The World Trade Organisation: I
International Trade, Dispute Settlement & the Environment

by
Minette Ilse Greyling

Research Assignment presented in partial fulfilment of the requirements for the degree of Master of Arts (International Studies) at the University of Stellenbosch

Supervisor: Prof. P Nel

January 2003

eclaration

the undersigned, hereby declare that the work contained in this research assignment is my own riginal work and that I have not previously in its entirety or in part submitted it at any university for degree.

Abstract

The norms governing international trade on the one hand, and sustainable development on the other, have both different origins and objectives. This is the central problem that will be addressed in this research assignment, by analysing the structure, functioning and future of the World Trade Organisation Dispute Settlement Mechanism (DSM). Though there has been a significant shift from politics to legality, the dispute settlement system is still far from perfect. When looking at recent environmental trade disputes, the stress placed on the system is revealed.

The focus is on the impact of environmental disputes on the nature and functioning of the DSM, and how these disputes have contributed to the development of international trade law, and the concept of sustainable development. These will all contribute to a greater understanding of the interaction of the World Trade Organisation and the multilateral trading system, and the future role the WTO should play on the agenda for sustainable development.

Opsomming

Die norme wat enersyds internasionale handel, en andersyds volhoubare ontwikkeling beheer, het uiteenlopende oorspronge en doelstellings. Hierdie is die sentrale probleem wat deur hierdie navorsingsverslag aangespreek word, te wete deur die struktuur, funksionering en toekoms van die Wêreldhandelsorganisasie (WHO) *Dispute Settlement Mechanism (DSM)* te analiseer. Hierdie dispuutskikkingstelsel is nog steeds nie volmaak nie, ten spyte daarvan dat daar reeds 'n betekenisvolle verskuiwing van politiek tot wetlikheid plaasgevind het. As daar na onlangse omgewingshandelsdispute gekyk word, kom die druk wat op die stelsel geplaas word, duidelik na vore.

Die focus word dus met hierdie navorsingsverslag geplaas op die impak wat omgewingsdispute op die aard en funksionering van die *DSM* het, en hoe die dispute bygedra het tot die ontwikkeling van internasional handelswette asook op die konsep van volhoubare ontwikkeling. Hierdie focus behoort by te dra tot 'n groter begrip tot die interaksie tussen die Wêreldhandelsorganisasie (WHO) en die multilaterale handelstelsels, asook op die toekomstige rol wat die WHO behoort te speel met betrekking tot die agenda vir volhoubare ontwikkeling.

Table of Contents

Chapter 1: Introduction

Many acknowledge that the global trading system under GATT (General Agreement on Trade and Tariffs), since 1947, had not been perfected. Under the Uruguay Round of trade negotiations (1986-1993) new mechanisms were established in order to improve the, now World Trade Organization's (WTO), regulation of world trade. One such mechanism, (under which GATT was said to have no teeth), is the Understanding regarding the Settlement of Disputes[1] that has been applied since 1 January 1994 under the new WTO.

Dispute Settlement had little success under the GATT, but almost a decade since the installation of the WTO Dispute Settlement Mechanism things is looking different. There is evidence that the Understanding is functioning very well. However, there are increasing signs that the Dispute Settlement Mechanism is taking some strain, specifically when it comes to dealing with the effects of trade liberalization on the environment and development. Questions that have to be asked include: Are all countries on an even par when it comes to the settlement of disputes, or are the inequalities of the old system (GATT) reproduced in the WTO? Although reference is made to special procedures involving Least-Developed Country Members[2], no mechanism is built in to prevent the dominance of the weak by the strong. These problems are exacerbated when it comes to the settlement of environmental-related disputes, such as the Tuna-Dolphin, Shrimp-Turtle and Salmon disputes.

This is a very important problem that must be addressed since the widening gap that has developed between the rich and the poor in the world is something that can no longer be ignored. It is important to adhere to the contemporary saying that "Poverty anywhere threatens posterity everywhere." The structural imbalances in the world have to be addressed, and the WTO is a good place to start. Trade stands at the centre of the growing gap between rich and poor, and the structure of the WTO reflects this. By exposing this asymmetry in the WTO, we can begin to address the asymmetry in the world trading system.

---

[1] Reproduced from Multilateral Trade Negotiations (The Uruguay Round) Document MTN/FA, Part II, Annex II, of December 15, 1993. The understanding on rules and Procedures Governing the Settlement of Disputes is annexes to the Agreement Establishing the WTO which is itself annexed to the Final act of the Multilateral Trade Negotiations.

[2] The Special Procedures involving Least-Developed Country Members can be found in the understanding on Rules and Procedures Governing the Settlement of Disputes, Section 24.

1.1. The Central Problem

The central problem that has to be addressed concerns the nature of the global economic and trade system, and the role-played by environmental issues therein. The only way to answer this question is to look at how one of the WTO mechanisms operates, and then decide. One of the mechanisms that did undergo many changes is the Dispute Settlement Mechanism. Most of the changes involved enhancing the capacity of the mechanism to enforce rules, but is the new WTO Dispute Settlement Mechanism any more effective in dealing with trade disputes, and how does this mechanism deal with disputes involving environmental issues?

With the growth of free trade and the concurrent rise in awareness of environmental issues, it became apparent that GATT was ill equipped to deal with the new realities of free trade on a global level. Concerns about global and regional environmental problems as well as their possible association with rapid economic growth and trade liberalization have led to increasing pressure to broaden the interpretation of WTO rules to allow for the greater use of trade measures to achieve environmental objectives. (Nash, 2001:1)

The role of the international trading system, with specific focus the WTO DSU will also be analyzed, looking at the impact the settlement of disputed related to the environment has had on the body, and international trade law as a whole.

1.2. The Purpose of the Study

The purpose of this study will be to describe the functions, procedures, rules and processes of the Understanding Governing the Settlement of Disputes in the World Trade Organization, as decided upon at the conclusion of the Uruguay Round of Trade Negotiations. A Case-study design will be used, thus making an in-depth study of this mechanism of the WTO. The intent is to develop an understanding about how the Dispute Settlement Mechanism works in the WTO, thus enabling the possibility of drawing conclusions about the effectiveness of its decisions. This is needed in order to conclude whether or not the Mechanism is any more effective in dealing with international trade disputes between Members of the WTO, thus identifying structural anomalies that exist in the World Trading System, especially with respect to the environment and development.

At this stage in the research, the WTO Dispute Settlement Mechanism will be defined as those procedures in the new WTO involving the settlement of international trade disputes.

1.3. An Overview of the Literature

1.3.1. The GATT, WTO and Dispute Settlement

The literature concerning the problem of the Dispute Settlement Mechanism of the WTO, and previously the GATT, can be divided into three categories. The literature will be discussed according to these:

- Literature concerning GATT and the Uruguay Round
- Literature focusing on the place of GATT (now WTO) in the World Trade System
- Literature that focuses on the structure and functioning of the WTO Dispute Settlement Mechanism

There is a vast amount of literature available on the function and procedures of the GATT, the changes it has undergone during the Uruguay Round, and the forthcoming WTO. Since the focus of this study is Dispute Settlement, this will be the focus of the literature used. Nicolaides focuses on the old GATT system, the weaknesses inherent in the system, and the way the Uruguay Round of Multilateral Trade Negotiations proposed to change it. He placed emphasis on the fact that GATT was primarily aimed at reducing protectionism and eliminating discrimination between different sources of supply. He does however state that the GATT, and the new WTO, attempts to achieve their aim by means of an institutional structure that is not the most effective for that purpose. That is, GATT was not an International Organization in the full sense of the word and could therefore not act on its own without the continuous approval of its members. Nicolaides does however make the statement that GATT's systemic weaknesses were improved during the Uruguay Round. He does not elaborate on this point, which leaves room for investigation.

Thomas (1996:1-9) focuses on the way the GATT Dispute Settlement Systems functioned, and concludes that the way in which GATT handled disputes can help the new WTO in its daunting task, if only from learning from its mistakes. Petersmann (1998:55) commented more specifically on the weaknesses of the GATT procedures for settling trade disputes. He comments on the difficulties of understanding the GATT legal system, stating that "even economic specialists on the GATT have complained that only ten people in the world understand it and they are not telling anybody." He goes further in discussing the way in which the Dispute Settlement Procedures function, as well as commenting on the weaknesses it has. He notes "business actually encountering trade problems in the market-place thinks of the GATT, to the extent that they think of it at all, as something remote and ineffectual" (Petersmann,1998:56).

The GATT, and today the WTO, is however set in a global economic and trade structure. This poses constraints on the functioning of the international organization as it affects what it looks like, how it functions, and which decisions it makes. Great volumes of literature were written on the

characteristics of the Global Economic Trade structure. Jones examines the North-South dilemma in his book **The North-South Dialogue: A Brief History** (Jones,1983:460), placing focus on the attempts that have been made to solve the problem.

The most famous writers on the dilemma that exists between the highly industrialized, rich developed countries and the less developed and developing poorer countries, are however related to the Globalist school of thought. They include names such as Raul Prebish and Immanuel Wallerstein. Prebish restricted his analysis to the economic dimensions of development, focusing on the unequal terms of trade between Less Developed Countries (LDC's) that exported raw materials, and northern industrialized countries that exported finished manufactured goods. He used his analysis to question the benefits of free trade for the LDC's. Wallerstein developed what he called the World Systems Theory, focusing on the Core-Periphery analysis. He attempted to understand the origins and dynamics of the modern world economy and the existence of uneven development, by analysing the emergence of Capitalism in Europe. (Viotti & Kauppi, 1993:459)

Isaak (1995: 148) writes that "Anglo-Saxon liberalism has been ideologically extended to cover the reality of the rapid development of postliberal coalition of regional trading regimes", placing focus on where the current notion of the free trade originated, stressing its western origins. He also focuses on the "North-South" structure and describes it as the "Asymmetrical or unequal relationship between the developed and developing countries in the world economy." (Isaak, 1995:173)

It is central that we focus now on the literature dealing with the current structure of the WTO Dispute Settlement Mechanism. Komuro (1995) focuses on the way the new WTO Dispute Settlement Mechanism functions. He looks at the typology of disputes that are covered by the Understanding on the Settlement of Disputes, focusing on bridging the gap between the GATT and the WTO. He then continues to discuss the way disputes are resolved in the WTO, with focus on the procedures and implementation of recommendations. He finally looks at the United States and the European Union Law on Trade Retaliation, speculating whether the WTO Dispute Settlement will be successful. Lukas (1995) also places focus on the role of the United States and the European Union in implementing and enforcing WTO decisions. Kuijper (1995) looks at the impact the new WTO Dispute Settlement system will have on the European Union.

From the above discussion it becomes clear that there is a deficiency in the literature, since most of the literature about the WTO is focused on the role and impact on highly industrialised countries. The literature can thus be seen to reflect three categories:

- The nature of GATT, the changes that took place during the Uruguay Round, and the impact it had on Developed and Developing countries.

- The characteristics of the World Trading System, and the constraints it places on certain states.
- The nature of the WTO Dispute Settlement and the role Developed states play, as well as the effect it has on them.

There is thus a need for material on the nature of the WTO Dispute Settlement, from the perspective of developing countries.

1.3.2. The GATT, WTO, and Dispute Settlement: The interrelationship between Trade, the Environment and Development

Many of the issues failed to be addressed within the framework of international trade under the old pre-1994 GATT system relates to the interrelationship between trade, the environment and development. Literature that deal with these issues have become more proliferated during recent years. One such collection of literature is "Trade, Environment and Sustainable Development" from the International Center for Trade and Sustainable Development. (Kotz [ed],2000)

The main issues that are identified in this literature are:

- The fear that environmentally motivated restraints to free trade – whether derived from unilateral action of the economic superpowers, or from multilateral environmental accords – be used as a pretext for protectionism or to impose environmental values on the rest of the world.
- The role of the international trading system, with specific focus on the exceptions to the GATT/WTO principles and the window left open for trade restraints as a tool to enforce or induce compliance with environmental accords.

1.4. Setting a Theoretical Framework for the Study

The World Trading System

Theories concerning the structure of the World Economy, and specifically the World Trading System, are available in abundance. **Classical economic theories** form the basis of these, and will be discussed briefly, since the paper is fundamentally on the political implications of economic factors. The earliest thinker on the classical theory of Free Trade was Adam Smith who proposed that increased competition would lead to increased productivity and increased wealth, making social progress through economic growth inevitable. (Isaak,1995:175)

This gave rise to David Ricardo's development of the Theory of Comparative Advantage that holds that countries specialize in the production of those goods and services that they produce most efficiently (Viotti & Kauppi, 1993:590). The terms of trade concept growing out of the theory of comparative advantage is critical for explaining the widening gap between the rich industrialized countries and the poor agricultural countries. Terms of trade is the ratio of a country's average export prices to its average import prices, and when import prices rise faster that export prices the terms of trade worsen, which is the case for most seveloping countries. This is because the prices of raw materials (in which developing countries specialize) have generally lagged behind the prices of imported manufactured goods from developed countries. (Viotti & Kauppi:1993:595)

The neo-**classical theory** holds that, "from a global perspective, costs will be reduced and economic growth increased in a free trade system without tariffs blocking the normal shift of production factors in the world market" (Isaak, 1995: 85). The basis of the GATT, and the WTO today, is skewed toward the ideology of free trade and comparative advantage. While it does allow compromises for the sake of domestic adaptation and political stability (by means of protectionist measures) among member states, there is an underlying assumption that all nations are potentially equals and can be brought quickly up to the standard of competitiveness in the world economy set by the major leading powers. (Isaak, 1995:86-88)

Scholars from developing countries, under which Raul Prebish and Hans Singer, argued that the terms of trade was systematically structured against the position of the developing countries, and in favour of the position of the developed countries. It was they who introduced the Core-Periphery analysis to reflect this relationship. This **Structuralist Theory** thus holds that the world economy is structured in an asymmetrical way, due to the fact that the demand for manufactured and industrial goods produced by the centre, was much greater than the demand for agriculture and minerals produced by the periphery. This unequal structural position between the centre and the dependant peripheral countries resulted in what is called a Trade Gap. From the structuralist perspective GATT was a "rich man's club", in which the Most Favoured Nation Principle[3] prevented rich nations from giving poor nations preferential treatment, thus resulting in GATT being a subtle maintenance system preserving the asymmetrical structures of the status quo.

[3] The Most Favoured Nation Principle is one of the founding principles of the GATT in which no country must receive preferential treatment, thus a tariff concession to one must be a tariff concession to all.

1.5. Central Questions, Hypotheses and Objectives

The central question that has to be asked is: What are the implications of the new Understanding regarding the Settlement of Disputes in the World Trade Organisation for the settlement of environmental disputes and sustainable development?

The study will explore the process and procedure of Dispute Settlement in the New World Trade Organization.

Important questions that will be asked is: How does the Dispute Settlement Body function? What does the World Trade Organization Law on Dispute Settlement look like? What has changed in the area of Dispute Settlement from GATT to the WTO? Why were changes necessary? How does the Dispute Settlement Body panel function? What are the functions and role of the Appellate body? Does the WTO Dispute Settlement Law and Procedures reflect the growing gap between North and South due to unfavourable terms of Trade? Are the World Trade Dispute Settlement Procedures fair? Do these Dispute Settlement Procedures adequately address the critical issues of the impact of trade liberalization on the environment and development?

1.6. The Scope of the Study

Since there are limits in this study as to length and time, the study will be limited to a study of the Dispute Settlement Mechanism in the WTO as it was set up at the conclusion of the Uruguay Round. The disputes that will be looked at will be limited to the period 1994-2000, and only disputes that resulted in the setting up of a panel report will be investigated in detail. All other disputes during that time that were resolved before a panel was set up will carry less weight in the analysis. The focus will be on disputes that involved environmental issues or barriers to trade.

There are limitations to an inquiry into the WTO dispute settlement in the sense that future findings may completely contradict this study's findings. The fact that dispute settlement in the first six years of the WTO's existence are investigated, may not be a reflection of the way it will operate once it becomes more established. These findings can thus not be generalised to reflect the WTO system as a whole.

1.7. Significance of the Study

An inquiry into the functions and procedures of the World Trade Organization Dispute Settlement, with a focus on the implications it has for the development of international trade law and how it impact on the World Trade system.

1.8. Procedure

1.8.1. The Qualitative Design

In a qualitative study, the researcher is primarily concerned with a process, rather than outcomes or products. This research will concern the process of the Dispute Settlement Mechanism (DSM) within the World Trade Organization (WTO) since the conclusion of the Uruguay Round of Trade talks. This leads to the fact that this research will be largely an investigative process, for which official documents will be used.

The search will be for what the meaning of a DSM is, the way it operates and how people see it. In a qualitative study such as this, all data will be mediated through the researcher who will assess documents, articles and official Laws and reports on Disputes that were settled. The process of qualitative research is such that, in the process, abstractions, hypotheses and theories will be built. Cresswell,1994)

The area with which this research deals is well suited to the qualitative design, since little previous research have been done on the DSM of the new WTO. This is mostly because it is such a new mechanism. There is also a lack of a coherent theory on trade dispute settlement, and the current proposal for research could contribute to building up such a theory.

1.8.2. Type of design: A Case Study

The type of design to be used in this research study is a case study. In a case study, the researcher examines one or a few cases of a phenomenon in considerate detail. (Creswell,1994:5) This will be the case when the DSM of the WTO is examined in detail. This study will take the form of a case study design, and the research will be focused on a single unit of analysis, namely the WTO's DSM. The choice of using a case study design will influence the approach that will be taken towards data collection, analysis, and report writing.

A case study design can be defined as follow (Creswell,1994), "an empirical inquiry that:

- investigates a contemporary phenomenon within its real-life context; when
- the boundaries between phenomenon and context are not clearly evident; and in which
- multiple sources of evidence are used."

Accordingly, case studies are most appropriately used to answer "how" and "why" questions, which will also be the case in this study. A case study design may be used for exploratory, descriptive or explanatory purposes. For this case study, the focus will be on exploration since little is known about the phenomenon. Since case studies are very useful for testing hypotheses from existing theories of politics, this can be applied in this study, where an existing theory concerning the imbalances in the global trading system will be verified.

1.8.3. Data Collection Procedures

The data collection processes most commonly used in a case study is personal interviews, document analysis and observation. In this study, the primary focus will be on document analysis. A case study design influences the way in which data is collected due to the fact that the researcher is not able to assign subject or cases to experimental or control groups. The researcher also has no control over the context or environment.

Data collection will take place in the following manner. Information will be collected from the WTO. All cases, involving environmental issues, brought to the DSM up until the end of the year 2000 will be looked at. Both cases that led to Panel Reports, and cases that were settled before a panel was set up, will be analysed. The DSM process will be analysed, and documents will form the basis of the analysis. The documents will be analysed, and information categorized, to facilitate an attempt to connect the outcomes of the trade dispute settlement with certain characteristics of the dispute, and parties to the dispute.

1.8.4. Data Analysis Procedure

Since a case study will be done, all available information concerning the subject will be analysed. The data analysis will thus take place as an activity simultaneously with data collection. The information will be categorized in terms of the following.

- The process of the Dispute Settlement Mechanism
- The process of the cases
- Attributes of States involved in the disputes

The researcher plays a significant role in the case study, since the possibility of the researcher bias is great. This is because the researcher is the primary medium through which data is mediated.

The researcher will play a large role in obtaining information from the WTO, and the other mentioned sources, concerning the new DSM.

1.9. In General: From GATT to the WTO

When the General Agreement on Tariffs and Trade was being negotiated in the late 1940's, it was also proposed that an International Trade Organisation (ITO) be created to administer and interpret the agreement and to serve as a counterpart to the international financial institutions that had been established at the 1944 Bretton Woods Conference. The ITO never materialised, largely because in the United States, Congress had not approved US participation in it.

The commercial policy rules set forth in the ITO were for the most part incorporated into the GATT, which has since been administered through a GATT Council (established by the Contracting Parties in 1960 and potentially consisting of representatives of all GATT Parties), a Secretariat, and a variety of procedural devices.

Over the years, the GATT system has encountered a substantial growth in the number of contracting parties, the addition of new agreements on non-tariff trade barriers, and an increasingly complex world trading system. In addition, as some GATT members were able to enjoy the benefits of the recent NTB agreements without becoming parties to them (creating the so-called 'free-rider' problem) many perceived it necessary to integrate these new rights and obligations into the GATT system as a whole.

The idea of a new institution to implement and co-ordinate the expanding GATT system was again proposed during the Uruguay Round and has resulted in the Agreement Establishing the World Trade Organisation (WTO Agreement). (Grimmet, 1994: 1-2)

Chapter 2: Dispute Settlement from GATT to the WTO

2.1. International Law: International Trade, the Environment and Development

2.1.1. International Law

International law can be defined as a body of rules and principles, which are binding upon states in their relations with one another. Nearly always the first question asked about international law is: How can it be law if it cannot be enforced? This question contains a critical assumption about international law, namely that international law cannot be enforced. The assumption seems to be based on the absence of a direct international counterpart of national law enforcers. (Kirgis,1996:1)

The debate surrounding this assumption is but one of the debates that surround public international law. One popular theory is that international law is not really law, and that it is a code of conduct of *moral force* only. The claim to legal status made for international law is challenged thereby, and the argument is based on the assumptions that international law:

- Lacks sovereign legislative authority
- Lacks enforcement machinery

Due to the two preceding points, there has been a continual disregard for international law, as it's content is seen not as 'law', but as politics.

However, this argument has been refuted by developments in the international political and economic environment, as the modern era has witnessed the phenomenon of international legislation, for example "law making treaties", UN legislation, (which is analogous to municipal legislation) as well as the establishment of the WTO, and its Dispute Settlement Body.

The argument surrounding lack of enforcement, has also been refuted due to the fact that enforcement cannot be seen as a hall-mark of 'law', as even in the domestic sphere much of what is called 'law' is also unenforceable, and consists of power-conferring rules respecting private arrangements. Such laws are not obeyed because of some enforcement pressure. The enforcement argument also do not stand up to the fact that there does exist in international law, a whole range of mechanisms which ensure that international law is enforced. Examples of these include:

- Chapter VII of the UN Charter: Where there has been a breach of, or threat to international peace and security, the Security Council may take measure ranging from economic to military sanctions.

- Judicial enforcement, via the International Court of Justice and other tribunals (even though they cannot be enforced.)
- Deprivation of legal rights and privileges: These include severance of diplomatic relations, freezing of assets, trade embargoes, suspension of treaty rights, etc.
- Self-help: retorting, reprisals and self-defence still remain legitimate mechanisms.

The question, "Is international law really law?", no longer has any jurisprudential relevance, and it is more important to answer the following questions:

- What is the normative basis of international law?
- What is the role of international law in the conduct of international relations?

These questions are commonly answered by saying that the binding nature of international law lies in the collective consent of States in the norm-creating processes. The majority of the rules of international law are generally observed by all nations without any compulsion, for it is generally in the interest of all nations concerned that they honour their obligations under international law. Thus, States obey international law out of collective self-interest or reciprocity. This principle forms the basis of the GATT and the WTO.

2.1.2. International Law in the Global Economy

The inadequacy of the rules and, to a certain extent, even the institutions that govern economic relations is a key issue in the debate within the international community. From international investment to international trade and international business, the international community has seen the rise of a network of relations, which today constitutes a truly global economic market. However, this evolution has not been accompanied by a corresponding development in global norms, which should govern this phenomenon. On the one side there is international law, which is only applicable to relations among states. Furthermore, because of its perceived voluntary nature and the perceived lack of effective instruments of enforcement, international law is scarcely suitable to govern relations of an economic nature, due to the fact that they are of an obligatory significance.

International law has not reached the stage of development such as to create a true "transnational law" – a self-sufficient legal system capable of governing the overall phenomenon of international commerce. Therefore, at present, international commerce is basically governed by designated national systems, when individuals are concerned or, in the case of relations between international persons, by international law.

When the WTO was established on 1 January 1995, it was stated in Marrakesh, by the Chairman of the Trade Negotiations Committee, the Minister of Foreign Affairs of the eastern Republic of Uruguay, Mr. Sergio Abreu Bonilla that:

> *"In the statements which they made in the course of the meeting, Ministers representing a number of participating delegations stressed the importance they attach to their requests for an examination of the relationship between the trading system and internationally recognised labour standards, the relationship between immigration policies and international trade, trade and competition policy, including rules on export financing and restrictive business practices, trade and investment, regionalism, the interaction between trade policies and policies relating to financial and monetary matters, including debt, and commodity markets, international trade and company law, the establishment of a mechanism for compensation for the erosion of preferences, the link between trade, development, political stability and the alleviation of poverty, and unilateral and extraterritorial trade measures.*
>
> *I Wish to take not of the fact that in taking our Decision on the on the Establishment of the Preparatory Committee, we have argued – in paragraph 8(c) (iii) of the Decision – that a function of the Preparatory Committee will be to discuss suggestions for the inclusion of additional items on the agenda of the WTO's work programme."*

(Tita, 1995:87)

Accordingly, the WTO appears to be the body entrusted by the international community to establish the standard rules of international commerce; then they would acquire real legal and universal dignity as the international trade law. Such international trade law or "transactional law" as it has sometimes been referred to, should bring together other works, such as those of:

- The United Nations Commission on International Trade Law (standards of contracts or arbitration)
- The Organisation for Economic Co-operation and Development (Finance and Insurance of international commerce)
- The World Intellectual Property Organisation (Patents, trademarks and copyrights)

Once the content of transactional law has been determined is this manner, the question of how it would rank, as a source of law remains important. According to Tita (1995: 88) "the status of transactional law should be equal to international law, as in the case with the law created by international organisations, which is binding on Member states and their nationals."

2.1.3. International Constitutionalism and the WTO

The 1994 Agreement establishing the World Trade Organisation is the most ambitious attempt in history at promoting welfare-increasing policies through international guarantees of freedom, non-

discrimination and rule of law in the field of international economic relations. It introduces a new kind of international integration law with far reaching implications for other existing international organisations, such as the UN Conference on Trade and Development and the World Intellectual Property Organisation.

However, the issue of 'International Constitutionalism' is still one that needs to be addressed, as the constitutional ideals of a 'government of laws, not of men', and of 'horizontal' and 'vertical' separation of powers, were never effectively applied to the conduct of foreign policies and international relations. Up to World War II, most national constitutions remained characterised by a focus on domestic policy issues and included few references to foreign policy issues, such as declarations of war, treaty making powers and treaty-making procedures. (Petersmann,1996: 1-3)

To date, most national constitutions appear to have dealt effectively with their task to protect the 'domestic policy constitution' from being undermined by abuses of 'foreign policy' powers, for instance by import restrictions which tax and restrict domestic citizens and redistribute income among domestic groups in a welfare-reducing manner. In globally integrated economies, 'domestic' and 'foreign' policies are often no longer separable, and citizens value the transactional exercise of their liberties no less than purely domestic activities. National constituencies therefore remain incomplete without effective constitutional constraints on foreign policy powers.

After World War II, FA Hayek wrote in his famous book, *The Road to Serfdom* that:

> *"What we need and can hope to achieve is not more power in the hands of irresponsible international economic authorities, but on the contrary, a superior political power which can hold the economic interests in check. (...) The need is for an international political authority which, without power to direct the different people what they must do, must be able to restrain them from action which will damage others, even more than in the national sphere, it is essential that these powers of the international authority should be strictly circumscribed by the Rule of Law. The international Rule of Law must become a safeguard as much against the tyranny of the state over the individual as against the new super-state over the national communities"*

This constitutional insight underlies many international post-war agreements such as the legal and institutional guarantees in the 'United Nations Law' for the respect of the 'sovereign equality of states' and the human rights of their citizens; the legal requirements in the 1944 Agreement establishing the International Monetary Fund (IMF) for freedom of payments, and the legal guarantees in the 1947 General Agreement on Tariffs and Trade (GATT) for non-discriminatory competition and the use of transparent, welfare-increasing trade policy instruments. The 'constitutional functions' of these and other guarantees of freedom, non-discrimination and rule of law for limiting abuses of national foreign policy powers, and for extending the national guarantees of freedom, non-discriminations and rule of law to transactional relations were particularly visible in

Western Europe after World War II, and has continue to proliferate globally with the spread of Globalisation. (Petersmann, 1996: 5)

2.1.4. International Law, International Trade and the GATT/WTO Dispute Settlement System

According to Ernst-Ulrich Petersmann (1999:1) "The world-wide trend towards deregulation, market economies, protection of human rights and democracies reflects also an increasing recognition that individual freedom, non-discrimination and rule of law are the best conditions for promoting individual and collective self-determination and social welfare." However, in contrast to the long-standing constitutional theories for national democracy, there is a troubling lack of theory on how to achieve a peaceful international order based on worldwide liberal rules and international institutions. Even though mankind has sought to establish rules to govern and circumscribe inter-group conflicts since the Middle Ages, recognising that such conflicts cannot be averted altogether, little success have been achieved, up until the second half of the 20 th century. (Howell & Wolff, 1992: 13)

Even though, following World War II, there was an ambitious effort to establish a comprehensive system of multilateral institutions and rules governing international commercial activity, the first half of the 20 th century, government policies in international relations continued to be dominated by power politics, protectionism and pragmatism. The consequences of these policies were government failures, such as wars and widespread poverty.

Following World War II, The United States and other industrialised nations recognised the need for economic stability in order to ensure peace. Through the institutions established at Bretton Woods in 1948, the planning for the International Trade Organisation and the eventual General Agreement on Tariffs and Trade (GATT) reached, have increasingly institutionalised the role of trade amongst nations. The steps taken to provide for free trade has limited the ability of the developed nations to act unilaterally in order to further its goals, be they economic, political or environmental.

The disappearance of the power-oriented cold-war international system, and the market oriented global integration, has created new opportunities for the establishment of a liberal international order based on principles of constitutionalism and democracy.

However, the same advances, which have given rise to the globalisation of the world's economy, have also given rise to the globalisation of the potential threats to both the global economy and the environment. While not expressly included in the Charter of the United Nations (UN), the UN's position on the responsibility of nations to protect the environment was clearly stated over twenty-five years ago as follows:

> "The protection and improvement of the human environment is a major issue which effects the well-being of peoples and economic development throughout the world; it is the urgent desire of the people of the whole world and the duty of all governments".[4]

It has become a generally accepted obligation under international law that each government, in the administration of its sovereign territory, must take into account protection of the environment. The environment to be safeguarded includes natural non-living resources, flora and fauna. The level of protection afforded to these natural resources varies according to the risk each faces.

2.2. GATT / WTO law in General: An International Legal Perspective

2.2.1. GATT

GATT entered into force in 1948 as a contract between 123 governments, or signatory states. The chief objective of the GATT is to provide a secure and predictable international trading environment, as well as a continuing process of market opening.

Under the GATT, the "international community has sought to help developing countries' economies by creating concessionary or preferential tariffs to encourage trade flows from them to the industrialised nations." (Franck, 1995: 413) There were also GATT exceptions to the MFN status for the Least Developed countries.

2.2.2. WTO: Legal Basis and Principles

The GATT/WTO Agreements set the basic principles, binding on all member states that govern international trade.

Sources of Law

The WTO agreements have no provision corresponding to Article 38[5] of the Statute of the International Court of Justice, which defines the sources of law that may be used by the Court. Sources of law that do relate to WTO law includes:

---

[4] **Report of the United Nations Conference on the Human Environment**, Stockholm, June 5-16 1972, UN Doc. A/CONF.48/14.

[5] **Article 38 of the Statute of the ICJ states that**: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

- *Jus cogens* - Authoritative norms of customary international law that cannot be overridden by treaty. There is little scope for this concept within the subject matter of WTO law.
- Treaty law and customary international law – The WTO legal system contains many treaties. Customary international law plays only a small role in the WTO, except as regards the interpretation of treaties. One of the stated purposes of the Dispute Settlement Understanding is to clarify the existing provisions of the WTO agreements "in accordance with customary rules of interpretation of public international law".[6]
- Other sources – The substantial jurisprudence of GATT panels is being rapidly expanded by WTO dispute settlement bodies.

The law of the WTO is almost entirely stated in or derived from treaties, the most important of which is the WTO Agreement. Like all such law, it depends on certain rules of customary international law, in particular those concerning the interpretation of treaties. Although most such rules are open to modification by treaty, the WTO has left them largely unchanged. (McGovern,2001: 1)

2.3. The Uruguay Round of Multilateral Trade negotiations

With the growth of free trade and the corresponding rise in awareness of environmental issues, it became apparent that GATT was not equipped to deal with the new realities of free trade on a global level. Many nations recognized this shortcoming and in 1986 trade ministers from the GATT signatory states agreed to meet. This meeting is what has become known as the Uruguay Round. Of primary concern to many of the contracting parties was the need for a more effective and expedious dispute resolution mechanism by which conflicts between nations could be resolved. To this end, the Agreements called for the creation of the World Trade Organization (WTO). The WTO serves as an umbrella organization by embodying all of the Agreements reached by GATT. During the Uruguay Round proceedings it became apparent that the conflict between trade and the environment would need to be addressed as well.

On 15 December 1993, the Trade Negotiations Committee of the Uruguay Round adopted by consensus the texts in the final Act embodying the results of the Round, bringing to a close seven years of negotiations. The Final Act consists of the Final Act itself, the Agreement establishing the WTO (The "WTO Agreement"), Agreements annexed to it as well as additional Ministerial decisions and declarations.

[6] DSU, Article 3.2

The parts of the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* relevant to this study is the *WTO Agreement* and Annex 2, *The Understanding on Rules and Procedures Governing the Settlement of Disputes.* (Annexure 2 to this document)

Features of the Post Uruguay Round Multilateral Trading System

The Uruguay trade agreements effectively redesigned the rules governing the multilateral trading system. The most significant features of the post-Uruguay Round trade regime are:

- ***The scope of the regime:*** Coverage has increased form a fraction of world merchandise trade prior to the Uruguay Round, to almost comprehensive coverage of trade in goods and services.
- ***The single undertaking***: In the past countries could pick and choose the sectors in which they would make GATT commitments. This led to a perceived imbalance in the rights and obligations assumed by members. In contrast, the Uruguay Round agreements were an "all-or-nothing" package: members had to sign all 28 agreements in a "single undertaking".
- ***Strengthened dispute settlement procedures for rules-based trade:*** As a consequence of the expansion of the rules governing world trade, the agreements provide for an effective and timely system for the resolution of disputes through the Dispute Settlement Body (DSB). This is a major feature of the multilateral process that distinguishes the WTO from other international organisations. Stronger dispute settlement procedures now largely preclude the use of unilateral retaliation in the event of trade disputes.
- ***Establishing the World Trade Organisation:*** The WTO, unlike its predecessor, the GATT, is legally a full-fledged international organisation that houses all Uruguay Round agreements, including the integrated dispute settlement procedures. It provides a permanent forum for the discussion of new and old trade issues, with a Ministerial Conference that meets every two years. It also exercises a degree of surveillance over the levels of compliance achieved by member states through the Trade Policy Review Mechanism (TPRM). As in the old GATT, decisions in the WTO are taken on the basis of "consensus"; there is also no executive body, nor is there and weighted voting.
- ***Provisions relating to Special and Differential Treatment:*** Since the Uruguay Round, Special and Differential Treatment for developing countries has changed character. The large and more advanced developing countries are expected to provide reciprocal market access rights and accept the same obligations as other members, although they enjoy longer transition periods for implementing WTO agreements and receive technical assistance. Least developed countries, however, are even closer to "non-reciprocity". They are not expected to make as many market access commitments as others, and in some sectors (such as part of the Agreement on Agriculture), they are exempt from making commitments altogether.
- ***Expansion of WTO membership:*** The GATT/WTO has expanded a great deal since the 1980's, with the overwhelming majority of new members being developing countries and

countries in transition. One hundred and 10 of the present 141 members are developing countries. Another 30 developing countries are in the queue for accession, with China being admitted very recently.

Taking into consideration these changes, developing countries, including the LDCs, can now benefit from globalisation thorough the reduction and removal of barriers to the integration of national markets through trade, capital flows, the movement of people and technological advance. The majority of empirical evidence clearly states that national openness to trade and foreign direct investment, in combination with sound macroeconomic policies and improvements in domestic institutions, deliver higher rates of growth, which in turn lead to greater reduction in poverty levels. Throughout the developing world, open economies grow faster and have more success in poverty reduction than closed economies.

However, notwithstanding fundamental changes to the multilateral trading system, most LDCs have been unable to take advantage of the opportunities that have been created, and their share of world trade has declined. This is due to inappropriate trade and other domestic economic policy choices, weak domestic institutions, and developed country protection in agriculture and textiles, which have prevented LDCs from reaping the gains from globalisation.

2.4. The WTO Agreement

The *WTO Agreement* establishes a new World Trade Organisation as the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and the associated legal instruments included in the Annexes to the Agreement. The WO Agreement has four Annexes:

- Annex 1 includes substantive trade agreements on trade in goods (Annex 1A), the new General Agreement on Trade in Services (GATS, Annex 1B), and the new Agreement on Trade Related Aspects of Intellectual Property Rights (Annex 1C).
- Annex 2 consists of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
- Annex 3 provides for the Trade Policy Review Mechanism, a process of multilateral surveillance of national trade policies.

The agreements in Annexes 1, 2 and 3 called the "Multilateral Trade Agreements, are integral parts of the WTO Agreement and binding on all Members of the WTO. Annex 4 on the other hand holds agreements, called "Plurilateral Trade Agreements", which are binding only on those Members that have accepted them.

The WTO has the tasks of implementing the WTO Agreement and the Multilateral Trade Agreements; providing the framework for implementation of the Plurilateral Trade Agreements; providing the forum for negotiations among its Members concerning matters dealt with in the attached agreements; providing a forum for other negotiations; and co-operating as appropriate with the Bretton Woods institutions.

As the focus of this study is Dispute Settlement in the GATT and the WTO, Annex 2 of the WTO Agreement will be discussed in detail here.

The institutional structure of the WTO, as it is set out in Article IV of the WTO Agreement constitutes essentially codified GATT practice, brought under the unifying authority of the Ministerial Conference. (Weiss, 1996: 2) It is doubtful whether the WTO provides any additional institutional power to that effectively exercised by the GATT.

The legal status of the WTO has however, much changed since 1948. Under GATT the Contracting Parties constituted the only legal basis of the GATT as an international organization. GATT lacked any administrative, secretarial or institutional agreements. It was only in the late 1960's that academic writers too accepted that it had developed into an international organization, despite its origins as a treaty for international trade.

Today the WTO, under Article 8, constitute the WTO as an international organization with international legal personality. The GATT 'acquis' is expressly preserved, as the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties of the GATT 1947, as well as the bodies established in the framework of the GATT 1947.

With regard to decision-making, it must be noted that the GATT has operated on the basis of consensus, notwithstanding the many provisions in the GATT text on voting. The WTO Agreement expressly requires the WTO to continue the practice of decision-making by consensus followed under the GATT 1947. Voting takes place only when a decision cannot be arrived at by consensus. Where voting becomes necessary, it is by simple majority, and is based on the principle 'one country, one vote'.

2.5. GATT/WTO Law and Dispute Settlement

The Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter the DSU) provides detailed rules and deadlines for settlement of disputes under the WTO Agreement

and/or any of the agreements now in Annexes 1, 2 or 4. A Dispute Settlement Body (DSB), which will make decisions, will administer the DSU, solely by consensus. Disputes will be considered by a panel of three experts and may be appealed to a new seven-member standing Appellate Body.

The "central pillar of the multilateral trading system and the WTO's most individual contribution" (Ruggiero, 1999: 1) is the Dispute Settlement Mechanism contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). (The DSU is incorporated into the WTO Agreement through its inclusion in Annex 2.)

Under the new WTO, there have been attempts to legitimise the process of Dispute Settlement, between member countries. This is achieved through the process in which the "WTO is to administer the rules and, in an accompanying Understanding, mandates a third-party conflict resolution procedure involving arbitration, panels and a permanent Appellate Body." This new procedure has the potential to substitute enforceable multilateral rules and remedies for the recent United States practice of 'aggressive unilateralism' that has often taken the enforcement of GATT rules into its own hands. The Understanding obligates members to have recourse to its Dispute settlement procedures, rather than act unilaterally.

The WTO DSU provides that the provisions of the Covered Agreements are also to be interpreted in accordance with the customary rules of interpretation on international law, unlike the past practice when the negotiatory approach (and hence more politics) prevailed.

The procedures for dispute settlement, which are laid down in the DSU, have many features, which make it quasi-judicial in nature. First, there is the assured access to these procedures. Second, there is the near automaticity in decision-making in all key issues related to settlement of individual disputes. Third, firm time limits are stipulated for each stage of the process, and finally there is provision for appellate review

Between Multilateral Rounds, emphasis is mostly placed on case-by-case dispute settlement. Since 1995, the DSU has taken center stage, and fundamental issues are discussed at panel proceedings. The WTO dispute settlement process is increasingly seen as being responsible for issues beyond the issues of trade liberalization. There is also a shift towards perceiving the WTO in constitutional terms, as an instrument of balancing a variety of equally legitimate interests and policies, in the process of interpreting rights and obligations by panels and the Appellate Body.

It is evident that panels as well as the Appellate Body, as do court of law, are bound to construe the WTO Agreements on the basis of the rules set forth in the Vienna Convention on the Law of Treaties.

2.6. The 1994 WTO Dispute Settlement Understanding

Overview

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), in general sets out the rules and procedures that will govern disputes arising under the various Uruguay Round procedures. The DSU provides a more effective and expeditious dispute resolution process with strict time limits for each step in the process, thereby improving upon the GATT dispute settlement mechanism. The DSU establishes an integrated system. The strengthened rules and procedures apply to all disputes (with minor exceptions), and a single panel may address all issues arising under any of the covered agreements. The DSU also emphasises the prompt settlement of disputes among WTO Members to protect their rights and obligations.

Scope and Coverage

All WTO Members are subject to the DSU procedures. The DSU creates a framework for dispute Settlement applicable to each of the Uruguay Round agreements, including the WTO agreement and the DSU. The agreements covered by the DSU are listed in Appendix 1 of the DSU. Certain multilateral trade agreements contain special or additional rules that supersede those of the DSU for matters arising under those agreements. The parties to those agreements will decide the manner in which the DSU applies to the four "plurilateral" agreements (such as the Agreement on Government Procurement and the Agreement on Civil Aircraft).

Purpose

The dispute settlement system of the WTO is a central element in providing security and predictability in the multilateral trading system resulting from the Uruguay Round. Its aim is to secure a positive solution to a dispute.

The purpose of the WTO DSU is to provide for an efficient, dependable and rule-oriented system to resolve, within a multilateral framework, disputes arising in relation to the application of the Marrakesh Agreement establishing the WTO. (http://www.wto.org/wto/eol/e/wto08/wto8_17.htm, 1998) The rule oriented system, where recommendations and rulings must aim at achieving a satisfactory settlement in accordance with the rights and obligations of the Members under the WTO Agreement (Article 3.4 DSU). As a result, all solutions to matters formally raised under the consultation and dispute settlement provisions of the WTO agreements, including arbitration awards, must be consistent with those agreements and must not nullify and impair benefits accruing to any Member under those agreements (Article 3.5 DSU).

If it is not possible to reach a mutually agreed solution, the first objective of the dispute settlement system is normally to secure the withdrawal of the measure concerned if they are fund to be inconsistent with the WTO Agreement (Article 3.7 DSU).

Principles and Functions

The DSU promotes the use of a multilateral system of dispute settlement in place of unilateralism in the resolution of trade conflicts (Article 23.1 DSU). This multilateral system is based on the principles for the management of disputes developed under Articles XXII and XXIII of GATT 1947, as further elaborated and modified by the DSU (Article 3.1 DSU).

The WTO dispute settlement provisions are composed of a set of internationally agreed rules to which WTO Members must have recourse where they seek redress of the effects of measures of other WTO Members under the WTO agreements (Article 23.1 DSU). Two examples of such measures are, firstly, a violation of the obligations or other nullification or impairment of benefits under the agreements, and secondly, an impediment to the attainment of any objective of the agreements.

Subject to certain conditions and exceptions, the DSU is applicable in a uniform manner to disputes under all of the WTO Agreements. The rules and procedures under the DSU apply to all disputes brought pursuant to the consultation and dispute settlement provisions of the WTO agreements listed in Appendix 1 DSU. However, it is subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements.

One of the most important functions of the WTO dispute settlement system is the preservation of the rights and obligations of Members under the WTO Agreement and to clarify the existing provisions of the WTO Agreement in accordance with customary rules of interpretation of public international law.

2.6.1. WTO DSU: Procedures (refer Figure 1)

The DSU establishes a Dispute Settlement Body (DSB) to oversee its application. The DSB is the key organ under the new system of dispute settlement. It is placed under the general Council of the WTO, and has a wide range of functions. The DSB establishes the panel and the appellate body, adopts their reports, makes recommendations based on their reports, maintains surveillance on implementation of these recommendations, and authorizes the aggrieved member to take retaliatory measures against the offending member. The DSB has to keep the relevant councils and committees of the WTO well informed about the developments in the disputes pending before

it. The dispute settlement process can be completed within approximately 14 months from the date of request for consultations, even where there is an appeal.

Consultation

The **first step** in the dispute settlement process under the WTO is **consultation**. Whenever a WTO Member is inconsistent with any provision under he Covered Agreements then, first of all, the former will have to make a request, in writing, to the latter for consultation. According to the DSU, a request for consultation has to be responded within ten days and the consultation process has to begin within thirty days of the request. If these time limits are not followed or the consultation process fails to solve the dispute within sixty days, the aggrieved party may request the DSB for the establishment of a panel vis-à-vis the concerned dispute. There is a provision for a quicker consultation process for urgent matters, for example for perishable goods. Thus, under the new system, a dispute could not be slowed down in the initial consultation process itself. Consultations are confidential, and are to be held without prejudice to the rights of Members in further proceedings.

Establishment of the Panel

A request for a panel marks the real beginning of the legal process of the dispute settlement as envisaged by the Dispute Settlement Understanding (DSU). In the event of the establishment of a Panel, a party must submit a written request for the establishment of a Panel, and indicate consultations were held, identify the measures at issue and summarize the legal basis of the complaint. In comparison with the GATT system, where the panelists were all government officials, in the WTO system, both officials and non-officials can be panelists provided they are "well qualified" in international trade laws and policies. This is because the DSU provides that the provisions of the Covered Agreements are also to be interpreted in accordance with the customary rules of interpretation on international law, unlike the past practice when the negotiatory approach (and hence more politics) prevailed.

A panel consists of three panelists, but the parties to the dispute may decide, within ten days of the establishment of the panel, that it should consist of five panelists. If the dispute is between a developing country and a developed country, at least one of the panelists has to be from a developing country Member of the WTO, at the request of the developing country. If within 20 days of establishment of a panel, the parties to the dispute cannot agree on the panelists, the WTO Director General will adopt panelists after consulting with the disputing parties.

Furthermore, the DSU provides that if a third party has a substantial interest in the concerned dispute, it will be given an opportunity to be heard and its interests would be taken into account by

the panel. The third party has a right to decide unilaterally that it has a substantial interest in a dispute.

The panel procedure is time bound at every stage. Once a panel is established it has to finish its work within six months (three months in the case of urgent matter), including consideration of the panel report by the DSB. In certain cases, this time limit may be increased up to nine months but no more than that. However, on the request of the complaining party, the panel can suspend its work for up to twelve months.

The panel can also seek advice, from outside, under the right to information clause of the DSU. Article 13.1 of the DSU states, "Each panel shall have the right to seek information and technical advice from any individual or body, which it deems appropriate". However, the panel, before doing so, has to inform the authorities of the Member State whether such individual or body is within the jurisdiction of that state. Furthermore, Article 13.2 of the DSU states, "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."

The DSB must adopt all panel reports within 60 days after issuance, unless a party to the dispute notifies the DSB that it will appeal the decisions or the DSB decides by consensus to reject the report. Individual Members cannot block the adoption of panel reports.

Appellate Body

The creation of an **appellate body** for review of panel decisions is a major improvement over the GATT system of dispute settlement. The WTO Appellate Body is a standing body composed of seven persons of recognized authority with demonstrated expertise in international trade law and the subject matter of the Covered Agreements. Of the seven persons, only three can serve on any one case on the basis of rotation, without any reference to their nationality or that of the parties to the appeal. The persons comprising the Appellate Body are to be unaffiliated to any government.

The most important functions of the Appellate Body is:

- If no appeal is made, then the panel ruling is final and the Appellate Body has no functions
- If an appeal is made, the report of the Appellate Body shall be adopted by the DSB and has to be accepted by the parties "unconditionally", within 30 days following its issuance to Members, unless the DSB decides by consensus against its adoption.

According to the DSU, the appeal is to be limited to "issues of law" covered in the panel report. The parties can only make an appeal to the dispute and not by third parties even if they have a substantial interest in the dispute. However, they will be given an opportunity to be heard in the

Appellate Body. The Appellate Body has to give its decision within sixty days (ninety days in certain cases) from the date a party to the dispute formally notifies its intention to the appeal.

Some general observations with respect to the Appellate Body:

- General international law is relevant and applies to all cases of the WTO and its treaty annexes, including the GATT 1994 treaty.
- Appellate Body decisions, while not entirely free of possible error, have been carefully crafted, and give a strong impression of opinions that judicial institutions in many legal systems follow.
- There exists a deferential attitude towards national government decisions, thereby exercising more judicial restraints, which is indeed a positive sign for the WTO in its being accepted as a non-partisan body.
- Panels and the Appellate Body are required to treat as confidential all submissions that they receive. Panel and Appellate Body deliberations are also confidential. However, a party to a dispute may disclose its own submissions to the public.

Adoption of Panel/Appellate Body Reports

With the introduction of the concept "negative consensus" in the DSU, the adoption of the panel/Appellate Body reports, by the DSB, have become certain. When a panel prepares its report on any dispute, it is to be issued to the Members for their consideration. The DSB can consider the report, for the purpose of adoption, after twenty days from the date it has been issued to the Members. If any Member has any objection to the report, it has to put forward its objection (with reasons) at least ten days prior to the DSB meeting in which the panel report will be considered.

Whenever the DSB meets to consider the report, the parties to the dispute can participate in such meeting as a matter of right and their views are to be recorded accordingly. The DSB has to adopt the panel report within sixty days from the date it has been issued to the Members, unless a party to the dispute formally give notice to the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

Similarly the Appellate Body report shall be adopted automatically unless the DSB decides, by consensus, not to adopt it within thirty days of its issuance to the Members. The parties to the dispute have to accept the Appellate report unconditionally.

Recommendations and Implementation

If a panel or the Appellate Body report concludes that the challenged measure is inconsistent with the concerned Covered Agreement, then it shall recommend the Member concerned to bring the measure in conformity with the Agreement. After that the Member concerned has to inform the

DSB of its intentions with respect to implementation of the recommendation. If the immediate implementation is impracticable then it will have a "reasonable period" to do so. The DSB provides three ways to determine the reasonable period. They are:

- The period of time proposed by the Member concerned and approved by the DSB.
- If the DSB does not approve then the period, which is mutually agreed on by the parties to the dispute.
- In the absence of any mutual agreement, the period of time determined through binding arbitration.

As a general rule, the time period from the date of establishment of the panel, until the date of determination of the reasonable period should not exceed fifteen months.

Compensations and Retaliation

The DSU objective is the full implementation of a recommendation to bring a measure into conformity with the agreement is preferred to compensation or the suspension of concessions or other obligations.

If the losing party to the dispute fails to comply with the recommendation then the prevailing party will ask the former to enter into a negotiation with them to come out with a scheme of compensation. In case no such agreement is reached within twenty days of the expiration of the reasonable period, the prevailing party will make a request with the DSB to authorize them to suspend the concessions (or other obligations) granted to the losing party under the Covered Agreement. Compensation and the suspension of concessions or other obligations are available as temporary measures if the recommendations and rulings are not implemented within a reasonable period of time.

The DSB is obliged to give such authorization within thirty days of the expiration of the reasonable period unless it rejects the request by consensus. These are, however, temporary measures and are not to be preferred to full implementation of the recommendations.

This restriction on trade must be at an equal level to the loss incurred by the prevailing party. Under the new rules, a country applying for compensation in a trade dispute must follow three steps:

- It must first see if it can restrict imports of the same product involved in the dispute.
- If it is not possible, it must see if it can take action against a different product, but one that is covered by the same agreement in the GATT.

- If neither of these options is "practicable or effective" it can take action against imports of any product.

The last two options come under cross-retaliation. It is an important issue for developing countries than it is for developed countries. This is for two reasons:

- The difference in the type of goods traded between developed countries, on one side, and between developing and developed countries on the other.
- The relatively limited number of goods exported by developing countries as compared to that of developed countries.

In the case that the losing party finds that the retaliatory measure followed by the prevailing party is excessive or that the underlying principles of the multilateral trading system has been undermined, it can raise an objection in this regard. The concerned dispute is then referred to arbitration, to be carried out by the original panel members (if they are available) or by any arbitrator appointed by the director general of the WTO.

The arbitration should complete within sixty days of the expiry of the reasonable period. A status quo has to be maintained during the course of the arbitration. The arbitrator's decision will be final and binding on the parties. After the decision is adopted by the DSB, it will authorize the prevailing party to retaliate in conformity with the same.

A good **example** where the retaliatory measure itself is disputed is the US-EU Banana Dispute. The dispute was between the US and the European Union with respect to the EU's import regime for bananas.

The EU Regime, based on the Lomé Convention, provided a differential treatment in favor of African, Caribbean and the Pacific (ACP) countries regarding imports, sale and distribution of bananas in the EU market.

On the other hand, US companies are the main producers and distributors of bananas from the Latin American countries. Taking on the case on behalf of the Latin American producers, the US, along with Ecuador, Guatemala, Honduras and Mexico, filed a complaint at the WTO in September 1995 against the EU alleging that the EU banana import regime was GATT-illegal.

A panel was established in May 1996. In May 1997, the panel gave its decision against the EU import regime. In June 1997, the EU appealed against the panel findings. The Appellate Body, upholding the panel decision, ruled that the EU's import regime for bananas was in contravention of the WTO rules.

In September 1997, the DSB adopted the Appellate Body report. The EU also accepted the Appellate Ruling. However, there was a conflict regarding cross-retaliation measures.

In 1998, WTO arbitration decided that the reasonable period of time for bringing the regime in conformity with the WTO rules would expire on 1 January 1999. To comply with the Appellate Body ruling the EU announced a revised regime to be enforced 1 January 2000.

The US (and others), however, alleged that the new regime does not comply with the ruling and is still illegal under the WTO laws. The original panel was reconvened to test the WTO-consistency of the new regime and to find out whether it was in compliance with the Appellate Body ruling. The reconvened panel also acted as arbitrator to determine the level of damages to the US economy due to the EU's banana import regime. On 12 April 1999, the reconvened panel came out with its report. It ruled that the new banana regime of the EU is in violation of WTO laws. The panel as an arbitrator determined that the US economy is suffering a damage of $191.4 mil per year due to the EU banana import regime.

On 19 April 1999, the DSB, based on the arbitrate award, authorized the US to impose trade sanctions against the EU to the amount of $191.4 mil per year. For the first time, the DSB has authorized any Member to use trade sanctions, due to non-compliance with the panel/Appellate Body rulings. The EU has said that it would comply with the rulings and would soon seek a WTO-compatible solution. Until then the sanction will remain in force.

Arbitration

As an alternative means of dispute settlement, members may seek arbitration within the WTO in situations where the issues in conflict are "clearly defined by both parties" to the dispute. The parties must agree to arbitration and the procedures to be followed. All members must be given prior notice of the arbitration. Third parties may join the arbitration only with the consent of the parties that have agreed to arbitration. Where the parties decide to arbitrate, they must agree to abide by the arbitration award.

Non-Violation Cases

The DSU provides special rules for cases where a WTO member seeks redress of another members' action that, while not inconsistent with any Uruguay Round Agreement, nevertheless results in benefits that should have accrued to it being "nullified or impaired". These are called non-violation disputes. In initiating such a case, the complaining member must provide a detailed justification of its grievances. The remedy in such cases differs from that of the usual "violation"

case in that, although there is no obligation for the defending Member to withdraw the measure in question, it must make a "mutually satisfactory adjustment", which may include compensation.

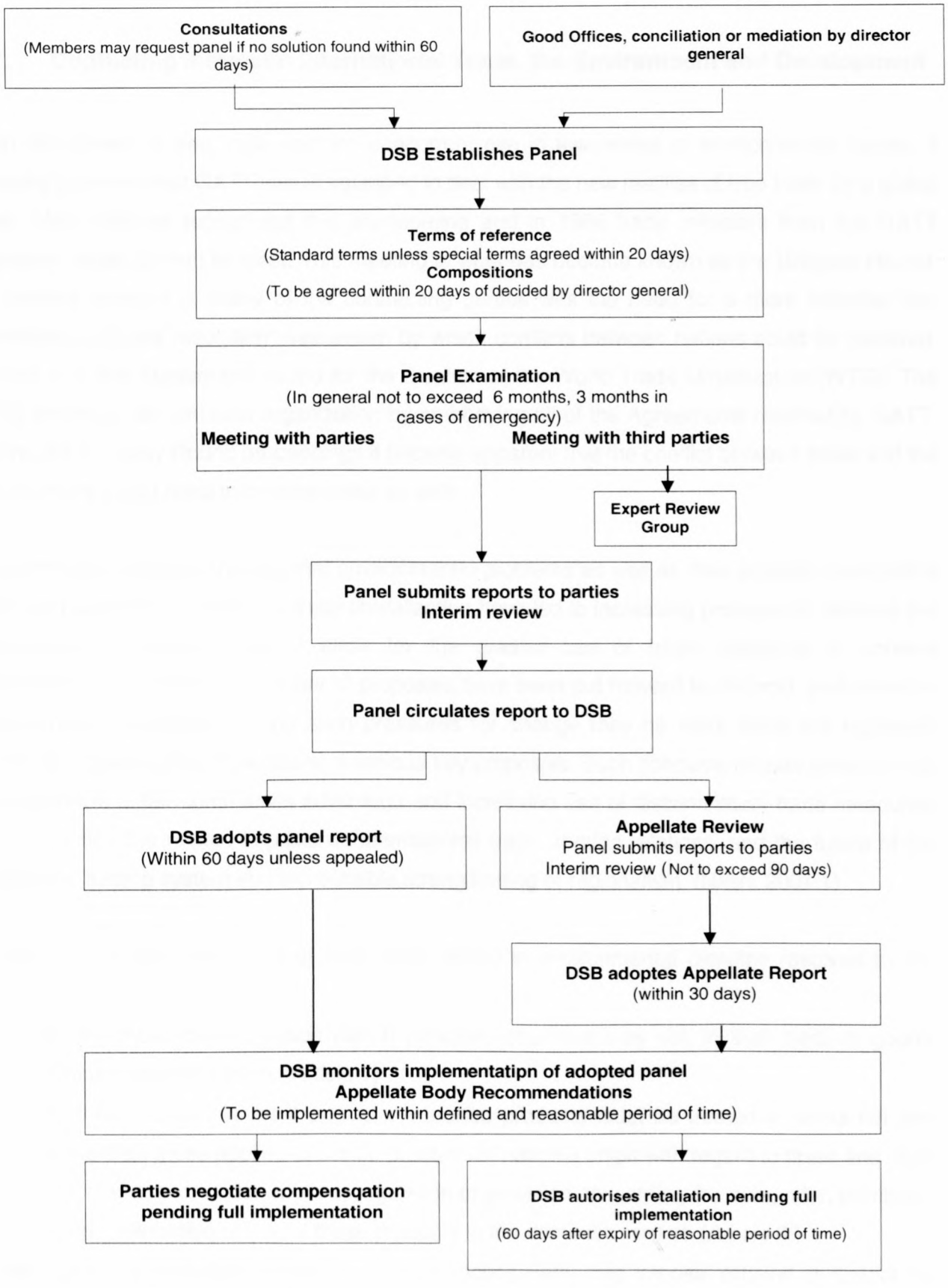

Figure 1: The WTO Dispute Settlement Procedure

2.7. Conflicting Interests: International Trade, the Environment and Development

With the growth of free trade and the concurrent rise in awareness of environmental issues, it became apparent that GATT was ill equipped to deal with the new realities of free trade on a global level. Many nations recognized this shortcoming and in 1986 trade ministers from the GATT signatory states agreed to meet. This meeting is what has become known as the Uruguay Round. Of primary concern to many of the contracting parties was the need for a more effective and expeditious dispute resolution mechanism by which conflicts between nations could be resolved. To this end, the Agreements called for the creation of the World Trade Organization (WTO). The WTO serves as an umbrella organization by embodying all of the Agreements reached by GATT. During the Uruguay Round proceedings it became apparent that the conflict between trade and the environment would need to be addressed as well.

Concerns about global and regional environmental problems as well as their possible association with rapid economic growth and trade liberalization have led to increasing pressure to broaden the interpretation of WTO rules to allow for the greater use of trade measures to achieve environmental objectives. A number of proposals have been put forward to this end, and while the environmental objectives driving such pressures for change may be valid, there are legitimate concerns regarding the implications of various key proposals. Such concerns include greater trade protectionism, unfair commercial advantage and increasing use of discriminatory trade measures, not to mention the related impacts on international trade, foreign relations, and the future of the multilateral trading system and the possible strengthening of regionalism. (Nash, 2001:1)

Some of the basic principles that have been raised in environmental disputes resolved by the GATT/WTO include:

- Under the most favored nation (MFN) principle, countries may not, in their trade in goods, discriminate against others. (Article 1)
- Under the national treatment principle, imported products must be treated in terms not less favorable than those applied to similar products of national origin with regard to taxes and other internal charges, or under any law, regulation or provision concerning the sale, offer, purchase, transport, distribution or use of these products in the domestic market. (Article III)
- As regards quantitative restrictions, no Contracting Party may impose, prohibit or restrict the import or export of goods by means of licenses or other measures unless these prohibitions or restrictions are necessary for the application of norms or regulations relating to the control of quality or to the sale of products destined for international trade (Article XI:2). Nor can such prohibitions or restrictions be imposed on imports or exports unless similar measures apply

also to the import of similar products originating in third countries, or the export of such products to any third country. (Article XIII)

The application of the above principles remains subject, however, to the exceptions specified in paragraphs (b) and (g) of Article XX with regard to measures needed to protect the health and life of persons and animals, and to preserve plant life, or intended for the conservation of non-renewable natural resources, as long as these measures correspond also to domestic restrictions on production or consumption.

In the majority of disputes that have come before the GATT/WTO dispute settlement bodies, the focus was on their analysis on the interpretation of the text of Article XX, specifically paragraphs (b) and (g).

2.8. The GATT, WTO and Environmental Law

Environmental problems tend not to stop at national borders and it is often hard to come up with solutions for environmental problems. The characteristic of environmental problems that makes it so difficult to deal with is, firstly, its spatial dimension. In the second place, there often exists a time lag between the human behaviour, and the moment at which the problem caused by this behaviour becomes clear. Finally the fact that the behaviour of one single person or factory might be harmless, but combined with behaviour of others the effects might be disastrous, is also an important characteristic of environmental problems.

It thus comes as no surprise that the relationship between the International Trade and Environmental Regulation is a complex one. In fact, trade regulation and liberalization has been depicted as a contrast to environmental concerns. However, according to Thomas Cottier, a Professor of Law at Berne (1999:1) "such juxtaposition, does not stand up to detailed scrutiny. It is necessary to look at the relationship on a case-by-case basis, taking into account the overall context and effect of regulations. There are areas of win-win situations where trade liberalization and environmental policies go hand in hand. But there are as well areas of conflict and tension."

Some of the examples of win-win situations mentioned by Cottier in his paper include, the reduction of production subsidies in agriculture and the fundamental shift to direct payments. This policy shift is highly beneficial to integrated, ecologically sound and sustainable production policies. The same holds true for the improvement of market access for modern and environmentally sound products in the industrial sector.

However, trade liberalization and environmental regulations will not end up living in full harmony and convergence – tensions are likely to stay, as tensions will always exist between different policy goals pursued simultaneously by government. It should be recognized that, the protection of global commons and of interests of common concern, could no longer be successfully approached under traditional doctrines of exclusive national sovereignty and jurisdiction.

Also according to Thomas Cottier (1999:1) "trade and environment is what may be called a horizontal issue in trade regulation. It cannot be specifically located in a particular area and dealt with as a succinct topic. It emerges in all the various fields and aspects of trade regulation." Therefore, it is hardly possible to negotiate the agreement on trade and environment – it requires a much broader view. It might therefore be useful to look first at constitutional issues and then turn to the main pillars of the WTO system: good, services and intellectual property.

It is important to look at underlying, ongoing and possible future changes, which are highly relevant for the process of interfacing trade and environmental regulation. While the GATT was an agreement whose purpose was almost exclusively the reduction of trade barriers, the WTO increasingly assumes constitutional functions in a globalizing economy, and has recently started moving center stage to shape global economic policies. We discuss this move to a constitutional function in more detail under 2.6.1.

2.8.1. Process and Production Methods (PPMs)

The Agreement on Technical Barriers to Trade (TBT) adopted at the close of the Uruguay Round is designed to regulate the use on non-tariff barriers to trade and ensure that technical regulations, standards and conformity assessment procedures do not create unnecessary barriers to international trade. PPMs refer to the way in which products are manufactured or processed, or to how natural resources are extracted or harvested. Both TBTs and PPMs, frequently used to justify environment-related restrictions on trade, can have significant impacts on trade flows and on market access.

Trade restrictions based on PPMs are in many cases contrary to WTO rules, unless such restrictions are necessary to enforce product performance characteristics. However, in response to growing concerns regarding the ecological impacts of inadequately controlled PPMs, various proposals have been put forward suggesting that WTO rules be amended or interpreted to legitimise the use of unilateral trade measures that discriminate between 'like' products solely on the basis of PPMs.

However, amending Article XX to allow for unilateral trade measures based on PPMs would subvert one of the fundamental principles underlying the GATT/WTO system, namely national treatment of like products. Such measures would amount to extra-territorial or extra-jurisdictional application of domestic regulations. They also raise important issues with respect to national sovereignty, as they would undermine an exporting country's ability to set its own environmental priorities and policies within its jurisdiction. PPM-based unilateral trade measures would also be extremely vulnerable to protectionist abuse, as it would offer governments new opportunities to use non-tariff barriers to artificially level the playing field. This position is supported by the Rio Declaration. Principle 12 of the Declaration advises that unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.

The Appellate Body (AB) ruling on the Shrimp-Turtle case is an important turning point in the WTOs application of PPMs. Controversy surrounds the AB's decision with respect not only to the procedural precedents that may have been established, but also to the policy implications of the decision itself. One important criticism of the decision is that, in its reasoning, the AB went beyond interpreting the rules of the WTO to applying them in a manner that is equal to policy making. More specifically, the AB decision seems to imply that unilateral trade measures based on PPMs are allowable provided certain conditions are met. In addition, its finding that the definition of natural resources should include not only non-living but also living natural resources – justified in part by reference to the "objective of sustainable development" in the Preamble of the WTO Agreement – may have broadened the scope of measures that could be accepted under Article XX, sub-article (g) relating to the conservation of exhaustible natural resources.

The AB also held that future interpretations of the chapeau of Article XX must take into account the specific language of the preamble to the WTO Agreement. Finally, the AB decision appears to have opened the door for Environmental NGOs and other stakeholder groups to have input into the dispute settlement process.

The AB ruling on the Shrimp-Turtle Dispute has serious implications of WTO Jurisprudence, due to the fact that the AB decision may have provided greater scope for unilateral PPM-based environment-related trade measures to be taken in the future. The impact of this decision remains to be seen. However, concern has already been expressed by some developing countries that the findings of the AB will not only open a floodgate of unilateral measures based on non-product related PPMs, but also have serious consequences for the future application of WTO rules and disciplines. The apparent trend towards "judicial activism" and the possibility that Panel and AB decisions may move GATT/WTO law forward in ways that WTO members had not intended are also a source of concern.

2.8.2. Eco-Labelling and Certification

As public concern for the environment grows in both developed and developing countries, environmental issues are playing a central role in economic and trade policies. This is reflected in the growing trend to inform consumers more fully about the products they purchase, not only with regard to the characteristics of commodities that affect their well-being directly, but also with regard to the impact of production processes on the environment in general. The practice of supplying information on the environmental characteristics of a good is called 'eco-labelling' or certification. Both generate many questions, especially for developing countries that fear that such schemes could be used toward protectionist ends or act as significant technical barriers to trade.

Eco-labelling schemes are viewed by some as voluntary, market-based instruments that can provide information to consumers and encourage better environmental performance by the industry. However, ill-designed life-cycle/multiple criteria schemes can raise discriminatory non-tariff barriers to trade that can have negative economic and environmental consequences. Such programs can also include criteria for product-related and non-product related PPMs. At present it is not clear if the Technical Barriers to Trade Agreement proposals cover voluntary PPM-based eco-labelling schemes.

Confirmation that voluntary, PPM-based, life-cycle/multiple-criteria eco-labelling programs are compatible with WTO rules could have significant consequences, as such a development would be another step towards legitimising unilateral PPM-based trade measures. It must also be recognized that life-cycle/multiple-criteria eco-labelling can be manipulated to create competitive advantage for domestic producers. This is due to the fact that choice and weighing of criteria tend to be subjective in nature in nature and not based on objective, scientific evaluation and analysis. Developing countries may suffer competitive advantage in important export markets, given that local conformity assessment producers may be unavailable, too costly or not recognized by groups granting labels in importing countries.

2.9. Legal Principles and Dispute Settlement: Strengthening the GATT/WTO Legal Principles

2.9.1. Constitution and Jurisprudence

As the goal of decreasing trade barriers is increasingly accompanied by the inclusion of additional trade related issues, the WTO function has become more multifunctional. As issues such as the environment, intellectual property, competition and labour standards move to centre stage, the

WTO increasingly has to deal with a number of partly competing, but equally legitimate policies. It becomes a matter of balancing interests. This, in essence, is a constitutional function, and, according to Thomas Cottier (1999:2) it evolves mainly for the following reasons:

- Trade policy and regulation emerge as the prime instruments of foreign policy. They take centre stage. Enforcement of foreign policy goals essentially operates with economic incentives of which market access assumes a key role. Traditional means, such as territorial control or military operations, are no longer suitable and available, being limited to emergencies.
- Therefore, it is no coincidence that GATT, and now the WTO, has been attracting regulatory needs in what are called trade related aspects of other policy areas. The attraction is due to the key role of trade regulation in enforcing foreign policy.
- Due to the central role of trade regulation in foreign policy, the WTO Dispute Settlement emerged as by far the most efficient legal and political instrument to settle international disputes. It contains the first international appeal process and stands for the rule of law.

The world trading system is bound to develop constitutional doctrines in structures and in case law in order to cope with the complexities of interfacing different policies. This is a major challenge, as the enlarged responsibility raises a number of constitutional issues. These issues are of particular importance to the relationship between trade and the environment.

2.9.2. Reasonable Expectations

In the period 1995 to 1998, the WTO has received over 100 trade disputes with 28 cases proceeding to a dispute settlement panel. The function of panels is to make an objective determination of the facts and the applicability of, and conformity with, the WTO Agreement.

The imprecise nature of GATT provisions has meant that panels often base their decisions on broad legal principles in order to overcome imperfections in the GATT. Some have argued that these principles amount to a re-writing of GATT obligations. Whilst panel reports have been subject to historical reviews and statistical analysis, little has been done to examine the uncodified principles of panel jurisprudence. (Chua, 1998:1)

One such principle, which is neither contained in the GATT, nor apparent from a textual interpretation, is the principle of reasonable expectations. Free trade is not an end in itself, as the GATT seeks to liberalise trade as a means of achieving higher standards of living, full employment and the efficient allocation of resources. For these benefits of free trade to be realised, there must be stability and certainty in competitive conditions for industries to invest and expand production. Chua (1998:2-5) argues that GATT and WTO panels have formulated and applied the reasonable

expectations principle as a means of achieving this objective. "By virtue of its consistent and frequent application, this principle has become more than a subsidiary means of filling gaps in the GATT. Rather it has become a primary consideration, which pervades the entire interpretation of the WTO Agreement" (Chua, 1998:4).

Although the principle has been applied in a number of contexts, its nature and scope has received little attention in literature. In light of DSU reforms, it is important that the scope and content of panel principles be ascertained and subjected to critical analysis. By foregoing their right to veto, and providing for automatic adoption of reports and authorisation of retaliatory measures for non-compliance, parties have "substituted legal legitimacy for political legitimacy" (Chua, 1998:4) in the WTO dispute settlement process. If the scope and content of panel principles remain hidden, they may be perceived as an ex post rationalisation for a conclusion reached on other grounds or influenced by realpolitik considerations. Such a perception would make it difficult for states to justify compliance measures to their domestic constituents.

2.9.3. Reasonable Expectations as a general principle of the GATT

Panels have frequently referred to "reasonable expectations", "reasonable anticipation", or "reasonable assumptions", without indicating the source or rationale of this principle, in applying the GATT. These principles are neither contained in the text of the GATT, nor in the interpretative notes adopted by the parties. Nevertheless, it is arguable that the protection of reasonable expectations is an intrinsic part of the GATT. The heart of the GATT is Article II, which obligates members not to charge tariffs in excess of the maximum levels negotiated for specific products. Many of the other GATT rules (MFN and National Treatment) are designed to protect expectations of better market access arising out of Article II tariff bindings.

Unlike the general international law principle of good faith in treaty relations which protects the confidence that one state may reasonable place in the promise of another, the reasonable expectations principle, as a general principle of the GATT, is an "umbrella" principle which protects, what is at first glance, an unrelated range of interests.

2.9.4. Exhaustion of Local Remedies Rule

The international rule of exhaustion of local remedies before taking to international remedies is one of the basic rules in international law. The object of the rule is to enable the respondent State to correct the harm and to do justice. The application of the rule of domestic remedies to the protection of human rights depends on conventional provisions.

2.9.5. Precautionary Principle

The precautionary principle is in fact a very simple concept. It basically states that " When an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically." (Science and Environmental Health Network, 2000: http://www.enviroweb.org/achive/precautions.htm)

Key elements of the principle include taking precaution in the face of scientific uncertainty[7], exploring alternatives to possibly harmful actions, placing the burden of proof[8] on proponents of an activity rather than on victims or potential victims of the activity, and using democratic processes to carry out and enforce the principle.

The precautionary principle is increasingly seen as a basic principle of international environmental law. In order to protect the environment, Principle 15 of the Rio Declaration encourages states to adopt a precautionary approach, for example where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation. In practice, the precautionary principle is used as a risk management measure that involves a political decision. It is exercised in conditions of uncertainty and taken to respond to public demands to eliminate a perceived risk or at least restrict it to an acceptable level. Proposals have been made for WTO rules to be interpreted and applied in order to accommodate the use of the precautionary principle in trade decisions.

There are many disadvantages identified with introducing the precautionary principle into WTO dispute settlement. Even a narrow interpretation of the precautionary principle could threaten the very functioning of the multilateral trade system. More specifically, adoption of the above proposal will open the door to more politically driven, as opposed to science-based, trade measures. In addition, a significant bias against new products/technologies could be introduced, thus introducing an undesirably high level of unpredictability and intolerance of innovation in international trade and investment, for example genetically modified products. This situation could be worsened by the fact that the application of the precautionary principle is likely to vary by country, given the difficulty of developing precise criteria to guide its implementation. WTO Panels would also have greater difficulty distinguishing between measures designed to address legitimate environmental problems and those that are disguised barriers to trade. The burden of proof may also shift in dispute settlement cases. Instead of the country introducing the trade measure having to demonstrate that

[7] According to the precautionary principle, when reasonable scientific evidence of any kind gives us good reason to believe that an activity, technology or substance may be harmful, we should act to prevent harm.
[8] The Precautionary Principle does not deal with absolute certainty, but does put the 'burden of proof' onto the innovator or perpetrator.

the measure is necessary to address an unreasonable risk, complainants may be required to furnish scientific evidence demonstrating the harmlessness of their product on a full life-cycle basis.

Due to these factors, the WTO has to date not acted on the precautionary principle. According to Saunders (2000: http://www.purefood.org/ge/precaution.cfm) "regulators tend to rely instead on what can be called the 'Anti-Precautionary Principle'. " This is based on the premise that, when a new technology is being proposed, it must be permitted unless it can be shown beyond reasonable doubt that it is dangerous. According to Saunders, the "burden of proof here is not on the innovator, it is on the rest of us." This perspective has given the WTO the image of "the most enthusiastic supporter of the anti-precautionary principle". At the WTO a country that wants to restrict or prohibit imports on grounds of safety has to provide definite proof of hazard. An example that is illustrative of this is the recent judgement that the EU ban on US growth-hormone levels in beef is not justified under WTO law.

The Beef-Hormone decision serves as an example of the debate surrounding the precautionary principle as well as the application of the Agreement on Sanitary and Phytosanitary (SPS). Based on the complaint from the US, a WTO appellate panel upheld a ruling against Europe's ban on beef from cattle treated with growth hormones, even though the ban treated domestic and foreign products alike. Europe's zero risk standard was based on the precautionary principle widely recognized in international environmental law and US domestic regulatory policy. (Public Citizen, 1998: 2) According to comments made by Public Citizen (1998:3) "the Beef-Hormone case demonstrates that the SPS Agreement enhances the role of science far beyond the point that is appropriate, attempting to eliminate all 'non-science' factors from standard setting." Despite the undisputed value of science in policy-making, scientific uncertainties remain.

As demonstrated by the Beef-Hormone ruling, the SPS Agreement requires standards to be based on risk assessment. The foundation of risk assessment in food safety standard setting is the notion that scientists can accurately predict the consequences of food additives, a notion acknowledged by scientists that they are currently not able to predict. For this reason, scientists, regulators as well as consumer and environmental organizations are calling for public health policies that prevent such exposures in the face of scientific uncertainty.

2.10. Multilateral Environmental Agreements (MEAs)

It is generally agreed that the relationship between international trade rules and MEAs ought to be mutually supportive. In practice however, the two regimes often contain incompatible provisions

and avoiding clashes remains a controversial ad hoc task. The relationship between the multilateral trade agreement of the GATT/WTO and MEAs are no different at present.

The use of trade measures pursuant to an MEA may lead to potential conflict between parties to an MEA and non-parties to the MEA that are members of the WTO, particularly if the application of the trade measure in question violates the principle of non-discrimination of the GATT. Given the concern that such disputes could potentially hinder the objectives of an MEA and inhibit the inclusion of trade measures in future MEAs, various proposals have been made suggesting that WTO rules be modified or interpreted to legitimise MEAs with discriminatory trade provisions.

However, proposals to amend or interpret WTO rules to facilitate discriminatory trade measures in MEAs against non-signatory WTO members would be equal to amending WTO members' rights and obligations. As a result, it would be almost impossible for WTO members that are non-parties to an MEA to challenge a measure taken against them pursuant to an MEA. This is exacerbated by the fact that there is no clear understanding either of what constitutes a global environmental problem. Given the potential trade benefits that may accrue to MEA parties, there may be a tendency to rely more on discriminatory trade measures than on alternative policy instruments in MEA policy packages. This, in turn would increase the likelihood of design flaws in future MEAs. These flaws could not only compromise the competitive position of industry and non-party countries, but also lead to undesirable environmental consequences.

The value of maintaining and reinforcing current rules cannot be overlooked. Indeed, the ability of non-parties that are members of the WTO to contest a discriminatory trade measure taken pursuant to an MEA imposes a discipline on MEA creators to assemble a package of policy instruments that both encourages broad-based participation in the MEA as well as steady, effective progress towards stated environmental objectives. Such policy instruments include non-discriminatory trade measures as well as other instruments, for example capacity building, financial and technical assistance and technology transfer. (Nash, 2001:3)

Both the **tuna-dolphin** and the **shrimp-turtle** cases serves as an illustration of the current incompatibility between MEA's and WTO law. According to Public Citizen, (1998: 5) the tuna-dolphin panels did not consider the US tuna embargo within the framework of multilateral agreements on dolphin protection. The panel found that US law violated GATT through the extraterritorial application of domestic law.

In the shrimp-turtle case, the fact that the US has signed agreements mandating the use TED's with 17 nations did not prevent the appellate body from ruling that the US was still implementing the shrimp import ban in a unilateral, extraterritorial and thus discriminatory manner. In addition,

the panel rejected application of the article XX exception even though the shrimp embargo conforms to MEA's such as the CITES. The CITES allows the imposition of trade sanctions on nations who endanger species threatened with extinction.

Chapter 3: From GATT to the WTO: Dispute Settlement and the Environment

3.1. Environmental Issues in the Multilateral Trading System

3.1.1. Overview of Environmental Issues in the Global Trading System

The debate surrounding the Global Trading System, dispute settlement and the environment go back to the establishment of the GATT. When the international trading system was reconstructed after WW II, the environmental consequences of economic integration were not a primary concern. Only indirect references to the environment were included in the exception clause of GATT 1947, Article XX, which allows countries to sidestep the normal trading rules if necessary to protect human, animal or plant life or health, or to conserve exhaustible natural resources, provided that such measures do not discriminate between sources of imports or constitute a disguised restriction on international trade. In the first decades of the GATT, no references were made to the environment, neither in the general proceedings of the contracting parties, nor in any trade disputes. (Nordström & Vaughan, 1999: 12)

The link between trade and the environment, both the impact of environmental policies on trade, and the impact of trade on the environment, was recognized only in 1970, when growing international concern about the impact of economic growth on social development and the environment led to a call for an international conference on how to manage the human environment, and the 1972 Stockholm Conference was the response.

In November 1971, the GATT Council of Representatives agreed to set up a Group on Environmental Measures and International Trade (EMIT). The decision also said group would only convene at the request of GATT members, and it was 20 years before the EMIT Group met because, until 1991, no one asked for it to meet.

In spite of this, between 1971 and 1991, environmental policies began to have an increasing impact on trade, and with increasing trade flows, the effects of trade on the environment had also become more widespread. This led to a number of discussions:

- During the **Tokyo Round** of trade negotiations (1973–1979), participants took up the question of the degree to which environmental measures (in the form of technical regulations and standards) could form obstacles to trade. The Tokyo Round Agreement on Technical Barriers to Trade (TBT), also known as the "Standards Code", was negotiated. Amongst other things, it

called for non-discrimination in the preparation, adoption and application of technical regulations and standards, and for their transparency.

- During the **Uruguay Round** (1986–1994), trade-related environmental issues were once again taken up. Modifications were made to the TBT Agreement, and certain environmental issues were addressed in the GATS the Agreements on Agriculture, SPS, Subsidies and Countervailing Measures, and TRIPS.
- In **1982**, a number of developing countries expressed concern that products prohibited in developed countries on the grounds of environmental hazards, health or safety reasons, continued to be exported to them. With limited information on these products, they were unable to make informed decisions regarding their imports. At the 1982 GATT ministerial meeting, members decided to examine the measures needed to bring under control the export of products prohibited domestically (on the grounds of harm to human, animal, plant life or health, or the environment). This led to the creation, in 1989, of a Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances.
- In **1991**, a **dispute between Mexico and United States** put the spotlight on the linkages between environmental protection policies and trade. The case concerned a US embargo on tuna imported from Mexico, caught using purse seine nets, which caused the incidental killing of dolphins. Mexico appealed to GATT, on the grounds that the embargo was inconsistent with the rules of international trade. The panel ruled in favor of Mexico.

During this period, important developments were also taking place in environmental forums. In 1987, the World Commission on Environment and Development produced a report entitled "Our Common Future" (also known as the Brundtland Report), in which the term "sustainable development" was coined. The report identified poverty as one of the most important causes of environmental degradation, and argued that greater economic growth, fuelled in part by increased international trade, could generate the necessary resources to combat what had become known as the "pollution of poverty".

As a result of these developments, the EMIT group's proposal met with a positive response. In accordance with its mandate of examining the possible effects of environmental protection policies on the operation of the GATT, the EMIT group focused on the effects of environmental measures, such as eco-labeling schemes, on international trade, the relationship between the rules of the multilateral trading system and the trade provisions contained in multilateral environmental agreements (MEAs) (such as the Basel Convention on the Transboundary Movement of Hazardous Wastes), and the transparency of national environmental regulations with an impact on trade.

The activation of the EMIT group was followed by further developments in environmental forums. The 1992 Rio Earth Summit drew attention to the role of international trade in poverty alleviation and in combating environmental degradation. Agenda 21, the programme of action adopted at the conference, addressed the importance of promoting sustainable development through, amongst other means, international trade. The preparatory work for the summit had itself influenced developing countries' approach discussing trade and environment issues in the EMIT group. The concept of "sustainable development" had established a link between environmental protection and development at large.

These moves were about to yield more concrete results within the trading system. The environment and trade were to be linked more explicitly in the new constitution of the multilateral trading system that was to be signed in 1994, with the establishment of the WTO.

While the purpose of the GATT was almost exclusively the reduction of trade barriers, the WTO increasingly assumes constitutional functions in a globalizing economy, moving towards playing a greater role in shaping global economic policies. Accordingly, the goal of reducing trade barriers is increasingly accompanied by the inclusion of additional, trade-related issues, of which the environment is one.

Towards the end of the 1986–94 Uruguay Round, attention was once again drawn to trade-related environmental issues, and the role of the soon-to-be-created World Trade Organization (WTO).

As a result, the preamble to the Marrakesh Agreement Establishing the World Trade Organization (sometimes described as the WTO's founding charter), refers to the importance of working towards sustainable development. The agreement was signed, along with all the other Uruguay Round agreements, in Marrakesh, Morocco, in April 1994. It states that WTO Members recognize:

> "that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."

The fact that the first paragraph of the preamble recognizes sustainable development as an integral part of the multilateral trading system illustrates the importance placed by WTO members on environmental protection.

In Marrakesh in April 1994, ministers also signed a "Decision on Trade and Environment" which states that:

"There should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other."

At Marrakesh, the parties also adopted a decision on Trade, Services and the Environment, and a second decision of Trade and the Environment. Under the latter the Committee on Trade and Environment was established to deal with the theme of the environment within the WTO. The functions of this Committee is:

- To relate trade-and environmental measures, so as to promote their positive interaction.
- To recommend changes in the multilateral trading system in function of the need to preserve the environment, on the understanding that these provisions would be compatible with the provisions of the GATT.
- To promote a greater transparency of the trade measures adopted for environmental reasons, ensuring that they are not used for protectionist purposes.
- To consider the linkage between the environmentally motivated provisions of the multilateral trade system, and any charges, taxes and other requirements prescribed for the same purpose with regard to particular products.
- To develop effective mechanisms for the settlement of disputes between the multilateral trade system and the multilateral environmental accords.
- To consider the environmental measures relating to market access and to the export of products whose sale were prohibited in the country of origin.

3.1.2. Trade, the Environment and Sustainable Development: A Theoretical Perspective

Trade regulation and liberalization has been frequently depicted as a contrast to environmental concerns. Such juxtaposition, however, does not stand up to detailed scrutiny. It is necessary to look at the relationship on a case-by-case basis, taking into account the overall context and effect of regulations. There are areas of win-win situations where trade liberalization and environmental policies go hand in hand. But there are as well areas of conflict and tension.

Moreover, trade and environment is what may be called a horizontal issue in trade regulation. It cannot be specifically located in a particular area and dealt with as a succinct topic. It emerges in all the various fields and aspects of trade regulation. In other words, it is hardly possible to negotiate the agreement on trade and environment.

Some of the disputes that have come before the WTO Dispute Settlement Body have also failed to address the issue of trade and the environment, and whether one country can take unilateral action

against other countries. A good example of this is the Shrimp-Turtle dispute. In this case four Asian counties objected to a US ban on shrimp imports on grounds that turtle excluder devices were not used while catching the shrimp, leading to the deaths of endangered turtles. The WTO ruled against the US, but only for the discriminatory manner in which the US had enforced its certification program, not because it amounted to 'extra-jurisdictionality', meaning enforcement of domestic US laws on the four other countries.

It is realized that globally acceptable standards for PPM's will open a Pandora's Box of trade conflicts. How shrimps are caught, is tuna dolphin-safe to name but a few will become matters of international concern. It is also important to note that trade wars, based on environmental grounds, do not only take place between industrialized and developing countries. The EU and US have been involved in a protracted battle surrounding hormone treated beef.

Challenges ahead:

- Effort to set globally acceptable PPMs will be an trade disadvantage to developing countries.
- Existing disparities between the WTO trade regime and multilateral environmental measures (MEAs), such as those between the WTO's Trade Related Intellectual Property Rights (TRIPs) regime and the Convention on Biological Diversity, should be thoroughly addressed.
- The developing country perspective is that the civil society of the north, as was evident at the 1999 WTO Ministerial meeting held in Seattle, supports the use of trade as a lever to control the environmental behaviour of the South. Developing country governments will have to support and advance the issues that are important to them.

3.1.3. Sustainable development and the WTO

The WTO has experienced many difficulties with incorporating the principle of sustainable development in the international trade regime. Despite the reference to sustainable development in the preamble of the Marrakesh Agreement, and the creation of the Committee on Trade and Environment, progress has not been significant so far. In fact, in an official report on the activities of the Committee on Trade and the Environment, the WTO concludes that its competence is limited to trade. In other words, the WTO considers it necessary to deal with environmental issues only when environmental policies have significant repercussions on trade. It is argued that "member countries do not expect, or wish the WTO to intervene in national or international environmental policy, nor to establish norms to that effect, since other organizations dealing specifically with environmental matters seem better qualified to do this." (Biggs, 2000: 10)

In fact, at a high level symposium held in Geneva in March 1999, with the participation of more than 130 countries, the WTO persisted in dealing separately with the relationship between trade and environment, and that between trade and development.

3.2. International Trade Dispute Settlement: An Environmental Perspective

The question at the heart of the trade-environment debate remains simple: what are the environmental impacts of free trade? The public concern is that unprecedented rate of global economic expansion, fuelled partly by trade liberalization, and similar rates of global environmental degradation are related. They argue that a possible correlation between environmental quality and free trade, direct or indirect, is grounds enough to stop any new trade initiatives until the environmental consequences of existing trade commitments are clearly understood, and adequate policy responses are put in place to minimize environmental costs, and maximize environmental benefits.

However, even though the seriousness of the trade-environment debate cannot be ignored, it is necessary to note the public profile of the debate, supported only by tentative or hypothetical observations. This in spite of the recent advances made in environmental assessments. In the last decade, environmental impact assessments have become more accurate and encompassing, built upon rigorous and comprehensive environmental data sets, baselines and aggregated indicators. They have become more robust with geographic information systems and various mapping techniques, as well as ecological economic and other models. Underlying these and other approaches, environmental impact assessments are grounded on the clear recognition that full transparency, and the early and regular input of the public legitimise them (Vaughan, 2000: 10).

When analysing the debate surrounding trade liberalization, the environment and dispute settlement, two very different perspectives arise from two very different sections of the global trading system. These perspectives are from, on the one side, developing countries, and on the other side, the industrialized nations of the world.

3.2.1. The WTO, Dispute Settlement and Sustainable Development

The problems surrounding free trade, environmental measures and development were triggered by economic globalisation, according to most writers and theorists from developing countries. They feel that economic globalisation has led to increased trade conflicts between countries. This is fact that will be disputed by few, as it is common knowledge that increased trade relations between nations will lead to increased conflict.

This is not the main concern of developing countries, but rather the fact that, as developing countries liberalize trade policies to compete globally, Industrialized countries invent new barriers to protect their industries from cheaper imports form developing countries. Industrialized countries object to the less stringent production and processing methods (PPMs) in developing countries, most often on environmental and labour grounds. According to developing countries, free trade under the 'North-driven' WTO has meant more costs and little advantage. Developing countries see trade restrictions as a form of 'protectionism' used by industrialized countries to protect their own companies from cheaper competition. Northern countries have also resorted to exporting domestic legislation (and morality) to other countries to 'protect' the environment.

3.2.2. International Trade, the Environment and Development

Experts agree that the WTO System has been very effective in bringing order and predictability to international trade through its rules and liberalization initiatives. Nevertheless, because the political economy of trade policy has changed significantly in recent years, the WTO is being pressured to respond to a growing array of issues. In particular, there are more diverse interests making demands on the international trade regime and there are concerns about the broader social and environmental impact of trade and trade liberalization.

3.2.3. Developing countries: Trade, Environment and Sustainable Development

Although the issue has already been on the multilateral trade agenda for some time, work has so far focused on discussions aimed at clarifying trade and environment issues, not on negotiations. However, there is now some pressure to "mainstream" trade and environment in several WTO agreements and to include the theme in a new round of multilateral trade negotiations. (Jha & Vossenaar, 2000: 1)

This creates both risks and opportunities for developing countries, as they have to be aware of the full implications of engaging in a new round of multilateral trade negotiations, where environment is expected to play an important role. They also need to be aware of the explicit inclusion of environment in the negotiating agenda.

Developing countries have in the past had legitimate apprehensions about engaging in a discussion on trade and environment, and even today developing countries have reasons for opposing broad WTO negotiations based on environmental considerations. One of the major concerns of developing countries is the lack of balance in the discussions on trade and environment. A good example of this would be the fact that the trade and environment debate has explored only some aspects of the linkages. The CTE discussions, for example, have focused

largely on issues such as the need to accommodate trade measures pursuant to multilateral environmental agreements (MEA) as well as eco-labelling based on non-product related PPMs. Although it is important to ensure a harmonious relationship between MEAs and the multilateral trading system, as well as between transparent and non-discriminatory eco-labelling programs and the multilateral trading system, its should nevertheless be noted that "developing country issues", such as safeguarding and further improving market access, controlling the export of domestically prohibited goods, and promoting technology transfer, appear to have received far less attention. (Jha & Vossenaar, 2000:74)

Another feature of the trade environment debate is that, although there is continuous pressure to legitimise the use of trade restrictions, based on non-product related PPMs, much less attention is given to encouraging the dissemination of environmentally sound technologies that would help developing countries move toward more environmentally friendly PPMs. (Jha & Vossenaar, 2000:75)

3.3. Case Studies: Historical Overviews

The focus of the case studies mentioned in this study, serves to support the analysis of the ways in which dispute settlement, and the views on dispute settlement have changed since the creation of the GATT in 1947, to date, where environmental issues have become a central issue in the WTO, when dealing with disputes relating to, or impacting on the environment. The disputes chosen as examples, all relate to the environment in some way.

The Shrimp-Turtle disputes as well as the Tuna-Dolphin disputes are highlighted in 1.12.2 and 1.12.3, as the two disputes in the history of the GATT/WTO, that have impacted profoundly, the way in which environmental issues are dealt with.

3.3.1. Case studies: From the GATT to the WTO

The case studies studied in this report serve a specific purpose. They will seek to highlight certain problems and anomalies in the GATT/WTO dispute settlement procedure. The main focus of the case studies chosen is the environment and sustainable development. As international trade, the environment and sustainable development are often interrelated; the case studies often deal with not only one, but also often all of the above issues.

Under the GATT (1948-1994), six panel proceedings involving an examination of environmental measures or human-health-related measures under GATT Article XX were completed. Of the six reports, three were not adopted. These include:

- **United States – Prohibition of Imports of Tuna and Tuna Products from Canada**. Ruling adopted on 22 February 1982. Case brought by Canada. An import prohibition was introduced by the US after Canada had seized 19 fishing vessels and arrested US fishermen fishing for albacore tuna, without authorization from the Canadian Government, in waters considered by Canada to be under its jurisdiction. The US did not recognize this jurisdiction and introduced an import prohibition to retaliate under the Fishery Conservation and Management Act. The Panel found that the import prohibition was contrary to Article XI:1, and was justified neither under Article XI:2, nor under Article XX(g) of the General Agreement.

- **Canada – Measures Affecting Exports of Unprocessed Herrings and Salmon**. Ruling adopted on 22 March 1998. Case brought by the US. Under the 1979 Canadian Fisheries Act, Canada maintained regulations prohibiting the exportation or sale for export of certain unprocessed herring and salmon. The US complained that these measures were inconsistent with GATT Article XI. Canada argued that these export restrictions were part of a system of fishery resource management aimed at preserving fish stocks, and therefore were justified under Article XX(g). The Panel found that the measures maintained by Canada were contrary to GATT Article XI:1 and were justifies neither by Article XI:2(b), nor by Article XX(g).

- **Thailand – Restrictions on the importation of, and Internal Taxes on Cigarettes**. Ruling adopted on 7 November 1990. Case brought by US. Under the 1966 Tobacco Act, Thailand prohibited the importation of cigarettes and other tobacco preparations, but authorized the sale of domestic cigarettes. Cigarettes were also subject to an excise tax, a business tax and a municipal tax. The US complained that the import restrictions were inconsistent with GATT Article XI:1, and considered that they were justified neither by Article XI:2 (c), nor by Article XX (b). The US also argued that the internal were inconsistent with GATT Article III:2.

  Thailand argued, on the other hand, that the import restrictions were justified under GATT Article XI:1 because the government had adopted measures that could only be effective if cigarette imports were prohibited and because chemicals and other additives contained in US cigarettes might make them more harmful than Thai cigarettes. The Panel found that the import restrictions were inconsistent with Article XI:1 and not justified under Article XI:2 (c). It further concluded that the import restrictions were not "necessary" within the meaning of Article XX(b). The internal taxes were found to be consistent with Article III:2.

- **United Sates – Restrictions on Imports of Tuna (the Tuna-Dolphin I Case).** Ruling not adopted, but circulated on 3 September 1991. Case brought by Mexico, etc. This case still attracts a lot of attention because of its implications for environmental disputes. It was handled

under the old GATT dispute settlement procedure. The key questions that were addressed in this dispute include whether one country can tell another what its environmental regulations should be. The other dominant issue addressed is whether trade rules permit action to be taken against the method used to produce goods, rather than the quality of the goods themselves.

- **United States – Restrictions on Imports of Tuna (the Tuna-Dolphin II Case).** Ruling not adopted, but circulated on 16 June 1994. Case brought by EU. The EC and the Netherlands complained that both the primary and the intermediary nation embargoes enforced pursuant to the Marine Mammal Protection Act did not fall under Article III, were inconsistent with article XI:1, and were not covered by any of the exceptions of Article XX. The US considered that the intermediary nation embargo was consistent with GATT since it was covered by Article XX, paragraphs (g), (b) and (d), and that the primary nation embargo did not nullify or impair any benefits accruing to the EC or the Netherlands since it did not apply to these countries. The Panel found that neither the primary nor the intermediary nation embargo were covered under Article III, that were contrary to Article XI:1 and not covered by the exceptions in Article XX (b), (g) or (d) of the GATT.

- **United States – Taxes on Automobiles**. Ruling not adopted, cut circulated on 11 October 1994. Case brought by the EU. Three US measures on automobiles were under examination: the luxury tax on automobiles ("luxury tax"), the gas-guzzler tax on automobiles ("gas guzzler"). And the Corporate Average Fuel Economy regulation ("CAFÉ"). The EC complained that these measures were inconsistent with GATT Article III and could not be justified under Article XX(g) or (d). The US considered that these measures were consistent with the General Agreement. The Panel found that both the luxury tax (which applied to cars sold for over $30,000) and the gas guzzler tax (which applied to the sale of automobiles attaining less than 22.5 miles per gallon) were consistent with Article III:2 of GATT.

  The CAFÉ regulation required the average fuel economy for passenger cars manufactured in the US or sold by any importer not to fall below 27.5 mpg. Companies that were both importers and domestic manufacturers had to calculate average fuel economy separately for imported passenger automobiles and for those manufactured domestically. The Panel found the CAFE regulation to be inconsistent with GATT Article III:4 because the separate foreign fleet accounting system discriminated against foreign cars, and the fleet averaging differentiated between imported and domestic cars on the basis of factors relating to control or ownership of producers or importers, rather than on the basis of factors directly related to the products as such. Similarly, the Panel found that the separate foreign fleet accounting was not justified

under Article XX(g). The Panel also found that the CAFE regulation could not be justified under Article XX(d).

On 1 January 1995, the WTO's dispute settlement procedure took over from GATT. Since then, two panel proceedings, related to environmental measures, have been completed.

- **United Sates – Standards for Reformulated and Conventional Gasoline**. (WTO Case numbers 2 and 4. Ruling adopted on 20 May 1996. Case brought by Venezuela and Brazil.)

  On 23 January 1995 Venezuela complained to the Dispute Settlement Body that the United States was applying rules that discriminated against gasoline imports. Venezuela formally requested consultations with the US, as required under WTO dispute settlement process. The case arose because the US applied stricter rules on the chemical characteristics of imported gasoline than it did for domestically refined gasoline. Venezuela said this was unfair because US gasoline did not have to meet the same standards. It therefore violated the "national treatment" principle and could not be justified under exceptions to normal WTO rules for health and environmental conservation measures.

  Just over a year later (on 29 January 1996) the dispute Panel completed its final report. By then, Brazil had joined the case, lodging its own complaint in April 1996. The same Panel considered both complaints. The dispute Panel ruled in favour of Venezuela and Brazil. The US was found to be violating WTO rules because it discriminated against the gasoline imports. The US appealed, and the Appellate Body completed its report, which was adopted by the Dispute Settlement Body on 20 May 1996, one year and four months after the complaint was first lodged. The appeal report upheld the panel's conclusions, even though it made some changes to the panel's legal interpretation.

  The agreed period for implementing the solution was 15 months from the date the appeal was concluded. The Dispute Settlement Body monitored progress. The US agreed with Venezuela that it would amend its regulation within 15 months, and on 26 August 1997, it reported to the Dispute Settlement Body that a new regulation had been signed on19 August.

- **United States – Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle Case).** (WTO case numbers 58 and 61. The ruling was adopted on 6 November 1998. India, Malaysia, Pakistan and Thailand brought the case).

  In early 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against a ban imposed by the US on the importation of certain shrimp and shrimp products. The protection of

sea turtles was at the heart of the ban. The US Endangered Species Act of 1973 listed as endangered or threatened the five species of sea turtles that occur in US waters. Under the Act, the US required that US shrimp trawlers use "turtle excluder devices" (TEDs) in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles.

The Panel ruled in favour of the complainants, stating that the ban imposed by the US was inconsistent with GATT Article XI, and could not be justified under Article XX. Following an appeal, the Appellate Body found that the measure at stake did qualify for provisional jurisdiction under Article XX(g), but failed to meet the requirements of the chapeau of Article XX.

3.3.2. The Tuna-Dolphin Disputes

Often regarded as emblematic of the trade environment debate, the two General Agreement on Tariffs and Trade (GATT) Tuna-Dolphin Disputes (1991 Tuna-Dolphin I and Tuna-Dolphin II) were the first to test the legitimacy of using environmentally unfavourable foreign process and production methods as justification for trade restrictions.

The disputes came at a time when trade and environment issues were lurking in the wings of the GATT. Tuna-Dolphin I revolved around a US primary embargo on Mexican Tuna caught using purse-seine nets that incidentally trapped a high number of dolphins, while Tuna-Dolphin II cantered on a secondary US embargo against countries who re-exported tuna from nations under the US embargo.

In great part due to the impact of the Tuna-Dolphin cases, the GATT Working Group on Environmental Measures and International Trade, dormant since its inception in 1971, was reactivated a few months after the first Tuna-Dolphin decision in 1992. Due to the partisan nature of the issues involved in the cases, a three-way divergence of views has developed that has characterized analysis of the disputes. As a result, the readings on the Tuna-Dolphin disputes tend to fall within either the "environment", "development", or "trade" approaches, though environmentalists have proven to be the most abundant writers.

3.3.3. The Shrimp-Turtle Dispute

The WTO Shrimp-Turtle dispute is arguably the most important environment related case to come before the trade body tribunal. US turtle protection efforts have maintained a slow a steady pace during the past two decades. The need for protective measures became apparent during the 1970's as documented evidence of the decline of sea turtle populations began to mount. In fact, all

five sea turtles that swim in US waters are currently on the Endangered Species List. Among the many factors threatening sea turtle populations, mechanized shrimping efforts were singled out because turtles get caught in their nets and drown. Even though turtles are mighty trans-oceanic swimmers, they periodically need to come up to the surface for air.

Responding to these problems, the National Marine Fisheries Service developed Turtle excluder Devices, a sort of cage that gets attached to shrimp nets allowing captured turtles to escape. Experience has shown that TED's are relatively cheap and effective turtle protection devices.

The dispute is centered on a 1989 Amendment to the Endangered Species Act (Public Law 101-102, title VI, Section 609 of 1989). (Michael's, 1998:1) This amendment requires that the US government to certify that all shrimp imported to the country be caught with methods that protect sea turtles from incidental drowning in shrimp trawling nets. One such method is the use of "turtle excluder devices, or TEDs, that reduce the number of turtles caught in shrimp nets by some 90%. The US-imposed trade embargo was expanded in May 1996 to include all shrimp-exporting countries, and currently affects about 40 nations. The WTO dispute grew out of this embargo.

India, Pakistan, Malaysia and Thailand lodged complaints at the WTO in early 1997, claiming that Section 609 violated a number of WTO rules. On 6 April 1998, a dispute settlement panel ruled against the shrimp embargo, arguing it represented the kind of unilateral measure that 'insofar as [it] could jeopardize the multilateral trading system, could not be covered by Article XX'. GATT Article XX allows WTO-inconsistent measures to be taken for environmental and health reasons.

Due to the nature of the dispute and the impact of the US law on developing countries, the case is characterized by a three-way tension between trade, environment and development. Most literature on the topic have been published from the environmental perspective, as the Shrimp-Turtle dispute represents a focal point for calls from NGO's to reform the GATT/WTO dispute settlement system.

The WTO Panel considered the trade embargo imposed by the US as inconsistent with GATT Article XI (which limits the use of import prohibitions or restrictions), and could not be justified under GATT Article XX (which deals with general exceptions to the rules, including environmental reasons).

Following an appeal, the Appellate Body found that the measure at stake did qualify for provisional jurisdiction under Article XX(g), but failed to meet the requirements of the chapeau of Article XX (which defines when the general exceptions can be cited). Many have missed the importance of the Appellate Body's ruling on this case. It recognized that under WTO rules governments have

every right to protect human, animal or plant life and health and to take measures to conserve exhaustible resources. The WTO does not have to "allow" them this right. The US lost the case, not because it sought to protect the environment, but because it discriminated between WTO Members. It provided countries in the Western Hemisphere – mainly in the Caribbean – technical and financial assistance and longer transition periods for their fishermen to start using TEDs. It did not give the same advantages, however, to the four Asian countries that filed the compliant with the WTO. The ruling also said WTO panels may accept "amicus briefs" (friends of the court submissions) from NGOs or other interested parties.

Chapter 4: The future of the WTO DSU: Critical Analysis & Opportunities for Change and Reform

4.1. A Critical Analysis of the WTO DSU

4.1.1. Sustainable Development

The norms governing international trade on the one hand, and sustainable development on the other, have both different origins and objectives. The basic principle governing international trade is non-discrimination, and its main components are the most favoured nation clause and national treatment. Since 1947, the only exceptions to the above principles were those specified in Article XX of the GATT, whose paragraphs (b) and (g) authorize Members to depart from the provisions of the Agreement for the purpose of protecting the health and life of people, animals and plants, and to conserve non-renewable resources.

The concept of sustainable development, unlike the principles governing international trade, is not yet fully internalised in the policies of governments and international organisations. The principle that the development and exploitation of natural resources should be sustainable over time was first proclaimed in 1987, in the Bruntland Report. The principle includes the following elements:

- That natural resources be exploited regionally, and preserved for the benefit of future generations.
- That environmental considerations of integrated development be integrated in economic plans, programmes and projects, and conversely that the considerations of integrated development be taken into account in environmental projects.

The principle of sustainable development relates to economic activity as a whole and not only to one of its components, therefore it must apply to production, as well as to transport, trade and consumption. Given the fact that the applicable policies and normative schemes are not the same for producing as for consumer countries, the international community has in practice had to recognize that developing countries are in a special and different situation. Among these differences is the application of stricter norms for countries that import, and less stringent ones for the countries that export basic products. This asymmetry of the applicable normative systems applies to international trade and must consequently be reflected in the norms governing such trade. This assumption represents a major challenge for the WTO, whose norms and policies should incorporate, or at least be compatible with, the principles of sustainable development.

The system governing international trade has however attempted to incorporate the principle of sustainable development. In 1971 the **Founex Report**[9] mentioned the relationship between the GATT and the environment. On the other hand, it was the Bruntland Report that has for the first time formulated concrete suggestions, which were subsequently, confirmed and broadened in the Rio Conference. (Biggs, 2000: 3-19)

The Bruntland Report noted that the mandates of international organizations such as the GATT and UNCTAD would have to include the concept of sustainable development. Consequently, their action had to take into account the concern with the environmental impact of international trade modalities, and the need for more effective instruments to integrate environment and development as complementary concepts in the international trade regimes. In its conclusions, the Bruntland report stressed that to become a reality, sustainable development needed an international system supportive of sustainable models of trade and financing.

This need for integration was subsequently reaffirmed in the Rio Declaration, which concluded in its Principle 4 that in order to achieve sustainable development, the protection of the environment had to be accepted as an integral part of the development process, and could not be considered in isolation.

4.2. WTO DSU Review: An Agenda for Evaluation and Reform

Criticism against the WTO DSU

The fact that the banana dispute went on for such a long period raises some doubt over the expediency and predictability of the WTO dispute settlement mechanism. The case also point towards ambiguities in the DSU, particularly the law regarding implementation of and compliance with the adopted rulings.

It is still not cleat as to who has the right to decide, "Whether the measure adopted by the losing party is in conformity with the DSB recommendations". The DSU, on the one hand, provides for reconvening the original panel to decide the question (under Article 21.5 of the DSU) while, on the other, it also allows the complaining party to seek authorization for retaliation, which the DSB can reject only by consensus. This area of trade disputes needs more clarification.

Practical problems

[9] The Founex Report was called **Development and the Environment** (June 1971). It was a report of a group of experts convened in Founex, near Geneva, by the Secretary General of the UN Conference on Human Development. The report

Right from the inception of the GATT in 1947, the developing and least developed countries have been advocating for a rule-based dispute settlement mechanism to ensure a better level of compliance by Member countries of the GATT.

Even though in theory the WTO dispute settlement mechanism is fairly sound, in practice the developing and least developed countries are facing some serious problems.

Litigation in the WTO involves a high cost, which many poor countries cannot afford to pay. Mainly due to lack of legal resources they have to hire foreign (often from developed countries) lawyers who charge very high fees (between $250 to $1000 per hour). As a result many developing countries can neither present their cases adequately nor bring genuine cases to the WTO.

The WTO Secretariat is obliged (under the Agreement establishing the DSU) to provide legal advice and assistance to developing and least developed countries by making available to them a qualified legal expert on their request. But this provision is not enough to fulfill their needs due to the fact that firstly, the WTO Secretariat's resources are insufficient, secondly, the legal experts in the Secretariat are required to maintain their impartiality, hence they are unable to provide services at par with an independent lawyer.

To address this problem, some Members have proposed to establish an Advisory Center on WTO Law (ACWL). The ACWL would provide legal aid and advice to developing and least developed countries on affordable fees. Until now, five developed countries (Denmark, The Netherlands, Norway, Sweden and the UK) and fourteen developing and least developed countries have decided to become founding members of the ACWL. It is proposed to be set up in Geneva, Switzerland.

From the beginning of the legal process till the withdrawal of the offending measure, the time period, in the new system, may extend up to thirty months. The lass to a developing or least developed country during this period could be irreparable, particularly for those who are highly dependent on a limited number of export products. There is no provision in the DSU for compensation of loss during this period. Such provision is also needed to check a Member from using any trade measures on frivolous grounds.

The only possible remedy under the DSU is to authorize the prevailing party to take retaliatory measures against the losing party. However, if a developed country is the losing party against a

---

concluded that the GATT would have to keep the rise of non-tariff barriers based on environmental considerations under review, and address the issue in its annual reports.

developing/least-developed country, then even if they are authorized to do so, they will be reluctant to retaliate. This is because their economies are highly dependent on external resources. As developed countries play an influential role vis-à-vis these resources, developing/least-developed countries would not risk ruining their relationship with them by taking retaliatory measures.

To tackle this problem a provision for "collective retaliatory action" by all the WTO Members against he losing party is controversial.

The DSU provides for special and differential treatment in favor of developing and least developed countries. However, these provisions have not been invoked so far. This is due either to their nature or due to lack of initiation on the part of developing countries. The provisions are generally declaratory in nature. Some of them are even vague. These provisions have been provided to facilitate equal participation by developing and least-developed countries in the dispute settlement process. Efforts should be made to make the implementation of these provisions predictable.

Conclusion

The Effective resolution of trade disputes is vital for the smooth functioning of the multilateral trading system. The decades of the 1980's and the 1990's saw intensification of trade disputes between nations. There are two reasons for this.

The first reason was the changing pattern of comparative advantage in producing goods, services and technology. Simply speaking, a country, which might have a comparative advantage in producing a particular good, may not know that their revealed comparative advantage does not exist any more. The second reason was due to the vaguely worded GATT provisions and differences in their interpretation.

While the first reason is a matter of pure economic logic, the second reveals the changing contours of the political economy of the multilateral trading system.

A major feature of the WTO is its rule-based dispute settlement mechanism. The earlier system under the GATT was based on a 'negotiatory' model, and thus, not binding. On the other hand, the WTO dispute settlement mechanism is based on an 'adjudicatory' model, and thus, more timely, automatic and binding.

Developing countries have been active in approaching the WTO DSB to settle their trade disputes with developed countries as well as between themselves. Earlier, trade disputes were mainly confined between the US, the EU and Canada.

Furthermore, many of them are dependent on single commodity for their export earnings. This may seriously jeopardize their access to foreign markets if they raise a dispute against a rich country and loose the case. At the same time, being politically weak, they cannot force strict compliance against a rich country, even if they win.

Though there has been a significant shift from politics toward legality, the system is still far from perfect. Indeed, a careful perusal of recent trade disputes reveals the stress on the system. This may be because of the fact that the multilateral trading system is witnessing a conflict between converging and diverging forces running in opposite direction. On one hand, countries have realized that protectionism could no longer serve their interests in the long run, and that integration into the global economy is a must for sustainable development of their economies. While on the other hand, national governments cannot ignore their domestic constituencies for obvious political reasons.

Such conflicts are manifested in trade disputes involving banana, the shrimp-turtle dispute and the tuna-dolphin dispute. In such situations, if the governments lack political will to support the open, multilateral trading system, the world may plunge into protectionism.

The ongoing review of WTO dispute settlement rules and procedures, should take into account all the points as mentioned above, and more importantly, should cater for an effective solution to the problems, which developing and least developed countries are facing vis-à-vis the WTO dispute settlement mechanism.

4.3. The future of the WTO within the international framework

The reasons for creating the WTO was, firstly, to create a presumption that all countries would adopt the complete settlement, in contrast to the last Round in which some agreements applied only to those who chose to join. Secondly, there was a desire to strengthen visibly the basis of the international trade system, not just making the coverage more comprehensive, but establishing clear obligations and better enforceability, and thirdly, it was to make the new organization more overtly part of the international policy system in parallel with the IMF and World Bank. (Overseas Development Institute; 1995:7)

In future, an important role of the WTO, with a Ministerial Conference every two years, will be to provide a framework and a forum for continuing negotiations, rather than relying on trade rounds. An example of this is the fact that in several of the new areas, particularly among services, there was explicit provision for completing or reopening negotiations during the five years after the

completion of the Uruguay Round. The trade policy reviews and the dispute settlement procedure should provide a framework for identifying problems and enforcing agreements.

Since its inception, the GATT/WTO system has made a major contribution to global prosperity, economic development and rising standards of living in both developed and developing countries. This progress is due, in large measure, to a steady deepening liberalization and widening of WTO rules, based on the principle of non-discrimination and enforced through a dispute settlement mechanism that respects the sovereign rights of WTO member countries. The record shows that the current trade regime helps create the enabling conditions that contribute to economic growth and, when properly supplemented by appropriate domestic policies, to poverty alleviation and the broader sustainable development objectives of society.

4.4. Proposals: The future of the WTO and the Environment

Recently, a number of proposals have been brought forward to modify or reinterpret WTO rules in order to extend the use of trade measures for environmental purposes.

The key proposals to reinterpret or modify WTO rules to better accommodate environmental objectives represent a significant threat to maintaining the benefits and confidence in the effective functioning of the current multilateral trading regime. Not only would their adoption undermine some of the fundamental principles of the GATT/WTO system, but they could also open the door to greater trade protectionism. Some of these proposals include:

- New interpretations or textual amendments to WTO rules to better accommodate discriminatory trade measures against non-signatory WTO members in Multilateral Environmental Agreement (MEAs).
- New interpretations of Article XX to legitimise the use of unilateral trade measures that discriminate between 'like' products solely on the basis of process and production methods (PPMs).
- New interpretations of WTO agreements to accommodate the use of trade measures based on the precautionary principle.
- The development of an understanding specifying that voluntary labeling schemes based on PPMs is compatible with WTO rules.

However, it is important that the WTO make a greater contribution to environmental protection and other sustainable development objectives. This can probably be best achieved by having the WTO focus on those areas that are within its current mandate and technical competence. More specifically, the WTO should exploit available opportunities that offer win-win situations and that

continue the trend towards further trade liberalization and the development of a more stable investment and trade environment. In this respect, consideration should be given to the following proposals: (Nash, 2001:5)

- In the areas of subsidies and technical barriers to trade, priority should be given to pursuing further reform in agricultural, fisheries and other policies, including the reduction and elimination of subsidies and other distorting policies that can cause a misallocation of resources and resultant negative environmental impacts. In addition, reducing and eliminating barriers, including tariffs, to the trade and dissemination of environmental protection equipment, services and technologies should be pursued.
- In light of legitimate concerns regarding the use of trade measures to pursue environmental objectives, and Understanding on Article XX should be developed that establishes requirements, in addition to those provided for in the Chapeau of Article XX[10], to ensure that such trade measures are justified and do not represent unnecessary barriers to trade. More specifically governments seeking exceptions under Article XX for trade measures that are deemed necessary to protect human, animal or plant life or health (XX(b)) or relating to the conservation of exhaustible natural resources (XX(g)) should be required to demonstrate that an unreasonable risk exists, using rigorous risk analysis. They should also demonstrate that such risk couldn't effectively be addressed with policy instruments other than trade measures, as well as that the measure chosen are the least trade distorting.
- An understanding should be developed so that the TBT Agreement incorporates requirements for scientific assessments similar to those embodied in the SPS. More specifically, governments wishing to adopt an environmentally based technical regulation or standard that is more stringent than generally agreed-to international standards should be required to demonstrate that such risks cannot be effectively addressed with policy instruments other than trade measures.
- The WTO should also attempt to ensure greater transparency in its proceedings by providing a wider and more rapid distribution of its documents. International symposia to encourage dialogue among international organizations, Member governments and civil society groups, including industry, have proven useful and should continue on a regular basis.

4.5. Conclusion

The WTO should not become the chosen instrument for responding to a variety of environmental and social issues. Solutions to environmental problems, whether national, transboundary or global

[10] The chapeau of Article XX currently requires that trade measures taken in pursuit of an environmental objective do not constitute a disguised barrier to trade or a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

in nature, are best addressed through international cooperation in their own for a, including the negotiation of MEAs, that respect the principle of common but differentiated responsibility.

While non-discriminatory trade measures are allowed under WTO rules, other policy instruments (capacity building, financial and technical assistance) should be given preference as they can offer greater scope to deal more directly and effectively with environmental problems. While the WTO may have a role to play, other international agencies such as the United Nations Environment Program (UNEP), the United Nations Commission on Sustainable Development (UNCSD) and the United Nations Conference on Trade and Development (UNCTAD) may be better positioned to address policy instruments that strike a balance between environmental protection and broader economic and social objectives.

What should, however not be underestimated, is the impact of the international legal principles that are strengthened by the actual process of dispute settlement in the World Trade Organisation. The implications of these on environmental issues have been very significant during the past 5 years, and will hopefully continue to address the issue of the environment and sustainable development within the multilateral trading environment.

Chapter 5 : Sources

Abbott, F.M. 1995. "Law and Policy of Regional Integration: The NAFTA and Western Hemispheric Integration in the World Trade Organisation System." in Rubin, S.J. & Alexander, D.C. (Series Editors). **NAFTA Law and Policy Series Volume 1.** London: Martinus Nijhoff Publishers.

Bhagwati, J. 1996. "The US-Japan Car Dispute: Universal Rules." in **International Affairs.** Vol. 72, No. 2.

Biggs, Gonzalo. 2000. "reflections on the WTO and Sustainable Development" in **Trade, the Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America.** (Edited by Peider Kötz). International Centre for Trade and Sustainable Development: Geneva.

Cho, G. 1995. **Trade, Aid and Global Interdependence.** London: Routledge.

Chua, A.T.L. 1998. "Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence." in **Journal of World Trade.** Vol. 32, No. 2.

Collier, P. 1997. "The Trade Policy Review of Uganda." in **World Economy.** Vol. 20, No. 5.

Cresswell, J.W. 1994. **Research design: Qualitative and Quantitative Approaches**. Sage Publications: California.

Day, DM. 1993. **The Law of International Trade.** Butterworths: London.

Franck, T.M. 1995. **Fairness in International Law and Institutions.** Clarendon Press: Oxford.

Froehling, H.C. 1994. "The GATT Agreement and the World Economy." in **Aussenpolitik**. Vol. 45, No. 1.

Giardina, A. & Zampetti, AB 1997. "Settling Competition-Related Disputes: The Arbitration Alternative in the WTO Framework." in **Journal of World Trade.** Vol. 31, No. 6.

Hirst, P. & Thompson, G. 1996. **Globalisation in Question: The International Economy and the Possibilities of Governance.** Cambridge, USA: Polity Press.

Hoekman, B.M. 1995. "Trade Laws and Institutions: Good Practices and the World Trade Organisation", **World Bank Discussion Paper, No. 282.** Washington: The World Bank.

Hoekman, B.M. & Kostecki, M.M. 1995. **The Political Economy of the World Trading System.** Oxford: Oxford University Press.

Hoekman, B.M. & Mavroidis, P.C. (1) 1999. "Enforcing Multilateral Commitments: Dispute Settlement and Developing Countries". **The WTO/World Bank Conference on Developing Countries' in a Millennium Round**. WTO Secretariat, Centre William Rappard: Geneva.

Hoekman, B.M. & Mavroidis, P.C. (2) 1999. "WTO Dispute Settlement, Transparency and Surveillance". **The WTO/World Bank Conference on Developing Countries' in a Millennium Round**. WTO Secretariat, Centre William Rappard: Geneva.

Howell, T.R. & Wolff, A.W. 1992. **Conflict Among Nations: Trade Policies in the 1990's.** Oxford: Westview Press.

Isaak, Robert. 1995. **Managing World Economic Change: International Political Economy**. (2 nd Edition) Prentice Hall: Cape Town.

Jackson, J.H. 1998. **The World Trade Organisation: Constitution and Jurisprudence**. Royal Institute for International Affairs: London.

Jackson, J.H. 1998 (2). **The World Trading System: Law and Policy of International Economic Relations.** (Second Edition) Cambridge: MIT Press.

Jha, Veena & Vossenaar, René. 2000. **Breaking the Deadlock: A Positive Trade Agenda on Trade, Environment and Development?.** UNCTAD.

Jones, Charles. 1983. **The North-South dialogue Brief History**. Frances Pinter: London

Kim, Yong K. 1996. "The beginnings of the Rule of Law in the International Trade System Despite US Constitutional Constraints" in **Michigan Journal of International Law**. Summer 1996.

Kirgis, Frederic L. 1996. "Enforcing International Law" in **ASIL Insight**. American Society of International Law.

Kufuor, K.O. 1997. "From the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes." in **Journal of World Trade.** Vol. 31, No. 5.

Komuro, N. 1995. "The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding." in **Journal of World Trade.** Vol. 29, No. 4.

Kraus, J. 1996. **The GATT negotiations: A Business Guide to the Results of the Uruguay Round.** International Chamber of Commerce.

Kuijper, P.J. 1995. "The New WTO Dispute Settlement System: The Impact of the European Community." in **Journal of World Trade.** Vol. 29, No. 6.

Kuruvila, P.E. 1997. "Developing Countries and the WTO Dispute Settlement Mechanism." in **Journal of World Trade.** Vol. 31, No. 6.

Lowenfeld, A.F. 1994. "Remedies Along with Rights: Institutional Reform in the new GATT." in **American Journal of International Law.** Vol. 88, No. 471.

Lukas, M. 1995. "The Role of Private Parties in the Enforcement of the Uruguay Round Agreements." in **Journal of World Trade.** Vol. 29, No. 5.

Magyar, K.P. 1995. "Classifying the International Political Economy: A Third World Proto-theory." in **Third World Theory.** Vol. 16, No. 4.

Martha, R.S. 1996. "World Trade Disputes and the Exhaustion of Local Remedies Rule." in **Journal of World Trade.** Vol. 30, No. 4.

Marceau, G. 1997. "Review Essay: Dispute Settlement Mechanisms. Regional or Multilateral: Which one is better?" in **Journal of World Trade.** Vol. 31, No. 3.

Mavroidis, P.C. & van Siden, S.J. 1997. "The Application of the GATT/WTO Dispute Resolution System to Competition Issues." in **Journal of World Trade.** Vol.31, No.5.

McGovern, Edmond. 20001. **International Trade regulation**. Globefield Press.

Merrills, J.C. 1991. **International Dispute Settlement.** Cambridge: Grotius Publications Limited.

Michaels, Patricia. 1998. "The Shrimp-Turtle Controversy: Shrimp1, Turtles 0." In About.Com, 1998. At http://www.about.com

Morrissey, O. & Rai, Y. 1995. "The GATT Agreement on Trade Related Investment Measures: Implications for Developing Countries and their Relationship with Transactional Corporations." in **Journal of Development Studies.** Vol. 31, No. 5.

Nordström, Håkan & Vaughan, Scott. 1999. **WTO Special Study: Trade and the Environment**. At http://www.wto.org/. WTO Publications: Switzerland.

Overseas Development Institute. 1995. **Briefing Paper: Developing Countries in the WTO**. Overseas Development Institute. At http://www.odi.org.uk .

Page, Sheila. 2000. "Developing Countries: Integration into the World Economy." Prepared for the **Department for International Development, Overseas Development Institute**. At http://www.odi.org.uk

Palmeter, D. 1998. "The WTO Appellate Body Needs Remand Authority." in **Journal of World Trade.** Vol. 32, No. 1.

Petersmann, E-U. 1998. "Strengthening GATT Procedures for Settling Trade Disputes." in **World Economy.** Vol. 11, No.1.

Petersmann, E-U. 1996. "The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organisation." In **The European Journal of International Law**. Vol.6, No. 2.

Rodrik, D. 1999. "Making Openness Work" in **ODC Policy Essay No. 24**, January 1999. Johns Hopkins University Press.

Ruggiero, Renato, 1999. Quoted in WTO, **Settling Disputes,** 19 December 1997. At http://www.wto.org/wto/about/dispute1.htm

Schoenbaum, Thomas J. 1996. "The concept of Market Contestability and new agenda of the Multilateral Trading System". In **ASIL Insight.** American Society of International Law.

Sharma, S.D. 1997. "The World Trade Organisation and Implications of Developing Countries." in **SAIS Review.** Vol. 17, No. 2.

Starke, J.G. 1989. **Introduction to International Law.** London: Butterworths.

Swacker, F.W., Redden, K.R. & Wenger, L.B. 1995. **World Trade Without Barriers: The World Trade Organisation and Dispute Resolution.** Volumes 1 & 2. Virginia: Michie Butterworth.

Thomas, C. 1996. "Litigation Process under the GATT Dispute Settlement." in **Journal of World Trade.** Vol. 30, No.2.

Tita, A. 1995. "A Challenge for the World Trade Organisation: Towards a True Transactional Law." in **Journal of World Trade.** Vol. 29, No. 3.

Vaughan, Scott. 2000. "Assessing the Environmental Effects of Free Trade: CEC Organises First Public Symposium" in **Bridges: Between Trade and Sustainable Development,** Year 4, No. 6. International Centre for Trade and Sustainable Development.

Viotti, P.R. & Kauppi, M.V. 1993. **International Relations Theory: Realism, Pluralism, Globalism.** (2 nd edition) Macmillan Publishing Company: New York.

Wang, Z.K. & Winters, L.A. 1997. **Policy Research Working Paper no. 1846. Africa's Role in Multilateral Trade Negotiations.** Economic Development Institute and Development Research Group. World Bank: Washington D.C.

Weinrichter, Norbet.1999. "Perspectives on the changing spirit of GATT". **In European Integration Online Papers**. Vol. 3, No. 10. Http://eiop.or.at/eiop/texte/1999-010a.htm

Weiss, F. 1996. "WTO Dispute Settlement and the Economic Order of the WTO Member States." in van Dijk, P. & Faber, G. (Eds.). **Challenges to the New WTO.** The Hague: Kluwer Law International.

Internet Sources

Web Page	Date
1. http://www.unicc.org/wto/webds_wpf.html	09/12/96
2. http://www.earthsummitwatch.org/shrimp/sea_turtles/WTOCase.html	22/09/98
3. http://www.wto.org/wto/about/beyond5.htm	22/09/98
4. http://www.ljextra.com/practice/internat/ica_iln1.html	07/04/97
5. http://www.wto.org/wto	24/03/97
6. http://www.ustr.gov/reports/wto/dispute.html	25/09/96
7. http://world.std.com/~uwsama/wtogas1.html	25/09/96
8. http://cnnfn.com/news/9605/14/china	25/02/97
9. http://www.ljextra/practice/internat/GATTdisp.html	25/02/97
10. http://pathfinder.com/@@UljIdAUA@Yn88yH2/Asiaweek/95/0630/biz5.html	26/02/97
11. http://www.ljx.com/practice/intrade/080itwto.html	23/12/97
12. http://www.itd.org/21eng_africa_5.html	23/12/97
13. http://www.ictsd.org/html/story1.htm	23/12/97
14. http://www.ictsd.org/html/digest5.htm#busy	23/12/97
15. http://www.law.harvard.edu/programs/JeanMonnet/papers/98/98-9—I.html	20/12/00
16. http://www.american.edu/projects/mandala/TED/ted.htm	
17. http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_II	7/01/02

Annexure 1:Glossary

ACP	African, Caribbean and Pacific Countries
COMESA	Common Market for East & Southern Africa
CTE	Committee on Trade and Environment
EC	European Communities
EMIT	Group on Environmental Measures and International Trade
EU	European Union
GATT	General Agreement on Tariffs and Trade
GSP	General System of Preferences
IMF	International Monetary Fund
Jurisprudence	The word "jurisprudence" comes from the Latin juris (meaning law, right, justice or equity) and prudentia (meaning skill or good judgment). A working definition of the term might encompass developing skill or good judgment in law. The skill and good judgment in issue relates not so much to the actual content of any given law but rather the particular aspects of law that relate to the substance and the "quality" of law.
LDC	Least Developed Country
MEA	Multilateral Environmental Measures
MFN	Most Favored Nation Principle
OECD	Organization for Economic Co-operation & Development
PPM	Production and Processing Methods
SADC	Southern African Development Community
SPS	Sanitary & Phytosanitary Agreement
TBT	Technical Barriers to Trade Agreement
TRIPS	Trade Related Aspects of Intellectual Property Rights
UNCED	UN Conference on Environment and Development
UNEP	United Nations Environment Programme
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
WB	World Bank
WTO	World Trade Organization
WWF	World Wildlife Foundation

Annexure 2.1

FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS

1. Having met in order to conclude the Uruguay Round of Multilateral Trade Negotiations, representatives of the governments and of the European Communities, members of the Trade Negotiations Committee, *agree* that the Agreement Establishing the World Trade Organization (referred to in this Final Act as the "WTO Agreement"), the Ministerial Declarations and Decisions, and the Understanding on Commitments in Financial Services, as annexed hereto, embody the results of their negotiations and form an integral part of this Final Act.

2. By signing the present Final Act, the representatives *agree*

(a) to submit, as appropriate, the WTO Agreement for the consideration of their respective competent authorities with a view to seeking approval of the Agreement in accordance with their procedures; and

(b) to adopt the Ministerial Declarations and Decisions.

3. The representatives *agree* on the desirability of acceptance of the WTO Agreement by all participants in the Uruguay Round of Multilateral Trade Negotiations (hereinafter referred to as "participants") with a view to its entry into force by 1 January 1995, or as early as possible thereafter. Not later than late 1994, Ministers will meet, in accordance with the final paragraph of the Punta del Este Ministerial Declaration, to decide on the international implementation of the results, including the timing of their entry into force.

4. The representatives *agree* that the WTO Agreement shall be open for acceptance as a whole, by signature or otherwise, by all participants pursuant to Article XIV thereof. The acceptance and entry into force of a Plurilateral Trade Agreement included in Annex 4 of the WTO Agreement shall be governed by the provisions of that Plurilateral Trade Agreement.

5. Before accepting the WTO Agreement, participants which are not contracting parties to the General Agreement on Tariffs and Trade must first have concluded negotiations for their accession to the General Agreement and become contracting parties thereto. For participants which are not contracting parties to the General Agreement as of the date of the Final Act, the Schedules are not definitive and shall be subsequently completed for the purpose of their accession to the General Agreement and acceptance of the WTO Agreement.

6. This Final Act and the texts annexed hereto shall be deposited with the Director-General to the CONTRACTING PARTIES to the General Agreement on Tariffs and Trade who shall promptly furnish to each participant a certified copy thereof.

DONE at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four, in a single copy, in the English, French and Spanish languages, each text being authentic.

[List of signatures to be included in the treaty copy of the Final Act for signature]

Annexure 2.2

ANNEX 2

UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

Members hereby *agree* as follows:

Article 1

Coverage and Application

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

Article 2

Administration

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

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

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

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

Article 3

General Provisions

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

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

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure

---

[1]The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

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

9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

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

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

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

Article 4

Consultations

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

---

[2]This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.

2. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.[3]

3. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

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

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

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

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

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

11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements[4], such Member

---

[3]Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

[4]The corresponding consultation provisions in the covered agreements are listed hereunder: Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14;

may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

Article 5

Good Offices, Conciliation and Mediation

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.

3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.

4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

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

Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

Article 6

Establishment of Panels

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

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

Article 7

Terms of Reference of Panels

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

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

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

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

Article 8

Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

---

[5]If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.

3. Citizens of Members whose governments[6] are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

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

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

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

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

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

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

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

---

[6]In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

Article 9

Procedures for Multiple Complainants

1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

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

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

Article 10

Third Parties

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

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

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

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

Article 11

Function of Panels

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

Article 12

Panel Procedures

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.

2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

3. After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.

4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.

6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

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

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

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

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

Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

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

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

Article 13

Right to Seek Information

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

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

Article 14

Confidentiality

1. Panel deliberations shall be confidential.

2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

3. Opinions expressed in the panel report by individual panelists shall be anonymous.

Article 15

Interim Review Stage

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

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

Article 16

Adoption of Panel Reports

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

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

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

4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting[7] unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

---

[7]If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.

Article 17

Appellate Review

Standing Appellate Body

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

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

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

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

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

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

Procedures for Appellate Review

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

10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

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

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

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

Adoption of Appellate Body Reports

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

Article 18

Communications with the Panel or Appellate Body

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

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Article 19

Panel and Appellate Body Recommendations

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

---

[8]If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[9]The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

[10]With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

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

Article 20

Time-frame for DSB Decisions

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

Article 21

Surveillance of Implementation of Recommendations and Rulings

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

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

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

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

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

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

---

[11]If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[12]If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

[13]The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

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

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

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

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

Article 22

Compensation and the Suspension of Concessions

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

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

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

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

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

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

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

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

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

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

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

(i) with respect to goods, all goods;

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

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

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

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

(ii) with respect to services, the GATS;

---

[14]The list in document MTN.GNS/W/120 identifies eleven sectors.

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

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

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

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator[15] appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

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

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

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

---

[15]The expression"arbitrator" shall be interpreted as referring either to an individual or a group.

[16]The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.[17]

Article 23

Strengthening of the Multilateral System

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

2. In such cases, Members shall:

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

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

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

Article 24

Special Procedures Involving Least-Developed Country Members

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

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel

---

[17]Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

Article 25

Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

Article 26

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

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

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

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

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

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

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

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

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

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

Article 27

Responsibilities of the Secretariat

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

2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

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

APPENDIX 1

AGREEMENTS COVERED BY THE UNDERSTANDING

(A) Agreement Establishing the World Trade Organization

(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods
Annex 1B: General Agreement on Trade in Services
Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

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

(C) Plurilateral Trade Agreements

Annex 4: Agreement on Trade in Civil Aircraft
Agreement on Government Procurement
International Dairy Agreement
International Bovine Meat Agreement

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

APPENDIX 2

SPECIAL OR ADDITIONAL RULES AND PROCEDURES CONTAINED IN THE COVERED AGREEMENTS

Agreement	*Rules and Procedures*
Agreement on the Application of Sanitary and Phytosanitary Measures	11.2
Agreement on Textiles and Clothing	2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 through 8.12
Agreement on Technical Barriers to Trade	14.2 through 14.4, Annex 2
Agreement on Implementation of Article VI of GATT 1994	17.4 through 17.7
Agreement on Implementation of Article VII of GATT 1994	19.3 through 19.5, Annex II.2(f), 3, 9, 21
Agreement on Subsidies and Countervailing Measures	4.2 through 4.12, 6.6, 7.2 through 7.10, 8.5, footnote 35, 24.4, 27.7, Annex V
General Agreement on Trade in Services	XXII:3, XXIII:3
Annex on Financial Services	4
Annex on Air Transport Services	4
Decision on Certain Dispute Settlement Procedures for the GATS	1 through 5

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

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

APPENDIX 3

WORKING PROCEDURES

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

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

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

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

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

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

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

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

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

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

11. Any additional procedures specific to the panel.

12. Proposed timetable for panel work:

(a)	Receipt of first written submissions of the parties:		
	(1) complaining Party:	_____	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.

APPENDIX 4

EXPERT REVIEW GROUPS

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

1. Expert review groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in expert review groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on an expert review group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on an expert review group. Members of expert review groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before an expert review group.

4. Expert review groups may consult and seek information and technical advice from any source they deem appropriate. Before an expert review group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by an expert review group for such information as the expert review group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The expert review group shall submit a draft report to the parties to the dispute with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be issued to the parties to the dispute when it is submitted to the panel. The final report of the expert review group shall be advisory only.