Chapter 3

WTO'S DISPUTE SETTLEMENT MECHANISM: THE CONSTITUTIONAL FRAMEWORK

The metamorphosis from power-oriented conflict resolution to law-oriented dispute-settlement is reflected in the Understanding of Rules and Procedures Governing the Settlement of Disputes (DSU).

The innumerable procedures, the institutional structure, the existence of an Appellate Body contained in DSU is in contrast to the GATT 1947, that provided outlines of dispute settlement mechanism in Article XXII and XXIII. Nevertheless, the DSU, as part of the WTO Charter, is based on decades of experiment and practice in the GATT and has integrated various dispute settlement procedures of GATT 1947 as well as the Tokyo Round codes into a unified and coherent mechanism.

Before explaining the legal structure of the WTO, a brief explanation of the differences between GATT and WTO as well as the organisational structure of WTO is given.

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3.1 GATT and WTO: Major Differences

Even though WTO is regarded as the successor of GATT, there exist major differences, which could be enumerated as under:

3.1.1. Unified Package of Agreements

The GATT framework allowed for the existence of a number of important side agreements concluded in various GATT rounds. It is "a network of treaty agreements" that amounted to more than 180. For instance, the Tokyo Round, in addition to tariff-reduction protocols, included nine special agreements and four understandings that dealt with different subjects as follows:

Agreements on:

1. Technical Barriers to Trade (TECH)
2. Government Procurement (PROC)
3. Interpretation and Application of Articles VI, XVI and XXIII (subsidies) (SUBS)
4. Arrangement regarding Bovine Meat (MEAT)
5. International Dairy Arrangement (DAIRY)
6. Implementation of Article VII (Custom Valuation) (VAL)
7. Import Licensing Procedures (LIC)
8. Trade in Civil Aircraft (AIR)
9. Implementation of Article VI (Anti-Dumping Duties (AD)).

Understandings on:

1. Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.
2. Declaration on Trade Measures Taken for Balance of Payments Purposes.
4. Understanding Regarding Notification, Consultation, Dispute Settlement and

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The agreements were signed as stand-alone treaties, binding only those nations that sign and ratify them. Each had its own dispute settlement mechanisms, eventually leading to balkanization of judicial process.

But WTO has provided a unified package of agreements by providing a common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments included in the annexes to the Agreement. There are four such Annexes that deal with the rights and obligation of members.

Annex 1, which has three parts: Annex 1A, related to trade in goods, contains the GATT 1994; Annex 1B that contains Trade in Services (GATS); and Annex 1C dealing with the Agreement on Intellectual Property Rights (TRIPS). Annex 2 contains the Understanding of Rules and Procedures governing the Settlement of Disputes, i.e. the WTO’s dispute-settlement mechanism. Annex 3 contains the Trade Policy Review Mechanism (TPRM), through which the WTO conducts the surveillance of its members' trade policies. Lastly, it has Annex 4, referred to as Plurilateral Trade Agreements that would bind only the signatories.

3.1.2. Expansion of GATT

The domain of WTO is expanded by including Trade in Services (GATS) and TRIPS within the multilateral system.

GATS: The General Agreement on Trade in services is divided into six parts contained in twenty-nine articles. The GATS included four elements. (1) a set of

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1 Jackson, supra note 3, p.28. Jackson says:

No longer do different subjects have different dispute settlement procedures, and the dispute-settlement procedures under the separate Tokyo Round Codes are no longer valid. Nevertheless, even though this was the goal, complete achievement was not entirely possible, as one of the appendices of the DSU indicates. (Also see John H. Jackson, The World Trading System: Law and Policy of International Economic Relations (Cambridge: Massachusetts & London, MIT, 1997) p.125.)

2 There are four such agreements:
(a) Agreement on Trade in Civil Aircraft
(b) Agreement on Government Procurement
(c) International Dairy Agreement
(d) Arrangement regarding Bovine Meat

general concepts, principles and rules related to trade in services; (2) specific commitments; (3) an understanding for progressive liberalisation of trade in services; and (4) a set of attachments and annexes concerned with sectoral specificities and ministerial decisions concerned with the Agreement.

TRIPS: It has seven major parts and 73 articles that cover copyrights and related rights, layout designs of integrated circuits, geographical indications, trademarks, industrial designs and patents.

3.1.3. Expansion of Membership

There has been a great expansion in the membership. The membership of WTO currently stands at 145. China is the last member to join.

Table 3.1: Membership in GATT during different rounds was as follows:

<table>
<thead>
<tr>
<th>Rounds</th>
<th>Period</th>
<th>No. of Contracting Parties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Geneva</td>
<td>1947</td>
<td>23</td>
</tr>
<tr>
<td>Annecy</td>
<td>1949</td>
<td>29</td>
</tr>
<tr>
<td>Torquay</td>
<td>1950-51</td>
<td>32</td>
</tr>
<tr>
<td>Geneva</td>
<td>1955-56</td>
<td>33</td>
</tr>
<tr>
<td>Dillon</td>
<td>1960-61</td>
<td>39</td>
</tr>
<tr>
<td>Kennedy</td>
<td>1963-67</td>
<td>74</td>
</tr>
<tr>
<td>Tokyo</td>
<td>1973-79</td>
<td>99</td>
</tr>
<tr>
<td>Uruguay</td>
<td>1986-94</td>
<td>103 in 1986</td>
</tr>
<tr>
<td></td>
<td></td>
<td>117 by end 1993</td>
</tr>
<tr>
<td></td>
<td></td>
<td>124 as of early 1991</td>
</tr>
</tbody>
</table>

(Source: Hoekman and Kostecki, supra note 7.)

3.2 Organisational Structure of WTO

The WTO shall provide a single institutional framework for the conduct of trade relations among its members and matters related to 'covered' agreements. Its objective is to achieve economic development by substantially reducing tariffs, dismantling trade barriers and eliminating discriminatory treatment in international trade relations. WTO, being assigned with the responsibility for the multilateral trading system, has the same status as institutions like the World Bank and the IMF.

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8 This will be discussed in detail, later.
11 Hoekman and Kostecki, supra note 7.
It has its own legal personality and its officials and the representatives of the members are accorded privileges and immunities similar to those accorded to the specialised agencies of UN.\(^9\)

3.2.1 Organisational Structure\(^{13}\)

At the apex of WTO comes the Ministerial Conference, which shall meet at least once every two years. The Ministerial Conference is composed of representatives of all the Members. A General Council composed of representatives of all the members will oversee the operation of the agreement and ministerial decisions on a regular basis. This General Council will also act as Dispute Settlement Body and Trade Policy Review Mechanism (See Chart).

\textbf{Figure 3.1: The World Trade Organisational Tree}

\begin{center}
\begin{tikzpicture}
\node (minConf) {Ministerial Conference (every 2 years)};
\node (generalCouncil) [below of=minConf] {General Council};
\node (disputeBody) [left of=generalCouncil] {Dispute Settlement Body};
\node (tradePolicy) [right of=generalCouncil] {Trade Policy Review Mechanism (trade)};
\node (tradeCommittee) [below of=tradePolicy] {Council on Trade in Goods};
\node (servicesCommittee) [left of=tradeCommittee] {Council on Trade in Services};
\node (balanceCommittee) [above of=servicesCommittee] {Council on Trade & Development};
\node (financeCommittee) [left of=balanceCommittee] {Committee on Trade in Services};
\node (tradeEnvironmentCommittee) [below of=financeCommittee] {Committee on Trade & Environment};
\end{tikzpicture}
\end{center}

(Committees and working parties set up to administer the various arrangements that are covered by GATT, GATS or TRIPS.)
(Source: Hoekman and Kostecki, supra note 7, p.39.)

\(^{12}\) \textit{Marakkehs Agreement}, Article VIII, supra note 9.

\(^{13}\) \textit{Id.}, Article IV.
There shall be three councils\textsuperscript{14}, which shall operate under the general guidance of the General Council. The Ministerial Conference shall also establish four Committees - Trade and Development; Balance of Payments Restrictions; Budget, Finance and Administration; and Trade and Environment.

\subsection{3.2.2 Decision by Voting}

Normally, decisions in WTO are made on the basis of negotiation\textsuperscript{15} and consensus and decisions of the Ministerial Conference and the General Council are taken by a majority of the votes cast, on the basis of `one country, one vote'.\textsuperscript{16} However, there are certain types of issues, which require specific quota of votes. This is presented in the following table:

\begin{table}[h]
\centering
\begin{tabular}{|l|p{10cm}|}
\hline
\textbf{Decision making rule} & \textbf{Type of Issue} \\
\hline
Unanimity & Amendments relating to general principles such as MFN treatment \\
Three-quarters majority votes & Interpretation of the provisions of the agreement and waiver of a member's obligations; \\
Two-third majority vote & Amendments relating to issues other than general principles such as MFN treatment \\
Consensus & Where not otherwise specified \\
\hline
\end{tabular}
\caption{Decision-Making in the WTO}
\end{table}

(Source: Hoekman & Kostecki, \textit{supra} note 7, p.40.)

Adoption of amendment is an exclusive prerogative of the Ministerial Conference. However, an amendment can be recommended by any member or any Council or the General Council\textsuperscript{17} through submission to the Ministerial Conference.

Now the major provisions in Annex 2 on “Understanding on Rules and Procedures Governing the Settlement of Disputes” that create the WTO’s dispute settlement mechanism will be explained.

\subsection{3.3 WTO’s Dispute Settlement Mechanism}

\textsuperscript{14} The three Councils are: (a) Council for Trade in Goods, which shall oversee the functioning of the Multilateral Trade Agreements on trade in goods in Annex 1A; (b) Council for Trade in Services, which shall oversee the functioning of the Multilateral Trade Agreements on trade in services (GATS) in Annex 1B; (c) Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS), which shall oversee the functioning of the Multilateral Trade Agreements on TRIPS in Annex 1C.

\textsuperscript{15} Hoekman and Kostecki, \textit{supra} note 7, p.40.

\textsuperscript{16} Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member states (see GATT Article IX).
3.3.1 General Provisions

The general purpose of Article 3 is to harmonise the dispute settlement mechanism under Article XXII and Article XXIII of GATT 1947 with new rules and procedures of WTO developed at the Uruguay Round. Each member is bestowed with the responsibility of avoiding obstruction to treaty objectives and to act in harmony with them. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is to seek a withdrawal of measures inconsistent with the provisions of any of the covered agreements. And the last resort is the suspension of the application of concessions or other obligations under the covered agreement.

Article 3.2 calls for the clarification of WTO provisions in accordance with the customary rules of interpretation of public international law. Articles 31 and 32 of the Vienna Convention on the Law of Treaties have attained the status of customary international law for treaty interpretation. This article reflects a "measure of recognition that the GATT is not to be read in clinical isolation from public

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17 Marakkesh Agreement. Article IV: 5, supra note 9.
18 DSU, Article 3.7, supra note 1.
19 This phrase has been interpreted by the AB to refer to the interpretation rules of the Vienna Convention. (See WTO Appellate Body Report, Japan-Taxes on Alcoholic Beverages, WTO Doc., WT/DS 8,10,11/AB/R dated Oct. 4, 1996, p.10.)
20 Vienna Convention on the Law of Treaties, (opened for signature on May 23, 1969), Article 31 reads:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.

And Article 32 entitled "Supplementary means of interpretation" reads:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable. (Also see Ian Sinclair, The Vienna Convention on the Law of Treaties (N.H: Dover, Manchester University Press, 1984)
international law.\textsuperscript{21}

If there is an infringement of the obligations assumed under a covered agreement, the action is considered \textit{prima facie} to constitute a case of nullification or impairment, which means that a breach of rules has the adverse impact on other member parties to that covered agreement. In such a case the burden of rebutting the charge is placed upon the Member against whom the complaint has been brought.\textsuperscript{22} Regarding the complaints invoked under the provisions of GATT-1947, GATT dispute settlement rules and procedures shall continue to apply so that the older dispute mechanism would remain undisturbed.\textsuperscript{23}

3.3.2 Consultations

Article 4 that deals with the consultations is the "diplomatic opening gun".\textsuperscript{24} WTO’s dispute settlement process begins with consultations. Article 4 strives to strengthen and improve the effectiveness of the consultation procedures. It also fixes certain time-table for the completion of consultation process. Thus, a request for consultation, unless otherwise mutually agreed, has to be replied to within 10 days after the date of its receipt and the parties shall enter into consultations within a period of 30 days. If this does not happen, the concerned Member could directly proceed to request the establishment of a panel.\textsuperscript{25}

If consultations are held and if they fail to settle a dispute within 60 days after the receipt of the request for consultations, the complaining party may request the establishment of a panel.\textsuperscript{26} With respect to cases of urgency, including those which concern perishable goods, the time schedule is shorter. In this case, Members shall enter into consultations within a period of 10 days after the receipt of the request. Complaining party could request the establishment of the panel, if consultations fail.\textsuperscript{27} Consultations shall be confidential\textsuperscript{28} and special attention to the particular problems of the developing

\textsuperscript{22} DSU, Article 3.8, supra note 1.
\textsuperscript{23} Id., Article 3.11.
\textsuperscript{24} Swacker, et al., supra note 1, p.369.
\textsuperscript{25} DSU Article 4.3, supra note 1.
\textsuperscript{26} Id., Article 4.7.
\textsuperscript{27} Id., Article 4.8.
\textsuperscript{28} Id., Article 4.6.
countries should be addressed.\textsuperscript{29} A third party having substantial trade interest in the matter could also join, provided it shall notify the consulting Members and the DSB, within 10 days after the circulation of the request for consultations.\textsuperscript{30}

### 3.3.3 Good Offices, Conciliation and Mediation\textsuperscript{31}

These are procedures that are undertaken to settle a dispute voluntarily.\textsuperscript{32} They may be requested at any time by the party to a dispute and may be terminated at any time. Once these procedures are terminated, a complaining party can request the establishment of the panel.\textsuperscript{33} The proceedings are confidential. The Director-General acting in an ex officio capacity can offer good offices, conciliation, or mediation to enable the Members to reach a settlement.\textsuperscript{34}

### 3.3.4 Establishment of Panels

Article 6 entitles the complainant to have the panel established.\textsuperscript{35} The complainant should make his request in writing, which should indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint to present the problem clearly.

The Parties have to adopt the terms of reference within which the panels are to act. Panels should adopt the terms of reference within 20 days, unless the parties otherwise agree.\textsuperscript{36}

The panel shall be composed of well-qualified individuals who may be panelists in GATT mechanism, a representative to the Council or Committee of any covered agreement, a scholar in international trade, or a senior trade policy official of a Member. To ensure independence in judgements, citizens of Members whose governments are parties to the disputes or third parties are restrained from serving as

\begin{itemize}
  \item \textsuperscript{29} Id., Article 4.10.
  \item \textsuperscript{30} Id., Article 4.11.
  \item \textsuperscript{31} Id., Article 5.
  \item \textsuperscript{32} Id., Article 5.1.
  \item \textsuperscript{33} Id., Article 5.3.
  \item \textsuperscript{34} Id., Article 5.6.
  \item \textsuperscript{35} A single panel may be established to examine multiple complaints, if such complaints are related to the same matter. However the panel shall submit separate reports, if one of the parties so requests. And in case more than one panel is established on the same subject matter, the same persons shall serve as panelists on separate panels. (See Article 9 on 'Procedures for Multiple Complaints', id.).
  \item \textsuperscript{36} Id., Article 7.
\end{itemize}

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panelists. Besides, panelists shall serve in their individual capacities and not as government representatives. Panels shall be composed of three panelists and a developing country Member could demand the inclusion of a panelist from a developing country Member, if its dispute is with that of a developed country Member.\(^{37}\)

The function of this panel is to assist the DSB, which will make recommendations or give rulings based on a panel's objective assessment of the matter. For this, the panel shall be in touch with the disputants regularly and give them sufficient opportunity to develop a mutually satisfactory solution.\(^{38}\)

### 3.3.5 The Panel Process

Within a week of its composition the panel fixes its timetable. The disputants then make written submissions on the facts and arguments in the case. At the first substantive meeting, the complainant presents its case and the respondent submits its defense. The third party\(^{39}\) members who have substantial interest in the case would also make submissions. The panel members may ask questions and seek clarifications. At the second substantive meeting, the disputants make formal rebuttals. Panel deliberations shall be confidential.\(^{40}\) The panel could seek information from any individual or an expert review group to report on scientific or technical matters.\(^{41}\)

The panel then issues the descriptive (factual and argument) sections of its draft report to the parties to the dispute, giving them an opportunity to make comments.\(^{42}\) Following the expiration of the set period of time, the panel shall release an interim report, including findings and conclusions. However, a party may request the panel for an opportunity to review the interim report prior to circulation.\(^{43}\) The review may include further meetings with the party; but the review may not take more than two

\(^{37}\) Id., Article 8.

\(^{38}\) Id., Article 11.

\(^{39}\) Article 10 speaks of third parties, which means that if any Member having a "substantial interest" in a matter before a panel and having notified its interest to the DSB shall have an opportunity to be heard by the panel. But if the third party feels that the subject of a panel nullifies or impairs its benefits as well, it could have recourse to normal dispute settlement procedures. But their participation is voluntary and the outcome does not bind them.

\(^{40}\) DSU, Article 14 supra note 1.

\(^{41}\) Id., Article 13.

\(^{42}\) Id., Article 15.1.

\(^{43}\) Id., Article 15.2.
weeks. The panel then submits its final report, which includes a discussion made at the interim review stage. This report issued prior to the panel report makes it possible to avoid errors and provides the parties to the dispute adequate opportunity to avoid Appellate Body Review. This stage is supposed to maintain the "diplomatic spirit of the agreement". (See Chart 2 for a diagrammatic representation of the dispute settlement process.)

3.3.6 Adoption of the report

The DSB adopts the panel report within 60 days of its circulation. Adoption cannot take place until 20 days after its issuance. Members having objections must state their objections in writing before the DSB meeting that considers it. The DSU provides that a panel report will be adopted unless the DSB decides by consensus not to adopt it. Assuming that a losing party could not block a DSB decision in its favour, this "reverse consensus" provision assures automatic adoption of the panel report. This automatic nature of the panel report approval process manifests the qualitative superiority of WTO dispute settlement system compared to that of GATT dispute settlement system. This is meant to prevent the recurrence of blocking of the implementation of the panel report.

However, the losing party could appeal before a seven-member Appellate Body, to review the panel decision. But here too like a panel report, an AB report is adopted unless the DSB decides by consensus not to adopt it.

3.3.7 Appellate Review

Article 17 says that an Appellate Body (AB) comprising persons of recognised authority, with demonstrated expertise in law, international trade and WTO agreements shall be established by the DSB. It shall be composed of seven persons, three of whom shall serve in any one case. The members shall serve a four year term,

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42 Swacker et al. supra note 1, p.396.
43 DSU, Article 16. supra note 1.
44 Id., Article 16.4.
and each member may be re-appointed once.\textsuperscript{49}

Only parties to the dispute, not third parties, may appeal a panel report and an appeal shall be limited to the issues of law covered in the panel report.\textsuperscript{50} The AB may uphold, modify or reverse the legal findings and conclusions of the panel.

The proceedings shall not exceed 60 days. However, it could be elongated; but in no case shall the proceedings exceed 90 days. And an AB report shall be adopted by the DSB and unconditionally accepted by the disputants.\textsuperscript{51} But the panel or AB cannot add to or diminish the rights and obligations of the members.\textsuperscript{52}

This new provision incorporated in the WTO charter is intended to ensure maximum conformity with WTO rulings by the Members as well as to minimise the apprehension of WTO Member. The ultimate result of the procedure is that the appellate report will in virtually every case come into force as a matter of international law.

\textbf{3.3.8 Time frame for DSB decisions}

The period from the date of establishment of the panel by the DSB, until the DSB considers the panel or appellate report for adoption shall not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. However, this could be changed if the parties to the dispute agree.\textsuperscript{53}

\textbf{3.3.9 Surveillance of implementation of recommendations and rulings}\textsuperscript{54}

To ensure effective resolution of disputes, prompt compliance with recommendation is called for. The Member concerned must state its intentions on implementation of recommendations of a panel or the AB at a DSB meeting held within 30 days of adoption of the report concerned. If it is impracticable to comply immediately with the rulings, a "reasonable period of time"\textsuperscript{55} shall be granted to the Member.

\textsuperscript{49} \textit{id.}, Article 17.1,2 and 3.
\textsuperscript{50} However, third parties could make written submissions to AB (See \textit{id.}, Article 17.4.)
\textsuperscript{51} \textit{id.}, Article 17.5
\textsuperscript{52} \textit{id.}, Article 19.2.
\textsuperscript{53} \textit{id.}, Article 20.
\textsuperscript{54} \textit{id.}, Article 21.
\textsuperscript{55} \textit{id.}, Article 21.3 speaks about 'reasonable period of time' which shall be:
If the member fails to comply with the recommendations within the reasonable period of time, the complainant may enter into negotiations in order to determine a "mutually acceptable compensation". If no satisfactory compensation is agreed within 20 days, the complainant may request authorization from the DSB to suspend concessions or obligations against the other party.\textsuperscript{56} If there is no consensus against the request, the DSB shall authorise the suspension within 30 days of the expiry of the "reasonable period of time". If the member concerned objects to the level of suspension requested, the matter will be referred to arbitration. The arbitration shall be completed within 60 days after the expiry of the reasonable period of time.\textsuperscript{57}

The arbitrator shall determine whether the level of such suspension is equivalent to the nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions is permissible under the covered agreement. The DSB shall be informed of the decision of the arbitrator. The decision of the arbitrator is final.\textsuperscript{58}

The suspension of the concession shall be brought to an end when the Member concerned confirms with WTO provisions.\textsuperscript{59} The DSB shall continue to keep under surveillance the implementation of adopted recommendations and the case remains on its agenda until it has been resolved.

\subsection*{3.3.10 Retaliation\textsuperscript{60}}

The complaining party could request authorisation for retaliation from the DSB if the following conditions are met.\textsuperscript{61}

\begin{itemize}
\item[(a)] the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,
\item[(b)] a period of time mutually agreed by the parties to the dispute within 45 days after the date of the recommendations and rulings; or, in the absence of such agreement,
\item[(c)] a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.
\end{itemize}

\textsuperscript{56} Id., Article 22.2.
\textsuperscript{57} Id., Article 22.6.
\textsuperscript{58} Id., Article 22.7.
\textsuperscript{59} Id., Article 22.8.
\textsuperscript{60} Id., Article 22.3.
\textsuperscript{61} Norio Komuro, 'The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO
If the losing party has not brought the inconsistent measures into compliance with the covered agreements or if it has not complied with the rulings or recommendations within a reasonable period of time authorisation for retaliation could be sought.

Disagreement on satisfactory compensation:

If no satisfactory compensation has been agreed within 20 days after the expiry of a reasonable period of time, the aggrieved party could seek authorization to retaliate.

For retaliation, the DSU identifies twenty sectors spread over four agreements, i.e., Annex 1A and Plurilateral Trade Agreements with respect to goods, the GATS regarding services, and TRIPS with respect to intellectual property rights.(see Table 3)

Table 3.3: Agreements and sectors for Retaliation purposes

<table>
<thead>
<tr>
<th>The Agreements</th>
<th>The Twenty Sectors</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Goods</strong>: The Agreements listed in Annex 1A of the WTO Agreement taken as a whole, as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute to these agreements</td>
<td>One Sector for all goods</td>
</tr>
<tr>
<td><strong>Services</strong>: The GATS Agreement</td>
<td>Eleven sectors identified in the Services Sectoral Classification List^62</td>
</tr>
<tr>
<td><strong>Intellectual Property Rights</strong>: The Agreement on TRIPS</td>
<td>Nine Sectors: Copyright and related rights, trademarks, geographical indications, industrial designs, patents, lay-out designs (topographies of integrated circuits), and the protection of undisclosed information</td>
</tr>
</tbody>
</table>

(Source: Komuro, *supra* note 59, p.136)

As far as the types of retaliation are concerned, the complaining party could choose between three options.63

- Parallel retaliation: The general principle is that the complaining party should first seek to retaliate by suspending concession with respect to the same sector in which nullification or impairment has been found.64


62 See the list in document MTN GNS/W/120, GATT, Geneva.

63 DSU, Article 22.3(a), (b), and (c), supra note 1. (Also see Komuro, *supra* note 59, p.136).

64 *Id.*, Article 22.3(a).

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- Cross-sector retaliation: If the party considers the first option not practicable or ineffective, it may seek to retaliate in other sectors under the same agreements. For instance, retaliation in one sector of the GATS against an impairing measure in another sector of GATS.

- Cross-agreement retaliation: If a party considers both the options ineffective, and if it thinks that circumstances are serious enough, it could seek to retaliate in another covered agreement. Thus retaliation in TRIPS is authorised against inconsistent measures in goods sector.

To bring about compliance three additional tools are also available. First, the continuous monitoring of the implementation process, secondly, the provision of "recourse to these dispute settlement procedures, including wherever possible resort to the original panel" and thirdly, the right available to a Member to arbitration, if it has any objection regarding 'level of suspension'.

3.3.11 Arbitration

Apart from its emphasis on public international law and private international law, the WTO also relies on the premises of the law of international commercial arbitration. Article 25 speaks of arbitration within WTO as an alternative means for dispute settlement to resolve certain disputes that are clearly defined by both parties. However, in order to resort to arbitration, the parties must mutually agree to settle the dispute through arbitration. They shall also agree on the procedures to be followed.

The DSU rules on determining the deadlines regarding implementation of panel
reports, compensation and retaliation shall apply to arbitration proceedings too.\textsuperscript{74} The proceedings regarding surveillance of implementation of DSB rulings and recommendations as well as compensation and suspension of concessions shall be applicable to arbitration as well.\textsuperscript{75} The arbitration award shall be notified to the DSB and the parties to the proceeding shall agree to abide by it. A third party could join in an arbitration proceeding if both the parties who have recourse to arbitration agree.\textsuperscript{76}

\subsection*{3.3.12 Non-Violation Nullification and Impairment Complaints}

This means that even if a Member’s measures are not in violation of WTO obligation and consistent with WTO obligations technically, if the measures nullify the benefits of another Member, it could bring a complaint against those measures.\textsuperscript{77} Some WTO Agreements permit Members to raise complaint on the basis of non-violation nullification. However, certain conditions are set out to initiate non-violation complaint. The complaint shall present a detailed justification in support of the complaint \textsuperscript{78}; and if the complaint is found valid, there is no obligation to withdraw the measure. The panel or AB is to make only a mutually satisfactory adjustment.\textsuperscript{79}

\subsection*{3.3.13 Responsibilities of the Secretariat}

The Secretariat played an effective role in GATT panel proceedings.\textsuperscript{80} The WTO Agreement in effect replaces the GATT Secretariat. The WTO Secretariat too is bestowed with the responsibility of assisting panels especially on the legal, historical and procedural aspects of the matters dealt with and providing secretarial and technical support.\textsuperscript{81} The Secretariat make available a qualified expert from the WTO technical cooperation services to any requesting developing country Member.\textsuperscript{82} In order to keep the Members better informed on procedures and practices of dispute

\textsuperscript{74} Paragraph 15 of United States Administrative Action Statement, which is included as a part of the Uruguay Round Agreements Act, P.L.103-465, p. 1019 (quoted in Swacker et al., supra note 1, p.423
\textsuperscript{75} DSU, Article 25.4, supra note 1 which states that:
Articles 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards.
\textsuperscript{76} Id., Article 25.3.
\textsuperscript{77} Id., Article 26.1(a).
\textsuperscript{79} The non-violation complaints will be discussed in detail elsewhere.
\textsuperscript{81} DSU, Article 27.1. supra note 1.
\textsuperscript{82} Id., Article 27.2.
settlement, the Secretariat shall conduct special training courses for interested Members.83

3.3.14 Agreements covered by the Understanding84

Appendix 1 of the DSU speaks of three groups of agreements covered by the Understanding. However only the members who have already agreed to the provisions of Plurilateral Trade Agreements shall be covered by Appendix 1 as far as applicability of this Understanding to the Plurilateral Trade Agreements is concerned.

3.3.15 Working Procedures

Apart from following the relevant provisions of the DSU the panel in its proceedings shall also adhere to the working procedures enumerated in Appendix 3. It stipulates that the panel shall meet in closed session and the deliberations of the panel shall be kept confidential.85 It also proposes a time-table for panel work, which is enumerated below86. However, the proposed time-table may be changed due to unforeseen developments, and additional meetings could be held, if needed. These procedures are intended to outline guidelines for the parties and the panels as well.

3.3.16 Expert Review Groups87

Appendix 4 that deals with “expert review groups” is in fact an addendum to the provisions of paragraph 2 of Article 13, which states that:

Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group.

These review groups shall be under the panel authority; and the panel shall decide their terms of reference and working procedures.88 Members of the expert review groups shall be persons of professional standing and experience in the field in

83 Id., Article 27, 3.
84 Id., Appendix 1.
85 Id., Appendix 3, paras 2 and 3.
86 Id., para 12.
87 Id., Appendix 4
88 Id., para 1
question. Neither the citizens nor the government officials of the parties to the dispute could serve on an expert review group. This provision is intended to ensure the impartiality of expert groups. They could seek information and technical advice from any source. Information provided to the expert groups is accessible to the parties to the disputes, unless it is of confidential nature.

The expert review groups shall submit a draft report to the parties to obtain their comments. But the final report of the expert review groups shall be of advisory nature only.

3.3.17 Implementation

Article 22.2 says that compensation and suspension of concessions are temporary measures. It equally asserts that that neither compensation nor suspension is to be preferred to full implementation. These statements indicate that full implementation of panel and Appellate Body decisions should occur at some point of time. However,

there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jail house, no bail bondsmen, no blue helmets, no truncheons or tear gas...to punish a Member that has not implemented the rulings or recommendations of WTO.

If compliance with the DSB’s ruling is not achieved within a 'reasonable period of time', the defeated Member can offer 'compensation', which involves lifting of trade barriers such as tariffs or increases in import quotas -by the losing party. On July 11, 1996 a panel convened at the request of the EU, Canada, and the US found that Japan's taxation scheme was inconsistent with its obligations under Article III: 2 of the GATT 1994. This is because Japan assessed higher taxes on various imported liquor products than on

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89 Id., para 3.  
90 Id., para 4.  
91 Id., para 5.  
92 Id., para 6.  
93 Id., Article 22.  
96 Pauwelyn, supra note 66, p.337  
97 Panel, Japan-Taxes on Alcoholic Beverages-Report of the Panel [hereinafter Japan-Alcohol case].
domestically-produced *shochu*. The AB affirmed the panel ruling with some modification and the decision was formally adopted by the DSB on Nov. 1, 1996. But Japan expressed its unwillingness to implement the report within 'a reasonable period of time'. However, it was able to reach an agreement with EU by giving compensation in the form of an accelerated reduction of the tariff rates on whisky and brandy for slow implementation on other products.

Failure to reach a satisfactory compensation may result in suspension of concession or other obligations under the covered agreements. In April 1999, the DSB authorised the US to suspend concession to the EU in the amount of $191 million for the latter's failure to implement a ruling on its banana import regime. A few months later, as a result of EU's failure to implement a ruling on hormone treated meat, the DSB authorised the US to suspend concessions to the EU in the amount of $171 million. In both these cases the DSB authorised suspension of concessions due to the EU's unwillingness to implement adverse rulings.

3.4 Trade Policy Review Mechanism (TPRM)

The objective of the TPRM is to ensure improved adherence by all the Members to the rules and obligations under WTO Agreements by achieving greater transparency on government decision making on trade policy matters of Members. The TPRM would make a periodic review of the trade policies of all the WTO Members. Accordingly, trade policies of the first four trading entities (identified on the basis of their share of world trade) shall be analysed every two years; the next 16 shall be analysed every 4 years; and the rest every 6 years. A longer period could be fixed for least developed countries.

The TPRM is not intended to serve as a basis for the enforcement of WTO obligations or dispute settlement procedures or new policy commitments on Members. Its prime objective is to see the smoother functioning of multilateral trading system by

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Panel, *EC Measures Concerning Meat and Meat Products (Hormones)* , WTO Doc., WT/DS 48/R/CAN.

understanding the trade policies and practices of the Member countries.  

3.5 Major Constitutional Issues

3.5.1 Stare Decisis in WTO Law: A Myth

Continuity of GATT principles is one of the policies adopted by WTO for its dispute settlement system. Article XVI of the Marrakesh Agreement provides that "the WTO shall be guided, unless otherwise provided, by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to the GATT 1947." These include the reports of GATT panels as well as WTO panels and reports of AB.

In Japan-Alcohol case the panel treated "adopted reports" at par with the status of judicial decisions and held that the adopted reports came within the meaning of Article 1(b) (iv) of GATT 1994. But the AB disagreed and treated adopted panel reports...

...as an important part of the GATT aequus. They are often considered by the subsequent panels. They create legitimate expectations among WTO Members, and therefore should be taken into account where they are relevant to any dispute.

However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have

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100 Id.
101 A nice exposition on such a line of thinking could be found in the trilogy by Raj Bhala:
102 Marrakesh Agreement, supra note 9.
103 Japan-Alcohol case, supra note 95.
104 A distinction has to be made between adopted panel reports and unadopted panel reports. Unadopted panel reports have no legal status for they have not been endorsed through decisions by CONTRACTING PARTIES to GATT or WTO members, However, they may serve as 'useful guidance'. (See Appellate Body, Japan: Taxes on Alcoholic Beverages, WTO Doc., WT/DS/ 8/AB dated Nov. 1, 1996.p.16 quoting Japan Alcohol-Panel Report, para 6.10).
105 Article 1(b) (iv) of GATT 1994 provides institutional recognition that adopted panel reports contribute to subsequent practice. (See Japan Alcohol case, supra note 94, para 6.10.)
From the ruling of AB, we could conclude that the doctrine of *stare decisis* does not operate in WTO jurisprudence or at least there is no question of 'binding precedent' as far as panel reports and AB reports are concerned. This is because a panel report is supposed to apply only to the matter at issue and to the parties involved in a particular case. Besides WTO Agreement states that only the Ministerial Conference or General Council can adopt interpretation of the General Agreement. But both the panel and AB reports have 'persuasive power'. And the AB is likely to have a stronger persuasive power because AB is "effectively a standing judicial body" unlike panels.

### 3.5.2 Ambiguity of Non-Violation Cases

The idea of attaching dispute settlement measures and the possibility of countermeasures to action that are not in violation of any obligation does not have precedent either in international or domestic law. But GATT attached such a provision under Article XXIII (b) when it stated that a contracting party could consider invoking dispute settlement procedures if it feels that benefits accruing to it are nullified or impaired as a result of:

(a) failure to carry out obligations as “violation complaints”;

(b) application of measures, "whether or not it conflicts with the provisions of this Agreement" called as “non-violation complaints”; or

(c) the existence of any other situation, known as "situation complaints".

The incorporation of such an ambiguous clause was criticised at the inception of
GATT itself.\textsuperscript{114} Because of its ambiguity it was modified too.\textsuperscript{115} Still there were twenty four complaints\textsuperscript{116} related to "non-violation" in GATT history. However, only three panel reports were adopted,\textsuperscript{117} even though there were seven affirmative panel rulings.

Despite the inherent ambiguity associated with non-violation cases, DSU incorporated such a provision under Article 26.\textsuperscript{118} This uncertainty surrounding the non-violation complaints has great consequences in WTO jurisprudence. This will enable the panelists to apply the non-violation complaints to newly emerging areas like environment, labour, etc., which do not find any place in WTO legal text.\textsuperscript{119}

Article 26 retains the non-violation provisions of Article XXIII of the GATT. Article

\textsuperscript{114} South African delegate, Dr. Holloway was its bitter critic. He stated: We should whenever sanctions are provided for, limit their application to specific and contractual obligation and limit it very severely and where there is any doubt whether it is specific, contractual or not, or goes beyond it, than in order to steer clear of vesting in the ITO international sovereignty, we should rather arrange for those doubtful matters to be subjected to consultation and not subject to sanction.

He concluded:

Mr. Chairman, there is a saying in English: "The road to Hell is passed with good intention." We have a large number of good intentions in the Charter. I hope we are not laying paving stones to Hell.

The chief supporter of this clause, Dr. H.C.Coombs, the Australian delegate too admitted:

The difficulty with a clause of this sort, however, is that it is designed to deal with situations about which it is fairly difficult to be precise.\textsuperscript{7} (This debate is quoted in Williams, \textit{supra} note 111, id., pp. 765-767)

\textsuperscript{115} The modification required the complaining party to submit a "detailed justification" to support a non-violation case. (See GATT, "Agreed Description of the Customary Practice of the GATT in the field of Dispute Settlement", para 5, which is an Annex to the \textit{Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance}, GATT B.I.S.D (26th supplement), 1980, p. 210. (Also see \textit{Tokyo Round Agreements}, \textit{supra} note 4.)


\textsuperscript{118} There are two clauses under Article 26. Clause 1 deals with complaints of the type described in para 1 (b) of Article XXIII of GATT 1994, i.e., non-violation complaints and Clause 2 which deals with the complaints of the type described in para 1 (c) of Article XXIII of GATT 1994, i.e., situation complaints.

\textsuperscript{119} Cho, \textit{supra} note 116, p.33
XXIII:1(b) has not been amended; but Article 26 enumerates four clauses which stipulated that:

(1) the complainant must present a detailed justification in support of the complaint relating to a non-violation measure;
(2) the panel or Appellate Body cannot order the removal of measure;
(3) the panel or Appellate body can recommend that the Member concerned may make a mutually satisfactory adjustment;
(4) either party may request an arbitration to make a determination of the level of benefits which have been nullified or impaired.

Thus it is pointed out that there is an obligation to remove a non-violation measure. Giving compensation or removing the measure are result of a mutually satisfactory agreement. But Article 22(1) says that compensation and retaliation are temporary measures and full implementation of the recommendation is preferred. Besides, the provision requiring automatic decisions to be made except in the case of negative consensus do apply to non-violation complaints. This means that unless there is a consensus against doing so, the panel or the AB report must be adopted. If mutually agreed solution is not reached, the DSB could even authorise retaliation. Situation complaints are dealt differently under Article 26.2 of the DSU. But unlike non-violation complaints, the dispute settlement procedures apply only to the point of distribution of panel report. Here the rules of negative consensus do not apply. Neither the panel nor AB could authorise countermeasures in the case of situation complaint. However, a complaint could be treated as situation complaint, only if the paragraphs 1(a) or 1(b) cannot be applied.

3.6 Dispute Settlement Mechanism of GATT and WTO: A Comparative Analysis

After making a perusal of the dispute settlement mechanisms outlined in Article XXII and Article XXIII of GATT 1947 and twenty-seven articles contained in DSU of WTO one could infer the following conclusions:

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120 Williams, supra note 111, pp.691-2.
121 DSU Article 26.2, supra note 1. (Also see id., pp.692-3.)
3.6.1 A Unified vs. Multiple Dispute Settlement Mechanisms

Article 1.1 of the DSU says that the Understanding shall apply to disputes brought pursuant to the dispute settlement provisions of the Multilateral Trade Agreements listed in Appendix 1 to the DSU. Multilateral Trade Agreements include Trade in Goods in Annex 1A, the GATS in Annex 1B and TRIPS Agreement in Annex 1C of the WTO Agreement. Article 23 entitled “Strengthening of the Multilateral System” also underlines the superiority of WTO dispute settlement system vis-à-vis alternative dispute settlement systems outside the WTO.122

But the dispute settlement system evolved during the GATT period was a legally fragmented one relying on procedures adopted in 1966, 1979, 1984 and 1989. And the most exhaustive round held at Tokyo fragmented the “GATT a la carte” system further by introducing several dispute settlement mechanisms. But the DSU established a “unified mechanism”123 to resolve any dispute.

3.6.2 Prescribed Time Limits for dispute adjudication

Unlike its predecessor GATT, the DSU of WTO has specific time limits for conflict resolution. One of the major criticisms levelled against GATT is rectified by prescribing time limit for each stage of the panel process.124 This enables the parties to complete the panel processes within 15-20 months from the date of initiating litigation. See Table 3.3.

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123 Jackson, supra note 5, p.125.
124 DSU, supra note 1. Appendix 3 entitled “Working Procedures”, Article 12 reads proposes a time table:
(a) Receipt of first written submissions of the parties:(1)complaining Party:3-6 weeks(2)Party complained against: 2-3 weeks; (b)Date, time and place of first substantive meeting with the parties; third party session:1-2 weeks; (c) Receipt of written rebuttals of the parties: 2-3 weeks; (d) Date, time and place of second substantive meeting with the parties: 1-2 weeks (e) Issuance of descriptive part of the report to the parties: 2-4 weeks; (f) Receipt of comments by the parties on the descriptive part of the report: 2 weeks; (g) Issuance of the interim report, including the findings and conclusions, to the parties:2-4 weeks; (h) Deadline for party to request review of part(s) of report: 1 week; (i) Period of review by panel, including possible additional meeting with parties: 2 weeks; (j) Issuance of final report to parties to dispute: 2 weeks; (k) Circulation of the final report to the Members: 3 weeks
The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.
Table 3.3: WTO Dispute Settlement Procedures and Deadline

<table>
<thead>
<tr>
<th>Dispute Settlement Stage</th>
<th>Deadline</th>
<th>(Total Elapsed Time in Months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consultations</td>
<td>60 days</td>
<td>2</td>
</tr>
<tr>
<td>Request for a panel</td>
<td>25-60 days</td>
<td>3-4</td>
</tr>
<tr>
<td>Establishment of a panel</td>
<td>30 days</td>
<td>4-5</td>
</tr>
<tr>
<td>Issuance of panel report</td>
<td>6-9 months</td>
<td>14</td>
</tr>
<tr>
<td>Adoption of panel reports (if appealed)</td>
<td>60 days</td>
<td>12-16</td>
</tr>
<tr>
<td>Decision of Appellate Body</td>
<td>60-90 days</td>
<td>14-19</td>
</tr>
<tr>
<td>Adoption of Appellate Report</td>
<td>30 days</td>
<td>15-20</td>
</tr>
<tr>
<td>(Whether appealed or not)</td>
<td>Reasonable Time</td>
<td></td>
</tr>
<tr>
<td>Comply with rulings or Negotiate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mutually Satisfactory Compensation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(If failure to comply or compensate)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Request for Retaliation</td>
<td>20 days</td>
<td></td>
</tr>
<tr>
<td>Retaliation Authorization</td>
<td>30 days</td>
<td></td>
</tr>
<tr>
<td>Final Arbitration</td>
<td>60 days</td>
<td></td>
</tr>
</tbody>
</table>

(Source: Schott, supra note 1.)

3.6.3 Existence of an Appellate Body

One of the outstanding features of WTO dispute settlement mechanism is standing Appellate Body having persons of recognized authority with demonstrated expertise in international trade law. GATT was bereft of such an institution even though a similar one called Executive Board was allowed to hear appeal against the rulings of Conference under the Havana Charter that envisaged the creation of ITO. The existence of an Appellate Body will enable an aggrieved disputant to appeal against a panel report, if it so desires. Since the decision of WTO’s dispute settlement mechanism is binding the rulings of Appellate Body would assume the character of international law. However, an appeal should be limited to the issues of law covered in the panel report. Consequently, dispute settlement in GATT becomes a “two stage process”;\(^{125}\) whereas dispute resolution under GATT – 1947 ends with a panel decision.

Figure 3.2: WTO dispute Settlement Procedure

Consultations
(Members may request panel if no solution found within 60 days)

Options use of good offices, conciliation or mediation by Director-General

Dispute Settlement Body (DSB) establishes panel
(No later than at 2nd DSB meeting)

Terms of reference
(Standard terms unless special terms agreed within 20 days)

Composition
(To be agreed within 20 days or decided by Director-General)

Panel examination
(In general not to exceed 6 months, 3 months in case of urgency)
Meetings with parties
Meetings with 3rd parties

Panel submits report to parties
Interim Review

Panel circulates report to DSB

DSB adopts panel report
(Within 60 days unless appealed)

Appellate Review
(Not to exceed 60-90 days)

DSB adopts Appellate Report
(Within 30 days)

DSB monitors implementation of adopted panel/Appellate Body Report
(To be implemented within defined “reasonable period of time”)

In the event of non-implementation, parties negotiate compensation

If no compensation is agreed after expiry of “reasonable period of time”, DSB authorizes retaliation pending full implementation

Source: Petersman, supra note 121, p.184.)
3.6.4 Effective Enforcement Measures

Under WTO’s DSU, provision of blocking a panel report is avoided. This implies that the parties to the dispute will have to adopt a panel report and the DSB shall keep the implementation of adopted rulings and recommendations under regular surveillance. And if the recommendations are not implemented in a reasonable period of time, compensation or the suspension of concessions are called for. Developed countries have this facility also.

Besides, for the proper enforcement of rulings, DSB could also authorise retaliation. Since cross-sector retaliation is provided under DSU, it gives the developing countries greater leverage than they enjoyed under GATT. For instance, the arbitration ruling on March 24, 2000 gave Ecuador the power to cross-sector retaliation under Article 22.3 against EU. Ecuador could do it by removing intellectual property protection on European Union imports for EU’S failure to make its banana import system consistent with WTO rules. The emphasis on legalistic approach of DSU has comparatively increased the power of developing countries.

Thus after making a close examination of dispute settlement mechanism contained in Article XXII and XXIII of GATT and that contained in the DSU of WTO, one could come to the conclusion that WTO’s dispute settlement mechanism is constitutionally far superior to that of GATT. The WTO’s dispute settlement apparatus with well-written and unambiguous rules, time bound panel process with the provision for an Appellate Body, whose decisions are binding and with a provision for retaliation will enable the disputants to reach a settlement. DSB’s continued surveillance of the panel’s ruling and recommendations add more teeth to the adjudicatory machinery.

But how far does it work?

For an answer, the focus should be shifted to the performance of WTO’s dispute settlement system. This constitutes the subject matter of next chapter.

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