National Governments, 90 AJIL 2 at 195 (1996).
Round influenced by their reaction to some GATT Panel Cases, especially anti-dumping cases, in which observers felt that the panels have over-reached their authority and been too intrusive in disagreeing with national government authorities.\footnote{147}{Ibid at 95-96. For example in some cases panels had not developed a consistent rule and were not guided by previous doctrines. In 1951 in a case involving complaints by Ozechoslovakia against US, escape clause action that had raised tariff barriers on the importation of ‘hatter’s fur’. The working party concluded in favour of US, reasoning that: (i) a matter must be to a certain extent a matter of economic judgement and that it is natural that governments should on occasion be greatly influenced by social factors such as local employment problems and (ii) violation must be clear and unreasonably great. While in a 1985 case brought by Finland against New Zealand on application of anti-dumping duties on imports of Transformers the panel rules that: (i) maternal enquiry must be sufficiently established by the defendant and (ii) the panel reserves the right of standard of review.}

In the name of previous decisions, procedures, and the customary practices of GATT doctrines, the DSB cannot exercise its interpretive authority to add or diminish the rights and obligations provided in the Covered Agreements.\footnote{148}{Article 3.2 of the DSU runs: The dispute settlement system is central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements in accordance with the 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.}

Such ‘restrainism’ had already got a seed in the 1982 decision.\footnote{149}{Paragraph 3 of the 1979 understanding’s annex provided: ‘the function of a panel has normally been to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters. In contrast, paragraph (X) of the 1982 Ministerial Decision stated. It is
Article 3.2 clearly reflects the view widely held by trade policy makers that international trading rights and obligations could be created, modified or diminished only through negotiations between the relevant parties and not through judicial interpretations.\(^{150}\) It cognitates a clear perspective of further development of international trade law in accordance with the customary rules of interpretation of public international law.

The approach to dispute settlement reflected in paragraph 3.2 is consistent with the objectives of those countries which sought to achieve a better rule-based international dispute settlement system to deal with international trade disputes. The adherence to the rules of interpretation of the public international law in the implementation of provisions of the Covered Agreements will contribute towards enhancing the security, certainty and predictability of the system and provide a greater justice basis for the decisions of the DSB.

**The Juristic basis applied by the DSB in its first decided case, United States-Standards for Reformulated and Conventional Gasoline.**\(^{151}\) The DSU observed, analyse and draw conclusions based on part decisions of GATT and the ICJ.\(^{152}\) As Shenk observes, that the Appellate Body has applied a


\(^{152}\) Such observed part cases are (i) Canada administration of the Foreign Interment Review Act, BISD 305/140 adopted on 7\(^{th}\) February 1984 (ii) United States, section 337 of the Tariff Act of 1930, BISD 365/345 adopted 7\(^{th}\)
version of the least trade restrictive approach that has characterized GATT jurisprudence.\textsuperscript{153}

### 3.8 Innovations of WTO Understanding

WTO has brought out two innovations i.e., (i) Operational innovations and (ii) Institutional innovations.\textsuperscript{154}

#### 3.8.1 Operational Innovations

##### 3.8.1.1 The Negative Consensus Rule and Automaticity

Past experience has proved that the consensus rule granted a veto power to each and every Contracting Party, who wanted to defeat the panel process and the surveillance process, if it was against the party’s will. This rule resulted in weakening the

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whole GATT norms and doctrines. If the WTO has to work effectively, the first reform of consensus rule has to be removed, and to save WTO from being crumbled, the DSU adopted negative Consensus rule. According to this negative consensus rule, ‘suo moto’ the panels are formed, the decisions of panel and appellate body are adopted, and the surveillance process is effectuated, unless decided by consensus not to do that.

In this regard, Article 2.4 of the DSU states that where the rules and Procedures of this understanding provide for the DSB to take a decision, it shall do so by consensus.”

The footnotes of the Article 2.4 foresees that:

“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.”

This definition is commonly in accordance with the generally accepted term of ‘consensus’; at far the adoption of decision, concerns positive consensus is exercised. But the DSU has embraced a profound reverse consensus rule as one of the major innovations articulated by WTO. The concept of reverse consensus rule is incorporated in Articles 6.1, 16.4, 17.4, 21.6 and 22.6. All these Articles provide that ‘ipso facto’ decision is taken from establishing panel to the authorization of retaliation, unless decided by consensus not to do that.155 Once the panel is

155 Article 6.1 on establishment of panel states “if the complaining party so requests, a panel shall be established...unless at that meeting the DSB decides by consensus not to establish a panel. Article 16.4, on adoption of panel Report provides...the report shall be adopted at a DSB meeting,
established, its functions and procedures up to the adoption of panel report of Appellate Body Report cannot be abstracted by a veto of disputing parties unless a mutually agreed solution is reached halfway. Panel or Appellate Body ruling is automatically adopted. Once it is adopted, the issue remains in the agenda unless it is executed faithfully. Multilateral surveillance and retaliation is automatically granted in case of failure of the defendant to implement ruling.

3.8.1.2 Participation of Disputing Parties

This disputing parties have to participate in a bilateral consultation as a first step. The party should reply to a request for consultation not later than ten (10) days after the request was made and had to enter into consultation within thirty (30) days from the date of request.\textsuperscript{156} If the consultations fail to settle a dispute within sixty (60) days after the request for consultations, the complaining party may request for the establishment of a panel. The complaining party may request a panel during the sixty days period of the consulting parties jointly consider that consultations have failed to settle the

\textsuperscript{156} Article 4.3 of DSU.
dispute.\textsuperscript{157} In the case of Uruguay, including in the case of perishable goods, Members enter into consultations within a period of not more than ten (10) days from the date of the request. If the consultations fail to settle the dispute within a period of twenty (20) days after the request, the complaining party may request for the establishment of a panel.\textsuperscript{158}

In the panel proceedings, the parties retain a right to be consulted regularly and a corresponding duty falls to the panel also. The disputing parties should be given adequate opportunity to develop a mutually satisfactory solution.\textsuperscript{159} Similarly, the panel has to provide sufficient time for the parties to the dispute to prepare their submissions.\textsuperscript{160} If a mutually satisfactory solution fails, the panel issues its final report to the parties within six (6) months and in case of Uruguay Round within three (3) months from the date of the formation of the panel.\textsuperscript{161} However, before issuing a final report the panel provides interim report to the parties to the dispute for their comments.\textsuperscript{162}

Article 16.3 provides a right to the parties to a dispute to participate fully in the consideration of the panel report by the DSB, and assures that their views shall be fully recorded. A question naturally arising here is whether the parties are provided with a right to Veto under this Articles or not. It does not mean that negative consensus rule would appear unlikely to take place.

\textsuperscript{157} Ibid Article 4.7.
\textsuperscript{158} Ibid Article 4.8.
\textsuperscript{159} Ibid Article 11.
\textsuperscript{160} Ibid Article 12.4
\textsuperscript{161} Ibid Article12.8
\textsuperscript{162} Ibid Article 15.
3.8.1.3 Transparency

Disputing parties are not prevented from publicly voicing their position. Moreover, if other WTO Members so request, non confidential summaries of the opinion paper submitted during panel procedures could also be prepared for disclosure to the general public.\textsuperscript{163} Written submission to the panel or to 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 statement of its own positions to the public. 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.\textsuperscript{164}

3.8.1.4 Restrictions on Unilateral Retaliations

When the contracting party concerned fails to implement the recommendation or ruling of the council within the reasonable period of time, the other party may request authorization from the Council to suspend the application to the contracting party concerned of concessions or other obligations under the DSU.\textsuperscript{165} This possibility, which was hardly been invoked in GATT practice, is likely to be resorted to under WTO in future.\textsuperscript{166} Due to the innovation of the negative consensus rule, a regime of

\textsuperscript{163} Ibid at 118
\textsuperscript{164} Article 18.2 of the DSU
\textsuperscript{165} Ibid Article 22.
\textsuperscript{166} Supra note 27 at 155-56.
retaliation is created at request.\textsuperscript{167} Retaliation is restricted in two senses; they are:

One, under Article 23.1, retaliation cannot be used unilaterally. It is to be used, following the rules and procedures established under the DSU for settlement of dispute. This designs that without the rulings of the DSB, the use of unilateral retaliation is a manifest violation of WTO norms. \textbf{When US enacted its Trade Act 1974, 98 cases have been investigated thereafter under the Section 301.\textsuperscript{168} } After WTO coming into existence, bypassing WTO, US used section 301 once \textbf{unilaterally in the Automobile Disputes with Japan but its action was sharply criticized at home and abroad, } although, the dispute resolved fairly quickly through bilateral consultations and negotiations.\textsuperscript{169}

Two, requesting suspensions of concession and obligations applies certain formalities. First, it should seek to suspend concessions or other obligations in the same sector, as the panel or the Appellate Body has found a violation or other nullification or impairment. Second, if the party concerned considers that the suspension of concessions or other obligations in the same sector is not practicable or effective, it may seek to suspend concessions or other obligations in other sectors under the same agreement. Third, it considers that this is not practicable or effective, and the circumstances are serious enough, it may seek to suspend concessions or other obligations under another

\textsuperscript{167} Ibid at
\textsuperscript{168} Puckett, Lynne A and Reynolds, William, Rules Sanctions and Enforcement under section 301: At Odd with the WTO, 90 AJIL.4 at 676 (1996).
The purpose of these provisions is to avoid retaliation measures which cause harm to producers who have nothing to do with the original dispute. Mora Miquel has studied the limitations and dimensions of retaliation in the following three broad prospectuses. First, the new consensus rules make the adoption of retaliatory measures very feasible. Experience will show whether this will be a useful tool to induce compliance by the defaulting party. Since retaliatory measures adopted by weak countries are usually meaningless, a criticism that might be advanced is that this system is only likely to work in cases involving parties with similar economic weight. An analysis of the dispute settlement procedures that have taken place in recent years reveals that most cases, in which implementation problems have arisen, have been among the four wealthiest parties, US, EC, Japan and Canada. Although some scholars have defended sanctions, they have limited use and their deterrent effect is doubtful. In addition, according to economic theory, the imposition of trade sanctions is self-defeating; it harms primarily the country which imposes them. Retaliation is considered as a remedy, which,

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170 Supra Article 22.
in the end, is more harmful than the disease.\textsuperscript{174} Third, it is likely that, if the retaliation measures fail to induce compliance, the complaining party will request successive extensions of the authorization. Although the retaliatory measures are designed to be temporary, a risk exists that in practice they will evolve towards a substitute for the specific performance of the defaulting party.

3.8.2 Institutional Innovations

3.8.2.1 Establishment of Dispute Settlement Body (DSB)

Under GATT 1947, there was no formal dispute settlement institution.\textsuperscript{175} The GATT Article XXII and XXIII were not adequate to provide detailed rules and procedures for settlement of dispute as the GATT council characterized a diplomatic body rather than a judicial body. Unlike the GATT 1947 Understanding and Decisions, WTO Agreement established an autonomous body or institution for settlement of dispute. i.e., Dispute Settlement Body (DSB) and Dispute Settlement Understanding (DSU). As a noticeable achievement of Uruguay Round\textsuperscript{176}, the dispute settlement mechanism became considerably judicial in nature.\textsuperscript{177}

\textsuperscript{174} Hilf, Meinhard, Settlement of Disputes in International Economic Organisations, Comparative Analysis and proposals for strengthening the GATT Dispute Settlement Procedure, in Petersmann & Hilf (eds), the New GATT Round of Multilateral Trade Negotiations, Legal and Economic Problems at 318 (1987),

\textsuperscript{175} Getlan, Myles, TRIPS and the Future of Section 301. A Comparative Study in Trade Dispute Resolution, 34 column. J. Transnt’l L.1.203.

The nucleus and vital part of the WTO institutional structure is the dispute settlement procedure derived from decades of experiments and practice in the GATT, but now, the new treaty text of the DSU, is a part of the WTO charter. Over the last fifteen years, many countries have come to recognise the crucial role that dispute settlement plays for any treaty system. Dispute settlement procedures assist in making rules effective, adding an essential measure of predictability and effectiveness to the operation of a rule-oriented system in the otherwise relatively weak realm of international norms. Thus the GATT Contracting Parties resolved at the 1986 launching meeting of the Uruguay Round to deal with some of the defects and problems existing in the dispute settlement rules. The result of that resolve was the new DSU.178

The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, to secure the withdrawal of the measures concerned, the provisions of any of the covered agreements are found to be inconsistent. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable. The last resort which this understanding provides to the Member invoking the dispute settlement procedures, is the possibility of suspending

177 Jackson, John H., The WTO Dispute Settlement Understanding-Misunderstanding on the Nature of Legal Obligation, 91 AJIL, 1, at 60-64 (editorial comment) (1997).
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.\textsuperscript{179} So both pragmatic and judicial solutions of dispute are obvious under this mechanism.

One of the most contentious issues during the Uruguay Round was the DSU and its effect upon sovereignty of nations.\textsuperscript{180} It was because the new dispute settlement mechanism vitiated the veto system and demanded obligation from Members to legislate in conformity with the WTO.\textsuperscript{181} The US Congress mandated the US negotiators in the Uruguay Round. The main aim of US in the Uruguay Round was to establish a binding and automatic dispute resolution system replacing the old GATT.\textsuperscript{182} While the US House of representatives on 29 November 1994, and the Senate on 1 December 1994 voted for Uruguay Round implementation of legislation, the debate centred on the issue of DSU and its impact on the US sovereignty.\textsuperscript{183} These facts also prove the potential role and innovative character of DSU in multilateral trading system.

The institutional frame work of the DSU also meaningfully resembles to the stratified local judicial structure.

At the top is the Dispute Settlement Body, and below that, is the Appellate Body and below the Appellate Body there is a Panel.

\textsuperscript{179} Article 3.7 of the DSU.
\textsuperscript{180} Horlick, Gray N. WTO Dispute settlement and the Dole Commission, 29, J. World Trade 6 at 45 (1995).
\textsuperscript{181} Article XVI.4 of the WTO Agreement.
\textsuperscript{182} Supra Note 95.
\textsuperscript{183} Ibid Note 97.
When disagreements appear between the concerned parties on rulings with a mutual agreement, arbitration may be a recourse.

**Figure 3.1**

**Adjudication Chart**

Source: WTO Publication

The General Council of the WTO works as Dispute Settlement Body (DSB) and the Panel works like a Trial Court in the national context similar to the National Court of the Record. The Appellate Body decides the disputes and interpret the legal issues. Still one more ladder of alternative mechanism is accorded to Arbitration. Example; *Japan-Taxes on Alcoholic Beverages*.186

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184 Ibid Art. 17.6.
185 Ibid Art. 25.
186 WTO (WT/DSB/15/February (1997). On 1 November 1996, the DSB adopted (WT/DSB/M/25), the Appellate Body Report and the Panel Report, on modified by the Appellate Body. As required by Article 21.3 of the DSU, Japan informed the DSB on 20 November 1996 of its intention in respect of
In essence, the WTO dispute settlement system can be characterised as a compulsory and binding system with stringent time scales, according to which, dead lines have been set, providing for legal appeal and for clear rules of implementation of the rulings of Panels and Appellate Body. Possible compensation and retaliation has also been regulated in greater detail than before. Finally, it is structured as an integrated system.

The substructures of the DSB are inter alia.

the implementation of the DSB’s recommendation and rulings. Japan indicated that it would not be able to implement immediately, but only within ‘reasonable period of time’. Japan did not propose the DSB’s reasonable period of time; for the latter’s approval as provided for under Article 21(3) of the DSU. It indicated that, it would initiate negotiations with the EC, the US and Canada, the other parties to the dispute, on what constituted ‘a reasonable period of time’. These negotiations did not succeed, and no mutual agreement within the meaning of Article 21(3) (b) of the DSU was reached. The negotiations with EC, did however, lead to an agreement on an accelerated reduction of the tariff rates on wisky and brandy as compensation for delayed implementation, but this agreement does not prejudice their position on the issue of a ‘reasonable period of time’. In the absence of an agreement the US requested on 24 December 1996, that the ‘reasonable period of time’ should be determined through binding arbitration as is provided for by Article 21(3). After Japan and the US founded to agree on the appointment of an arbitrator within the ten days envisaged by the note to Article 21(3), the US requested on 7 January 1997 that the Director General appoint arbitrator. Following consultation with the US and Japan the Director General Appointed Julio Lecarte-Muro as an arbitrator on 17 January 1997. He awarded the arbitration concluding 15th months as a ‘reasonable period of time’.
3.8.2.2 Panel

Panels are formed automatically (Art. 6.1 of DSU). If consultation fails to settle a dispute within sixty days, or if the consulting parties jointly request a panel before that time (DSU. Art. 4.7), in urgent cases, the period is reduced to twenty days (DSU. Art. 4.8), unless at that meeting, the DSB decides by consensus not to establish a panel.\textsuperscript{187} In this regard the WTO rules are not a codification of GATT doctrine but an answer where there is no doctrine.\textsuperscript{188} Request for establishment of a panel can be made in writing. It is the most important document, based on which the rights and obligations of the parties are determined.

Generally, a panel is composed of three members. But, if the parties do not agree within ten days from the establishment of a three member panel, the DSB establishes a five member panel (Art. 8.5 of DSU).

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. (DSU. Art. 8.10)

3.8.2.3 Multiple Complaint

When more than one complaint on the same issue is brought before the DSB, a single panel is formed to handle the matter, which is based on the doctrine of Judicial economy. Such a

\textsuperscript{187} Art. 6.1 of DSU.

\textsuperscript{188} Necos, Philip M; Trade Without Values 90, NW, UL. Rv at 401 (1996).
practice of joinder developed in GATT since 1987,\textsuperscript{189} when the US practices influenced it.

As per Art. 9 of the DSU, when a request for the establishment of a panel is made by more than one complainants in respect of the same matter, a single panel may, as a rule, be established.

\textbf{3.8.2.4 Third Parties}

While resolving the dispute, apart from the parties to the dispute, other Members who are interested in the dispute will also be taken into full account during the panel process, though, all the Members do not have the right to be heard. But the third party retains a right of hearing, submission in written form, communication of such submission to the parties to the dispute as well as communication of the submission of the disputing parties to the third party and reflexion of its submission and hearing in the panel report. To be a third party, a Member’s substantial interest in the concerned dispute has to be subjoined (Art. 8.10 of the DSU).

Even in the GATT practices, third party had given access to written comment and oral arguments.\textsuperscript{190} The 1979 understanding slightly codified the right of the third party to appear before the panel, but stated nothing else concerning their other rights. The DSU went a step further, providing third party the right to appear before panels, and mandated that third party’s submissions be reflected on the panel report, and also granted access to submissions produced by the disputing parties without requiring the permission of the panel.


\textsuperscript{190} Japan-Measures on Import of Silk Yarn, 25 supp, BISD, at 107, (1978).
3.8.2.5 Appellate Body

On completion of the work of the panel, it provides its report to the DSB. The report is automatically adopted by the DSB, and placed for adoption in the meeting of the DSB after twenty days of its issuance and adopted within sixty days from its issuance, unless the dissatisfied or losing party to the dispute formally notifies the DSB of its intention to appeal or decides by consensus not to adopt it after twenty days of its issuance (DSU, Art. 16).

But Art. 16 does not clearly mention the limitation of the appeal. The right to appeal pertains only to the disputing parties and not to the third party. Appeal is limited to issues of law covered in the panel report and legal interpretation developed by the panel. Third party may make a written submission and be heard by the Appellate Body (DSU. Art. 17.4 and 17.6).

3.8.2.6 Execution of Report

During GATT era, the weak implementation mechanism, as of the consensus rule, created controversies and doubt on adequate compliance with recommendations and rulings. In some cases, implementation had been partial, or had taken a very long time and increasing problems of conditional and incomplete implementation of panel report was in vogue. The DSU is structuralised to solve these weaknesses of the old regime. Among its improvements, one of the salient features is

the detailed regulation of compensation and suspension of concessions.

Some doubt the effective implementation of the recommendations or rulings in diplomatic, political and academic circles. The controversy is about the legal status of such a report when adopted. The specific question here is whether the international law obligation deriving from such a report gives the option either to compensate for trade or other measures or to fulfill the recommendation of the report mandating that the Member brings its practices or law into consistency with the text of the annex to the WTO agreement.

Like the GATT rules that preceded them, the WTO rules are simply not binding in the traditional sense. When a panel established under the WTO Dispute settlement understanding issues a ruling adverse to a Member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted on police enforcement. The WTO has no prison, no bail bondsman, no blue helmets, no lathi or tear gas.

WTO is essentially a confederation of sovereign national governments. It relies upon voluntary compliance. The genius of the GATT/WTO system is the flexibility with which it accommodates the national exercise of sovereignty, yet promotes compliance with its trade rules through incentives.192

192 Bellow, Judia Hipper, The WTO dispute settlement understanding; Less is more (Editorial Comment) 90 AJIL.3 at 416-17 (1996).
This chapter is an attempt to highlight the statutory changes taking place in the dispute settlement mechanism until the formation of the World Trade Organisation.
Chapter IV

ROLE AND PRINCIPLES OF THE WTO DISPUTE SETTLEMENT