

for adoption by the DSB until 20 days after their circulation to the WTO Members. If Members have objections to a panel report, they 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. The disputing parties have the right to participate fully in the DSB's consideration of the panel report and their views shall be fully recorded.

The report shall be adopted by the DSB, within 60 days of the issuance of the panel report to the Members, unless one of the disputing parties formally notifies the DSB of its intention to appeal or the DSB decides by consensus not to adopt the report. Where a party has notified its intention to appeal the panel report shall not be adopted until the appeal process is completed.

(iv) **Appellate Review**

Standing Appellate Body - Composition and Functions: Paragraph 17 provides that a standing Appellate Body shall be established by the DSB to hear appeals from the panel cases. It will be composed of seven members. Members shall be appointed for a four-year term, and each person may be reappointed once. As regards the qualifications of such members, they shall be persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.

Only parties to the dispute may appeal a panel decision. Third parties which have notified the DSB of a substantial interest in the matter, may make written submissions and given an opportunity to be heard by the Appellate Body. An appeal shall be limited to issues of law covered in the panel report and legal interpretation developed by the panel. The report of the Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel. Rules of confidentiality and transparency governing the panel proceedings are *mutatis mutandis* applicable to the Appellate Body.

As a general rule, the appellate proceedings shall not exceed sixty days from the date a party notifies its intention to appeal to the date the Appellate Body issues its decision. If the Appellate Body finds the duration to be inadequate, it shall inform the DSB of the reasons for the delay together with

an estimate of the period within which it will submit the report. In no case, shall the duration for appellate proceedings exceed ninety days.

Adoption of Appellate Report: An appellate 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 report within thirty days following its issuance to the Members. The WTO Members have the right to express their views on an appellate report.

The WTO Understanding sets stringent time periods for each phase of the panel and appellate proceedings. Paragraph 20 provides that the period from the establishment of the panel to the time until the DSB considers the panel or appellate report for adoption shall, as a general rule, not exceed nine months where the report is not appealed or twelve months where the report is appealed.

(v) **Implementation**

The DSB oversees the implementation of the recommendations. The WTO Understanding sets out a three-fold system of remedies, which includes: prompt compliance with recommendations, compensation, and suspension of concessions.

(a) Prompt compliance with recommendations or rulings of the DSB is essential to ensure effective resolution of disputes to the benefit of all Members. Hence, paragraph 21.3 directs the defendant party to inform the DSB meeting, within 30 days of the adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations of the DSB. If immediate compliance is not feasible, then the defendant party shall be given a reasonable period of time to do so. The reasonable period of time shall be

(i) the period of time proposed by the defendant party and approved by the DSB; or

(ii) in the absence of such an approval, a period of time mutually agreed by the parties to the dispute within 45 days after the adoption of the

recommendations and rulings; or

(iii) in the absence of such agreement, a period of time determined through binding arbitration within 90 days following the adoption of the recommendations and rulings.

In case, there is a disagreement on the consistency of the measures taken by the defendant party with a covered agreement, such dispute shall be decided through recourse to these dispute settlement procedures, involving resort to the original panel wherever possible. The panel shall issue its decision within 90 days of referral of the matter to it.

The DSB shall, under paragraph 21.6, keep under surveillance the implementation of the recommended measures. Any Member may raise the issue of implementation at the DSB following the adoption of recommendations. The issue of implementation shall be placed on the agenda of the DSB meeting after six months following the establishment of the reasonable period of time and shall remain on the DSB's agenda until the issue is resolved. The defendant party shall provide a status report of the progress in implementation, ten days prior to each such DSB meeting.

Differential treatment is provided for monitoring a developing country Member that has brought a dispute settlement case. Under paragraph 21.8, in cases brought by a developing country Member, the DSB while considering what appropriate action might be taken is required to take into account not only the trade coverage of impairing measures, but also their impact on the economy of developing country Members concerned.

(b) Compensation and the Suspension of Concessions: In the event that the recommendations and ruling are not implemented within a reasonable period of time, paragraph 22.1 of the Understanding prescribes compensation and suspension of concessions or other obligations, as alternate remedies. The Understanding characterizes compensation and suspension as 'temporary measures' and declares that neither 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.

If the defendant party fails to ensure prompt compliance with the recommended measure, it shall, no later than the expiry of the reasonable period of time, enter into negotiations with the other party, with a view to developing mutually acceptable compensation. Wherein no satisfactory compensation has been agreed upon within 20 days after the expiry of the reasonable period of time, any party which had invoked the dispute settlement mechanism may seek authorisation from the DSB to suspend the application to the defendant party, of concessions or other obligations.

Principles governing suspension of concessions: In considering what concessions or other obligations to suspend the complaining party shall apply the following principles and procedures:

Parallel retaliation - 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.

Cross-sector retaliation - If the party considers that parallel retaliation is not practicable or effective, it may seek to suspend concessions or other obligations in other sectors under the same agreement.

Cross-agreement retaliation - If the party considers that it is not practicable or effective to seek cross-sector retaliation, it may seek to suspend concessions or other obligations under another covered agreement.

Where the complaining party decides to seek authorization to suspend concessions, either cross-sector or cross-agreement retaliation, then it shall state the reasons therefor. At the same time as the request is forwarded to the DSB, it shall also be forwarded to the relevant Councils and sectoral bodies.

In applying the above principles, the complaining party must take into account two elements, viz.,

- trade in the sector or under the agreement under which nullification or impairment has been found, and the importance of such trade to that party;

- the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other

Authorization by DSB: When a request seeking authorization is made, the DSB shall suspend concessions within thirty days of the expiry of the reasonable period of time, unless the DSB decides by consensus to reject the request. In this context, it is important to note that the level of the suspension of concessions or other obligations authorised by the DSB shall be equivalent to the level of the nullification or impairment. Where a covered agreement prohibits such suspension, the DSB shall not authorize suspension.

In the event of a dispute - where a defendant party objects to the level of suspension proposed or claims that the principles and procedures for seeking cross-retaliation has not been followed by the complaining party - the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel or by an arbitrator appointed by the Director-General and shall be completed within 60 days of the expiry of the reasonable period of time. The parties shall accept the arbitrator's decision as final and shall not seek a second arbitration.

The suspension of concession or other obligations shall be temporary, and shall be applied until such time.

- the inconsistent measure is removed; or
- the defendant party that must implement the recommendations provides a solution to the nullification or impairment of benefits; or
- a mutually satisfactory solution is reached.

5. Settlement of disputes - 'Non-violation' and 'Situations' complaints:

Non-violation complaint: The WTO Agreement confirms the continued availability of non-violation complaints, more notably in the specific dispute settlement provisions of the WTO Subsidies Agreement (Art.4), the Agreement on Agriculture (Art. 13), the General Agreement on Trade in

Services (GATS) [Art. XXIII], and in the Agreement on Trade-Related Intellectual Property Rights (TRIPS) [Art. 64]. More specifically, paragraph 26 of the WTO Understanding codifies and develops the relevant rules on non-violation complaints as described in GATT Article XXIII: 1(b).

Paragraph 26.1 postulates the applicability of the WTO Understanding and requires a panel or Appellate Body to make rulings or recommendations, in a dispute that involves a non-violation complaint, on the fulfilment of the following two conditions:

1. The non-violation provision as laid down under Article XXIII: 1(b) is applicable to the relevant covered agreement. and
2. A party to the dispute considers that any benefit accruing to it directly or indirectly under the 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.

Wherein a panel of Appellate Body determines that a case concerns non-violation complaints, the procedures of the WTO Understanding apply, subject to the following four conditions:

- (a) the complaining party should present a detailed justification in support of its non-violation complaint;
- (b) even when there is a determination made that the measures complained against nullifies or impairs a benefit arising out of a covered agreement, but if such measures do not violate the agreement, there is no obligation to withdraw the measures. In such cases, the panel or Appellate Body may however, may recommend that the defendant party make a mutually satisfactory adjustment.

- (c) In case parties resort to the arbitration procedure, as set forth in paragraph 21.3, the resulting arbitral determination may clarify the level of benefits which have been nullified or impaired and also suggest ways and

means of reaching a mutually satisfactory adjustment. However, such suggestions shall not be binding upon the parties.

(d) Compensation may be part of a mutually satisfactory adjustment as a final settlement of non-violation disputes.

It must be noted that the above four conditions, substantially varies with the normal procedure prescribed for a violation complaint.

Situation complaint. Paragraph 26.2 states that a panel may make rulings/recommendations in a dispute involving a 'situation' complaint, provided:

1. The situation complaints provision as laid down under Article XXIII-1(c) is applicable to the relevant covered agreement; and

2. A party to the dispute considers that any benefit accruing to it directly or, indirectly under the 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 violation of covered agreements and non-violation measures.

Wherein a panel determines that a case is covered by situation complaints, the procedures of the WTO Understanding apply, subject to the following conditions:

(a) the complaining party should present a detailed justification in support of its situation complaint,

(b) the procedures of the WTO Understanding shall apply 'only up to and including the point in the proceedings where the panel report has been issued to the Members'.

(c) the procedures for adoption recommendations, surveillance and implementation are governed by the dispute settlement rules and procedures contained in the GATT Decision of 1989, and not by the WTO Understanding; and

(d) if a panel finds that cases also involve dispute settlement

matters other than those of a situations complaint, then the panel shall issue a report addressing such matters and a separate report on matters concerning the situation complaint.

6. Special procedures for Least-Developed Countries

Paragraph 24.1 of the WTO Understanding lays down the general rule that, "at all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member (LDC), particular consideration shall be given to the special situation of LDCs". In this regard, Members of the WTO are obliged to exercise due restraint in raising matters under these procedures involving a least-developed country. More specifically, if nullification or impairment is found to result from a measure taken by a LDC, then complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concession or other obligations, pursuant to these procedures. Besides, paragraph 24.2 mandates the Director-General or the Chairman of the DSB, on a request from the least-developed country Member and when consultations have not yielded a solution, to offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute.

Apart from paragraph 24, the Understanding contains a host of other provisions concerning special procedures for developing countries, Following is a checklist of such provisions..

3.12 - if a complaint is brought by a developing country member, as an alternative the procedures under the Understanding, choose to apply the provisions of the GATT 1966 Decision which entitles developing countries to the good offices of the Director-General and a shorter time limit for panel procedures.

4.10 - WTO Members shall give special attention to the particular problems of developing countries during consultations.

8.10 - in a dispute involving a developed and developing country Member, the composition of the panel shall at least include one, panellist from

a developing country, if the if the developing country Member so requests.

12.10 - the panel examining a complaint against a developing country shall grant sufficient time for the developing country to prepare and present its arguments.

12.11 - in disputes involving a developing country, the panel report shall explicitly indicate how special and differential provisions raised by the developing country has been taken into account.

21.2 and 21.8 - While keeping the implementation of recommendations under surveillance, particular attentions shall be paid to matters affecting the interest of developing countries. If the case has been brought by a developing country Member, the DSB while considering what appropriate action might be taken is required to take into account not only the trade coverage of impairing measures, but also their impact on the economy of developing country Members concerned.

C. General Comments

The WTO Understanding, which constitutes a single integrated system of dispute settlement covering trade in goods, services and matters arising out of the TRIPS Agreement constitutes a significant advancement, as against the legally fragmented GATT system. The wider coverage of the WTO Understanding has the distinct advantage of not only reducing the scope for 'forum shopping', but also enables Members to benefit from the DSB's authorization of 'cross-retaliation' when suspension of concessions in the same sector is not practicable.

The edifice of the WTO dispute settlement mechanism is fundamentally constructed on the following three basic premises: (i) the right to seek establishment of a panel; (ii) the general application of a panel's recommendations, and (iii) the prohibition of resort to unilateral measures for vindication of trade interests. Such a rule-oriented approach and judicialization of dispute settlement process would lead to increased recourse by Member States to the WTO's dispute settlement procedures. More particularly, the

Understanding would meet the special requirements of small and marginalized economies, who can look up to an effective multilateral dispute settlement system as the final guarantor of their rights.

The Understanding also offers the widest possible alternatives for arriving at a negotiated settlement within an adjudicative framework. Given the scope for less formal procedures like consultations, good offices, mediation and conciliation; and arbitration it may be hoped that many disputes could be settled, without progressing to the panel stage, by mutual agreement between parties.

Guided by the lessons learnt from the GATT dispute settlement regime, the Understanding has introduced many innovative procedures which could render the dispute settlement under WTO more effective, timely and automatic. The introduction of 'negative consensus' rule for decision-making by the DSB brings an element of automaticity to the decisions of the DSB. The stringent time frame governing all stages of the dispute proceedings, would ensure timeliness and certainty of the outcome. Moreover, the inclusion of procedures concerning 'interim review' and 'appellate review' could function as some kind of quality control, thereby strengthening the legal authority of panel reports.

Ideally, the introduction of special procedures for disputes involving least-developed countries, should lead to their increased participation in the dispute settlement proceedings. It is true that the Understanding is replete with such special provisions warranting due consideration of the interests of LDCs in the administration of the dispute settlement procedures. But, it is too early to speculate on the specific modalities by which, either the WTO Members or the panels, would extend the contemplated special and differential treatment for the LDC'S.

THE WORKING OF THE WTO DISPUTE SETTLEMENT SYSTEM SINCE ITS ESTABLISHMENT - A SURVEY

Since the entry into force of the WTO Agreement on 1 January 1995, and until the end of August 1997 the DSB was notified of almost 100 requests for consultations pursuant to paragraph 4 of the WTO Dispute Settlement

Understanding. In comparison with the GATT's dispute resolution mechanism (which dealt with some 300 disputes - an average of six disputes a year) the record of the WTO dispute settlement mechanism (averaging 40 disputes annually) has been hailed to represent a vote of confidence by WTO Members in the improved dispute settlement procedures of the new organization. This part of the brief endeavours to provide a preliminary survey of the working of the WTO dispute settlement system since its establishment.

Adoption of reports by the DSB: The DSB, which is the final decision-making body on all disputes within the WTO framework, has adopted the following seven reports (covering the period between January 1995 to September 1997):

1. United States - Standards for Reformulated and Conventional Gasoline, complaints by Venezuela and Brazil. A single panel established to consider both complaints, found the regulation to be inconsistent with GATT Article III:4 and not to benefit from an Article XX exception. Following an appeal by United States, the Appellate Body issued its report, modifying the panel report on the interpretation of GATT Article XX(g), but concluding that the exception provided by Article XX was not applicable in this case. The Appellate Body Report, together with the panel report as modified by the Appellate Body Report, was adopted by the DSB on 20 May 1996.

2. Japan - Taxes on Alcoholic Beverages, complaints by the European Communities (EC), Canada and the United States. A joint panel was established by the DSB on 27 September 1995. The panel report found the Japanese tax system to be inconsistent with GATT Article III:2. Following an appeal by Japan, the Appellate Body reaffirmed the panel's conclusion, but pointed out the areas where the panel had erred in its legal reasoning. The Appellate Body Report, together with the panel report as modified by the Appellate Body Report, was adopted by the DSB on 1 November 1996.

3. United States - Restrictions on Imports of Cotton and

Man-Made Fibre Underwear, complaint by Costa Rica. The panel found that the US restraints were not valid. On 11 November 1996, Costa Rica notified its decision to appeal against certain aspects of the panel report. The Appellate Body allowed the appeal. The Appellate Body Report, together with the panel report as modified by the Appellate Body Report, was adopted by the DSB on 25 February 1997. On 10 April 1997, the US informed the DSB that the measure had expired on 27 March 1997 and not renewed.

4. Brazil - Measure Affecting Dried Coconut, complaint by Philippines. The report of the panel concluded that the provisions of the agreements relied on by the claimant were inapplicable to the dispute. Following the appeal by Philippines, the Appellate Body upheld the findings of the panel. The Appellate Body Report, together with the panel report as upheld by the Appellate Body Report, was adopted by the DSB on 20 March 1997.

5. United States - Measures Affecting Imports of Woven Wool Shirts and Blouses, complaint by India. The panel established on 17 April 1996 found that the US safeguard measure violated the provisions of the Agreement on Textiles and Clothing and the GATT 1994. On 24 February 1997, India notified its intention to appeal. The Appellate Body upheld the panel's decisions on those issues of law and legal interpretations that were appealed against. The Appellate Body Report, together with the panel report as upheld by the Appellate Body Report, was adopted by the DSB on 23 May 1997.

6. Canada - Certain Measures concerning Periodicals, complaint by the United States. The panel established on 19 June 1996 found that the measure applied by Canada to be in violation of GATT rules. Following an appeal by Canada, the Appellate Body upheld the panel's findings and conclusions on the applicability of GATT 1994 to Part V. 1 of Canada's Excise Tax Act, but reversed the panel's finding that Part V. 1 of the Act was inconsistent with the first sentence of Article III:2 of GATT 1994. The Appellate Body further concluded that Part V. 1 of the Excise Act was inconsistent with the second sentence of Article III:2 of GATT 1994. The Appellate Body also reversed the panel's conclusion that Canada's funded