

Globalization and Trade Dispute Settlement in WTO: Implications for Developing Countries with Special Reference to the India

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1. Introduction

Free flow of goods, services, capital and labour across national boundaries constitutes the core of globalization process. Though the arguments in favour of 'free trade', *i.e.*, free flow of goods have a long history, the advocacy for free movement of services and capital are relatively recent phenomena. The movement of capital was viewed as '*volatile*' in nature and hence, not to be encouraged. To a large extent, the East-Asian miracle is mainly responsible for such revision of views about capital movement. The recent boom in information technology is also responsible for mobility of services and capital. Though the economic impacts of free mobility of goods and of labour (in terms of changes in employment and production across regions/producers) may be very similar, the movement of labour remains a distant dream (?), if not an impossibility altogether.

As a part of the Bretton Woods System, International Trade Organization (ITO) was supposed to formulate and implement the rules of 'free and fair' trade in 'goods'. As it turned out to be a blue-baby, in 1948 GATT emerged as an 'agreement' with 23 contracting parties. It was only in January 1995 that a full-fledged institution, *i.e.*, WTO was established with responsibilities akin to those conceived in ITO Charter. However, the agenda of WTO is much wider in scope as compared to the ITO. A unique feature of WTO is its dispute settlement procedure (DSP). DSP details the legal procedure for a member nation which deviates from 'free and fair' trade. It is important to mention that 'WTO-consistent free trade' does not imply complete removal of trade barriers across nations. If free trade in WTO framework does not imply complete removal of trade barriers then 'fair' trade' becomes a contentious issue and amenable to various interpretations. The DSP of WTO is supposed to be a jury on interpretations when a dispute arises between the nations. WTO is regarded as superior to its predecessor GATT due to its sound legal basis. The procedures to be followed and the time frame to be adhered to in resolving disputes under WTO regime have been documented with great precision.

The data on trade disputes indicate that primarily it is the developed countries that have used DSP against each other. Besides, the trade conflicts between developed and developing economies have largely involved countries like India, China, Brazil, Argentina and Mexico. The least developed countries have hardly been involved in trade disputes. In view of this, it is the large developing countries that will have to prepare to defend themselves and use the DSP of WTO.

The scope and organization of this paper are as follows. Section 2 examines the scope for deviating from free trade as permitted within the WTO framework. Section 3 details the trade dispute settlement mechanism embedded in the WTO framework. Section 4 provides an overview of the functioning of the dispute settlement mechanism of WTO since its inception. It surveys 301 trade disputes on various issues involving different issues and countries. Section 5 discusses 29 trade disputes in which India has been involved either as a complainant or as a respondent. The paper attempts to evaluate WTO's legal system with respect to the following criteria: (i) the scope of using WTO dispute settlement mechanism towards protectionism; (ii) effective access to legal system by the developing and least developed countries; (iii) time required for delivering ruling; and, (iv) effectiveness of rulings as a deterrent to wrongdoings. The paper finally highlights the lacunae in WTO's DSP and how some of these can be eliminated. Summary of observations emanating from the analysis of the trade disputes carried out in the previous sections is provided in Section 6.

2. Permissible Deviations from Free Trade under WTO

The ultimate removal of the existing quantitative restriction and progressive reduction of tariff barriers is the objective of the WTO. In other words, WTO-consistent 'free trade' does not imply absolute removal of all kinds of quantity and price barriers on trade by member nations 'under all circumstances'. However, the '*Most Favoured Nation*' (MFN) and '*national treatment*' principles constitute the two crucial pillars of the *non-discriminatory* regime of *multilateral trade liberalization* approach embedded in both GATT and WTO. MFN implies that if a country gives favourable treatment to one member country regarding a particular issue, it must handle all (contracting parties in GATT /WTO members) equally regarding the same issue. However, the practices deviant from non-discriminatory and multilateral trade liberalization have also been allowed, *inter alia*, in following cases.

- i) Regional Integration
- ii) Generalized System of Preferences
- iii) Non-Application of Multilateral Trade Agreements between Particular Member States (WTO Article XIII)
- iv) Other Exceptions

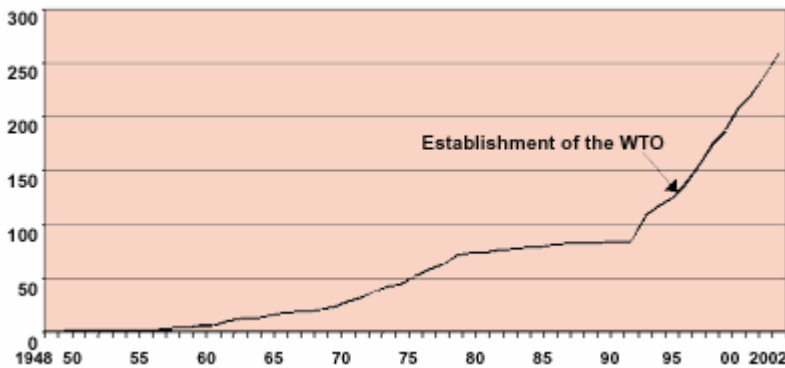
2.1 Regional Integration: GATT 1947, GATT 1994 and WTO

All the forms of regional integration are based on ‘discrimination’. Up to the conclusion of the Uruguay Round, rules concerning Regional Trade Arrangements (RTAs), *viz.*, Customs Unions (CUs) and Free Trade Agreements (FTAs), were spelt out only in Article XXIV of GATT 1947. This Article allowed contracting parties to form FTAs and CUs, despite the fact that preferential agreements violate the principle of non-discrimination. Though the conditions for formation of FTAs and CUs were specified in Article XXIV, the examination of RTAs in the GATT led to numerous problems consistently over the years. CUs and FTAs were to facilitate trade in the member countries without raising barriers to the trade for other trading member countries. This ambiguity of (in)consistency of RTAs with GATT, placed Article XXIV on the Uruguay Round agenda. This led to drafting of the ‘Understanding on the Interpretation of Article XXIV’ of GATT 1994. It serves as the basic framework for WTO on RTAs. GATT 1994 allows countries not only form CUs and FTAs, but also allows the ‘*interim agreements*’ leading to CUs and FTAs. For trade in services, the RTAs are governed by Article V of the General Agreement on Trade in Services (GATS), whereas, the Enabling Clause operative since the conclusion of Tokyo Round (1979) allows Preferential Trade Arrangements (PTAs) on goods between developing countries.

The logic behind permitting RTAs is that these allow participating countries to lower their tariffs between each other but do not heighten their trade barriers against the other WTO members. In other words, this involves discrimination among the WTO members, but it is permissible within the WTO framework as it reduces tariff barrier at least among some countries and hence, considered to be a ‘*building block*’ for multilateral free trade. WTO allows for the examination of RTAs by WTO members. This is intended to serve two purposes: (i) ensure the transparency of RTAs; and, (ii) examine the WTO-consistency of RTAs. In February 1996, the

General Council of the WTO established the Committee on Regional Trade Agreements (CRTA) for examination of the implications of RTAs for the multilateral trading system. The establishment of this Committee ended the need for appointing working committees for the examination of individual RTAs. In Figure 1, we provide a bird's eye view of the growth in notifications of RTAs to GATT/WTO.

Figure 1. Evolution of RTAs in the World, 1948-2002

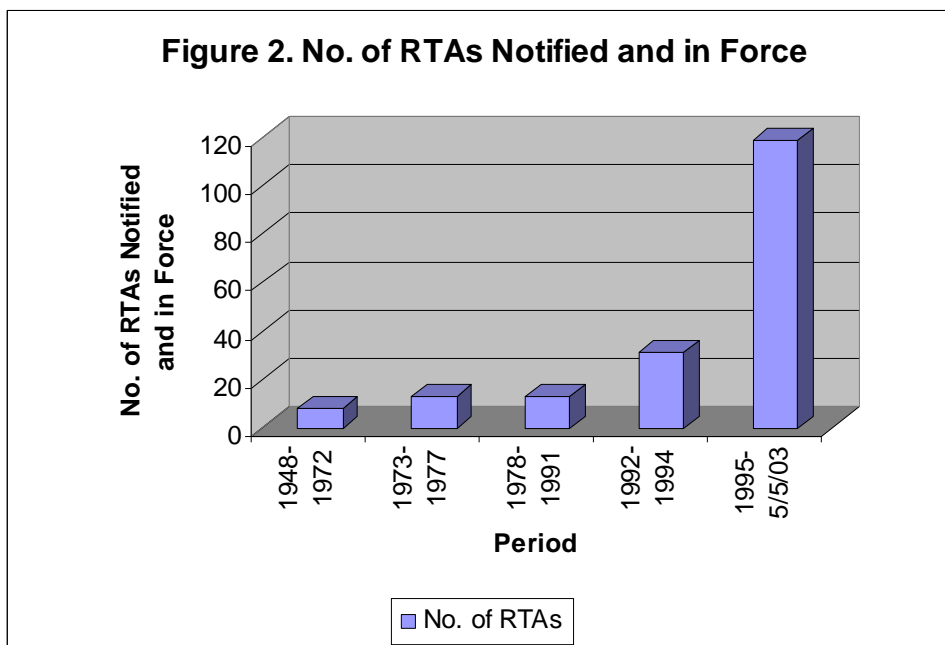


Source: http://www.wto.org/english/tratop_e/region_e/regfac_e.htm

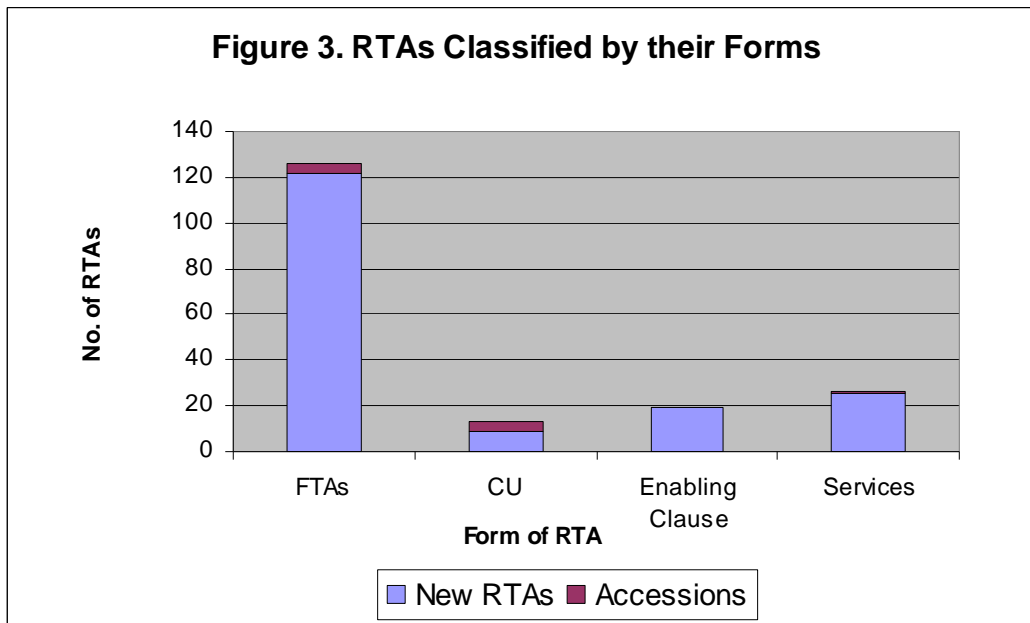
It can be seen from Figure 1 that the growth of RTAs has been most sharp during since the early nineties and this trend had set in even before the advent of WTO on the global scene. The GATT received 124 notifications of RTAs (relating to trade in goods) during (1948-1994), *i.e.*, during the GATT regime. Since the creation of the WTO, more than 141 additional arrangements encompassing trade in goods and services have been notified (from January 1995 to May 2003). (http://www.wto.org/english/tratop_e/region_e/regfac_e.htm). Out of these, about 190 are functional. There are also instances, not uncommon, of RTAs which are operational but not notified to the GATT/WTO. The number of such RTAs is estimated to be about 60. By July 2003, only three WTO members, *viz.*, Macau China, Mongolia and Chinese Taipei did not have membership of any RTA. (http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm).

In Figure 2, we provide a synoptic view of the number of RTAs which have been notified and are in force as on 5th May 2003. This figure also reconfirms that during the nineties, there has been a proliferation of RTAs and this proliferation has been more pronounced after the establishment of WTO.

Despite the fact that the WTO acts as a body to promote multilateral trade liberalization, there has been a parallel growth of RTAs. The cause for concern in the formation of RTAs is that, in some instances, it may conflict with the objective of promotion of multilateral trade. Growth of RTAs has been paralleled by increasing number of trade disputes. More than 160 requests for consultations required to resolve the trade disputes were brought to WTO during 1995-2000, which is almost thrice (on a per annum basis) of that brought to the GATT (Hoekman and Mavroidis, 1999). Growing regionalism may reduce the number of intra-RTA trade disputes but may lead to growing number of inter-RTA or RTA vs non-RTA trade disputes. Three features of RTAs can be noted (see Figure 3). These are: (i) most of the RTAs are in the form of Free Trade Agreements (FTAs); (ii) a growing number of RTAs are in the form of enabling clauses and service agreements; and, (iii) hardly half a per cent of these agreements are in the form of accession to the existing agreements, *i.e.*, the growth of RTAs has been basically in the form of new agreements. If intra-RTA trade encompasses a large share of the global trade, these would become ‘stumbling blocks’ rather than the ‘building blocks’ for multilateral trade liberalization (Bhagwati, 1991). In brief, both GATT and WTO have allowed member countries to conclude RTAs and/or interim agreement leading to RTAs, which violate the fundamental principle of non-discrimination set in the MFN clause of Article I.



Source: Based on data from http://www.wto.org/english/tratop_e/region_e/summary_e.xls



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2.2 Generalized System of Preferences

The Generalized System of Preferences (GSP) allows for lower tariff rates on the products from developing countries *vis-à-vis* those normally applicable under MFN. Under GSP, developed countries unilaterally grant benefits to developing countries. Also least-developed countries are given preferential treatment in markets of both developed and developing countries.

2.3 Non-Application of Multilateral Trade Agreements

The Article XIII (WTO) provisions were created to deal with problems arising from accessions. In a situation when a contracting party of GATT/member of WTO does not wish to accord MFN status to a new member, it is allowed to do so under the provisions of this article.

2.4 Other Exceptions

Article XX regarding General Exceptions for measures necessary to protect public morals, life and health, *etc.*, and Article XXI regarding Security Exceptions also permit the exceptions to MFN principle. Under WTO Article IX:3, countries may, with the agreement of other contracting parties, waive their MFN obligations. However, new waivers require the consent of

seventy five percent of the contracting parties/member nations. These waivers are subject to annual review (Article IX:4). The MFN principle also need not be adhered to under the circumstance of unfair trade (retaliation) or protection of national interest under emergency conditions. These exceptions can take the form of:

- 1) Actions against dumping (selling at an unfairly low price): GATT (Article 6) permits countries to take action against dumping, *i.e.*, imposition of additional import duties (anti-dumping duties).
- 2) Subsidies and special ‘countervailing’ duties to offset the subsidies: The ‘Agreement on Subsidies and Countervailing Measures’ is aimed at curtailing the use of subsidies and regulate it by allowing the affected countries to counter the effects of subsidies. A country can use the WTO’s DSP to ‘seek the withdrawal of the subsidy or the removal of its adverse effects’. Alternatively, the country can conduct its own investigation and impose extra duty (*i.e.*, countervailing duty) on the subsidized imports that are found to be harming the domestic producers.
- 3) Emergency measures to limit imports temporarily so as to ‘safeguard’ domestic industries: A WTO member can curb imports of a product temporarily, *i.e.*, take ‘safeguard’ measures, if its domestic industry is adversely affected in a ‘serious manner’ due to influx of imports. Safeguard measures were part of GATT (Article XXIX). However, bilateral negotiations, such as voluntary export restraint, were preferred over safeguard measures. The WTO agreement prohibits the former measures and also stipulates stricter conditions, (*e.g.*, in the form of sun-set clause) on all safeguard actions. A safeguard measure, in general, should not last more than four years, although this can be extended up to eight years.

In brief, there is a wide scope for countries to indulge in WTO-consistent discriminatory trade. At times, deviation from free trade is supposed to counter the unfair trade, such as in the case of anti-dumping and countervailing duties. Protection of national interests is allowed only as an emergency measure and in this sphere, discrimination against a country can be resorted to, as is seen in the provision of the safeguard measures. However, a crucial deviation from the non-

discriminatory trade is permitted in the case of RTAs. We have seen above that proliferation of such arrangement has been rampant despite the WTO regime.

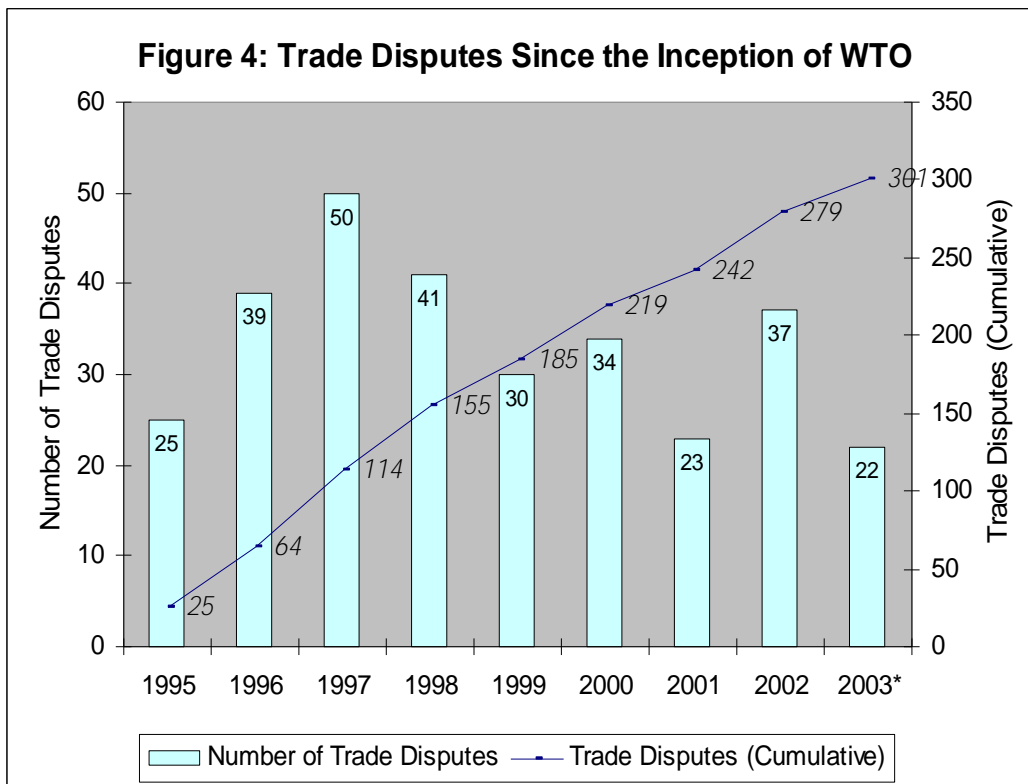
3. WTO and Trade Dispute Settlement Procedure (DSP)

One of the superiorities of WTO over GATT regime is said to be that the former has a sound legal basis. The DSP under the GATT regime evolved as a matter of convention. Both in terms of institutional legal set up and the mapping of time-schedule to complete the trade dispute cases WTO can be considered to be improvements in WTO over its predecessor. In Annexure 1, we provide a synoptic view of the DSP of the WTO. As can be seen from Annexure 1, if a trade dispute arises between member(s) of WTO, they are first required to hold consultations. Only if no mutual agreement is reached, the panel is constituted which looks into the matter and a report is prepared and circulated. The panel report is adopted if none of the parties (complainant and respondents) raise objections regarding the same. If still the disagreement persists, appeal can be made and then the Appellate Body (AB) looks into the matter. The verdict given by the AB report is expected to be implemented by the losing party. If the losing party is the respondent then it is expected to undertake compliance measures within a 'reasonable period of time' and report the status of compliance measures to the Dispute Settlement Body (DSB) of the WTO. In the case of non-compliance by the respondent, the complainant can ask for compensation. If there is no agreement on compensation than the DSB authorizes the complainant to retaliate and cross-retaliate. Also the possibility of arbitration on the principles of retaliation exists. The time frame for all the intermittent stages involved is provided in Annexure 1. As per the schedule outlined, the minimum time required for the complainant country to retaliate in the case of non-compliance by the respondent is about 2 and half years.

4. An Overview of the Trade Disputes under WTO: Facts and Figures

Facts and figures on trade disputes provided in this section pertain to the following aspects; (i) number of trade disputes over the years; (ii) the manner in which trade disputes (un)resolved; (iii) classification of trade issues across the income groups of the respondent/complainant and (iv) subject/issue involved in trade issue which have been brought to WTO.

In Figure 4, we provide a synoptic view of the number of trade disputes which have arisen since the inception of WTO. The average number of disputes brought to WTO since its inception is about 34 disputes per year. The number of trade disputes brought to WTO since 1995 ranges between 22 and 50. The total cumulative number of trade disputes brought to WTO until 9th Oct., 2003 is 301. Within three years of establishment of WTO, the number of cases brought to WTO doubled. The average number of trade disputes brought to WTO per year during 1995 to 1997 was 38. This number declined to 33 during 1998 to 2002. The possible reasons for this could be: (a) WTO has acted as a deterrent to ‘unfair’ trade; and, (b) WTO has not been effective in making countries comply with the rules of ‘fair’ trade and hence, lesser number of cases has been brought to WTO.



Source: Based data provided at http://www.wto.org/english/news_e/pres03_e/pr353_e.htm
 Data for 2003 is only up to May 2003.

In Table 1, we provide a synoptic view of the mode of resolving, or lack thereof, of these trade disputes. The mode of resolving disputes is important from the point of efficacy of WTO in ensuring ‘fair trade’. Out of 301 cases brought to WTO, even less than one fifth of these were

resolved through mutual agreement. Panel reports were adopted in about one-fourth of these cases. Appellate Body reports were adopted in the case of about 16 per cent of the cases and arbitration awards was circulated just in 1 case out of the total of 301 cases. For timely disposal of trade disputes, a pyramid structure with a wide base should be expected. We see that the proportion of cases taken to the panel is higher than that which is resolved through mutual agreement. Besides, very few cases go for higher level of legal proceedings. A potential reason for this could also be due to the high costs involved in such proceedings.

In Table 2, we provide the income categories of the complainants and respondents. More than 60 per cent of trade disputes have involved high income countries. United States and European Union are involved in more than 40 per cent of trade disputes. Upper Middle Income countries have been respondents in about 17 per cent of trade disputes. Three Latin American countries, *viz.*, Chile, Argentina and Brazil have been the main defendants. In about 13 per cent of the trade disputes, the lower middle income countries were defendants. In this group also, trade complaints have been mainly against Brazil. Trade disputes have been lodged against the low income countries as well and India has been the main respondent from this income category.

As regards the classification of trade disputes according to the issue/subject, most of the cases have been related to agricultural products (25), anti-dumping (53), automobiles (15), countervailing duties (18), safeguards measures (33), import measures (12), patents (11), steel (27), Textiles (18) and TRIPS (24). Products, such as, agricultural, steel, textiles, automobiles are the ones that predominate in the export baskets of developing countries and some of the developing countries have competitive edge in production of these goods. Issues such as dumping, provision of subsidies and import restriction on various grounds including safeguard measures are contentious ones and as we will see that a long-drawn costly legal battle does not work to the advantage of developing countries, despite the existence of the DSP of WTO.

Table 1: Trade Dispute Resolution (lack of resolution) Since the Inception of WTO

	As a % of Total for the respective year									Cumulative Total (Number)	As a % of Cumulative Total
	1995	1996	1997	1998	1999	2000	2001	2002	2003		
	100	100	100	100	100	100	100	100	100	301	100.0
Established [2]	20	31	30	34	67	32	65	30	68	118	39.2
Imposed	36	31	44	37	77	35	70	49	86	146	48.5
	16	23	26	27	63	21	52	22	36	91	30.2
	32	23	40	29	73	24	57	41	36	115	38.2
		8	14	10	30	12	39	16	27	48	15.9
	12	18	20	27	3	21	43	14	14	57	18.9
		10	20	24	43	53	30	27	32	79	26.2
		5	10	29	30	44	57	30	27	73	24.3
		10	12	20	30	32	22	16	14	52	17.3
		5	10	20	23	24	39	16	14	48	15.9
					10	6	0	3	5	7	2.3
(Article 25)							4			1	0.3
								3		1	0.3

found at http://www.wto.org/english/news_e/pres03_e/pr353_e.htm

Establishment of a panel and the constitution of a panel may be in two different years, the date of establishment of a panel is taken as the

Similar disputes were consolidated into one panel proceeding; thus, the number of disputes that have gone to a panel exceed the established i.e. the recent US – Steel Safeguards case was established as one panel but deals with eight complaints (WT/DS248, WT/DS252, WT/DS253, WT/DS254, WT/DS258, WT/DS259).

There have been decisions by the DSB to establish a panel, the dispute has been settled before the actual constitution of the panel; in all in the composition stage.

If the DSU, if, within 20 days after the establishment of a panel, the parties cannot decide on the selection of the panelists either Director-General to determine the composition of the panel either in its entirety or partially in those cases where the parties have all of the panelists.

Parties notified a mutually agreed solution before the issuance of the final panel report. Therefore, a short panel report was circulated WT/DS7/R and WT/DS12/R, WT/DS14/R in 1996; and WT/DS72/R in 1999.

There were appeals. In the disputes EC – Hormones (WT/DS26 and WT/DS48) and US – 1916 Act (WT/DS136 and WT/DS162), there were appeals but they were joined at the appeal stage.

Table 2: Income Category of Complainants and Respondents

Countries/Country	Number of		As a % of Total	
	Complainant	Respondent	Complainant	Respondent
High Income (of which)	204	189	62	63
<i>European Union</i>	62	47	19	16
<i>United States</i>	75	81	23	27
Upper Middle Income (of which)	47	50	14	17
<i>Argentina</i>	9	15	3	5
<i>Chile</i>	8	10	2	3
<i>Mexico</i>	13	10	4	3
Lower Middle Income (of which)	58	40	18	13
<i>Brazil</i>	22	12	7	4
<i>Thailand</i>	10	1	3	0
Low Income (of which)	20	22	6	7
<i>India</i>	15	14	5	5
TOTAL	329	301	100	100

Source: Based on data from http://www.wto.org/english/news_e/pres03_e/pr353_e.htm

Note: The number of complainant is larger than the number of respondents as there can be more

5. Trade Dispute Involving India

Low income countries brought 20 complaints to WTO and out of these 15 cases were brought by India. Similarly out of 22 cases filed against the low income countries, 14 were against India. Thus, India is the single most important countries from the low income countries involved in the trade disputes. We first take up the cases in which India was a complainant. These cases are discussed below.

5.1 India as a Complainant:

In Table 3, we provide details of trade disputes in which India featured as complainant. Out of the 15 complaints, 6 were lodged against the United States and 4 were lodged against the European Union. These are India's main trading partners. EU accounts for more than 20 per cent of India's exports and the US accounts for nearly 20 per cent of India's exports. With EU, India has a deficit in trade, and this deficit has been much lower in the recent years (2000-01 and 2001-02) as compared to that in the preceding three years (1997-98 to 1999-2000). The average deficit with EU was US \$ 1.3 billion during the former period and it declined to barely US \$ 0.3 billion in the latter period. With the US, India has a trade surplus which has increased in the recent years. The average trade surplus with the US was US \$ 3.8 billion in the former period as compared to US \$ 5.8 billion during the latter period. Declining trade deficit and increasing

surplus of India with these countries can be one of the reasons for trade aggressiveness both on the part of India as well as these countries.

Table 3: Trade Disputes Brought to WTO by India

Sr No	Dispute No.	Date of Dispute Initiation	Subject	Respondent Country
1	DS19	18 October 1995	Import régime for automobiles	Poland
2	DS32	15 March 1996	Measures affecting imports of women's and girls' wool coats	United States
3	DS33	01 April 1996	Measures affecting imports of woven wool shirts and blouses	United States
4	DS34	23 March 1996	Restrictions on imports of textile and clothing products	Turkey
5	DS58*	14 October 1996	Import prohibition of shrimp and shrimp products	United States
6	DS134	8 June 1998	Measures affecting import duties on rice	European Communities
7	DS140	7 August 1998	Anti-dumping measures on imports of unbleached cotton fabrics from India	European Communities
8	DS141	7 August 1998	Anti-dumping measures on imports of cotton-type bed-linen from India	European Communities
9	DS168	13 April 1999	Anti-dumping duties on import of certain pharmaceutical products from India	South Africa
10	DS206	12 October 2000	Anti-dumping and countervailing measures on steel plate from India	United States
11	DS217**	9 January 2001	Continued Dumping & Subsidy Offset Act of 2000	United States
12	DS229	17 April 2001	Anti-Dumping Duties on Jute Bags from India	Brazil
13	DS233	30 May 2001	Measures Affecting the Import of Pharmaceutical Products	Argentina
14	DS243	22 January 2002	Rules of origin for textiles and apparel products	United States
15	DS246	12 March 2002	Conditions for the granting of tariff preferences to developing countries	European Communities

Source: Based on World Trade Organization (2005) (Brought by India):

Note: * brought also by Malaysia, Pakistan, Thailand and ** brought also by Australia, Brazil, Chile, the EC, Indonesia, Japan, Korea, and Thailand

We now discuss in detail only those disputes which involved rulings by the Panels and/or Appellate Body.

DS 33: The bilateral textile agreement between India and the United States and the Multi Fibre Agreement (MFA) was supposed to expire on 31 December 1994 and the Agreement on Textile and Clothing (ATC) was to come into effect from 1 January 1995. On 30 December 1994, the United States requested for consultations with India so as to negotiate a bilateral agreement for establishing restraints on India's exports of woven wool shirts and blouses to the United States. The two countries held consultations in Geneva on 18 April 1995. However, India considered that *w.e.f.* from 1 January 1995 the framework for international trade in textiles was provided by the ATC and the other WTO agreements and hence, asking India to restrain its exports was unfair. On 18th April, 1995, the United States withdrew its request for export restraint and requested for new consultations with India on, *inter alia*, under the transitional 'safeguard mechanism' of the ATC. United States imposed restraints on imports from India on 14th July 1995. It was to be operative for one year, *i.e.*, from 18th April 1995 to 17th April 1996. India ultimately brought the issue to the Dispute Settlement Body (DSB) on 14th March, 1996, requesting the formation of the panel, as the consultations had failed. The DSB circulated this request by India on 1st April, 1996. On 27th May 1997, the Appellate Body ruled in India's favour stating that the US import measures had nullified and impaired India's benefits under the WTO and ATC. In other words, Indian exports were unfairly restrained from 18th April, 1995 and the final verdict from WTO came on 27th 1997, almost after two years. Though these restraints by the US had to be lifted, the loss to Indian exporters for more than 2 years is not taken care by the legal set up of the WTO.

DS 34: On 23rd March, 1996, Turkey imposed restriction on imports of textiles and clothing from India. This measure was on the lines similar to that followed by the US. On 23rd Sept., 1999, the Appellate Body ruled in India's favour and the last intimation (on 7th Nov., 2000) to the WTO by Turkey was that it was working on the issue. The ruling took about more than three years. Again, the injustice to the Indian exporters for more than three years (*i.e.*, more than the time frame permitted by the WTO for resolving the trade disputes), remains unpunished.

DS 58: On 19th April 1996, the US imposed a ban on imports of shrimp and shrimp products from India, Malaysia, Pakistan, and Thailand, under Section 609 of U.S. Public Law 101-162.

This was on the grounds of ‘Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations’. On 14th October 1996, India, Malaysia, Pakistan, and Thailand brought this matter to the WTO. On 12th Oct., 1998, the Appellate Body ruled against the US. The US asked for 13 months (*w.e.f.* 21st Jan., 1999) as a ‘reasonable time’ for compliance to the Appellate Body’s rulings. Again, in this case, the time between the implementation of the unfair trade practice and the ultimate compliance was long enough, without providing any compensation to the complainant during this period.

DSP141: The EC initiated anti-dumping proceedings against the import of cotton type bed linen from India through the notification in September 1996. On 12th June 1997 and 28 November 1997, provisional and final anti-dumping duties were imposed by EC. On 7th August 1998, India brought the matter to the WTO. On 22nd March 2001, the Appellate Body report which had ruled in India’s favour, was adopted by the DSB of the WTO. As a follow up, the EC reported of compliance on 28th Jan., 2002. Besides the time lag involved during the legal procedures of DSB, there is generally a time lag between the initiation of unfair trade practice and lodging of the formal complaint by the complainant. This is because exporters association need to bring the matter to the attention of their governments and the governments require time to prepare for the case. Governments acting as filters also delays in filing complaints if red-tapism and bureaucratic procedures exist in the complainant country. Thus, the effective length of the case was from 12th June 1997 to 28th Jan., 2002, almost five years. The non-compliance during this period has gone unpunished.

DS 206: On 13th December 1999 the US Department of Commerce (DOC) viewed the sales of certain ‘Cut-to-Length Carbon Quality Steel Plate Products’ from India as an act of dumping and affirmed it on 10 February 2000 and imposed anti-dumping and countervailing measures. India brought the matter to the WTO on 12th Oct., 2000. On 29th July 2002, the Panel ruled in India’s favour. The US asked for a reasonable time extending up to 31st Jan., 2003 and mutually agreed for further progress in the matter. Again, in this case, the effective non-compliance period is almost three years and no punishment for the non-compliance during this period!

DS 217: On 28th October 2000 the US Government amended the Tariff Act of 1930 and titled it as ‘Continued Dumping and Subsidy Offset Act of 2000’. Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand regarded it as violation of the WTO

agreements and requested for consultation on 9th Jan., 2001. On 16th Jan., 2003, the Appellate Body ruled against the United States. The US has asked for a reasonable period of time which expires on 27th Dec., 2003. In this case as well, the non-compliance period would be more than 3 years.

DS 243: The rules of origin applicable to textile and apparel products had to be changed in conformity with the Uruguay Round Agreements Act *w.e.f.* from 1 July 1996. On 22nd Jan., 2002, India requested for consultation about the issue of non-implementation of the changed rules by the US. On 20th June, 2003, the Panel has ruled in against India and on 23rd July the Panel report was adopted. Though the time length involved in the legal proceeding has been just more than a year, i.e., much lesser than that outlined by the DSB and taken for disposal of other cases, the effective length of non-compliance is almost six years.

DS 246: This complaint by India (against the EC) was regarding the conditions for granting of tariff preferences to developing countries. The Indian authorities raised the following concerns. *First*, the tariff preferences accorded by the EC under the special tariff arrangements for combating drug production and trafficking are applied selectively. *Second*, the selectivity is retained for tariff preferences regarding the cases involving the protection of labour rights and the environment. These were deemed to result in problems for India's exporters to the EC and thereby, nullify or impair the benefits accruing to India. India brought the matter to the WTO on 12th March 2002 and the matter is yet to be resolved. Panel for this case has been appointed on 27th Jan., 2003.

5.2 India as a Respondent

In Table 4, we provide the data regarding the trade dispute cases filed by different countries against India. Seven out of 14 cases have been filed by the European Community, whereas, three cases have been filed by the United States. Thus, India is basically involved in trade disputes with the developed countries. This is important as the resource and expertise constraints acting on the complainant and respondents differ considerably. Detailed discussion of the disputes in which India was respondent is also restricted only to those which involved rulings by the Panels and/or Appellate Body.

Table 4. Trade Disputes Cases brought to WTO Against India

Sr No	Dispute No.	Date of Dispute Initiation	Subject	Brought by
1	DS50	09 July 1996	Patent protection for pharmaceutical and agricultural chemical products	United States
2	DS79	6 May 1997	Patent protection for pharmaceutical & agricultural chemical products	European Communities
3	DS90	22 July 1997	Quantitative restrictions on imports of agricultural, textile and industrial products	United States
4	DS91	22 July 1997	-”-	Australia
5	DS92	22 July 1997	-”-	Canada
6	DS93	22 July 1997	-”-	New Zealand
7	DS94	23 July 1997	-”-	Switzerland
8	DS96	24 July 1997	-”-	European Communities
9	DS120	23 March 1998	Measures affecting export of certain commodities	European Communities
10	DS146	12 October 1998	Measures affecting the automotive sector	European Communities
11	DS149	12 November 1998	Import restrictions	European Communities
12	DS150	3 November 1998	Measures affecting customs duties	European Communities
13	DS175	7 June 1999	Measures relating to trade & investment in the motor vehicle sector	United States
14	DS279	9 January 2003	Import restrictions maintained under the export and import policy 2002-2007	European Communities

Source: Based on World Trade Organization (2003)

DS 50 and DS 79:

Dispute DS 50 was filed by the US on 9th July 1996, whereas, Dispute DS 79 was filed by the EC on 6th May 1997. Both of these disputes pertained to absence of ‘either patent protection or formal systems that permit the filing of patent applications for pharmaceutical and agricultural chemical products and that provide exclusive marketing rights in for pharmaceutical and agricultural chemical products’. On the 5th Sept., 1997 the panel submitted its report and on 19th Dec., 1997 the Appellate Body report directed India to comply with the TRIPS provisions of the

WTO agreement. In response to this Government of India had introduced a Bill in the Indian Parliament to effect certain Amendments to the Patents Act, 1970. These Amendments to the Patents Act, 1970, as passed by both Houses of Parliament, have been approved by the President of India and notified in the Gazette of India on 26th March 1999 as the Patents (Amendment) Act, 1999. This case is involved public health issue as well as acquiring benefits of R & D which need not be related to the originator of R & D. It is not one of the routine cases and still remains to be a contentious issue. The other dimensions of fairness of developed countries to developing countries are also linked to this issue. Given the fact that developing countries are ill-equipped to file patents, which is a costly and time-consuming process, the developed countries have an edge over the developing countries in terms of acquiring patents even if R & D is not done by the former.

DS 90, DS 91, DS 92, DS 93, DS 94 and DS 96: India maintained quantitative restrictions on the imports of agricultural, textile and industrial products on 2,714 tariff lines and notified these to the Committee on Balance-of-Payments Restrictions (the "BOP Committee"). On 30 June 1997, following consultations in the BOP Committee, India agreed to eliminate its quantitative restrictions over a seven-year period, which was considered to be too long a period, especially by the US. In view of this, complaints against India were brought not only by the United States but also by Australia, Canada, New Zealand, Switzerland, and European Communities. The issue was the same, *i.e.*, quantitative restrictions on imports of agricultural, textile and industrial products. All these complaints were filed between 22nd to 24th July 1997. The Panel Report, circulated on 6 April 1999, recommended that India should bring its measures into conformity with WTO Agreement. On 23rd August 1999, the Appellate Body submitted its report to WTO as regards DS 90 reinforcing the panel report. On 22 September 1999, the Dispute Settlement Body adopted the Appellate Body report. The communication to this effect was circulated on 13 October 1999.

DS 146 and DS 175: The European Commission filed the complaint on 6th Oct., 1998 (DS 146) and the same was circulated on 12 October 1998. The complaint was regarding the measures in contained in the Export and Import Policy, 1997-2002. The public notification issued by India on 12th December 1997, stated that the imports of complete automobiles and of certain parts and components thereof were subject to discretionary import licenses, though as per the notifications

of India to the WTO, imports of these parts and components were 'free' from quantitative restrictions. The European Communities deemed it as a lack of conformity of the above measures with the obligations of India under GATT 1994 and the TRIMs Agreement. On 12 October 2000, the European Communities requested the establishment of a panel for resolving DS 146. On 7th June 1999, the US also filed a complaint on this matter (DS 175). In the On 27th July 2000, the panel for DS 175 was established and it was also mandated to investigate DS 146. Korea and Japan were third parties in these disputes. The Panel Report, circulated on 21 December 2001, found Indian measures to be GATT 1994 inconsistent and deemed it unnecessary to examine their consistency to TRIMS Agreement. On 19 March 2002, the Appellate Body ruled against India on these two cases and the report was adopted on 5 April 2002. India had already removed the indigenization requirement on 4 September 2001 and on 19th August 2002, it terminated the trade balancing requirement, even though it was given time frame for compliance which was to expire on 5th Sept 2002.

DS279: On 9th January 2003, EC filed a complaint against India which pertains to the import restrictions maintained under the export and import policy, 2002-2007. India has agreed for consultation on this issue.

6. Concluding Observations

The evaluation of the functioning of the dispute settlement mechanism of the WTO can be done with respect to the following criteria. These are:

- The scope of using WTO dispute settlement mechanism towards protectionism
- Objectivity of the judgment
- Effective access to legal system by the developing and least developed countries
- Time required for delivering ruling
- Effectiveness of rulings as a deterrent to wrongdoings

The scope and coverage of complaints brought to DSP of WTO have been quite comprehensive. The disputes covered under WTO can be classified into following three types (Horn and Mavroidis, 1999),. These are: (i) violation complaints; (ii) non-violation complaints; and, (iii) situation complaints. Violations complaints pertain to WTO-incompatibility and the complainant has to merely demonstrate the violation of WTO agreements. Non-violation and

situation complaints have a wider scope. A non-violation complaint includes the application of any measure regardless of whether it conflicts with the WTO Agreement. A situation complaint pertains to any other situation which does not involve actions prohibited by the WTO Agreement but is still injurious to free trade. For lodging a non-violation and situational complaints nullification and impairment (trade effects) have to be demonstrated. In brief, potentially the WTO's DSP covers not only WTO-non compliant trade disputes but also the other disputes which cause damage to member nations. De Bièvre Dirk (2001) distinguishes between two categories of disputes, these are routine enforcement disputes and disputes on broad ranging issues encompassing political disagreements on public health, labour and environmental standards and developmental issues. He opines that the WTO is an appropriate forum for resolving the routine trade disputes but the wider issues cannot be meaningfully resolved by litigation procedure of WTO. He also raises the question about the 'legitimacy and the expertise' of the WTO to 'adjudicate on societal questions in a globalizing economy'. According to him the institutional framework of the WTO's Dispute Settlement Understanding is being stretched to its limits. We have also seen in the earlier section that there has been a parallel growth of regionalism which has been deemed WTO-consistent. Thus, there is ample scope within the WTO framework to indulge into non-discriminatory trade.

As regards objectivity of the judgment is interpreted rather narrowly. We merely interpret it as whether it has systematic bias in ruling against the developing countries and we infer the same with respect to the trade disputes involving India. In the cases where India was the complainant, the rulings went against India in only one of the disputes (DS 243) as compared seven ruling in favour of India (in the cases where panel/Appellate body reports were produced). As regards India as a respondent, India has all the cases and has complied with the WTO rulings by taking concrete actions, thus, averting any possible retaliation. The quality of ruling does not seem to be a problem with the WTO's DSP. Generally, the complainants have been the winners. This could be due to the fact that the complainant lodge complaints only when they are confident about the 'unfairness' of their trading partner and the 'objectivity of DSB'.

A large number of complaints filed against the US and the EC (almost 40 per cent of the total complaints, since the inception of the WTO, see Table 2) also can be taken as indications of growing dissatisfaction of trade practices of these major players against each other and WTO has acted as a satisfactory legal system for resolving these disputes. This view has also been expressed as the “frequent recourse to dispute settlement in the WTO by the US and the EU is a sign of good health of the transatlantic relationship” (De Bièvre Dirk, 2001). However, it becomes difficult for poor countries with diverse cultural backgrounds, to absorb and use the legal system provided in WTO. Distribution of knowledge has been regarded as a sacred and highly respected activity in cultural traditions some of the developing countries and internalizing and privatizing the gains associated with it is considered unethical. Though the mindsets and attitudes regarding this are changing, still it becomes difficult to conceive the idea of assigning monetary value to every existing ‘idea’ and privatizing the domain of ‘new ideas’ in a market framework. This is compounded by the paucity of both financial resources, absence of institutional set up and legal expertise in developing countries. This gets reflected in the ‘ineffective access to legal system’ by the poorer countries. The inequalities of resources between the developed and developing countries are bound to accord a systematic bias in favour of the former and this bias is not peculiar to the DS mechanism of WTO alone. Moreover, governments act as ‘filters’ and given the fact that exporters’ lobbies are not as organized in developing countries as in the case of developed countries, there are practical difficulties in filing complaints by the exporters of the developing countries.

Justice delayed is regarded as justice denied and hence, the issue of timely ruling becomes pertinent. It can be seen from Table 3 that the dispute cases (DS 34, DS 58, DS 141, DS 206 and DS 217) involved rulings to be made only after years. Similarly we can also see in Table 4 that delays have occurred in cases where India has been defendant (see Table 4). Despite the fact that the number of complaints brought by developing countries has increased under the WTO, the doubts have been expressed about the lowering of the costs of resolving disputes under the WTO regime. The entire process of dispute settlement under WTO (see Annexure 1) is a time consuming process, which enables defendant to choose the delay options and has created a host of procedures in between the filing of initial complaint and the ultimate legal conclusion of the case. This is exclusive of the incubation period, *i.e.*, time taken to prepare the case and convince

the government to file the complaint. WTO like GATT lacks the automatic enforcement authority. In fact, under the DS mechanism of WTO the complainant has to wait for about two and a half years more than under GATT before retaliating against the defendant's non-compliance (Reinhardt, 2000). The bigger states can choose not to implement the rulings despite the adoption of panel reports and challenge the smaller states to retaliate. We see this quite clearly in terms of statement of compliance by India in cases where it has lost. The same is not true about most of the cases where large developed countries have lost. This gets linked to the efficacy of DS mechanism to act as a deterrent to unfair trade practices.

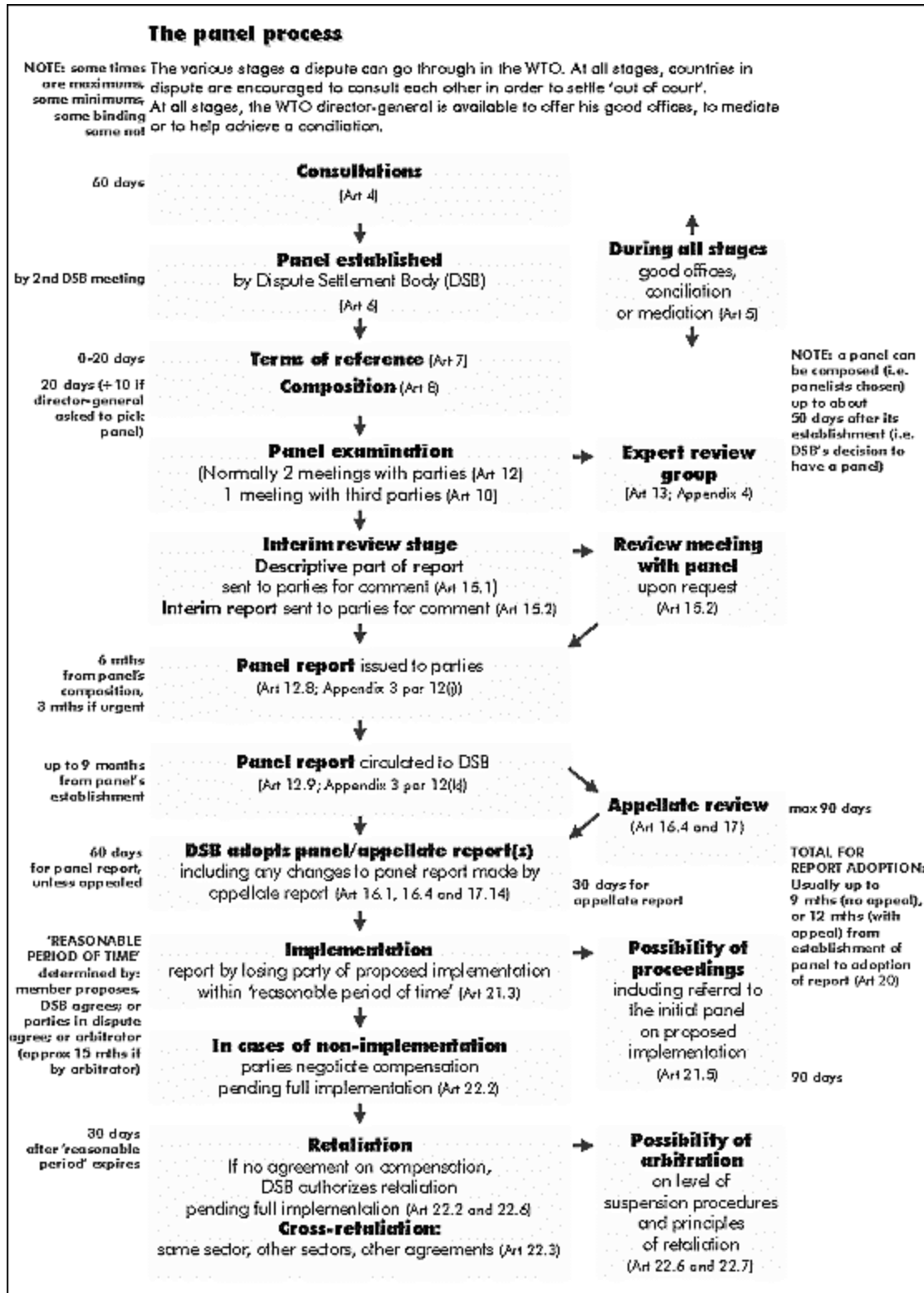
Another feature of the dispute settlement mechanism under WTO that has come under criticism is that the WTO-inconsistent trade practices can at best invoke the *status quo ante*. Any legal deterrent ought to not only restore the *status quo ante* but also should have some penalties for nullification and impairment. WTO-inconsistent policies can at best attract compensation for the damage caused to the complainant of an equal amount. The use of compensation has been rather rare under the WTO regime. The deterrent role of legal system is effective when the penalty exceeds the damage caused. If there is no agreement on compensation, WTO authorizes the winning party to retaliate and cross-retaliate. More often than not, retaliation takes the form of heightening import barriers against the offender country. This is rather absurd. For several reasons, it difficult for small countries to retaliate against large countries. Even if they do, they cannot target the offender industry and compensate the losers in the domestic economy. Such heightening of trade barriers merely protects some other segment of the domestic industry which did not suffer the loss of export market. Thus, retaliation penalizes the complainant country in a distorted manner. Due to this, developed countries can target various sectors of a small country in a sequential manner and thus perpetually keep on destroying its export market and go unpunished. Moreover, WTO system has favoured benign recommendations rather than provocative suggestions and does not satisfactorily deal with situations where the defendant resorts to only cosmetic changes in policy (Anderson, 2002).

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Annexure 1: Dispute Settlement Process in WTO



Source: http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm