

**The School of Law, University of Edinburgh**

**PhD Thesis**

**The WTO and the Settlement of Disputes---From a  
Developing Country Perspective**

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## Preface

As a scholar from a developing country, I have always been with a cherish of doing some research on the current development of public international law and its impact on the developing countries. The creation of the World Trade Organisation and, particularly, the accession of China to the WTO provide me an opportunity to study international law against the setting of this new institution and its dispute settlement mechanism.

The World Trade Organisation is a new institution, compared with the United Nations and many other international organisations. The same sense applies to the WTO dispute settlement mechanism, if we compare it with the International Court of Justice and other international tribunals. Despite its short history, the WTO has performed well from the perspective of both developed and developing countries. Its unique dispute settlement mechanism has, so far, functioned well in resolving the trade disputes among the Member governments. The fact that quite a few countries are still waiting for their membership vindicates this predication. But these positive features do not mean that the WTO and its dispute settlement mechanism are far from improvements. On the contrary, the active participation in this institution and frequent use of its dispute settlement mechanism have exposed their imperfect aspects to the fore. Based on the general principles of public international law, the research in this thesis is targeted at studying the institutional features of the WTO and the early practice of its dispute settlement mechanism from a developing country Member perspective, then, putting forward some proposals for the future reform.

The three years away from my family and my home country for a PhD degree is an arduous experience for me. But I feel lucky to have been offered an ideal studying place by the school of law, the University of Edinburgh, and the thoughtful supervision by professor Alan E. Boyle. Professor Boyle is an excellent supervisor. He is always ready to answer my various questions and able to guide me to overcome the difficulties in the way of my research. Without his help, it is impossible for me to finish the thesis today.

I feel much indebted to my parents, my wife, Jianli Chen, and my son, Yandong Hu. Whenever I feel sick and depressed, I can get comforts and encouragement from them. Without their support, I cannot continue my research to the end. My gratitude should also go to Mr. Adnan Amkhan. He is the first person who introduced me to do the research at the University of Edinburgh. At last, I wish to take this opportunity to thank all my friends and the staff of the school of law who have helped me either directly or indirectly in my research.

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# Contents

Preface	
Chapter One Introduction: From the GATT to the WTO.....	1
Section One The Significance of the New Institution and Basic Differences Between the GATT and the WTO.....	1
1.1.1. The major achievements of the Uruguay Round negotiations.....	1
1.1.2. Basic differences between the GATT and the WTO.....	5
Section Two Bringing Developing Countries into the Global Trading: Fortune or Misfortune?.....	10
1.2.1. Globalisation vs marginalisation: a challenge to the World Trade Organisation.....	10
1.2.2. Integration into the global economy: an ambivalent choice.....	13
Section Three Adjudication of International Trade Disputes.....	17
1.3.1. Different methods of peaceful dispute settlement.....	17
1.3.2. The WTO dispute settlement mechanism: a guarantee of realisation for the Uruguay Round negotiated results.....	21
Chapter Two WTO and Developing Countries.....	25
Section One The Definition of a Developing Country: A Nominal Dilemma.....	25
2.1.1. An evolutionary status of developing countries from the GATT to the WTO .....	25
2.1.2. Are the world trade rules fair to developing countries?.....	29
2.1.3. The rationale for the special and preferential rules.....	37
2.1.4. Special and preferential rules: universal or differential?.....	40
Section Two Developing Countries and Trade Policy.....	45
2.2.1. Implementation and adaptation: an evolution or a revolution?.....	45
2.2.2. Legal reform and technical assistance.....	49
2.2.3. Contradictions of the definition and the rationale of regrouping.....	52
Chapter Three WTO and the Institutional Issues.....	62
Section One Legal Analysis of the WTO Institutional Characteristics.....	62
3.1.1. The functional approach towards the classifications of international organisations.....	62
3.1.2. The issues of membership and standing of representation in an international organisation---a case study of the World Trade Organisation.....	67
Section Two The Global Governance and New Agenda of the WTO.....	76
3.2.1. The governance of the WTO in the global terms.....	76
3.2.2. Globalisation vs regionalisation: another challenge to the World Trade Organisation.....	82
3.2.3. The new agenda of the World Trade Organisation.....	86

Chapter Four The Inter-Relationship of WTO Law and Public International Law.....	93
Section One International Law in a Multicultural World.....	93
4.1.1. A retrospective and prospective view of international law.....	93
4.1.2. Fundamental differences in the attitudes toward international law.....	95
4.1.3. International law, international economic law, and WTO law.....	99
Section Two The Sources of WTO Law.....	101
4.2.1. General agreements.....	101
4.2.2. Reports of prior panels and the Appellate Body.....	104
4.2.3. Customary rules of interpreting international law.....	108
4.2.4. General principles of law.....	111
4.2.5. Teachings of the most highly qualified publicists.....	113
4.2.6. Other international agreements.....	115
Section Three The Role of WTO Law in the Development of International Law...	116
4.3.1. WTO law is not a closed system.....	116
4.3.2. WTO law needs development.....	120
4.3.3. The relevance of the decisions made by other international tribunals.....	124
4.3.4. The contributions and implications of WTO law to the development of international law.....	128
Section Four Fairness, the Objective of International Law.....	131
4.4.1. Legitimacy and distributive justice: two components of fairness.....	131
4.4.2. Economic fairness: terms of development.....	133
4.4.3. Combining legitimacy and distributive justice: from the GATT to the WTO.....	135
 Chapter Five The WTO Dispute Settlement Mechanism: Power- Oriented or Rule-Oriented?.....	 139
Section One From Power-Oriented to Rule-Oriented: A Historical Evolution.....	139
5.1.1. Power-orientation or rule-orientation, a political dichotomy.....	139
5.1.2. Rule-orientation: a rational option.....	141
5.1.3. GATT dispute settlement mechanism: a practice evolving towards rule- orientation.....	143
Section Two The Rationale for a Rule-Orientation and the Pragmatism in Reality.....	149
5.2.1. The legal analysis of and the rationale for a rule-orientation.....	149
5.2.2. Pragmatism in developing the rule-orientation.....	151
5.2.3. A new international trade order with the rule-orientation concept.....	154
Section Three Rule-Orientation Under the WTO Jurisdiction.....	157
5.3.1. The uniqueness of the GATT/WTO dispute settlement mechanism.....	157
5.3.2. The inherent cohesion between GATT Articles XXII, XXIII and the <i>Dispute Settlement Understanding</i> .....	161
5.3.3. Non-violation complaint: a “panacea” or a “Pandora’s box”?.....	164
5.3.4. Enforcement under the WTO jurisdiction: compensation or retaliation?...	169
5.3.5. Arbitration: to be or not to be?.....	174

Section Four The Function and Vocation of the WTO Panel Process.....	179
5.4.1. The legacies from and improvements upon the GATT panel process.....	179
5.4.2. Evidence-presenting and expert supporting.....	183
5.4.3. Burden of proof and standard of review.....	187
5.4.4. The need for a due process to draft a panel report.....	193
Section Five Legal Significance of the WTO Appellate Review.....	195
5.5.1. The right of a WTO Member to bring a claim under the new dispute settlement mechanism.....	195
5.5.2. The objectives and legal characteristics of the Appellate Body.....	198
5.5.3. The function of and jurisdiction by the Appellate Body.....	202
5.5.4. The role of the Appellate Body in bringing developing countries into the WTO dispute settlement mechanism.....	205
Section Six Developing Countries and the WTO Dispute Settlement Mechanism.....	209
5.6.1. Statistical analysis: participation of developing country Members in the WTO dispute settlement proceedings.....	209
5.6.2. Obligations of national governments to submit their disputes for adjudication and the impact of the disputes settled within the WTO to the domestic policy- making.....	220
Chapter Six Towards a Complete Dispute Settlement Mechanism .....	226
Section One Relevant Issues to Be Clarified for a Complete Dispute Settlement Mechanism.....	226
6.1.1. Representation of parties in the WTO dispute settlement proceedings.....	226
6.1.2. The exception to the customary rule of exhaustion of local remedies.....	230
Section Two Towards a Fair and Open Dispute Settlement Mechanism.....	236
6.2.1. Does the WTO remedy system benefit developing country Members?.....	236
6.2.2. From quasi-judicial to the judicial, the future of the WTO dispute settlement institutions.....	241
Conclusions	
Bibliography	

# Chapter One Introduction: From the GATT to the WTO

## Section One The Significance of the New Institution and Basic Differences Between the GATT and the WTO

### 1.1.1. The major achievements of the Uruguay Round negotiations

Until the end of 1994, there was no multilateral or international organisation that was competent to deal with trade issues between countries.<sup>1</sup> For almost fifty years, the international trading system had functioned without such an organisation: under the aegis of the *General Agreement on Tariffs and Trade*(GATT),<sup>2</sup> rules of the game in international trade had been developed and reasonably respected. But the GATT was applied through the *Protocol of Provisional Application* practised from 1948,<sup>3</sup> it did not have the legal status of an international organisation.<sup>4</sup>

Then, all of that changed from 1 January 1995. A new institution, the World Trade Organisation(WTO) came into being for the purposes of assisting the governments of its Members to better manage problems of international economic interdependence.<sup>5</sup> This event occurred fifty years after the establishment of the Bretton Woods System which was targeted at setting up a framework to regulate international economic affairs,<sup>6</sup> and

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<sup>1</sup> : The Uruguay Round of Multilateral Trade Negotiations was substantially concluded on 15 December 1993. From 12 to 15 April 1994, ministers representing the 124 governments and the European Communities participating in the Uruguay Round negotiations met at Marrakesh, Morocco, to declare that the Uruguay Round of Multilateral Trade Negotiations was formally concluded. Ministers also declared that their signature of the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* and their adoption of associated Ministerial Decisions initiated the transition from the GATT to the WTO. They established a Preparatory Committee to lay the ground for the entry into force of the *WTO Agreement* and committed themselves to seek to complete all steps necessary to ratify the *WTO Agreement* so that the World Trade Organisation could enter into force by 1 January 1995. The WTO was established according to the original schedule as the necessary ratification of the *WTO Agreement* by the participating governments was acquired by the end of 1994. See *Marrakesh Declaration of 15 April 1994*. cf. *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press(1999).

<sup>2</sup> : Originally contemplated as part of the proposed International Trade Organisation(ITO) Charter(*Havana Charter*), the GATT was signed in 1947. Because of the failure of the ITO, the GATT had, *de facto*, functioned as an organisation to regulate international trade till the day when the WTO was established.

<sup>3</sup> : Since Article XXIX:2 of GATT 1947 states: "Part II of this Agreement shall be suspended on the day on which the *Havana Charter* enters into force", it was widely recognised that the purpose for the application of this protocol was to avoid the losses of those countries which had made their tariff-reducing commitments before the International Trade Organisation was established and the *Havana Charter* began to bind all its participants.

<sup>4</sup> : As Schermers and Blokker define: "An international organisation is born when the treaty containing its constitution comes into force", an agreement with constitutional characteristics is one of the most important factors for the recognition of an international organisation. See Henry G. Schermers and Niels M. Blokker: *International Institutional Law*, Martinus Nijhoff Publishers(1995), p.1617. GATT 1947 is only an official document to regulate the governments of the potential (ITO) members for their conducts in international trade. It contains no provisions to define the legal status of an international organisation and its relationships with its members and other international organisations.

<sup>5</sup> : See Article III(Functions of the WTO) of the *WTO Agreement*. See supra note 1.

<sup>6</sup> : It is named after the place Bretton Woods, New Hampshire of the United States, where an international conference was held from 1 to 22 July 1944. The participants of the conference discussed issues concerning how to regulate the international economic affairs, especially the financial affairs, after the World War II. According to professor John Jackson, there were two main objectives sought at the Bretton Woods

almost fifty years after the 1947 establishment of the GATT and the later failure of the International Trade Organisation(ITO),<sup>7</sup> which would have been the institution to complete the Bretton Woods System in parallel with its sister institutions of the International Monetary Fund and the International Bank for Reconstruction and Development(World Bank).

The establishment of the WTO is one of the major achievements of the extended Uruguay Round of Multilateral Trade Negotiations(1986-1994) which was under the auspices of the GATT. This newly-born institution marks the regulation of international trade shifting from negotiation-orientation to rule-orientation. Although the World Trade Organisation, as one scholar observed, “has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas”,<sup>8</sup> the sense of community encourages its Members to abide by the rules and the possible retaliation measures which are authorised by the WTO to a suffering Member seem effective, so far, in frightening those potential recalcitrants who may breach their commitments. In the context of assistance to its Members, the WTO has no power over debt reduction, nor can it guarantee development funds or infrastructure spending to assist development. What it may offer is trade rules which are designed to maximise the benefits from open markets. Apart from these obvious advantages, there are also some other outstanding achievements resulted from these multilateral trade negotiations, which can be summarised in the following aspects.

Firstly, the Uruguay Round negotiations have resulted in some impressive advances in market access with a reduction in the numbers of products exported to the developed countries from the developing countries in accordance with quotas(the remaining quotas

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Conference and the subsequent conferences that led to the negotiations of the GATT and the International Trade Organisation(ITO). The first objective, and the more important one at that time, but sometimes overlooked, was the prevention of another war. The idea was to build institutions, which would avoid the problems that occurred in the inter-war period and that were blamed for leading to the second world war. The second objective was the economic betterment of the whole world. This is based on general policies about economics and the market structure of economics. The basic idea is that increasing the amount of resources for each individual(or family) is the best way to allow that individual to follow his or her choices, lifestyle, and goals in life. See John H. Jackson: *The WTO “Constitution” and Proposed Reforms: Seven “Mantras” Revisited*, Journal of International Economic Law, No.4, 2001, p.68.

<sup>7</sup> : There are several factors which account for the failure of the ITO. The most prominent one is that such a surrender of sovereignty was politically premature shortly after the war. However, it is generally acknowledged that the fault for failure to adopt the complete liberalisation programme lies with the US, whose executive branch of government by 1950 had decided to abandon attempts to gain legislative approval for entry into an actual international “organisation”. In this regard, it is worth noting that international trade is an area of commerce where competition and conflict between the US President and Congress is particularly intense. In the US, then as now, the Congress was determined that the executive would not gain too much power in the area of foreign trade relations. Thus from the 1930s onward, the US Congress granted the President limited authority to enter into trade agreements of a reciprocal, bilateral nature. Clearly, the implications of this are very different from the prospect of entering into a multilateral organisation. In light of these limitations on presidential action, there could be no entry into the proposed ITO without specific congressional authorisation. Since the *Havana Charter* was not passed in the US Congress, other countries seemed unwilling to join the ITO without the participation of the United States. See Sara Dillon: *International Trade and Economic Law and the European Union*, Hart Publishing(2002), p.27.

<sup>8</sup> : Judith Hippler Bello: *The WTO Dispute Settlement Understanding: Less Is More*, The American Journal of International Law, Vol.90, 1996, p.416.

will be changed into tariffs),<sup>9</sup> as well as substantial tariff-cutting(perhaps the most of all eight rounds of GATT multilateral trade negotiations).<sup>10</sup> Some of the most substantial tariff-cutting has been accomplished by the developing countries. Overall, developed countries' tariffs on industrial products have been cut by an average of 40 percent, with the average tariff reduced from 6.3 percent to 3.8 percent. The average tariff cut on industrial products achieved by developing countries is estimated to be 20 percent with the average tariff reduced from 15.3 percent to 12.3 percent.<sup>11</sup> As the tariff-cutting is negotiated on a reciprocal basis, the developing countries, while they are expecting to increase their exports to the developed countries, will also be required to further open their own markets for foreign investment and products.

Secondly, not only has the largest number of countries in history made significant trade liberalisation commitments in goods,<sup>12</sup> but the participating countries have agreed to expand the scope of their activities considered to include trade in services and protection of trade-related intellectual property rights, to reintegrate textiles and apparel into the GATT system, to start the process of liberalisation in agriculture.<sup>13</sup> All countries ended up agreeing to accept the entire package of agreements, a major change from prior

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<sup>9</sup> : For example, prior to the WTO, the volume of textile and clothing exports from the developing countries to the developed countries is decided according to the quotas distributed by the importing countries under the *Multiple Fibre Arrangement*(MFA). However, Article 2(6) of the *Agreement on Textiles and Clothing* requires each WTO Member to "integrate into GATT 1994 products which accounted for not less than 16 per cent of the total volume of the Member's 1990 imports of the products" at the establishment of the World Trade Organisation. The remaining products, which have not been integrated into GATT 1994 under paragraph 6, shall be integrated in three stages as not less 17 per cent three years after the establishment of the WTO, not less 18 per cent seven years after the establishment of the WTO, and all other products ten years after the establishment of the WTO. See supra note 1.

<sup>10</sup> : According to the estimates by some scholars, the value of trade covered by tariff-cutting is around 3700 billion US dollars. See John H. Jackson: *The World Trade Organisation Constitution and Jurisprudence*, Royal Institute of International Affairs(1998), p.21.

<sup>11</sup> : The sources come from the GATT Secretariat. See *The Results of the Uruguay Round of Multilateral Trade Negotiations; Market Access for Goods and Services: Overview of the Results*, November 1994, at 8. According to the GATT Secretariat, the trade liberalisation measures implemented during the Uruguay Round negotiations will result in an increase of almost one-quarter in the volume of goods traded, and an annual increase in world income of approximately 510 billion US dollars by 2005. Id.

<sup>12</sup> : 124 countries and the European Communities participated in the Uruguay Round negotiations.

<sup>13</sup> : Agricultural products had always been treated differently from manufactured goods in the GATT system. This sense of difference, known as "agricultural exceptionalism", was taken for granted over many decades. The fact that food security, rural life and culture were intimately tied to viable national agricultural structures meant that the key participants in the GATT system were not willing to open up trade in primary products to the same level of competition as other goods. It is for this reason that the *Agreement on Agriculture* made in the Uruguay Round negotiations must be seen as a dramatic first step towards economic integration in food; as well as the first step towards dismantling the traditional protection of the rural sector, with all that this implies for the national life in many WTO Members. The preamble of the *Agreement on Agriculture* states that WTO Members have decided to "establish a basis for initiating a process of reform of trade in agriculture" and to "establish a fair and market-oriented trading system"; Members are to ensure that "a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines". See supra note 1. See also Sara Dillon, supra note 7, p.175; Dimitris Moutsatsos: *The Uruguay Round Agreement on Agriculture: Issues and Perspective*(included in *Negotiating the Future of Agricultural Policies: Agricultural Trade and the Millennium WTO Round*, edited by Sanoussi Bilal and Pavlos Pezaros, The Hague: Kluwer Law International[2000], pp.29-30); Randy Green: *Part II: Review of Substantive Agreements*(Part IIC: *Agreement on Agriculture: the Uruguay Round Agreement on Agriculture*), Law and Policy in International Business, No.31, 2000, p.819.



Rounds.<sup>14</sup> Although the WTO agreements have no direct effect upon the national law, the WTO Members are required to keep their domestic law and regulations in conformity with the WTO rules. This will bring some fundamental changes to the legal system of some Members, particularly those with a centralised economy. While the opening of markets for textile and agricultural products may benefit some of the developing countries, the inclusion of the *General Agreement on Trade in Services*(GATS) and *Agreement on Trade-Related Aspects of Intellectual Property Rights*(TRIPS) within the ambit of the WTO will surely have some significant impact on most developing countries. Furthermore, these expansions started the considerations of this institution beyond trade issues to trade-related ones, although the linkage is still a little murky.<sup>15</sup>

Thirdly, the Uruguay Round negotiations aimed at phasing out all the “voluntary export restraint agreements”(prevalent before the Uruguay Round in industries such as steel, electronic products and motor vehicles), the so-called grey-area practice whereby one country agrees to limit its exports to another country to a pre-set level. Compliance of such arrangements with the GATT has always been doubted, as all the compromises and benefits negotiated are only bilateral, not multilateral.<sup>16</sup> However, these arrangements have long been tolerated by the GATT due to the economic and social significance of the sectors concerned. The binding commitments offered by each WTO Member have guided them back to the track of the most-favoured-nation principle, and this will make the international trade more predictable and enforceable.

Fourthly, the increasing number of accession signifies that the new institution is attracting more and more countries to join. Some of the new entrants, like China, are transforming their economies from centralisation to market-orientation. The impact of the WTO rules upon their domestic systems is comprehensive and ostensible, touching almost every aspect of their ordinary life. Developing countries are more fully integrated into the GATT/WTO system than before,<sup>17</sup> with a requirement that all WTO Members should have their goods and service tariff schedules with some constraint on certain developing country exceptions.<sup>18</sup> This measure can be regarded as one of the most important Uruguay Round achievements.

Last but not least, the Uruguay Round negotiations, for the first time, established an overall unified dispute settlement mechanism for all portions of the agreements signed

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<sup>14</sup> : The previous seven rounds of negotiations are: Geneva(1947); Annecy(1949); Torquay(1950); Geneva(1956); Dillon(1960-1961); Kennedy(1962-1967); Tokyo(1973-1979). Only since the Kennedy Round negotiations, did the multilateral agreements begin to be discussed. However, different from the practice of the Uruguay Round negotiations, the adoption of the multilateral agreements in the previous rounds of negotiations was not compulsory, but optional.

<sup>15</sup> : As for the linkage issues, see *Symposium: The Boundaries of the WTO*, The American Journal of International Law, No.1 2002, pp.1-145.

<sup>16</sup> : For example, Article XIII:1 of GATT 1947 requires that “No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, *unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted*”.(Emphasis added). See supra note 1.

<sup>17</sup> : For example, although the number of participating countries in the Tokyo Round negotiations is 99, next to that of the Uruguay Round negotiations, few developing countries accepted the negotiated multilateral agreements (which were called “codes” at that time).

<sup>18</sup> : The references to “less-developed contracting party” and “developed contracting party” in GATT 1947 has been transformed as “developing country Member” and “developed country Member” respectively. See *Explanatory Notes to GATT 1994(a)*. See supra note 1.

during the negotiations, together with a legal text entitled *Understanding on Rules and Procedures Governing the Settlement of Disputes* (*Dispute Settlement Understanding* or DSU) to carry out those procedures. These new procedures include measures to avoid the “blocking” when the Dispute Settlement Body<sup>19</sup> decides to establish a panel, to adopt the panel or Appellate Body report, which frequently occurred under the previous positive consensus decision-making mechanism,<sup>20</sup> and for the first time, a new “appellate procedure”, which is designed to replace some of the procedures that were vulnerable to blocking. The significance of this new dispute settlement mechanism can best be described in the words of late His Majesty King Hassan II of Morocco at the closing ceremony of the Uruguay Round negotiations at Marrakesh, Morocco, on 15 April 1994: “By bringing into being the World Trade Organisation today, we are enshrining the rule of law in international economic and trade relations, thus setting universal rules and disciplines over the temptations of unilateralism and the law of the jungle.”<sup>21</sup>

Although Article XVI:1 of the *Marrakesh Agreement Establishing the World Trade Organisation* (the *WTO Agreement*) states that “Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES<sup>22</sup> to GATT 1947 and the bodies established in the framework of GATT 1947”,<sup>23</sup> the World Trade Organisation is still fundamentally different from its predecessor, the GATT. Therefore, it is necessary for us to distinguish the basic differences between the GATT and the WTO before we move into any further research concerning this new institution.

### 1.1.2. Basic differences between the GATT and the WTO

The postwar trade and financial order was mainly designed to enable States to manage their domestic economies, in a manner consistent with political and social stability and justice, without the risk of setting off a protectionist race to the bottom. States obligated themselves not to impose quotas or related import restrictions, of the sort strongly associated with the race to the bottom of the interwar years. On the other hand, they were not required to eliminate or reduce their import tariffs. The legal structure of

<sup>19</sup> : In contrast to the GATT Council, which was the main body to deal with the disputes, the Dispute Settlement Body is set up particularly to deal with the disputes under the Dispute Settlement Understanding, although it is with the same staff of the General Council. See Article IV:3 of the *WTO Agreement* and Article 2 of the *Dispute Settlement Understanding*. See supra note 1.

<sup>20</sup> : The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision. See footnote 1 of the *WTO Agreement*. See supra note 1. The positive consensus requires that there is no formal objection from any party present at the meeting in adopting a decision. Thus, more often than not, a defeated party will object to the passage of a decision which is unfavourable to it. The WTO, however, has reversed this practice into the negative consensus which requires that there is no formal objection from any party present at the meeting in negating a decision. It seems unlikely that a prevailing party will join the consensus to negate the decision which is favourable to it.

<sup>21</sup> : *GATT Activities* (1994-1995), Geneva, p.15.

<sup>22</sup> : The GATT is not an international organisation, but an international agreement ratified by the governments of its participants; the contracting parties were those governments which had accepted GATT 1947. When the reference was made as to the joint action of the contracting parties, they were designated as the CONTRACTING PARTIES. (Note added). See Articles XXV and XXXII of GATT 1947. See supra note 1.

<sup>23</sup> : See supra note 1.

the GATT was designed to facilitate such concessions and make them binding. Over the years, the two pillars which supported the GATT legal structure are the most-favoured-nation(MFN) treatment and the national treatment, which are embedded in Article I and Article III of GATT 1947. The former is designated to regulate the treatment on the imports from all foreign countries, while the later is to deal with the relationship between the imports and similar domestic products. The World Trade Organisation has inherited the basic principles from the GATT in regulating international trade. However, the GATT, because of its birth defects, had some limitations in carrying out these principles. In contrast, the WTO has not only strengthened these principles, but expanded the dimension of their application beyond the trade in goods.<sup>24</sup> Therefore, the differences between the GATT and the WTO are reflected in both their institutional structures and regulating targets.

The first and most prominent difference lies in the objectives of the GATT and the WTO, which are defined in the preambles of GATT 1947 and the *WTO Agreement*. The general objectives of the GATT were defined with a view to “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the *full use* of the resources of the world and expanding the production and exchange of goods”(Emphasis added). The WTO, in addition to retaining the objective of raising the living standards of people as its general target, has diverted its emphasis from the “full use” of the world’s resources to the “optimal use” in accordance with the objectives of sustainable development,<sup>25</sup> with a view to “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 developments”.<sup>26</sup> This change of attitude reflects the fact that the drafters of the *WTO agreements* have realised that the economy cannot develop at the expense of the preservation of natural resources and environmental protection. Although Article XX(g) of GATT 1947 has already permitted a GATT contracting party(now WTO Member) to invoke unilateral measures “relating to the conservation of exhaustible natural resources” on condition that “such measures are made effective in conjunction with restrictions on

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<sup>24</sup> : For example, Article II and Article XVII of GATS; Article 3 and Article 4 of TRIPS. See supra note 1.

<sup>25</sup> : As professor Patricia Birnie and professor Alan Boyle have observed, the concept of “sustainable development” is by no means easy to identify. The use of this concept had already emerged prior to the UN Conference on Environment and Development which was held in Rio de Janeiro, Brazil in 1992, but, obviously, only after the Rio CONFERENCE, did it begin to be frequently adopted as a policy by numerous governments, both at national and regional levels. The concept is often exemplified and instantiated but rarely, if ever, defined. The majority opinion in the International Court of Justice asserts, in the context of the *Gabcikovo* case, that sustainable development “means” looking afresh at the environmental impact of the project. But sustainable development clearly includes more than this anodyne prescription. Philippe Sands identified four elements within the concept of “sustainable development”, i.e. (a)inter-generational equity; (b)sustainable use; (c)intra-generational equity; (d)integration of environmental protection and development. See Philippe Sands: *Principles of International Environmental Law*, Manchester University Press(1995), pp.199-208. Patricia Birnie and Alan Boyle defined the concept of “sustainable development” from both the substantive and procedural levels. They observed Principles 3-8 and 16 of the *Rio Declaration* as containing the substantive elements, while Principles 10 and 17 containing the procedural elements of the concept of “sustainable development”. See Patricia Birnie and Alan Boyle: *International Law and the Environment*, second edition, Oxford University Press(2002), pp.84-86.

<sup>26</sup> : See supra note 1.

domestic production or consumption” against imports entering into its domestic market,<sup>27</sup> the scope of application for the *WTO Agreement* provisions is much broader. Furthermore, GATT Article(g) is retroactive in nature, while the provisions of the *WTO Agreement*, in their nature, seem to be prospective.<sup>28</sup> From the perspective of developing country Members, these provisions mean a lot to them as they have already found it much more difficult to keep their economic development in accordance with the “optimal use” of natural resources.

The second difference derives from the different legal status of the GATT and the WTO. Because of its contractual character, the competence of the GATT is quite limited in regulating international trade, particularly in dealing with the relationships with other international organisations. Professor John Jackson once observed that “the GATT limped along for nearly fifty years with almost no basic ‘constitution’ designed to regulate its organisational activities and procedures”<sup>29</sup> although, through experimentation, trial and error, the GATT evolved some fairly elaborate procedures for conducting its business. In contrast, the WTO has its own legal personality and enjoys the full privileges and immunities of an international organisation. According to the *WTO Agreement*, the privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be “similar to the privileges and immunities stipulated in the *Convention on the Privileges and Immunities of the Specialised Agencies*, approved by the General Assembly of the United Nations on 21 November 1947”(Article VIII:4). Within its own competence, the WTO will cooperate with the International Monetary Fund and the World Bank with a view to achieving greater coherence in the global economic policy-making(Article III:5). The WTO may also make appropriate arrangements with other governmental or non-governmental organisations concerning the matters related to those of the WTO(Article V).<sup>30</sup> In the short span of its new life, the WTO, as professor John Jackson described, appears to be the “prodigal

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<sup>27</sup> : Id.

<sup>28</sup> : Professor Jagdish Bhagwati took a different view as to the binding effect of the preamble of the *WTO Agreement*. In a recent article, he stated that “many of us nonlegal intellectuals and experts think that the preamble is like the overture at the opera: the audience is free to rustle through the libretto and even to whisper to friends until the real opera begins!”. He did not agree that the *WTO Agreement* should be interpreted as a nod in favour of shifting GATT Article XX in a more environmentally friendly direction, as the Appellate Body in the *Shrimp* case did. See Jagdish Bhagwati: *Afterword: The Question of Linkage*, *The American Journal of International Law*, No.1, 2002, p.133 and note 27. The author cannot agree with him on these points. Article 31(2) of the *Vienna Convention on the Law of Treaties* states: “The context for the purpose of interpretation of a treaty shall comprise, in addition to the text, including the preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.” See *Basic Documents in International Law*, fourth edition, edited by Ian Brownlie, Oxford University Press(1995). Thus, the binding effect of the preamble in a multilateral treaty like the *WTO Agreement*, in the view of the author, should be the same as that of the context.

<sup>29</sup> : See supra note 10, p.19.

<sup>30</sup> : As for the relationship with those non-governmental organisation, Article 8(2) of the *Agreement on Technical Barriers to Trade* requires WTO Members to “ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures”. See supra note 1.

child” of the international trading system,<sup>31</sup> already establishing a fairly good relationship with relevant international organisations.

The third difference is concerned with the mandates of the GATT and the WTO. The GATT’s original mandate was to facilitate the implementation of the General Agreement. After decades of development, the GATT legal system evolved two fundamental goals or functions, i.e. (a) to reduce the policy-related uncertainty surrounding the exchange of goods across national frontiers by providing a set of rules and procedures governing countries’ trade-related policies; (b) to provide a forum for dispute settlement, and for negotiations both to strengthen and extend the rules and procedures, and to further liberalise trade-related policies. In the Uruguay Round negotiations, participants gave the WTO a mandate that expands in some important ways on the GATT’s mandate. Article III of the *WTO Agreement* spells out the five functions of the WTO, i.e. (a) to administer the implementation of the multilateral and plurilateral trade agreements that together make up the WTO legal framework; (b) to act as a forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the covered agreements; (c) to administer the application of the *Dispute Settlement Understanding* and arrange the dispute settlement among its Members; (d) to administer the Trade Policy Review Mechanism to review their national trade policies of its Members; (e) to co-operate with the IMF and the World Bank with a view to achieving greater coherence in global economic policy-making. The first of these WTO’s functions is inherited directly from the GATT’s original mandate; the second and the third are derived from the GATT’s practice; and the fourth was provisionally added in 1989 and made permanent under the WTO. The fifth function is a completely new addition.<sup>32</sup>

The fourth difference reflects different binding effects of the agreements under the GATT and the WTO legal systems. Before the Uruguay Round negotiations, the Tokyo Round negotiations (1973-1979) achieved much more than ever in the GATT history. Seven multilateral trade agreements (which were called “codes” then) were signed. Namely, they are *Government Procurement Code*; *Customs Valuation Code*; *Product Standards Code*; *Antidumping Code*; *Subsidies and Countervailing Code*; *Import Licensing Code*; and *Civil Aircraft Code*. For the first time, the GATT legal system touched those non-tariff issues like the technical standards. But the participation in these codes was optional, i.e. only the contracting parties which had signed the code(s) followed these recommended practice(s).<sup>33</sup> Therefore, the use of these codes was reduced to a limited scope and often caused trouble in the application between the members and the non-members of these codes. Under the WTO legal framework, this problem has been expediently avoided. As Article II:2 of the *WTO Agreement* states, the multilateral trade agreements are integral parts of it and “binding on all Members”.<sup>34</sup> This realises the single undertaking enshrined at the *Punta del Este Declaration* which started the Uruguay Round negotiations, and has great significance in protecting the negotiated rights and

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<sup>31</sup> : John H. Jackson: *Global Economics and International Economic Law*, Journal of International Economic Law, No.1, 1998, p.17.

<sup>32</sup> See Konstantinos Adamantopoulos: *An Anatomy of the World Trade Organisation*, Klumer Law International (1997), p.30.

<sup>33</sup> : See *GATT Activities* (1979), Geneva.

<sup>34</sup> : As to the binding effect of those Plurilateral Trade Agreements, Article II:3 of the *WTO Agreement* states that they are “also part of this Agreement for those Members that have accepted them”, and “binding on those Members”. See *supra* note 1.

ensuring the implementation of obligations by WTO Members. As to the priority while conflicts of application arise, there are two clauses which are designated to deal with these problems. Article XVI:3 of the *WTO Agreement*, which regulates the relationship between the *WTO Agreement* and other multilateral trade agreements, states: "In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict". Similarly, the general interpretative note to Annex 1A of the *WTO Agreement* also provides that the provision of that other multilateral trade agreement shall prevail when a conflict arises between it and GATT 1994.<sup>35</sup>

Another difference deserving clarification is the conceptual shift from GATT 1947 to GATT 1994. It is well known that GATT 1947 was originally contemplated to be applied provisionally for several years until the ITO came into being, and then would have been put under the umbrella of and conformed to the ITO Charter. Naturally, GATT 1947 has some intrinsic defects. However, GATT 1994 is just one of the major results achieved in the Uruguay Round negotiations, which is contained in Annex 1A to the *WTO Agreement*. To be more specific, GATT 1994 consists of (a) the provisions in GATT 1947 (excluding the *Protocol of Provisional Application*) as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the *WTO Agreement*; (b) the provisions of the legal instruments set forth below that have entered into force under GATT 1947 before the date of entry into force of the *WTO Agreement*: (i) protocols and certifications relating to tariff concessions; (ii) protocols of accession; (iii) decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the *WTO Agreement*; (iv) other decisions of the CONTRACTING PARTIES to GATT 1947; (c) six understandings which include: (i) *Understanding on the Interpretation of Article II:1(b) of GATT 1994*; (ii) *Understanding on the Interpretation of Article XVII of GATT 1994*; (iii) *Understanding on Balance-of-Payment Provisions of GATT 1994*; (iv) *Understanding on the Interpretation of Article XXIV of GATT 1994*; (v) *Understanding in Respect of Waivers of Obligations under GATT 1994*; (vi) *Understanding on the Interpretation of Article XXVIII of GATT 1994*; and (d) *Marrakesh Protocol to GATT 1994*. Therefore, the contents contained in GATT 1994 are much more than those in GATT 1947. Meanwhile, with the transformation from the GATT to the WTO, those GATT contracting parties and the European Communities which had accepted the "single package" of the Uruguay Round as of the date of entry into force of the *WTO Agreement* became WTO Members.<sup>36</sup>

Around two hundred years ago, the classical political economists, like Adam Smith and David Ricardo, told us that, with some qualifications or exceptions, a policy of liberalising restrictions on imports would maximise the wealth of that sovereign.<sup>37</sup> Back to the years of Smith and Ricardo when, with a few exceptions, most countries were in a similar development level, the theories of absolute and comparative advantages should sound plausible. But whether these classical theories can be vindicated by the realities of the present world is quite another story. The World Trade Organisation came into existence with the applaud that the international trade will be conducted in a freer and

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<sup>35</sup> : See supra note 1.

<sup>36</sup> : See Article XI:1 of the *WTO Agreement* and explanatory note (a) to GATT 1994. See supra note 1.

<sup>37</sup> See Michael J. Trebilcock and Robert Howse: *The Regulation of International Trade*, second edition, Routledge (London and New York, 1999), Chapter One.

more legalised atmosphere. In the eyes of some people, the WTO may perform like the Noah's Ark to many developing countries, especially the least-developed countries, in their severe struggling against the floods of poverty and hunger. But the protests in Seattle in 1999 and later in somewhere else have reminded us that the free trade advocated by the WTO has not benefited all the residents in this global community. Thus, it is time to think about such questions: What is wrong with the classical theory of free trade? What can the WTO do for the world's poor in the face of globalisation?

## **Section Two Bringing Developing Countries into the Global Trading: Fortune or Misfortune?<sup>38</sup>**

### **1.2.1. Globalisation vs marginalisation: a challenge to the World Trade Organisation**

Globalisation is the latest fashionable term used to describe the all pervasive forces of a new stage of capitalism in which multinational companies and financial institutions move their capital around the world in search of the highest returns, and in so doing create a truly global market and global capital. The term "globalisation" was first coined in the 1980s, but the concept stretches back decades, even centuries, if we count the trading empires built by Spain, Portugal, Britain and Holland. Some would say that the world was as globalised 100 years ago as it is today, with international trade and migration.<sup>39</sup> Globalisation can be briefly characterised as the following: "it has brought diminishing national borders and the fusing of individual national markets. The fall of protectionist barriers has stimulated free movement of capital and paved the way for companies to set up several bases around the world".<sup>40</sup> Professor John Jackson summarised the causes of these new developments as the "incredible advances in efficiency of communication, extraordinary reduction in transport costs, growing prevalence of instant tele and cyber transactions, treaty and other norms causing reduction of governmental barriers to trade, an economic climate more favourable to principles of market economics, cross-border influences of competition which have driven increases in production and service efficiencies, and last but not least: the blessing of relative peace in the world".<sup>41</sup>

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<sup>38</sup> : The term "developing countries" was first launched around 1957-58 by the OECD. Namely, these countries are in a process of development and are filling the economic gap with industrialised countries. Since then, this term has been widely used in the official documents of numerous international organisations including the United Nations and the World Trade Organisation.

<sup>39</sup> : But the 1930s depression put "paid" to that. States drew back into their shell on realising that international markets could deliver untold misery in the form of poverty and unemployment. The resolve of Western States to build and strengthen international ties in the aftermath of World War II laid the groundwork for today's globalisation.

<sup>40</sup> : See *BBC E-cyclopaedia*. cf. [http://news.bbc.co.uk/hi/english/special\\_report/1999/02/99/e-cyclopaedia](http://news.bbc.co.uk/hi/english/special_report/1999/02/99/e-cyclopaedia)

<sup>41</sup> : See John H. Jackson, *supra* note 31, p.1. Jackson summarised the manifestations of the globalisation as "stock market trends that flow quickly around the world; impacts of national government monetary and fiscal decisions; effects of fraud within certain banking or other financial enterprises; worries about health and safety of products moving across borders such as foodstuffs, pharmaceuticals, machinery, appliances; effects of governmental mismanagement and sometimes corruption; worries about the power of non-government and private enterprises and their capacity in some cases to operate on the global economy while largely ignoring particular national governmental regulatory protections; and flows of 'cultural' influences involving various media often moving swiftly with new communication techniques to transmit

It was once believed that globalisation would lead the world into a bright new era of rapid poverty reduction and falling levels of inequality. Economists confidently predicted a process of income “convergence” with increased flows of trade and investment, enabling poor countries to catch up with the average income level of those rich countries. Some believe that the early promise has been delivered. “Global integration”, declares the World Bank, “is already a powerful force for poverty reduction”.<sup>42</sup> However, that assessment is difficult to reconcile with the facts. On the evidence of the World Bank’s own figures, the impact of global integration on poverty reduction appears less powerful than often suggested. Extreme poverty declined only slowly in the 1990s. The proportion of the world’s population living on one US dollar a day fell from 28 per cent in 1987 to 23 per cent in 1998. At the start of the twenty-first century, 1.1 billion people are struggling to survive on less than one US dollar a day, the same figure as in the mid-1980s. The proportion and number of people living on less than two US dollars a day, a more relevant threshold for middle-income countries, show similar trends.<sup>43</sup> In other words, the wealth that flows from liberalised trade is not trickling down to the poorest, contrary to the claims of the enthusiasts of globalisation.

As countries in this global community tend to be more inter-connected, developing countries become more exposed to the fluctuations of world markets, as are the livelihoods of their populations. All countries are affected by mutual interdependence, but developing countries have the least capacity to protect their citizens from its associated risks. According to the figures published by a non-governmental organisation Oxfam, the average income gap, in terms of purchasing power parity (the real purchasing power taking into account the different values reflected in different currencies), between poor and rich countries widened in the 1990s from a ratio of 1:5.4 to 1:7.3. From every one US dollar wealth generated in the global economy, high-income countries receive about 80 cents, and low-income countries, with the most extreme concentrations of poverty, and with 40 per cent of the world’s population, receive around three cents.<sup>44</sup> In

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music or drama across borders (with substantial economic implications and other effects, even to cause a new taste in Paris for Halloween pumpkins!)”. Id, pp.1-2.

<sup>42</sup> : See World Bank Report, 2001(a).

<sup>43</sup> : See World Bank Report, 2001(d). Behind this global picture, there are important regional differences. The contrasting experiences of East Asia and Latin America, two regions that have been rapidly integrating into the global economy, show that there is no simple relationship between globalisation and poverty reduction. The incidence of poverty in East Asia has fallen by 10 per cent, whereas in Latin America it remains the same as in 1987, and there are now another 15 million people living below the poverty line. The incidence of poverty in South Asia has fallen, but not fast enough to negate the effects of population increase, so that another 48 million people are below the poverty line. In Africa, the incidence of poverty increased in the first half of the 1990s before falling back by the end of the decade to the levels of the mid-1980s, leaving an additional 73 million people in extreme poverty. Having realised the necessity of comprehensive efforts in the poverty-reduction process, the heads of many governments in the recently-concluded UN Johannesburg Summit 2002 pledged to halve, by the year 2015, the proportion of the world’s people whose income is less than \$1 a day and the proportion of people who suffer from hunger (reaffirmation of Millennium Development Goals); by 2020, to achieve a significant improvement in the lives of at least 100 million slum dwellers, as proposed in the “Cities Without Slums” initiative (reaffirmation of Millennium Development Goals) and; to establish a world solidarity fund to eradicate poverty and to promote social and human development in the developing countries. cf. [www.johannesburgsummit.org](http://www.johannesburgsummit.org)

<sup>44</sup> : Oxfam: *Rigged Rules and Double Standards: Trade, Globalisation, And The Right Against Poverty*, Chapter Three (*Left behind: poor countries and poor people in the international trading system*), p.67.



the absence of effective redistributive measures, it is very difficult to close income gaps as wide as those that prevail in the present world economy. In the calculation of the Oxfam Report, if developing countries are to increase their average incomes by three per cent a year, and average incomes in high-income countries are to increase by one per cent a year, it would still take approximately 70 years before absolute incomes in both sets of countries increase by an equal amount.<sup>45</sup>

Then in the context of international trade, although export growth in developing countries was more rapid than that in high-income countries in the 1990s (7 per cent versus 5.6 per cent), there were wide regional variations. Growth rates for Africa were less than one half of the high-income countries' average, while Latin America achieved equivalence. Only East Asia and South Asia exceeded high-income countries' growth levels, the latter from an exceptionally low base.<sup>46</sup> This helps to explain why sub-Saharan Africa is falling further behind in both relative and absolute terms. The unequal distribution of export activity reinforces wider income inequalities. Even though developing countries have been increasing their growth rate of exports, the resulting income gains have been smaller than those gained by rich countries. This is for the obvious reason that a small increase in a large initial figure is worth more than a proportional increase in a small figure.

Thus, as the Oxfam Report concluded, low-income developing countries as a group increased per capita income from exports by 51 US dollars during the 1990s, while high-income countries generated an average gain of 1938 US dollars. Even East Asia has fallen behind in absolute terms, despite having an export growth rate that is double the high-income countries' average. The per capita value of its exports increased by 234 US dollars, compared with 1493 US dollars for the USA, even though the exports of the former were growing at twice the rate of the latter. For sub-Saharan Africa, export marginalisation has contributed to the region's fast-diminishing share of world income. Whereas the value of its per capita gained from exports rose by 46 US dollars, a modest industrial-country exporter like the UK enjoyed an increase of 2701 US dollars. Meanwhile, the three regions with the worst record on poverty reduction in the 1990s have seen their share of global exports either stagnate (Latin America), rise very slightly from a low base (South Asia), or decline (sub-Saharan Africa). At the end of the 1990s, South Asia and Africa---two regions that account for almost three-quarters of world poverty and one-third of world population---were generating only two per cent of world exports.<sup>47</sup>

It is widely acknowledged that the present world we live in is still full of injustices. This is a place in which, as the former WTO Director-General Renato Ruggiero described, "far too many people lack proper access to food, water, health care, education, or justice. The benefits of development are not evenly shared, and marginalisation

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<sup>45</sup> : Id. In a global economy, it is appropriate to ask what is happening to income distribution across all countries, treating the world as if there were no borders. Researchers at the World Bank have attempted this exercise, using surveys covering more than 90 per cent of the world's population for the period 1988-1993 (Milanovic 1998). The results provide a powerful contradiction to some of the more benign assessments of globalisation: they show that the poorest 10 per cent of the world have only 1.6 per cent of the income of the richest 10 per cent. The World Bank study also identified widening average income gaps between countries as the main factor behind widening global inequalities.

<sup>46</sup> : See Oxfam Report, Chapter Three, p.69.

<sup>47</sup> : Id, pp.69-70.

remains a real threat for too many".<sup>48</sup> The despair caused by the escalating number of jobless people in some countries has already caused serious societal tensions which may boil into violence and cruelty. The stress and shock brought by the globalisation have often made some national leaders feel helpless to fulfil their promises for their constituents in the face of external trade and monetary pressures. The impact and consequence of the national interdependence became ever more impressive when we witnessed the financial crisis of 1997-98, which was totally unexpected, but caused severe economic problems for some countries. Thus, it is not right to deny the existence of globalisation and the problems associated with it. But it is not right either to contribute all these problems to the globalisation. The presence of marginalisation has some more profound internal social reasons. Political instability, high rate of illiteracy, and lack of initiatives and financial resources for reforming domestic economic structures<sup>49</sup> may all account for the failures of some countries in their integration into this global world.

Economists teach us that trade liberalisation creates more goods or more welfare for people overall, but they are unable to guarantee that every person will be better off in this process of liberalisation. There will still be some winners and some losers, particularly if they are disadvantaged. Who should bear the task to help the poor to catch up with the rich in this process? The World Trade Organisation seems to fit this role. This choice comes not only from the vocation of this organisation, but from the expectation of many people around the world. This is also the basis for the present study, through which, the author wishes to achieve a deeper insight into the WTO legal system, particularly its dispute settlement mechanism, then to put forward some useful means by which developing countries may benefit from this legal system.

### 1.2.2. Integrating into the global economy: an ambivalent choice

The attitudes among developing countries toward the Uruguay Round negotiations and the reform of the dispute settlement mechanism are in a way diversified.<sup>50</sup> A group of developing countries, led by India and Brazil, had much stronger objections to the proposal for a new round of negotiations. They did not want the GATT to be extended to the new areas because services, intellectual property rights, and foreign investment were sectors in which developing countries were generally no match for their developed country counterparts. Accordingly, they challenged the GATT's legal competence to enter these new areas, arguing that the GATT was an agreement confined to trade in goods, and also that other international organisations had prior jurisdiction over the new

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<sup>48</sup> : These words were quoted by Mike Moore, the present WTO Director-General, in his speech: *The WTO: The Challenge Ahead--Address to The New Zealand Institute of International Affairs*.  
cf. [http://www.wto.org/english/news\\_e/spmm\\_e/spmm01\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm01_e.htm)

<sup>49</sup> : Some developing countries have seized the opportunities created by globalisation. They are not only increasing the volume of their exports, but also raising the quality of their exports in terms of local value-added, entry into dynamic sectors of world markets, technological composition, and employment creation. Many more countries are failing. This group includes not only the majority of primary-commodity exporters and countries in sub-Sahara Africa, but also countries that are participating in some of the most dynamic areas of international trade---on the basis of low-quality export activity. While export growth is creating employment in these countries, it is often based on simple low-cost assembly operations. Links with the local economy are minimal, and little effort has been made to create the foundations for successful integration into world markets. One consequence is that export-linked employment is highly vulnerable to competition from low-wage competitors.

<sup>50</sup> : See *GATT Activities*(1986), Geneva.

areas subjects. In addition, these developing countries correctly pointed out that the GATT had not yet been able to deliver the kinds of improved market access promised in the Tokyo Round negotiations. Without some better assurance of payment on these promises, these countries did not want to enter another round of negotiations where more demands would be made on them in exchange for more unkept promises.<sup>51</sup>

Meanwhile, another group of pro-Uruguay Round developing countries, which consisted mainly of those newly industrialised countries, was taking shape. As they had a large volume of trade with the developed countries and possessed a relatively mature market for those new areas, they took a more moderate attitude.<sup>52</sup> They were more ready for a new round of negotiations including those of the reform to the GATT dispute settlement mechanism. Under the influence of these countries and, to some extent, the threats from the developed countries, the India-Brazil-led group eventually gave their way at the last minute before the initiation of the Uruguay Round negotiations.

It is no surprise that such contrasting viewpoints could arise out of developing countries. In fact, after decades of development, it is difficult to characterise developing countries in a concise way as they have already differed so widely both politically and economically. These countries include China with a population of over 1.2 billion, India(1 billion) and Brazil(120 million), as well as Nauru with a population of a little more than 10,000, Grenada(100,000) and Swaziland(600,000). They range from States, like Bangladesh and the Central Africa Republic, with an extreme backward and rudimentary economic structure to countries such as Singapore, Korea, Mexico and Nigeria, where considerable progress towards industrialisation has been achieved and at least one sector of the economy has advanced along with the lines similar to those prevailing in the developed countries. By the same token, developing countries comprise both nations where economies are based on free market and free competition principles, and nations where centralised economy or transitional economy prevails.

Notwithstanding the huge difference, a few generalisations are still possible, with the usual caveat that they tend to over-simplify the reality.

First of all, the author should make it clear that the existence and degree of underdevelopment may be assessed on the basis of a number of factors. All these factors suffer from various flaws. Nevertheless, the least questionable of all is probably the criterion of per capita income. It would appear that developed countries have an average per capita income from 8000 to 15000 US dollars per annum, while the average capita income of the developing countries is from 70 to 1500 US dollars per annum.<sup>53</sup>

Upon these statistical analyses, I then turn to the principal economic characteristics of many developing countries. The following points may be worth noticing: (a)The dominant economic activity is agriculture(while in developed countries, industrial production prevails). (b)Often two sectors of economy coexist: one export-oriented, which is more advanced; and another which is based on subsistence activities. (c)Both agriculture and manufacture are conducted on a family basis, i.e. primarily in family-sized, cottage-type units, rather than in industrial productive units. (d)The industrial and

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<sup>51</sup> : For an example of the debate over both points, see C/M/187(meeting of 30 April-1 May 1985); see also L/5744(meeting of 23 November 1984).

<sup>52</sup> : Some countries in this group, like Korea, were unwilling to open their markets for agricultural products because of the vulnerability in this area.

<sup>53</sup> : See M. Bertrand: *Refaire L'Onu: un programme pour la paix*, Geneva(1986), p.79.

agricultural equipment is primitive, or at any rate not very sophisticated. As a consequence, the labour productivity is low and the output is relatively poor. (e) So-called concern-unemployed prevails. In other words, “the situation prevails in which the number of workers employed would be reduced without causing a fall in production, even without a change in the stock of capital and technique of production used”.<sup>54</sup> (f) There is a low level of capital stock. The accumulation of capital necessary for the acquisition of better industrial equipment and more generally for productive investment does not take place for two principal reasons: first, the low productivity of labour does not bring about the excess of production over consumption which allows private saving (in other words, industrial and agricultural output primarily serves to ensure the subsistence of workers); second, that part of the national products not earmarked for the subsistence of the labour force often goes to a small wealthy elite, normally made up of landowners, a few industrial entrepreneurs, and political leaders.<sup>55</sup>

These features create what economists have called “the vicious circle of poverty”. In the words of a distinguished scholar: “To increase income per capita, it would be necessary to increase productivity, which in turn would require a fast rate of accumulation of capital and therefore a substantial excess of production over subsistence consumption; but this surplus is very small because income per capita is so low in the first place. The existence of this vicious circle condemns some developing countries to a practically stationary situation, which is all the more hopeless because the excess of output over subsistence consumption is not only small but, in many cases, also destined for the affluent consumption of the wealthy classes”.<sup>56</sup>

A further complicating factor is the steady increasing in population in many developing countries. Early in 1964, Prebisch, the then Secretary General of UNCTAD, warned in a report to the United Nations that economic growth was likely to be largely absorbed by the growth of population in some countries. He pointed out that “Nearly half of the capital invested in the developing countries is needed to provide for the increase in population, thereby limiting the resources available for substantially and steadily raising the overall level of living. Unless the present tempo of population growth slows down, it would take eighty years at an annual rate of GDP growth of 5 per cent for some developing countries to reach the current average per capita income level of Western Europe, and approximately forty years more for them to reach that of the United States. For the least developed countries, accounting for one half of the population of all developing countries, the period required to reach the present Western Europe level would be of the order of two hundred years”.<sup>57</sup> Unfortunately, this situation has not changed much since then.

In view of these problems prevalent in many developing countries, the multilateral trade agreements signed during the Uruguay Round negotiations contain some provisions which are designated to accord special or differential treatment to developing countries. These provisions can be found chiefly in the Preamble, Article IV:7 and Article XI:2 of

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<sup>54</sup> : C. Napoleoni: *Thought of the Twentieth Century*, translated and edited by A. Cigno, London(1972), p.145.

<sup>55</sup> : See Antonio Cassese: *International Law in a Divided World*, Oxford: Clarendon Press(1994), pp.352-355.

<sup>56</sup> : Id, p.147.

<sup>57</sup> : R. Prebisch: *Towards a New Trade Policy for Development*, Report by the Secretary General of UNCTAD, CE/Conf. 46/3.(1964), p.5.

the *WTO Agreement*; Part IV of GATT 1994; the selected provisions of some multilateral trade agreements annexed to the *WTO Agreement*;<sup>58</sup> and in some ministerial decisions.<sup>59</sup> From the perspective of developed countries, the provisions of the *TRIPS Agreement* and GATS are perhaps the most significant, while the *Agreement on Textiles and Clothing*, for example, figures more prominently in the agenda of developing countries. The *Agreement on Agriculture* and *Agreement on Subsidies and Countervailing Measures*, on the other hand, are of significant interest to both developed countries and developing countries.

The World Trade Organisation recognises the special development, financial and trade needs of developing countries in the implementation of the obligations attendant their accession. These special needs arise both at national and international levels. Thus, where the WTO imposes obligations on its Members, either to take affirmative action or to abstain from certain conduct, developing countries may be allotted more time to fulfil their obligations.<sup>60</sup> Selected exemptions from obligations also may be available for developing countries.<sup>61</sup> Furthermore, to address the special needs of developing countries, some of the multilateral trade agreements require developed country Members to provide assistance to developing country Members.<sup>62</sup> In the words of Alice Alexandra Kipel, these various measures are intended to remove those seemingly insurmountable obstacles from the paths for developing countries so that they can fully participate in the WTO activities.<sup>63</sup> Through accession, developing countries become bound to act in accordance with the parameters set forth in the WTO agreements. Consequently, the activities of developing countries in international trading should become subject to those widely recognised norms.

For many developing countries, to participate in the global trading is an ambivalent choice. On the one hand, nations in the present world are so closely connected that “our

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<sup>58</sup> : For example, *Agreement on Agriculture*: Article 12(2), Article 15, Article 16; *Agreement on the Application of Sanitary and Phytosanitary Measures*: Article 10; *Agreement on Technical Barriers to Trade*: Article 11, Article 12; *Agreement on Trade-Related Investment Measures*: Article 4; *Antidumping Agreement*: Article 15; *Customs Valuation Agreement*: Part III; *Agreement on Import Licensing Procedures*: Article 2(2); *Agreement on Subsidies and Countervailing Measures*: Part VIII; *Agreement on Safeguards*: Article 9; *General Agreement on Trade in Services*: Article IV; *Agreement on Trade-Related Aspects of Intellectual Property Rights*: Article 65(2), Article 66, Article 67; *Dispute Settlement Understanding*: Article 3(12), Article 4(10), Article 8(10), Article 12(10-11), Article 21(8), Article 24; *Trade Policy Review Mechanism*: Paragraphs C and D. See supra note 1.

<sup>59</sup> : See *Decision on Measures in Favour of Least-Developed Countries* and *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries*. See supra note 1.

<sup>60</sup> : For example, Article 65 of the TRIPS permits a developing country to delay the implementation of its TRIPS obligations in general for four years, and an additional period of five years in the area where the product patent is not so protectable in its territory on the date of application of the TRIPS. See supra note 1.

<sup>61</sup> : For example, Article 15(2) of the *Agreement on Agriculture* states: “Developing country Members shall have the flexibility to implement reduction commitments over a period of up to 10 years. Least-developed country Members shall not be required to undertake reduction commitments”. See supra note 1.

<sup>62</sup> : For example, Article 11(1) of the *Agreement on Technical Barriers to Trade* states: “Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations”. See supra note 1.

<sup>63</sup> : Alice Alexandra Kipel: *Special and Differential Treatment for Developing Countries*(in *World Trade Organisation---The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, edited by Terence P. Stewart), American Bar Association(1996), p.626.

independence is best guaranteed by interdependence".<sup>64</sup> On the other hand, citizens in many countries feel locked out, forgotten, angry and hurt in the face of the increasing pressures. They falsely believe that globalisation is the cause of all these problems. Under these circumstances, the first and foremost task for the WTO is to strengthen the confidence of its Members, especially the developing country Members, for their participation in the global trading. The UN Secretary General Kofi Annan said recently: "globalisation should not be made a scapegoat for domestic policy failures...the WTO must not be distracted from its own vital task: extending the benefits of free trade fully to the developing world".<sup>65</sup> Now it is the time for the WTO to vindicate that.

There are indeed many ways by which the WTO may help the developing countries to manage international trade rules, and eventually to benefit from them. To solve trade disputes among WTO Members, particularly those concerning developing country Members, in a fair and reasonable manner under the new dispute settlement mechanism is definitely one of the most important benefits of the new organisation.

### **Section Three Adjudication of International Trade Disputes**

#### **1.3.1. Different methods of peaceful dispute settlement**

A dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another.<sup>66</sup> In the broadest sense, an international dispute can be referred to exist whenever such a disagreement involves two or more governments, international institutions, or juridical persons (corporations), private individuals of different countries. Disputes are an inevitable part of international relations, just as disputes between individuals are inevitable in domestic relations.

A basic requirement, when a dispute arises, is a commitment from those who are likely to become involved, that dispute settlement will only be pursued by peaceful means. On the international plane, Article 2(3) of *Charter of the United Nations* requires all UN Members to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".<sup>67</sup> A General Assembly Resolution of 1970, after quoting Article 33 of the UN Charter, proclaims: "States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice".<sup>68</sup> These methods are not used with the same frequency and may change their form to some extent in different situations. With regard to the WTO dispute settlement mechanism, negotiation, mediation, conciliation and arbitration are the most relevant means despite the fact that they may have different forms.

Negotiation is, in practice, employed more frequently than all the other methods put together. Often, indeed, negotiation is the only means employed, not just because it is

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<sup>64</sup> : Mike Moore, see supra note 48.

<sup>65</sup> : Kofi Annan, *New York Times*, 29 November 1999, at A28.

<sup>66</sup> : J. G. Merrills: *International Dispute Settlement*, Grotius Publications Limited(1991), p.1.

<sup>67</sup> : See *Basic Documents in International Law*. See supra note 28.

<sup>68</sup> : Id, *General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*. G. A. Res. 2625(XXV), 24 October 1970. The resolution was adopted by the General Assembly without a vote.

always the first to be tried and is often successful, but also because States tend to believe its advantages to be so great as to rule out the use of other methods, even in situations where the chances of a negotiated settlement are slight. On the occasions involving other methods of dispute settlement, negotiation is still used more commonly as a preliminary procedure of the whole process. In fact, negotiation is more than a possible means of settling differences, it is also a technique for preventing them from arising as negotiation is a process which allows the disputing parties to retain the maximum amount of control over their dispute. Consequently, negotiation, in most cases of dispute settlement, has become a process which is not optional, but obligatory.<sup>69</sup>

When the parties to an international dispute are unable to resolve it by negotiation, the intervention of a third party is a possible means of breaking the impasse and producing an acceptable solution. Such intervention can take a number of different forms. The third party may simply encourage the disputing States to resume negotiations, or do nothing more than to provide them with an additional channel of communication. When the third party, working as an active participant, is authorised and expected by the disputing parties to advance his own proposals and to interpret, as well as to transmit, each party's proposals to the other, this activity is known as "mediation". Mediation is often used together with good offices which consist of action taken by a third party to bring about, or cause to be continued, negotiations, without the third party actively participating in the discussion of the dispute. In many occasions, the terms of "mediation" and "good offices" are employed indifferently rather than as labels for distinct approaches to dispute settlement.<sup>70</sup> Mediation may be sought by the disputing parties or offered voluntarily by outsiders. Once under way, it provides the governments in dispute with the possibility of a solution, but without any prior commitment to accept the mediator's suggestions. Therefore, it has the advantage of allowing the disputing parties to retain control of the dispute, and to subject the dispute to being settled in a face-saving way.

"Inquiry" as a term of art, is used in two distinct, but related senses. In the broader sense, it refers to the process that is performed whenever a court or other body endeavours to resolve a dispute from the issues of fact. In this regard, it resembles the information-seeking process in the WTO panel examination. Inquiry may become more relevant when the disputes involve some complicated technical issues. In addition to the use by a court or other legal bodies, inquiry can also be used as a specific institutional arrangement which States may select in preference to arbitration or other techniques,

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<sup>69</sup> : For example, Article XXII:1 of GATT 1947 requires GATT contracting parties(now WTO Members) "shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation...with respect to any matter affecting the operation of this Agreement"(Emphasis added). Article 41 of the 1978 *Vienna Convention on Succession of States in Respect of Treaties* provides that "If a dispute regarding the application or interpretation of the present Convention arises between two or more Parties to the Convention, they shall, upon the request of any of them, seek to resolve it by a process of consultation and negotiation"(Emphasis added). See supra note 1. See also R. Laval: *Dispute Settlement under the Vienna Convention on Succession of States in Respect of Treaties*, The American Journal of International Law, Vol.73, 1979, p.407.

<sup>70</sup> : Both the *Hague Convention for the Pacific Settlement of International Dispute* of 1899 and 1907(Articles 2-8) do not differentiate between them. Article 33(1) of the UN Charter does not specifically mention good offices either. Sometimes, however, both are mentioned and apparently treated as distinct, as in the *Pact of Bogota* 1948(Articles IX-XIV). See also Article 5 of the *Dispute Settlement Understanding*. See supra note 1.

because they may desire to have some disputed issues investigated independently. Thus, in its institutional sense, inquiry refers to a particular type of international tribunal, known as the “commission of inquiry” which was introduced by the 1899 *Hague Convention*.<sup>71</sup>

Conciliation has been defined as: “A method for the settlement of international disputes of any nature according to which a commission is set up by the parties, either on a permanent basis or an *ad hoc* basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the parties, with a view to its settlement, such aid as they may have requested”.<sup>72</sup> The eclectic character of this method is at once apparent. If a mediation is essentially an extension of negotiation, conciliation puts third party intervention on a formal legal footing and institutionalises it in a way comparable, but not identical, to inquiry or arbitration. While the fact-finding exercise that is the essence of inquiry may or may not be an important element in conciliation, the search for terms “susceptible of being accepted” by the parties, but not binding on them, provides a sharp contrast with arbitration and a reminder of the link between conciliation and mediation.<sup>73</sup> This feature of conciliation has presented commissions with something of a dilemma. On the one hand, they wish to make their proposals as persuasive as possible by supporting them with reasons; on the other hand, they are unwilling to provide the disputing parties with legal arguments or findings of fact that may be cited in subsequent litigation.

Arbitration seems to contain the elements of both consensus in a diplomatic settlement and jurisdiction in a legal settlement.<sup>74</sup> After having developed over the last two hundred years, arbitration provides the parties to a dispute with the opportunity to obtain a decision from an impartial third party of their own choice. This is important because, if governments are persuaded to refer their disputes to third parties for settlement, they must have confidence in those people who are to give the decision. As an arbitration tribunal has the subject matter of the dispute and the criteria for its decision

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<sup>71</sup> : *Hague Convention* of 1899, Articles 9-14. Envisaged by the *Hague Convention* as an institution for the management of a relatively narrow range of disputes, the international commission of inquiry has carved out a worthwhile, yet curiously ambivalent record. From its inception over a century ago, inquiry has been employed in cases in which honour and essential interests were unquestionably involved, for the determination of legal as well as factual issues, and later by tribunals whose composition and proceedings more closely resembled courts than commissions of inquiry as originally conceived. The diversion of the function has led to the decreasing use of inquiry in the recent years, since the disputing parties may resolve their dispute either by negotiation, mediation, in which the outcome is completely in the hands of the disputing parties, or by arbitration, court, in which both of the parties are bound by the award or decision. However, as one of the dispute settlement methods, inquiry is still worth discussing here.

<sup>72</sup> : Article 1 of the *Regulation on the Procedure of International Conciliation* (adopted by the Institute of International Law in 1961). See *Annuaire* (1961), 49(ii), pp.385-391.

<sup>73</sup> See J. G. Merrills, *supra* note 66, p.59. All the conciliation commissions have the same functions to investigate the dispute and to suggest the terms of a possible settlement. However, within this broad mandate, conciliation commissions have performed a variety of different tasks. What a commission does and how it goes about its work depend in the first place on the instrument setting it up. But much also depends on how the parties choose to present the particular case, and how the members of the commission see their role. As a result, though the practice of conciliation commissions exhibits many common features, significant differences of approach to the most basic matters are also to be found.

<sup>74</sup> : The division between diplomatic means and legal means is only based on the binding effect of the decisions made. Despite the fact that there may exist more division methods, the dichotomy containing diplomatic and legal means is nevertheless the one widely accepted and used.



laid down by the disputing parties, arbitration can be used to produce a solution to a selected problem and on any agreed basis. Unlike inquiry and conciliation, arbitration results in a decision which is binding on the disputing parties. Provided that no problems of interpretation, nullity, etc., arise, an arbitration award should be reasonably expected to dispose of complex technical issues as most arbitration tribunals are composed of experts in one field or another who can give an award in no way inferior to a court decision.

Despite these obvious advantages, arbitration still has its own limitations. The most prominent of all is the enforcement of the arbitration award. Although arbitration produces a binding award, there is no guarantee that the unsuccessful party will carry out its obligation to recognise that award. This does not mean that arbitration awards are widely disregarded. On the contrary, since States often prefer to end a dispute rather than incur the political costs which would follow refusing to accept an award, arbitration awards are usually implemented. But if there are practical reasons for not carrying out an unfavourable award, the lack of procedures for enforcement is certainly a conspicuous limitation.<sup>75</sup>

Then the judicial settlement comes as the last line of defence, which involves the reference of disputes to permanent tribunals for legally binding decisions. Since the judicial settlement developed from arbitration, it is no surprise that there exists a close similarity between the two. For most of the recent century, the judicial settlement has been available through a number of courts of either general or special jurisdiction. The most comprehensive example of them, in the context of international dispute settlement, is the International Court of Justice, which was founded in 1945 as the principal judicial organ of the United Nations.

Both the advantages and limitations of the judicial settlement are easy to notice. In addition to the advantage of saving costs,<sup>76</sup> the reference of a dispute to a permanent judicial body with an established composition and procedure also avoids the need to negotiate about the membership of the tribunal and related matters, the problems which could arise with arbitration. More importantly, dispute settlement in a judicial body is assisted by the development of international law and consistent jurisprudence, which may be expected to contribute more to the legal progress than occasional arbitration. But on the other hand, States are reluctant to surrender control over their disputes, particularly where important interests are involved. This partly accounts for the present picture of a situation in which international litigation is a wholly exceptional act and the vast majority of disputes are handled by other means.

In terms of the binding effect, negotiation creates a situation in which matters are entirely in the hands of the disputing parties, then mediation, inquiry and conciliation, in each of which outside assistance is utilised, but the disputing parties still have the final say on the disputing issues. Only in the context of arbitration and judicial settlement, the object is to produce a legally binding decision. As it shows in the above analyses, no sole

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<sup>75</sup> : The 1958 *New York Convention* solves the problem of enforcement to a certain extent, which ensure that the arbitration awards should be as enforceable as court decisions among its signatories, although this convention is limited in its effects only to civil and commercial arbitration awards.

<sup>76</sup> : Except for the expenditures for preparing the documents, hiring counsels and advocates, there is no charge for the disputing parties in the legal proceedings of ICJ. As for a State which is not a UN Member, the Court will decide the amount which that State is to contribute towards the expenses of the Court. See Article 33, Article 35(3) and Article 64 of the *Statute of the International Court of Justice*. See *supra* note 28.

method provides a perfect settlement for the disputing parties. In practice, a dispute is usually settled in a mixed way, i.e. involving more than one of the discussed methods. The newly-born WTO dispute settlement mechanism reflects such a trend.

### 1.3.2. The WTO dispute settlement mechanism: a guarantee of realisation for the Uruguay Round negotiated results

The World Trade Organisation has realised the goal to have all the multilateral trade agreements bind its Members. Central and vital to the WTO institutional structure is the dispute settlement mechanism which was derived from almost half century of experiment and practice in the GATT, but now is elaborately set forth in the new treaty text of the *Dispute Settlement Understanding*(DSU). Over the last two decades, people have come to recognise the crucial role that dispute settlement plays for any treaty system.<sup>77</sup> It is particularly crucial for a treaty system designed to address today's myriad of complex economic questions of international relations and to facilitate the cooperation among nations that is essential to the peaceful and welfare-enhancing aspect of those relations.<sup>78</sup> Dispute settlement procedures assist in making the negotiated rules effective, adding an essential measure of predictability and effectiveness to the operation of a rule-oriented system in the otherwise relatively weak realm of international norms.<sup>79</sup> Thus, the GATT contracting parties resolved at the 1986 launching meeting of the Uruguay Round negotiations to deal with some of the defects and problems of the then-existing dispute settlement mechanism. The result of that resolve is the new DSU.

Serving as the backbone of the WTO dispute settlement mechanism, the *Dispute Settlement Understanding* has altogether 27 articles, 132 paragraphs, 4 appendixes which include the multilateral trade agreements covered by the DSU, special or additional rules and procedures contained in the covered agreements, working procedures of the panel process,<sup>80</sup> rules and procedures of the expert review which is required in accordance with Article 13(2) of the DSU. This is a lengthy and comprehensive agreement on all aspects of the dispute settlement process. It absorbs, but consolidates, all of the earlier GATT agreements on dispute settlement process, which were issued in the previous rounds of negotiations and ministerial meetings, including the 1979 *Tokyo Round Understanding with its Agreed Description of Customary Practice*, the 1982 *Ministerial Declaration*, the 1984 *Agreement on Panel Selection*, and the procedural reforms adopted at the 1988 Montreal Midterm Meeting. The DSU borrows large chunks of text from all these earlier reform documents. It retains most of the gains, but it goes much further.

The key new element in the DSU is the elimination of the veto power by reversing the decision-making mechanism from the positive consensus to the negative consensus. The

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<sup>77</sup> : Everyone will make such a conclusion if we compare the consequences of dispute settlement before and after the establishment of the World Trade Organisation. In fact, it has become quite common that when a new international regime emerges, it is usually accompanied by its dispute settlement mechanism, which combines the general principles of international law and its unique rules as the legal foundation. The recent development of such examples are the Court of Justice of the European Communities , the European Court of Human Rights, and the tribunals envisaged by the 1982 United Nations Law of the Sea Convention.

<sup>78</sup> : See John Jackson: *The Uruguay Round, World Trade Organisation, and the Problem of Regulating International Economic Behaviour*, in Policy Debates(Ottawa, Centre for Trade Policy and Law, 1995).

<sup>79</sup> : See Hugo Paemen and Alexandra Bensch: *From the GATT to the WTO---The European Community in the Uruguay Round*, in Policy Debates(Ottawa, Centre for Trade Policy and Law, 1995).

<sup>80</sup> : The working procedures for appellate review were made on 28 February 1997. See WT/AB/WP/3. cf. [http://www.wto.org/english/tratop\\_e/dispu\\_e/ab3\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab3_e.htm)

*Montreal Midterm Agreement* had eliminated that veto power from some early phases of the panel process by giving automatic answers to certain preliminary questions, such as terms of reference. But the *Montreal Midterm Agreement* had equivocated on the veto power over the creation of a panel, and had clearly preserved the veto power over Council adoption of a ruling and Council authorisation of retaliation.<sup>81</sup> On each of these three key blocking points, the new *Dispute Settlement Understanding* clearly removes the power to veto. In each case, the process moves forward unless the Dispute Settlement Body(DSB) takes consensus to stop it.

On the first point about the authorisation of the DSB to a panel, Article 6(1) of the DSU leaves no ambiguity this time, which states: "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".<sup>82</sup> Two conclusive points can be drawn from the above statement: firstly, the complained party may object to the establishment of a panel at the first DSB meeting; secondly, it is certain that the panel will be established at the following DSB meeting since it is unlikely to occur that the complaining party will keep silent in negating the establishment of the panel.

On the second point of adopting a panel ruling, the DSU sets forth a pattern contrary to that made in the *Montreal Midterm Agreement*. In Article 16, the new Understanding provides for full participation by the disputing parties in the follow-up proceedings. It permits them, and others, full opportunity to record their review. But then, "Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting 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..."<sup>83</sup> In other words, the panel ruling becomes binding on the parties to a dispute at most 60 days after the circulation of the panel report unless the ruling is overruled by the DSB on the base of consensus, or is appealed.

The main danger of such automatic binding effect is that the panel may have made a legal error in its deliberation. To meet this potential problem, the Uruguay Round negotiators created a second, appellate stage in the dispute settlement process. The DSU provides for a standing Appellate Body which consists of seven qualified individuals appointed by the DSB, from whom appellate groups of three are to be chosen by rotation.<sup>84</sup> This arrangement is based on the assumption of equal division of the appellate work and avoiding the practice of "choosing forum". Although at the moment, the appellate review is limited to "issues of law covered in the panel report and legal interpretations developed by the panel",<sup>85</sup> some of the Appellate Body decisions have already produced much impact on the disputing parties,<sup>86</sup> and certainly, have some

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<sup>81</sup> : See *GATT Activities*(1989), Geneva.

<sup>82</sup> : 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.(Footnote original) See supra note 1.

<sup>83</sup> : Article 16(4) of the *Dispute Settlement Understanding*.(Original footnote omitted) See supra note 1.

<sup>84</sup> : See Article 17(1) of the *Dispute Settlement Understanding*. See supra note 1.

<sup>85</sup> : See Article 17(6) of the *Dispute Settlement Understanding*. See supra note 1.

<sup>86</sup> : To name a few, such appellate reviews include *United States--Standards for Reformulated and Conventional Gasoline*(WT/DS2/AB/R); *India--Patent Protection for Pharmaceutical and Agricultural*

potential impact on the future cases. As a general rule, the appealing process shall not exceed 60 days from the time when the request to appeal is formally notified to the day the Appellate Body circulates its report. In no case shall the process exceed 90 days. Thereafter, the Appellate Body's ruling becomes binding unless the DSB decides by consensus not to adopt it within 30 days following its circulation to the WTO Members.<sup>87</sup> Under the same reason as that in the establishment of a panel, we can expect that this adoption is almost automatic as no winning party will join such a consensus.

Then comes the third point. Once a ruling becomes binding, the DSU sets out to give the winning party a right to enforce that ruling without being subjected to blockage. The process first provides for a "reasonable time" for compliance, with the length of the deadline being submitted to binding arbitration if the disputing parties cannot agree. The new process also provides for binding adjudication, in 90 days, of any dispute about whether the lost party's corrective action has satisfied the ruling. Then, if the reasonable time expires without satisfactory corrective action, the process provides a further 20 days for the disputing parties to negotiate compensation. If no agreement on compensation is reached during this period, the winning party is allowed to withdraw its concessions from the schedule 10 days later.<sup>88</sup>

Taken as a whole, the *Dispute Settlement Understanding* has converted the GATT dispute settlement process into a mandatory one that takes a legal claim from complaint to retaliation without any need to obtain the defendant's consent of any stage. Compared with the dispute settlement reforms outlined in the 1988 *Montreal Midterm Agreement*, the DSU represents nothing less than a sea change in the attitudes of WTO Members toward dispute settlement. The *Montreal Midterm Agreement* rested on a view that dispute settlement required a strong measure of voluntary cooperation from defendants, and so consciously left a way out for those defendants willing to pay the price. The DSU, by contrast, provides a legal ruling in every case, and guarantees a full enforcement effort, right down to retaliation.

During the Uruguay Round negotiations, the *Dispute Settlement Understanding* was discussed with reference to the traditional GATT dispute settlement process under Article XXIII of the *General Agreement on Tariffs and Trade*. Most of the leading negotiators had anticipated that, at the end of the negotiations, all of the Uruguay Round negotiated agreements including the new area agreements on services, intellectual property rights protection, and investment should be linked by a common dispute settlement process which would allow the enforcement by "cross-retaliation", that is to use trade sanctions to enforce new area agreements. This anticipation has been reflected in the new Understanding.<sup>89</sup> As to the conflicts of applicability between the rules and procedures of the DSU and the special or additional rules and procedures contained in the multilateral trade agreements, Article 1(2) of the DSU states: "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

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*Products*(WT/DS50/AB/R); *United States--Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R).

<sup>87</sup> : See Article 17(5), Article 17(14) of the *Dispute Settlement Understanding*. See supra note 1.

<sup>88</sup> : See Article 21(3), Article 21(5), and Article 22(2) of the *Dispute Settlement Understanding*. See supra note 1.

<sup>89</sup> : See Article 1(1) and Article 22(3) of the *Dispute Settlement Understanding*. See supra note 1.

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...<sup>90</sup> Therefore, different from the relationship between the *WTO Agreement* and those multilateral trade agreements, the *Dispute Settlement Understanding* provides a general structure for the dispute settlement, while the special or additional rules and procedures contained in the multilateral trade agreements are invoked to deal with disputes in specific situations. Together with all these provisions, the new mechanism pushes WTO dispute settlement to move in a more judicial way.

By stipulating new trade rules and establishing new dispute settlement mechanism, the World Trade Organisation has facilitated the integration of developing countries into the global economy. But which countries can really benefit from this integration process and, to what extent, these new rules and procedures are fair to most developing countries? To answer these questions involves a comprehensive study of the relationship between the new institution and developing countries. This study also constitutes the *leitmotif* of the rest chapters in this thesis.

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<sup>90</sup> : The special or additional rules and procedures contained in the covered agreements include those in *Agreement on the Application of Sanitary and Phytosanitary Measures*(Article 11[2]); *Agreement on Textiles and Clothing*(Articles 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*(Article 14[2] through 14[4], Annex 2); *Agreement on Implementation of Article VI of GATT 1994*(Article 17[4] through 17[7]); *Agreement on Implementation of Article VII of GATT 1994*(Article 19[3] through 19[5], Annex II.2[f], 3, 9, 21); *Agreement on Subsidies and Countervailing Measures*(Article 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*(Article XXII:3, Article XXIII:3); *Annex on Financial Services*(Rule 4); *Annex on Air Transport Services*(Rule 4); *Decision on Certain Dispute Settlement Procedures for the GATS*(Paragraphs 1 through 5). See supra note 1.

## Chapter Two WTO and Developing Countries

### Section One The Definition of a Developing Country: A Nominal Dilemma

#### 2.1.1. An evolutionary status of developing countries from the GATT to the WTO

The future of developing countries is one of the most pressing issues of international economy in our era, and the resolution of this issue will profoundly affect the lives of the people from both developing countries and developed countries. The intense desire of the majority of the human race to escape its debilitating poverty and join the developed world is a determining feature of international politics. Yet in the final decades of the twentieth century, bitter controversy still exists regarding the causes of and possible solutions to this problem.<sup>1</sup>

The causes of this tragic situation for most developing countries are various, both historically and politically. The predatory exploring of their natural resources by the powerful countries in history, the mismanagement of domestic affairs by their own leaders after independence and, the lack of external financial aid and internal technological innovation are the most substantial ones. Aware of this huge gap between the developed countries and the developing countries, and its potential effect upon international politics, some international institutions began to reflect on the way to narrow this gap, and the GATT is just one of them.

GATT policy towards developing countries owed nothing to the past. There was no Golden Age that pointed the way. Before the World War II, the organising principle for rich-poor relationships had been colonialism. Most of the countries in Africa and Asia were colonies *de jure*. A goodly portion of those in Central and South America were colonies *de facto*.<sup>2</sup> This colonial past was not what the Bretton Woods system was looking for.<sup>3</sup> The GATT started its function to discipline its contracting parties in international trade on a most-favoured-nation and non-discrimination basis.<sup>4</sup> Despite the fact that, among the founding States of the GATT, almost half of them could be deemed as “less-developed countries”,<sup>5</sup> the first draft of the Charter of the proposed International

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<sup>1</sup> : See Robert Gilpin: *The Political Economy of International Relations*, Princeton University Press(1987), p. 263.

<sup>2</sup> : See Robert E. Hudec: *Developing Countries in the GATT Legal System*, Gower Publishing Company Limited(1987), p.6.

<sup>3</sup> : About the history of the Bretton Woods system, see John H. Jackson: *The World Trade Organisation, Constitution and Jurisprudence*, Chapter 2(*Bretton Woods, the ITO, the GATT and the WTO*), Royal Institute of International Affairs(1998), pp12-35.

<sup>4</sup> : The preamble of GATT 1947 states: “The governments...being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.” See *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press(1999).

<sup>5</sup> : The founding members are the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxembourg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. In the GATT history, contracting parties consisted of “developed countries” and “less-developed countries”. These nominations have been changed since the establishment of the WTO.

Trade Organisation(ITO), which was put forward by the United States, provided for a set of rules for all the potential members.<sup>6</sup> There were no specific provisions on economic development, nor were there any special rules or exceptions for developing countries.<sup>7</sup>

After the failure of the ITO, the GATT took the role to regulate international trade in the global community. The power to govern usually brings with it, according to most twentieth-century political norms, a duty to take care of the disadvantaged members of the community to be governed. The GATT had no money to give, only rules. Thus, rule assistance was naturally the core help which most developing countries could seek for in the GATT history.

The demands for the special and preferential rules during the first years' operation of the GATT were only limited to some dependent overseas territories of the former colonist powers. A Working Party was set up, by a decision of the CONTRACTING PARTIES on 17 January 1955, to examine the proposal of the United Kingdom relating to the special problems of its dependent overseas territories. The decision to set up the Working Party originated from a discussion, in a Plenary Session, of a proposal by the United Kingdom government to introduce an appropriate article into the General Agreement.<sup>8</sup> Since it was considered that the preferential arrangement for the dependent overseas territories contained in this proposal would constitute in effect an amendment to Article I of the General Agreement and would therefore require unanimous acceptance by the

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Explanatory Note 2(a) to GATT 1994 states: "The reference to 'contracting party' in the provisions of GATT 1994 shall be deemed to read "Member". The reference to 'less-developed contracting party' and 'developed contracting party' shall be deemed to read 'developing country Member' and 'developed country Member'. The reference to 'Executive Secretary' shall be deemed to read 'Director-General of the WTO'". Id.

<sup>6</sup> : *Proposals for Consideration by an International Conference on Trade and Employment*, Publication No. 2411, Commercial Policy Series No.79(Washington: United States Department of State, 1945).

<sup>7</sup> : The United States explained the absence of developing-country provisions in the Proposed Charter by saying that the special needs of developing countries would be addressed in the Economic Development Sub-commission of the United Nations Economic and Social Council and by institutions such as the World Bank. In other words, special attention may have been needed, but not in the trade-policy rules. See Clair Wilcox: *A Charter for World Trade*, New York: Macmillan(1949), p.141. Clair Wilcox served as chairman or vice-chairman of the United States delegation to the various GATT-ITO negotiating conferences in 1946-1948. According to professor Hudec, the initial position of the United States rested on the view that the key to industrial development was capital investment, especially private investment, coupled with an open international market for exports. The United States was unsympathetic to the infant-industry argument on conventional economic grounds--infant-industry protection would merely promote the creation of inefficient local industries, thereby wasting resources. These positions were drawn from, and reinforced by, a global economic and political policy that had two main objectives: (a)the desire to reduce trade protection generally, so that the world would not repeat the destabilising economic situation created by the protectionism of the 1930s, and (b)the desire to eliminate discrimination--partly for the same economic reasons but also because the United States wanted to eradicate the colonial system. To be sure, this global policy also served somewhat narrower visions of self-interest. Under the mercantilist perceptions of national advantage that tended to prevail in these calculations, the over-powering dominance of the United States' economy during this period made it appear that the United States had the most to gain from an open world market for exports. Robert E. Hudec, see *supra* note 2, pp.9-10.

<sup>8</sup> : The proposed article reads as "A metropolitan country may take action, or invoke any procedure under this Agreement, on behalf of the economic interests and development of a dependent territory for whose external relations it is responsible, and the provisions of the Agreement shall apply for this purpose as if the dependent territory were within the customs area of the metropolitan country; *provided* always that any measures taken by virtue of this paragraph shall operate substantially to the exclusive benefit of the dependent territories of the metropolitan country concerned." GATT BISD, 3rd Supplement(1955), p.131.

CONTRACTING PARTIES, the United Kingdom was advised to change its proposal to a draft waiver, which it accepted.<sup>9</sup>

The 1960s saw some dramatic changes in the GATT, not only in terms of its size, but in terms of its contents.<sup>10</sup> The first significant step made during this period is the *Declaration on Promotion of the Trade of Less-Developed Countries* which was adopted by the CONTRACTING PARTIES at their nineteenth session on 7 December 1961. Recognising that there was need for a rapid and sustained expansion in the export earnings of the less-developed countries if their development was to proceed at a satisfactory pace, the CONTRACTING PARTIES demanded that the governments of the contracting parties should give immediate and special attention to the less-developed countries on the following issues: (a) quantitative restrictions; (b) tariff reductions; (c) revenue duties; (d) state-trading; (e) preferential treatment within the customs unions or free-trade areas; (f) the use of subsidies; and (g) the disposal of commodity surpluses.<sup>11</sup>

The 1961 Ministerial Declaration set some general principles which demanded the developed countries to give their special and preferential attention to the less-developed countries. Shortly after that, the CONTRACTING PARTIES adopted an amendment to the General Agreement, which became Part IV of GATT 1947.<sup>12</sup> Part IV, with the general title *Trade and Development*, consists of three articles, i.e. Article XXXVI (*Principles and Objectives*), Article XXXVII (*Commitments*), and Article XXXVIII (*Joint Action*). As professor Robert E. Hudec pointed out: “the importance of

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<sup>9</sup> : Id. The waiver, as agreed by the Working Party, is recommended to the CONTRACTING PARTIES for acceptance in accordance with the procedures of Article XXV (Joint Action by the Contracting Parties) of the General Agreement.

<sup>10</sup> : According to Karin Kock, the Swedish expert on the GATT affairs, the issue of developing countries became critical once it became clear that a large number of British and French colonies were soon to achieve independence. “Cold War” competition for the loyalty of these emerging countries intensified when the former Soviet Union began to press for the creation of a global trade organisation, within the United Nations, that would provide an alternative to the Western-dominated GATT. The prospect of a rival United Nations organisation grew more substantial each year and finally materialised in the form of the United Nations Conference on Trade and Development (UNCTAD), formally constituted in 1964. See Karin Kock: *International Trade Policy and the GATT 1947-1967*, Stockholm: Almqvist & Wiksell (1969), p.236. By the early 1960s, GATT relations between developed and developing countries had become almost totally centred on competition with the UNCTAD. The UNCTAD threat considerably augmented the bargaining power of developing countries. Developed countries believed that a bloc decision not to participate in the GATT would be seriously damaging to Western political interests; they were therefore willing to pay a price to avoid it. Certain other factors are commonly cited as reasons for the substantial increase in the developing-country bargaining power during this period. One is the formation of an effective “bloc” in the early 1960s, the so-called “Group of 77”. Although not all Group of 77 members participated in GATT affairs, the presence of effective bloc behaviour in the international sphere, particularly in the United Nations, probably did increase the bargaining power and thus consolidated the traditional source of developing-country power---the participation issue---in a more effective way. See Robert E. Hudec, *supra* note 2, pp.39-40.

<sup>11</sup> : See GATT BISD, 10th Supplement (1962), pp28-32.

<sup>12</sup> : The scheduling of the UNCTAD conference in the spring of 1964 precipitated an effort within the GATT to demonstrate more forcefully its commitment to the interests of developing countries. The first step was a decision to draft amendments to the legal text of the General Agreement that would consolidate the various strands of the GATT's emerging policy towards developing countries. Initially, it was contemplated that the new legal text would be placed in Article XVIII (Governmental Assistance to Economic Development). The new text grew so long, however, that at the last moment it was repackaged as a new Part IV of the General Agreement. See GATT BISD, 13th Supplement (1965), p.2 (protocol introducing PART IV).



Part IV is not easy to describe. From a technical point of view, Part IV added nothing to the existing legal relationship between developed and developing countries. Part IV was merely a slightly more impressive statement of the urgent but non-binding texts that the Action Programme had been issuing over the preceding five years, giving them a permanent form in the text of the General Agreement. The language of Part IV was a bit more legalistic, giving the illusion of greater commitment. Indeed, the title of the new Article XXXVII, 'Commitments', actually said so. In fact, however, the text of Part IV contained no definable legal obligations."<sup>13</sup>

Despite its non-binding nature, Part IV did lay the rationale and morale for the developing countries in the GATT to ask for special and preferential treatment, and their constant demanding eventually resulted in the Generalised Special Preferences(GSP) schemes which were adopted in the GATT in 1971.<sup>14</sup> In the Ministerial Decision of 23 June 1971, the CONTRACTING PARTIES decided that GATT Article I(General Most-Favoured-Nation Treatment) would be waived for a period of ten years to the extent necessary to permit developed contracting parties to accord preferential tariff treatment to products originating in developing countries and territories without according such treatment to like products of other contracting parties.<sup>15</sup> The Ministerial Decision of 26 November 1971 permitted developing countries to exchange tariff preferences among themselves.<sup>16</sup> These two ministerial decisions laid the landmark that the GATT's new relationship with developing countries had been defined.

Shortly after the GSP was established, the United Nations adopted two major resolutions in 1974, one calling for the establishment of a new international economic order and the other declaring a *Charter of Economic Rights and Duties of States*. Developing countries regarded these UN resolutions as their victories in the contending with developed countries for more political and economic rights. Using these resolutions as their moral base, they pressed developed countries for more special preferences, which culminated in a series of legal texts known as the "Framework Agreement".<sup>17</sup> The Framework texts included a decision of the CONTRACTING PARTIES, called the Enabling Clause, which was a *de facto* amendment of the MFN obligation in GATT Article I. The Enabling Clause gave permanent legal authorisation for: (a)the Generalised System of Preferences; (b)preferences in trade between developing countries; (c)more

<sup>13</sup> : Robert E Hudec, *supra* note 2, p.56.

<sup>14</sup> : The GATT's first step towards the GSP was a waiver permitting Australia to give preferences to developing countries. See GATT BISD, 14th Supplement(1966), p.23. The first explicit experiment with preferences on trade between developing countries was a 1968 "decision"(not a waiver) permitting a preference agreement between India, the United Arab Republic and Yugoslavia, open to participation by all other developing countries. See GATT BISD, 16th Supplement(1969), p.17.

<sup>15</sup> : See GATT BISD, 18th Supplement(1972), pp.24-26. The terms of the GSP waiver required that preferences should be made generally available to all developing countries, but the details were not defined. Consequently, it was up to the government of each developed country to decide what products would be covered, what the margin of preference would be and what quantitative or other limits would be imposed on preference benefits. Each developed-country government did something different.

<sup>16</sup> : See GATT BISD, 18th Supplement(1972), pp.26-28. It should be noted that the legal status of the GSP programme was permissive and not mandatory. In UNCTAD, governments of developed countries had agreed in principle to grant preferences, but that agreement was never reduced to a contractual obligation, either in UNCTAD or in the GATT. The only GATT legal instrument on the GSP was the waiver allowing governments to introduce preferences if they chose.

<sup>17</sup> : See GATT BISD, 26th Supplement(1980), pp.203-210, reprinted separately as an unnumbered GATT pamphlet entitled *Relating to the Framework for the Conduct of International Trade*(1979).

favourable treatment for developing countries in other GATT rules dealing with non-tariff trade barriers; and (d) specially favourable treatment for the least-developed countries.<sup>18</sup>

Facing the constant demanding from developing countries, developed countries changed their strategies. On the one hand, they continued to use the GSP policy selectively, either to bargain for commercial advantage in return or to punish those developing countries whose behaviour was somewhat found wanting. On the other hand, they used the Kennedy Round(1962-67) and Tokyo Round(1973-79) negotiations to codify the international trading rules in some important areas like subsidies and anti-dumping.<sup>19</sup> Different from the WTO practice of “buying one, buying all”, which requires the participants to accept all WTO agreements(except the plurilateral agreements) for their memberships, the participation for the GATT contracting parties in these codes was optional. Professor Hudec criticised, in this respect, that the code approach had very important implications for the legal relations between developed and developing countries. It proposed a new legal community, limited to those members who were willing to subscribe to the rules. If developing countries wished to participate in the new community, they would have to accept equal obligations. If, on the other hand, they continued to insist on a one-sided relationship, they would find themselves excluded from the really serious work and left with only a GATT membership increasingly empty of any substance.<sup>20</sup>

From the non-discrimination of GATT 1947 to the permanent status of the GSP, developing countries seemed to have gained much in legal terms in the GATT after almost four decades of struggle. However, the irony is that, except some “industrialised” countries, most developing countries had not been able to use these specialised preferences efficiently and found the gap with developed countries even bigger when they were requested to co-operate with developed countries in the Uruguay Round of multilateral trade negotiations. Under these circumstances, it sounds only natural when these developing countries raised such a question: “are the world trade rules fair to us?”

### **2.1.2. Are the world trade rules fair to developing countries?**

The issue of developing countries had caught the attention of GATT contracting parties even before the Uruguay Round negotiations. Early in the 1982 GATT Ministerial Declaration, the CONTRACTING PARTIES acknowledged that “many countries, and particularly developing countries, now face critical difficulties created by the combination of uncertain and limited access to export markets, declining external demand, a sharp fall in commodity prices and the high cost of borrowing. The import

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<sup>18</sup> : See Decision of 28 November 1979(*Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*), GATT BISD, 26th Supplement(1980), p.203.

<sup>19</sup> : The result of the Kennedy Round negotiations on multilateral trade rules is only the *Anti-dumping Code*, while the results of the Tokyo Round negotiations include: *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*(known as the *Code on Subsidies and Countervailing Duties*), *Agreement on Technical Barriers to Trade*, *Agreement on Import Licensing Procedures*, *Agreement on Government Procurement*, *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade*(known as the *Customs Valuation Code*), *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*(known as the revised *Anti-Dumping Code*). See GATT Activities(1979), Geneva, pp.21-26.

<sup>20</sup> : See Robert E. Hudec, *supra* note 2, pp.82-83.

capacity of developing countries, which is essential to their economic growth and development, is being impaired and is no longer serving as a dynamic factor sustaining the exports of the developed world. Acute problems of debt servicing threaten the stability of the financial system.”<sup>21</sup> In light of this situation, the CONTRACTING PARTIES decided to: (a)instruct the Committee on Trade and Development<sup>22</sup> to examine how the developed contracting parties had responded to the requirements of GATT Part IV; (b)urge GATT contracting parties to implement more effectively Part IV and the Enabling Clause; (c)urge GATT contracting parties to work towards further improvement of GSP or MFN treatment for products of particular export interest to the least-developed countries, and the elimination or reduction of non-tariff measures affecting such products; (d)strengthen the technical co-operation programme of the GATT; (e)instruct the Committee on Trade and Development to carry out an examination of the prospects for increasing trade between developed and developing countries and the possibilities in the GATT for facilitating this objective.

Pushed by the 1982 Ministerial Declaration, the CONTRACTING PARTIES began to amend the trade rules made during the Tokyo Round negotiations. The task was so huge that another round of multilateral trade negotiations seemed necessary. In 1986, the *Punta del Este Declaration* marked the start of the Uruguay Round of multilateral trade negotiations.<sup>23</sup> The declaration reaffirmed the principle of differential and more favourable treatment towards developing countries, urged developed countries to further remove tariff and non-tariff barriers. Meanwhile the declaration demanded GATT contracting parties to give more attention to the particular situations and problems of the least-developed countries and to the need to encourage positive measures to facilitate expansion of their trading opportunities.<sup>24</sup>

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<sup>21</sup> : See GATT BISD, 29th Supplement(1981-1982), p.9.

<sup>22</sup> : The Trade and Development Committee inherited the unfinished work of the Legal and Institutional Committee that had drafted Part IV. The Contracting Parties agreed to create a permanent organ which would have its mandate all the objectives of Part IV. Since then, there was a permanent bureaucracy attending to developing-country concerns and preparing the agenda called for by their agreed principles. See GATT BISD, 13th Supplement(1965), p.76.

<sup>23</sup> : At the Special Session of the CONTRACTING PARTIES at Punta del Este, Uruguay on 20 September 1986, ministers of the contracting parties decided to launch a new round of multilateral trade negotiations. A trade negotiations committee was established thereafter, to carry out the negotiations.

<sup>24</sup> : There are four paragraphs concerning developing and least-developed countries in the “objectives” of the Punta del Este Declaration. Paragraph (iv) states: “The CONTRACTING PARTIES agree that the principle of differential and more favourable treatment embodied in Part IV and other relevant provisions of the General Agreement and in the Decision of the CONTRACTING PARTIES of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries applies to the negotiations. In the implementation of standstill and rollback, particular care should be given to avoiding disruptive effects on the trade of less-developed contracting parties.” Paragraph (v) states: “The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariff and other barriers to the trade of developing countries, i.e. the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter’s development, financial and trade needs.” Paragraph (vi) states: “Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under

Different from the “codes” made during the Tokyo Round negotiations, the multilateral trade agreements made during the Uruguay Round negotiations are implemented as a “single package”, which means that the precondition to be a WTO Member is to “buy in” all the results of the negotiations with only limited exceptions. Here, one fact deserving our notice is that a large number of former colonies became GATT contracting parties without experiencing the accession negotiations,<sup>25</sup> they did not have the opportunities, neither were they required, to familiarise themselves with the GATT rules. During the Tokyo Round negotiations, except some “industrialised” developing countries, most developing countries kept themselves away from the codifying process, devoting their efforts to asking for more special and preferential treatment.<sup>26</sup> In the Uruguay Round negotiations, developing countries, half-exhorted and half-threatened by the developed countries, agreed to integrate themselves into the global community. But even then, few of them could predict what impact of these trade rules would have upon them. When the WTO rules began to bind all its Members, developing countries came to realise that they already had no choice but to accept.

It is important, in this context, to assess how the WTO agreements have been implemented in sectors of international trade covered by the WTO where developing countries have a significant stake. During the 1996 and 1998 Ministerial Conferences of the WTO,<sup>27</sup> several developing countries called for such an assessment to be made, so that the benefits expected to flow from the Uruguay Round negotiations to developing countries could be properly evaluated, to see whether the attempt to enable these countries to effectively participate in, and benefit from the WTO system had succeeded.<sup>28</sup> The WTO itself had noted in 1996 that “some Members have expressed dissatisfaction

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the General Agreement.” Paragraph (vii) states: “Special attention shall be given to the particular situation and problems of the least-developed countries and to the need to encourage positive measures to facilitate expansion of their trade opportunities. Expeditious implementation of the relevant provisions of the 1982 Ministerial Declaration concerning the least-developed countries shall also be given appropriate attention.” See GATT Activities(1986), Geneva, pp.17-18.

<sup>25</sup> : Article XXVI, paragraph 5(c) of GATT 1947 states: “If any of the customary territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.” See supra note 4.

<sup>26</sup> : A major objective of the developing countries in the Tokyo Round was to seek improved and predictable conditions of access for their increasingly diversified range of exports, an improved legal framework for the future conduct of international trade taking into account their development, financial and trade needs, and special and differential treatment where this was feasible and appropriate, including special treatment for the least-developed countries. They were also concerned to ensure that any liberalisation achieved would be placed on a secure footing. See GATT Activities(1979), Geneva, p.13.

<sup>27</sup> : Article IV:1 of the *WTO Agreement* states: “There shall be a Ministerial Conference composed of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decision on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.” See supra note 4. Although the Minister Conference is the highest-level authority, it is not a permanent body. In most cases, its functions are carried out by the General Council.

<sup>28</sup> : See *WTO Focus Newsletter*, No.13, 1996, p.20; No.26, 1998, pp.3-6.

with certain aspects of the implementation of the Uruguay Round agreements".<sup>29</sup> It was pointed out that trade was "an instrument of development, to raise standards of living, expand production, keeping in view, particularly, the needs of developing countries and least-developed countries".<sup>30</sup> However, despite calls for such an assessment to be made prior to the launching of any further round of trade liberalisation negotiations, the WTO was prevented by developed countries from doing so in a coherent manner.<sup>31</sup>

The impact of the WTO rules upon developing countries are uneven in different trade sectors. A panoramic assessment of these impacts seems difficult, if not impossible, in light of the multitude of the WTO rules and the comparatively short period of implementation. A more important factor accounting for this difficulty is the huge difference among developing countries themselves in terms of their development level. In order to be more specific and convincing, the discussion of this part is only limited to those areas of greater interest to the developing countries, such as textiles and clothing, agriculture, trade-related intellectual property rights, and trade in services.

The textile and clothing industry has always occupied a sensitive position in national economies. It was, after all, the bedrock of the industrial revolution in many developed countries like Britain and Japan. While extremely labour-intensive, textile and clothing production is not particularly capital-intensive, and is often regarded as the first stepping stone out of an agrarian society. In recent times, when many developing countries attempted to produce textiles and clothing products for the same over-supplied world market, they found that this particular sector had already been kept outside the purview of the GATT system.<sup>32</sup> Liberalising this trade sector had been the demand of many developing countries in the GATT for almost four decades. The outcome of the negotiations on this subject during the Uruguay Round is the *Agreement on Textiles and Clothing*(ATC), which provides a 10-year transition period (1995-2004) for phasing out the quantitative restrictions(quotas) imposed arbitrarily under the *Multi-Fibre Arrangement*(MFA) by the United States, the European Union, Canada and Norway on imports of textiles and clothing products into their markets.<sup>33</sup> Although the phase-out

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<sup>29</sup> : *Singapore Ministerial Declaration*, WTO Document(WT/MIN/1996/DEC), dated 18 December 1996, para.10, p.3.

<sup>30</sup> : Ramakrishna Hegde: *WTO Issues and India's Concerns*(Speech at the Second Ministerial Conference of the WTO in Geneva, 18-20 May 1998), India and WTO, Vol.1, 1999, No.2, p.3.

<sup>31</sup> : See Asoke Mukerji: *Developing Countries and the WTO---Issues of Implementation*, Journal of World Trade, Vol.34, 2000, No.6, p.39.

<sup>32</sup> : Voluntary export restraints in this sector had been introduced at the end of the Second World War by the United States and the United Kingdom. In 1959, the United States introduced the concept of "market disruption" into the GATT examination of trade in textiles and clothing sector, in an attempt to provide a conceptual justification for import restrictions of these products. In 1961, the United States proposed a conference among cotton textiles producers, which led to the conclusion of a Short-Term Cotton Arrangement(STA), effectively marking the beginning of a long period during which textiles and clothing trade would be treated as a "special case" for the GATT. The STA was followed in 1962 by the Long-Term Arrangement(LTA), which was replaced in 1974 by the Multi-fibre Arrangement(MFA), which was in force until 31 December 1994. Throughout this entire period, international trade in cotton products, later extending to wool and man-made fibres, and in 1986 to practically every fibre in existence, was kept out of the GATT's purview, and trade was restricted arbitrarily by import restrictions in the form of quotas which were negotiated and implemented on a bilateral basis. The consequence of this bilateral action was that the cornerstone of trade liberalisation, the MFN treatment, was completely ignored. Id, pp.41-42.

<sup>33</sup> : Article 1(1) of the ATC states: "This Agreement sets out provisions to be applied by Members during a transition period for the integration of the textiles and clothing sector into GATT 1994." Article 2(6) of the

mechanism gives developing countries some assurance that this particular sector will be completely integrated into GATT 1994 from 1 January 2005, it is still disappointing to observe that developed countries, in the initial stages, opened their markets only to the products which were not commercially significant.<sup>34</sup> As regards those products which have already been integrated into GATT 1994, developing countries will still possibly meet the barriers raised by developed countries by invoking Article XIX of GATT 1994 (with the title *Emergency Action on Imports of Particular Products*), *Anti-Dumping Agreement*, and *Agreement on Safeguards* despite the fact that the use of these measures may become more politically costly. Therefore, the disadvantageous status of developing countries in the textiles and clothing sector has not been changed fundamentally merely because of the implementation of the ATC.

The Uruguay Round negotiations resulted in the *Agreement on Agriculture* (AOA), which is to be implemented over a six-year period beginning from 1995 (extended to a 10-year period for developing countries).<sup>35</sup> In the AOA, five broad areas were negotiated into the text of the agreement to address the concerns of developing countries. These negotiated areas are market access, food security (with specific reference to net food importing countries), domestic support commitment, export subsidy commitment,

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ATC states: "On the date of entry into force of the *WTO Agreement*, each Member shall integrate into GATT 1994 products which accounted for not less than 16 per cent of the total volume of the Member's 1990 imports of the products in the Annex, in terms of HS lines or categories." Article 2(8) states: "The remaining products... shall be integrated ... in three stages, as follows: (a) on the first day of the 37th month that the *WTO Agreement* is in effect, products which accounted for not less than 17 per cent of the total volume of the Member's 1990 imports of the products in the Annex; (b) on the first day of the 85th month that the *WTO Agreement* is in effect, products which accounted for not less than 18 per cent of the total volume of the Member's 1990 imports of the products in the Annex; (c) on the first day of the 121st month that the *WTO Agreement* is in effect, the textiles and clothing sector shall stand integrated into GATT 1994, all restrictions under this Agreement having been eliminated." See supra note 4.

<sup>34</sup> : The WTO review of the implementation of the ATC, which was conducted in 1997-98, expressed the concern of some developing countries on this issue: "... products selected for integration were concentrated in less valued-added products such as tops, yarns and fabrics, with only small shares of make-up textile products and clothing; furthermore, the shares of integrated products were substantially lower in terms of value of trade than in volume of trade while more of the integrated trade was being accounted for by imports from developed countries than from developing countries... with over 96 percent of restricted trade remaining to be integrated even after seven years of implementation, there would be no benefits for developing countries." See *Major Review of the Implementation of the Agreement on Textiles and Clothing in the First Stage of the Integration Process*, WTO Document G/C/W/105, dated 4 February 1998, para.10, p.3. This concern was shared by the WTO's collective membership, which stated: "... the integration programme of the major importing Members during the first stage, and as announced for the second stage, included only a small number of products which had actually been under quota restrictions, therefore, leaving a large number of products for which quota restrictions would need to be eliminated during the remainder of the transition period." Id, para.13, p.4.

<sup>35</sup> : Although the original GATT 1947 applied to the agriculture sector, it had significant loopholes. For example, it allowed countries to subsidise exports and use import quotas. The use of export subsidies, in particular, caused serious distortions of international trade. A major impediment to liberalising agriculture trade was the exemptions built into the GATT by the United States, allowing it to take measures to stabilise farm incomes, enhance export sales and shield US farmers from foreign competition. In 1955, the United States obtained a waiver from the GATT obligations for its farm programmes. This was compounded by the newly formed European Economic Community's Common Agriculture Policy (CAP), which was built on a foundation of guaranteed prices defended from import competition by a system of variable levies, as well as by a provision for export restitution to dispose of the inevitable bumper crops that guaranteed prices would stimulate. See Asoke Mukerji, supra note 31, p.45.

notification requirements and technical assistance. As in the sector of textiles and clothing, the implementation of these commitments has not been satisfactory.<sup>36</sup> According to Article 20 of the AOA,<sup>37</sup> the WTO started the negotiations to review the implementation of the AOA on 27 March 2001. Altogether 125 WTO Members (counting the EU as 16) out of a total of 140 submitted 44 negotiating proposals and three technical submissions in the first phase of the negotiations.<sup>38</sup> This reflected the general concerns of the WTO Members, especially the developing country Members, to the ineffectuality of the AOA, and their expectations to reform the present agreement. On 26 April 2001, the WTO Secretariat circulated a detailed study on the post-Uruguay Round market access conditions in three areas: industrial tariffs, agriculture and service,<sup>39</sup> which acknowledged: "As required by the Uruguay Round *Agreement on Agriculture*, all agricultural tariffs are bound, but in many cases these bindings are at very high rates and offer limited market access opportunities", while "the products of greatest export interest to the least-developed countries---many agricultural products together with clothing and other labour-intensive manufactures---are among the most heavily protected in the markets of their current and potential trading partners". At the outset of the new round of agriculture negotiations, the impenetrability of the language of the initial agreement, and the lack of substantial reforms of agricultural policies in some developed country Members are serious disadvantages. Without political consensus on such issues as the most desirable size of farming units, the role of food security and environment protection, the influence of multinational agribusiness, and the principal intended outcomes of any further reform, the next agreement on agriculture is likely to remain as obscure in its general aims and effects as the first one.

In the years leading up to the Uruguay Round negotiations, the developed countries, those capable of making huge investment in industrial innovations, had constantly urged the newly industrialised countries to cease their practice of mass copying of products that had cost dearly to develop. The reluctance of those countries to continue providing market access to the newly industrialised countries in the event of a continued failure to honour intellectual property rights is understandable. The traditional, uni-focus intellectual property conventions could not possibly persuade the countries of the developing world to alter their domestic regimes, since these conventions had no broader economic leverage over the offending parties.<sup>40</sup> Along with the new dispute settlement

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<sup>36</sup> : For example, although the preamble to the AOA specifies that "developed country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members", the fact remains that the post-Uruguay Round base tariffs of a number of sensitive commodities in many developed countries are higher than the actual tariff equivalents of all border measures which existed in 1986-1988. Id, pp.46-47.

<sup>37</sup> : Which states: "Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period..." See supra note 4.

<sup>38</sup> : See *WTO Focus Newsletter*, 2001, No.52, p.2.

<sup>39</sup> : See WTO Special Studies(6): *Market Access: Unfinished Business---Post-Uruguay Round Inventory and Issues*, pp.3-4. cf. [http://www.wto.org/english/res\\_e/booksp\\_e/maccess1\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/maccess1_e.pdf)

<sup>40</sup> : Administered by the World Intellectual Property Organisation(WIPO) under the auspices of the United Nations, the principal intellectual property conventions are the *Berne Convention for the Protection of Literary and Artistic Works*(1971); the *Paris Convention for the Protection of Industrial Property*(1967); and the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*(Rome Convention)(1961).

mechanism, and the “buying in, buying all” acceptance requirement for prospective WTO Members, for the first time, there is a chance that even the most recalcitrant intellectual property violators could be made to provide legal protection for non-national rights holders. But from the point of view of the developing world, paying the full cost of industrial innovation to wealthy corporations is unthinkable, if only because under the existing situation, copied products could be delivered on a mass scale to populations generally unable to pay the price of intellectual property rights. The standards of protection, set out during the Uruguay Round negotiations, “are at a level comparable to those in the major industrial countries today”.<sup>41</sup> The benefits guaranteed by the transitional provisions of the *TRIPS Agreement*<sup>42</sup> for developing countries have already been offset by the high standards of protection which have become the WTO norm. Many developing countries, by distancing themselves from the debate in the WTO on these standards of protection, have unwittingly endorsed this approach. This will have major repercussions for them after the end of the transition period, when their intellectual property rights protection regimes will be required to meet the same criteria as those of developed countries which already have a mature market and a complete intellectual property rights protection regime. The consequence of this over-emphasis on the protection of intellectual property rights has diverted peoples’ attention away from the spirit of both the preamble and substantive provisions of the *TRIPS Agreement* which deal with the issues of relevance to the developing countries.<sup>43</sup> During the first five years of operation of the WTO, attempts by developing countries to seek access to technology on realistic terms have been substantively obstructed by the stance of developed countries,<sup>44</sup> creating a new form of protectionism to the international economic order.<sup>45</sup>

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<sup>41</sup> : Adrian Otten and Hannu Wager: *Compliance with TRIPS: The Emerging World View*, Vanderbilt Journal of Transitional Law, Vol.29, 1996, p.396.

<sup>42</sup> : According to Article 65(*Transitional Arrangements*), except developing countries, all other WTO Member are obliged to apply the *TRIPS Agreement* one year after the creation of the WTO(beginning from 1 January 1996). Developing countries and those with a transitional economy are entitled to delay for a further period of four years the date of application(beginning from 1 January 2000). A developing country which previously did not provide product patent protection in any field of technology may be given an additional transition period of five years to provide protection in this field(beginning from 1 January 2005). See supra note 4.

<sup>43</sup> : For example, not much attention has been paid to the preamble of the *TRIPS Agreement* which states that the WTO should “ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade”. Id.

<sup>44</sup> : For example, proposals to examine the compulsory licensing provision(Article 31) and the term of protection(Article 33) of the *TRIPS Agreement* to ensure the transfer of environmentally-sound products and technologies to developing countries were rejected by developed countries in the CTE. See *Report of the Committee on Trade and Environment 1996*, WTO Document WT/CTE/W/40, 7 November 1996, paras.137-138, pp.31-32.

<sup>45</sup> : Two examples can be used to illustrate the favour to the developed countries and the disfavour to the developing and least-developed countries in the *TRIPS Agreement*. One is Article 23. This article is used to regulate the protection for geographical indications for wines and spirits, of which the developed countries have much advantage, while there are no similar provisions to protect those manufactures of relevance to the developing countries. The other example is that although Article 65(*Transitional Arrangements*) provides a five-year transition period for developing countries to apply the *TRIPS Agreement*, pharmaceutical and agricultural chemical products, however, are excluded from this transition period according to Article 69(8). This has already brought much impact on the development of many developing countries. This is also the main reason for the dispute raised by the United States against India’s patent protection regime for pharmaceuticals and agricultural chemical products. See *India—Patent Protection for*



The integration of services into the international trade sphere is another negative impact upon the economy of most developing countries. The *General Agreement on Trade in Services* (GATS) regulates the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.<sup>46</sup> The GATS is remarkable for the fact that it marks the first step in making it difficult(perhaps impossible) for the WTO Members to refuse rights of participation in their domestic economies, in almost any capacity, to non-nationals. Along with the GATS, those separate protocols on such heavily regulated sub-sectors as financial services, telecoms and transport indicate that for the first time in economic history, not only the nationality of goods, but also the nationality of economic structures, may be about to crumble. Although the GATS guaranteed a “progressive liberalisation” of markets to the developing countries, the backwardness of basic facilities and low level of education have made it difficult for most developing countries to compete with the developed countries in most service areas in a feasible future. Even in those labour-intensive areas like construction and tourism, in which some developing countries do have competitive advantages, the reality is that those developing countries still cannot earn as much as expected either because of the barriers raised by developed countries under the grounds of licensing or certification of the service suppliers, or because of the low efficiency of those developing countries.<sup>47</sup>

In the light of the huge gap existing between developed and developing countries, it is necessary to make the rule-based international economic system more responsive to the challenges facing developing countries, especially with regard to the operation of their economic and legal infrastructures which have to meet the twin demands of economic liberalisation and socio-economic development. Although the special and preferential

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*Pharmaceutical and Agricultural Chemical Products*, Report of the Appellate Body(distributed on 19 December 1997), WT/DS50/AB/R .

<sup>46</sup> : Article I:2 of the GATS. See supra note 4. The GATS almost covers all modes of internationally traded services which include business services(e.g. professional services, computer and related services, research and development services, real estate services, rental/leasing services without operators, advertising and other miscellaneous services); communication services(e.g. courier services, postal services, telecommunication services, audio-visual services); construction and related engineering services, distribution services; educational services; environmental services; financial services(e.g. insurance services, banking and other financial services); health and related social services; tourism and travel-related services; recreational, cultural and sporting services(e.g. entertainment services, news agency services, libraries, archives, museums and other cultural activities, sporting and other recreational services); and transport services(e.g. maritime transport services, internal waterways services, air transport services, space transport services, rail transport services, road transport services, pipeline transport services, and services auxiliary to all modes of transport). See Asoke Mukerji, supra note 31, p.58.

<sup>47</sup> : World Tourism Organisation statistics indicate that arrivals by air account for more than 90% of total arrivals in a significant majority of developing countries. Since many of these countries are far distant from the rich markets which provide their consumers, their export revenues are diminished by the high air-fares caused by low air traffic density and by protectionist aviation policies, which, according to the World Travel and Tourism Council, severely constrain the development of tourism. Protectionism in the air transport sector, at the expense of hotels and other tourist activities whose net revenues are likely to be far greater than those of national airlines, may be a very expensive strategy. See WTO Special Studies(6), supra note 39, pp.131-132.

treatment for the developing countries embedded in the WTO rules has received wide recognition from WTO Members, the rationale behind these rules has rarely been studied in detail. A careful study of this issue will help us to understand the current world trade rules in a more co-ordinated way.

### 2.1.3. The rationale for the special and preferential rules

International trade exerts a critical influence on the economic development of any country, be it a developed country, a transitional economy country, a developing country, or a least-developed country. Yet, the role of international trade in economic development is far from settled and uncontroversial. While international trade is widely viewed as an “engine of growth”, developing countries disagree profoundly over the role of international trade in the process of their economic development. The focal point of the debate is whether developing countries, as their economy is lagged far behind those of developed countries, should be bound by the same trade rules as those applicable to the developed countries or should be treated differently during their integration into the world economy. This was also a major issue of the Uruguay Round of multilateral trade negotiations. The justifications for those special and differential rules resulting from the Uruguay Round negotiations are numerous. From an economic perspective, any universal legal system must address the particular concerns of developing countries. The actual relative economic positions of developed and developing countries must be acknowledged and somehow reconciled.

The traditional neo-classical theory of international trade regards trade as a means of promoting (both productive and allocative) efficiency, equity, stability and growth on a world-wide scale. An interdependent world economy based on free trade, specialisation, and an international division of labour facilitates domestic development. Flows of goods, capital, and technology within and across national borders should work to the economic benefits of all countries, exploiting their comparative advantages.<sup>48</sup> While free trade may be theoretically attractive, the assumptions upon which this theory is based do not necessarily apply to the contemporary realities of the global economy and the majority of developing countries. In the real world, there exist imperfect competition, unequal trade, and differential human resource and technological growth. Accordingly, the question becomes one of whether international trade is to be a force of equality or inequality.

In contrast to the traditional view of international trade, some modern scholars argue that a liberal capitalist world economy tends to preserve or actually increase inequalities between developed and developing countries.<sup>49</sup> Whereas trade was indeed an engine of growth in the nineteenth century, it cannot continue to perform this role properly today because of the combined effects of free trade and the economic, sociological, and demographic conditions which are prevalent among many developing countries. These conditions include the combination of overpopulation and subsistence agriculture, rising expectations causing a low propensity to save, excessive dependence on unstable

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<sup>48</sup> : Adam Smith, in *The Wealth of Nations*, argued that the case for gains from the specialisation in domestic economic activities applied equally to specialisation in international trade: “What is prudence in the conduct of every private family can scarcely be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we can make, better buy it from them with some part of the produce of our industry.” Adam Smith: *The Wealth of Nations*, New York: Modern Library Edition, 1937, p.424. Smith’s theory marks the advent of neo-classical theory of international trade.

<sup>49</sup> : See Ian Roxborough: *Theories of Underdevelopment*, London: Macmillan(1979), chapter three.

commodity exports, and the consequential impact of long-time feudal elite leadership.<sup>50</sup> These misfortunes trap those developing countries in a self-perpetuating state of underdevelopment equilibrium from which they cannot escape without outside assistance.<sup>51</sup>

Although the globalists argue that flows of trade, investment, and technology diffuse economic development and reduce international inequalities, the real situation seems going in an opposite way in many developing countries. International market imperfections increase inequalities among developed and developing countries as the developed countries tend to benefit disproportionately from international trade.<sup>52</sup> While it may be true that the “developing countries” of the nineteenth century did enjoy the so-called advantages of backwardness that enabled them to learn from the experience of the more advanced economies, many of the twenty-first-century developing countries are, however, said to face almost insurmountable obstacles before they develop their national economy: the widening technological gap, their long experiences of marginalisation in the world economy, the lack of social discipline, conservative social structures, inherited population problems, low education level, harassment of indebtedness, and harsh climatic and geographic conditions. These developing countries are thus trapped in a vicious cycle of poverty from which escape is nearly impossible, and free trade may only make their situations become worse. As Ragnar Nurkse put it: “a country is poor because it is poor” whereas “growth breeds growth”.<sup>53</sup>

In order to expose the causes of these social injustices, some scholars point out that the world economy is composed of a core or centre of highly developed countries and a large underdeveloped periphery.<sup>54</sup> Technical progress that leads to increasing productivity and economic development is the driving force in this system, but technical advance has different consequences for the economic centre and the economic periphery due to their different economic structures and the international division of labour inherited from the past.<sup>55</sup> The heart of their argument is that the nature of technical

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<sup>50</sup> : The history of the twentieth-century China can mirror these social upheavals of a developing country. The 1911 bourgeois revolution ended the feudal elite leadership in China. After that, China was involved in the long-time civil war and the World War II. After 1949 when the Communist Party overthrew the Kuomintang government, China did not concentrate its efforts on the economic development until 1978 when the Open Door Policy was enacted.

<sup>51</sup> : See Gunnar Myrdal: *Economic Theory and Underdeveloped Regions*, New York: Harper and Row(1971).

<sup>52</sup> : According to Alice Alexandra Kipel, apart from those East Asian new industrialised countries, which account for more than two-thirds of the manufactured exports from developing countries, most developing countries export primary products as their main source of foreign revenues, which places them at a disadvantage relative to developed countries. See Alice Alexandra Kipel: *Special and Differential Treatment for Developing Countries*(in *The World Trade Organisation--The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, edited by Terence P. Stewart), American Bar Association(1996), p.618.

<sup>53</sup> : Ragnar Nurkse: *Problems of Capital Formation in Underdeveloped Countries*, New York: Blackwell (1953), p.4.

<sup>54</sup> : See Raul Prebisch: *Commercial Policy in the Underdeveloped Countries*, American Economic Review, No.49(May), 1959, pp.251-273.

<sup>55</sup> : Some scholars consider that even though the former European colonies have achieved political independence, they either have not developed or have at least remained economically subordinate to the more advanced countries. Rather than progressing into higher stages of economic development, some of these countries have in fact increased their reliance on advanced economies for food, capital, and modern

advance, cyclical price movements, and differences in demand for manufactured goods and primary products cause a secular deterioration for developing countries as they can only rely on their exportation of primary products for the importation of manufactured goods from developed countries. In the economic centre, technical progress is said to arise from the spontaneous operations of the economy and to diffuse throughout the whole economy so that employment displaced by increasing efficiency can be absorbed by investment in other expanding industrial sectors. Without large-scale unemployment and with the pressures of powerful trade unions, there is an increase in real wages. Moreover, monopolistic corporations can maintain the price level despite the increasing of productivity and the decreasing cost of production. In the non-industrial periphery, however, technical progress is introduced from the outside and is restricted primarily to the production of commodities and raw materials that are exported to the economic centre. Inflexible social structures and immobile factors of production make adaptation to price changes impossible. Increased productivity in the primary sector, a shortage of capital due to a low rate savings, and an elite consumption pattern imitative of advanced countries all combine to increase the level of national unemployment. With surplus labour in primary occupations and the absence of strong trade unions, the real wage in the periphery economy then declines, transferring the fruits of technical advance in the periphery economy to the economic centre via depressed prices for commodity exports.<sup>56</sup>

Based on this analysis, we can find that the terms of trade between developed countries(the core economy) and most developing countries(the periphery economy) tend to deteriorate constantly to the advantage of the former and to the disadvantage of the latter. As a consequence of this imbalance of the global economic structures, developing countries are unable to reverse this tragic situation, if they do not change the pattern of exportation. They will export ever more primary commodities in order to import the manufactured goods they need. Under these circumstances, even though the developing countries might gain absolutely from international trade, they would lose in relative terms.<sup>57</sup> As Arthur Lewis has cogently argued, the fact that the terms of trade for many developing countries are unfavourable is that they are unable to develop their agriculture. The combination of rapid population growth(which creates an unlimited supply of labour) and low productivity in food grains causes export prices and real wages in many

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technology. See Simon Kuznets: *Toward a Theory of Economic Growth*, New York: W. W. Norton(1968), p.2, note 2.

<sup>56</sup> : See Robert Gilpin, *supra* note 1, pp.275-276.

<sup>57</sup> : According to Kipel, due to the low income elasticity of demand for primary products, the export performance of developing countries is poor compared with the export performance of developed countries. Income elasticity of demand can be defined as the relation of the quantity demanded of a commodity to the changes in consumer income. It is expressed by the ratio of change in quantity demanded over the changes in consumer income. Relative income inelasticity of demand entails that the percentage increase in quantity demanded increases less than the percentage increase in national income. In the case of primary products, the world demand curve shows that the income elasticity of demand is in general relatively low. By contrast, in the case of manufactured goods, the income elasticity of demand is relatively high. Thus, as income rises in the developed countries, their demand for primary products from the developing countries rises less than proportionately(less than 1 to 1), but their demand for manufactured goods, the production of which is dominated by the developed countries, rises more than proportionately (greater than 1 to 1). See Alice Alexandra Kipel, *supra* note 52, pp.618-619.

developing countries to lag behind those of developed countries.<sup>58</sup> Although it is true that there are some developed countries, like Australia, New Zealand, Denmark and even the United States, which are also major exporters of agricultural products, the point here is that many developing countries, unlike the early modern Europe, are unable to improve their industrial productivity based on a prior rapid development of agriculture.<sup>59</sup> Low efficiency in agricultural sector and lack of innovations in industrial sector will place many developing countries in an even weaker position in the current integration of world economy.

The question of whether developing countries are better off to be integrated into or isolated from the global world cannot be answered in the abstract. In either scenario, international trading rules (and adherence thereto or exemptions therefrom) have a substantive economic impact. Furthermore, neither policy can realistically be pursued without acknowledging and somehow remedying the disparities between developed and developing countries. Indeed, special and differential treatment for developing countries can be utilised to promote exports and/or stimulate domestic production of manufactured goods.

The rationale of the special and preferential treatment accorded to developing countries is based on the recognition that “there is a wide gap between standards of living in less-developed countries and in other countries”.<sup>60</sup> While we focus our attention on narrowing the gap of living standards between developed and developing countries, we cannot neglect another important fact that the gap of living standards among developing countries themselves is widening. Being aware of this, some developing countries may ask: “are these special and preferential rules universal or differential?”

#### **2.1.4. Special and preferential rules: universal or differential?**

The *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (hereinafter as *Final Act*) contains many provisions which accord special and differential treatment to developing and least-developed country Members.<sup>61</sup> These provisions are found chiefly in the *WTO Agreement* (Preamble, Article XI), in Part IV of GATT 1947 (which has been incorporated into GATT 1994), in selected provisions of the multilateral agreements annexed to the *WTO Agreement*,<sup>62</sup> in the ministerial *Decision on*

<sup>58</sup> : See Arthur Lewis: *The Evolution of the International Economic Order*, Princeton University Press (1978).

<sup>59</sup> : The current movement of urbanisation in China indicates that the Chinese government has realised that the next stage of modernisation should include the sector of agriculture. Among the 1.3 billion of the population, about four-fifths live in rural areas. The autarkic mode of agricultural production has restricted the further development of the Chinese economy. After entering the WTO, China will face further pressure of low-price but high-quality agricultural products from abroad. A prior development of agriculture will accumulate more capital and provide surplus labour for a higher level of modernisation.

<sup>60</sup> : Article XXXVI:1(c) of GATT 1994. See supra note 4.

<sup>61</sup> : Paragraph 1 of the *Final Act* states: “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 Organisation (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.” (Emphasis original). See supra note 4.

<sup>62</sup> : For example, *Agreement on Agriculture* (Preamble, Articles 15, 16); *Agreement on the Application of Sanitary and Phytosanitary Measures* (Preamble, Article 10); *Agreement on Textiles and Clothing*

*Measures in Favour of Least-developed Countries*, and in the ministerial *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-developed and Net Food-Importing Developing Countries*. The WTO Members recognise the special development, financial and trade needs of developing and least-developed countries in the implementation of the obligations attendant their accessions to the WTO. These special needs arise on both a national and international level. Thus, where the *WTO Agreement* and its annexed agreements impose obligations on the Member governments, either to take affirmative action or abstain from a certain conduct, developing and least-developed country Members may be given more time to fulfil their obligations. Selected exemptions from obligations may also be available to developing and least-developed country Members. Furthermore, to address the special needs of developing countries, particularly the least-developed countries, some of the WTO agreements require developed country Members to provide for developing country Members the necessary technical assistance.

In situations where these terms are defined, a country's international status as "developed", "developing", or "least-developed" is determined primarily with reference to its Gross National Income(GNI) per capita. M. Bertrand used GNI per capita 8000 US dollars per annum as the dividing line for developing and developed countries.<sup>63</sup> However, while the *WTO Agreement*, its annexed agreements and the related documents make reference to "developing country Members", nowhere do they generally define the term "developing country", nor do they specify any numerical criteria. Hence, in the case of accession to the WTO(as it was in the GATT), designation of a country as "developing" occurs somewhat on an *ad hoc* basis, mostly through self-selection.<sup>64</sup> In the light of this situation, developing countries in the WTO can possibly be referred either to countries like Singapore, Korea, or to countries like South Africa, Kenya. In contrast, as for the term "least-developed", the *WTO Agreement* provides a benchmark---the Agreement refers to "least-developed" countries as those recognised as such by the United Nations.<sup>65</sup>

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(Preamble, Article 6[6]); *Agreement on Technical Barriers to Trade*(Preamble, Article 12); *Agreement on Trade-Related Investment Measures*(Preamble, Article 4); *Anti-Dumping Agreement*(Article 15); *Agreement on Customs Valuation*(Article 20); *Agreement on Preshipment Inspection*(Preamble); *Agreement on Import Licensing Procedures*(Article 1[2]); *Agreement on Subsidies and Countervailing Measures*(Articles 27, 29); *Agreement on Safeguards*(Article 9); *General Agreement on Trade in Services*(Preamble, Article IV); *Agreement on Trade-Related Aspects of Intellectual Property Rights*(Preamble, Article 66); *Dispute Settlement Understanding* (Article 24), etc. See supra note 4.

<sup>63</sup> : See M. Bertrand: *Refaire L'Onu: un programme pour la paix*, Geneva(1986), p.79.

<sup>64</sup> : There are no WTO definitions of "developed" and "developing" countries. A Member country may decide itself as a "developing country" by self-selection. However, this does not automatically provide rights under preference schemes such as Generalised System of Preferences(GSP). In addition, other Members can challenge this selection, and this has sometimes happened in specific areas such as intellectual property. This challenge can then lead to negotiations to clarify the position. For countries which negotiated to join the WTO after 1995, their status depends on the terms agreed in the accession negotiations. cf. [http://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm)

<sup>65</sup> : Article XI of the *WTO Agreement* states: "The least-developed countries recognised as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities." See supra note 4. There are currently 48 least-developed countries on the UN list, 30 of which to date have become WTO Members. These countries are: Angola, Bangladesh, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Congo, Democratic Republic of the, Djibouti, Gambia, Guinea,

According to Alice Alexandra Kipel, the vagueness regarding what constitutes a developing country can be attributed to two factors: (a) lack of consensus as to a definitive standard, and (b) disagreement over the goals sought to be achieved through special treatment for developing countries.<sup>66</sup> The lack of consensus on the definition by over 100 countries, which are at various levels of social and economic development and, therefore, have differing perspectives on this issue, is understandable and merits no further analysis.<sup>67</sup> The interplay between a flexible definition and the purposes to be served by special treatment for developing countries is more complex. Indeed, the purposes and the concerns addressed are different depending on whether the point of view is that of a developed country or a developing country.

Kipel in her article seems to favour a vague definition for developing countries: "a subjective definition likely inures to the benefit of both developed countries and developing countries. If a country is willing to describe itself as developing country and articulates a need for special assistance, there presumably is reason to provide special treatment to enable that country to assume the obligations of the Final Act, thereby helping to ensure that this developing country offers market access and is not a disruptive presence in the international trade arena. Moreover, without a bright-line test, putative developing countries can proffer a variety of justifications in support of their need for special treatment. A rigid definition of the term 'developing country', on the other hand, would preclude such a creative approach, thus preventing countries from obtaining the special treatment and assistance which they believe necessary. As such, a country might effectively be blocked from meaningful participation in the world trading system which the Final Act seeks to regulate".<sup>68</sup>

There might be some reasoning in Kipel's argument, especially for a young international institution like the WTO. Since the WTO Members have resolved to "develop an integrated, more viable and durable multilateral trading system encompassing the *General Agreement on Tariffs and Trade*, the results of past trade liberalisation efforts, and all of the results of the Uruguay Round of multilateral trade negotiations",<sup>69</sup> a practical way to fulfil this purpose is to attract the WTO Members in a flexible manner. However, the differences among developing countries themselves, in reality, are so huge that a set of vague standards for their definition could only make the special treatment become impracticable and contradictory. According to the statistics distributed by the World Bank, the world average level of Gross National Income(GNI) per capita in 1999 is 5,020 US dollars, with the average level of high-income countries at 26,440 US dollars, middle-income(including upper-middle-income and lower-middle-income) countries at 1,240 US dollars, and low-income countries only at 420 US dollars. These data profiles also reflect a similar contrast in the areas of technology, infrastructure, trade and finance.<sup>70</sup> In the World Bank documents, those low-income and

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Guinea Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Niger, Rwanda, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, Zambia, Vanuatu.

cf. [http://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm)

<sup>66</sup> : Alice Alexandra Kipel, see supra note 52, p.624.

<sup>67</sup> : See GATT Analytical Index: *Guide to GATT Law and Practice*, GATT BISD 13th Supplement(1965), pp.75-76(describing the lack of consensus as to how to identify developing countries).

<sup>68</sup> : Alice Alexandra Kipel, see supra note 52, p.625.

<sup>69</sup> : See the Preamble of the *WTO Agreement*. See supra note 4.

<sup>70</sup> : cf. <http://www.worldbank.org/data/databytopic/class1.htm>

middle-income economies are sometimes referred to as developing economies, but it is not intended to imply that all economies in this group are experiencing similar development or that other economies have reached a preferred or final stage of development. The reference used within the World Bank is just for the sake of convenience. The WTO has no similar criteria to classify its Members. Consequently, some of the WTO Members which label themselves as developing countries are grouped either as high-income countries or upper-middle-income countries by the World Bank.<sup>71</sup> Under such a circumstance, if the WTO does wish, as the *WTO Agreement* proclaims, to raise the living standard of developing countries by means of international trade under the auspices of those special treatment provisions, the definition of developing countries should be clearly-cut, otherwise the treatment accorded to developing countries is not special but universal.

Furthermore, just as Kipel herself acknowledged, a subjective definition can lead to friction between those countries seeking preferential treatment and the developed countries with whom they have substantial trading relations. For example, much debate and publicity surrounded the application of China for its WTO membership. Among the issues of contention between China and the United States was the question of whether China should enter the WTO as a developing country (the result desired by China) or as a developed country, thereby assuming the full obligations of a WTO Member (the result sought by the United States). China, after two decades of economic reform, has achieved significant progress in its economic development. But with a huge number of population, the gross national income per capita in China is still low compared with that of those developed country Members and some other developing country Members in the WTO.<sup>72</sup> The basic facilities, particularly those in the inland China, are quite backward. The education level of the population is still relatively low. Under these circumstances, it is understandable that China insisted on its developing country status in the WTO. From 1986, first for the resumption of the contracting party status of the GATT, then for the entry of the WTO,<sup>73</sup> China negotiated with all the GATT contracting parties/WTO

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<sup>71</sup> : According to the World Bank, 64 countries are grouped as low-income economies (all the 29 least-developed WTO Member countries, except Djibouti and Vanuatu which are grouped as lower-middle-income economies, are included in this group), among which are India and Kenya, 55 countries are grouped as lower-middle-income economies, among which are China and Morocco, 38 countries are grouped as upper-middle-income economies, among which are Korea and Saudi Arabia, 49 countries are grouped as high-income economies, among which are Kuwait and Qatar. Ironically, all the above-mentioned countries, including India, Kenya, Djibouti, Vanuatu, China, Morocco, Korea, Saudi Arabia, Kuwait, Qatar, are defined as developing country Members in the WTO.

cf. <http://www.worldbank.org/data/databytopic/class1.htm>

and [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)

<sup>72</sup> : In 2002, the gross national income per capita in China is just a little over 1000 US dollars. See *Chinese Economic News of 2002*, <http://www.people.com.cn/GB/jinji/31/179> See also *US-China GATT Accession Talks Described as Making Progress*, 11 International Trade Report, No.23, 1994, p.899.

<sup>73</sup> : China is one of the 23 original signatories of GATT 1947. After China's revolution in 1949, the government in Taiwan announced that China would leave the GATT system. Although the government in Beijing never recognised this withdrawal decision, nearly after 40 years later, in 1986, China notified the GATT of its wish to resume its contracting party status in the GATT. Since the negotiations could not be completed before 1995, the year of the establishment of the WTO, China entered the negotiations applying for the WTO membership.



Members which had significant trade relations with China. It is only a bit more than a year ago that the final obstacle in the way of China's entry into the WTO was removed.<sup>74</sup>

Here, one more question which merits noting is that the status of a developing country should not be stationary. Some countries, when they entered the GATT/WTO, were only at the initial stage of their industrialisation process and did need the external help for their fledgling industries. Nevertheless, after these years of development, they are still labelled as "developing countries" even if they have achieved much success and become quite "developed". In order to maximise the benefits of the special and preferential treatment, and to help those developing countries which still lag far behind others, the WTO needs to specify the criteria for a country which wishes to be accorded the special and preferential treatment. At the moment, there are two options available. One is, similar to the practice of the World Bank, to set a statistical standard to regroup the developing country Members and accord different special and preferential treatment to different groups in conformity with their respective development levels. The other option is, similar to the practice of some developed countries in implementing their overseas aid programmes, to adopt a "graduation" system.<sup>75</sup> The countries which have met a certain set criteria will automatically "graduate" from the list of the beneficiary.

The special and preferential provisions are designed to help developing country Members to reduce the risks when they are integrated into the global economy. However, they are not free lunch. While the developing country Members enjoy the special and preferential treatment, they are also required to open their domestic markets to other Members. Furthermore, the special and preferential treatment in most of the WTO agreements is not indefinite.<sup>76</sup> After the terms of special and preferential treatment expire, developing country Members will be required to keep their domestic law and regulations in conformity with the WTO rules and, this will bring about fundamental changes to these countries in the context of their legal systems and social lives. Therefore, it is high time for many developing country Members to consider whether they will evolutionise or revolutionise their own trade policies.

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<sup>74</sup> : On 17 September 2001, the World Trade Organisation successfully concluded negotiations on China's terms of membership of the WTO, paving the way for the text of agreement to be adopted formally at the WTO Ministerial Conference in Doha, Qatar, in November.

cf. [http://www.wto.org/english/news\\_e/pres01\\_e](http://www.wto.org/english/news_e/pres01_e)

<sup>75</sup> : The concept of graduation has entered into the legislation of some developed countries providing special or differential treatment to developing countries. Built into the U.S. Generalised Special Preferences (GSP) Programme, for instance, is a graduation principle. In fact, the United States has graduated governments such as Korea, Singapore from the GSP programme. While formerly designated as GSP beneficiary developing countries, by virtue of their graduation, these countries are now ineligible for the special treatment provided under the U.S. GSP programme. See James V. Feinerman: *Taiwan and the GATT*, Business Law Review, No.39, 1992, pp.47-48 and note 29.

<sup>76</sup> : For example, developing countries are only accorded five years of delay to implement the *Agreement on Trade-Related Aspects of Intellectual Property Rights*. In the *Agreement on Subsidies and Countervailing Measures*, developing countries are permitted to provide subsidies upon export performances for eight years from the date of entry into force of the *WTO Agreement*. See *supra* note 4.

## Section Two Developing Countries and Trade Policy

### 2.2.1. Implementation and adaptation: an evolution or a revolution?

At the moment, there is an increasing debate about the issue of globalisation. Although the merits and demerits of globalisation are outside the sphere of my study here, the impact of this trend on WTO Members is another issue which deserves our attention when we study the relationships of developing countries and their trade policies. Before the World Trade Organisation was created, developing countries had already been participating in the GATT activities, but they were only involved in those issues concerning their interests. The participation of those multilateral trade agreements concluded during the Kennedy Round and Tokyo Round negotiations was optional, and relatively few developing countries accepted these agreements.<sup>77</sup> Thus, in the GATT history, there were few international trade rules which bound developing countries and the reform of their domestic trade policies was almost out of the question.

Then, the newly-established WTO legal system changed all this overnight. Article II:2 of the *WTO Agreement* states clearly that “The agreements and associated legal instruments included in Annexes 1, 2 and 3(hereinafter referred to as ‘Multilateral Trade Agreements’) are integral parts of this Agreement, binding all Members.”<sup>78</sup> This make-up of uniform trade rules means that all WTO Members, no matter whether they are the original ones or new entrants, and no matter whether they are developed countries or developing countries(with a few years of delay to implement the WTO rules), need to keep their national trade policies in conformity with the WTO rules. Perhaps this means almost nothing to many developed country Members since they have already established a mature market and a relatively complete legal system, but this means a lot to most developing country Members because they either have a centralised economy base or lack a complete legal system(including a powerful legislature and an impartial judiciary). Entering the WTO has brought about in these countries many social changes including the legal reform.

Take the example of China which is the largest developing country, entering the WTO looks like a double-edged sword for this country. Both the advantages and disadvantages are easy to observe. Although, before China became a full Member of the WTO, it had already opened its door to the outside for more than two decades, this opening policy had been guided by the China’s domestic laws and regulations, and had been limited only to certain areas.<sup>79</sup> All the foreign trade and investment were subject to Chinese laws and regulations. Now the WTO membership has changed all these practices. While China enjoys the benefits of the multilateral trade system, it also needs to undertake a series of important commitments to further open its domestic market and liberalise its regime in order to better integrate into the world economy, and to offer a

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<sup>77</sup> : The Kennedy and Tokyo Rounds are the sixth and seventh rounds of multilateral trade negotiations. All the previous five rounds of negotiations were only limited to the tariff reductions and did not touch the issue of multilateral trade system. See supra note 3.

<sup>78</sup> : See supra note 4.

<sup>79</sup> : At the initial stage, China mainly used the duty and tax reductions or exemptions to attract foreign investment, and used government subsidies to encourage exports. The Open Door policy was first implemented in the coastal areas, then sprouting into the inner lands. Foreign investment was only limited in the sectors like manufacturing, tourism. The sectors, like agriculture and services, were still insulated from foreign penetration.

more predictable environment for trade and foreign investment in accordance with the WTO rules. In contrast to the practices of twenty years ago, the current opening policy is systematic and universal.

According to the terms of China's accession to the WTO, which were concluded on 17 September 2001, China will provide non-discriminatory treatment to all WTO Members. All foreign individuals and enterprises, including those not investing or registered in China, will be accorded treatment no less favourable than that accorded to the enterprises in China with respect to the right to trade. China will eliminate dual pricing practices as well as differences in treatment accorded to goods produced for sale in China in comparison to those produced for export. The *WTO Agreement* will be implemented by China in an effective and uniform manner by revising the existing domestic laws and enacting new legislation full in compliance with the WTO rules. Within three years of accession, all enterprises in China, no matter whether they are Chinese-based or foreign-based or jointly-funded, will have the right to import and export all sorts of goods with only limited exceptions. China will not maintain or introduce any export subsidies on agricultural products. Meanwhile, the conclusion of the negotiations on 17 September 2001 for market access on goods represents a commitment undertaken by China to gradually eliminate trade barriers and expand market access to goods from foreign countries. China has bound all tariffs for imported goods. After implementing all the commitments made, China's average bound tariff level will decrease to 15% for agricultural products. The range is from 0 to 65%, with the highest rates applied to cereals. China has agreed to limit its subsidies for agricultural production to 8.5% of the value of farm output. For industrial goods, the average bound tariff level will go down to 8.9% with a range from 0 to 47%, with the highest rates applied to photographic film, automobiles and related products. Some tariffs will be eliminated and others reduced mostly by 2004 but in no case later than 2010.<sup>80</sup>

While China may still reserve the right of exclusive State trading for certain products such as cereals, tobacco, fuels and minerals and maintain some restrictions on foreign investment in the areas like transportation and distribution of goods within its domestic market after it acceded to the WTO, many of the restrictions which foreign investors and traders currently meet in China will be eliminated or considerably eased after a three-year phase-out period. In other areas, like the protection of intellectual property rights, China has implemented the *TRIPS Agreement* in full from the date of accession. On the other hand, prohibitions, quantitative restrictions or other measures maintained against imports from China in a manner inconsistent with the WTO rules would be phased out or otherwise dealt with in accordance with mutually agreed terms and timetables specified in an annex to the Protocol of Accession.<sup>81</sup>

In contrast to the limits on foreign investment in certain designated areas under the Open Door Policy, entering the WTO has made it clear that China has been prepared to fully integrate into the global economy. This requires that China should open almost all areas for foreign investment. For example, services, including telecoms, banking and insurance, were highly protected areas before China entered the WTO. But this has been changed a lot because of the GATS obligations. Take the example of telecoms first, upon China's accession, foreign service suppliers will be permitted to establish joint venture

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<sup>80</sup> : cf. [http://www.wto.org/english/news\\_e/pres01\\_e/pr243\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr243_e.htm)

<sup>81</sup> : Id.

enterprises without quantitative restrictions, and provide services in several cities. Foreign investment in the joint venture shall be no more than 25%. Within one year of accession, the areas will be expanded to include services in other cities and foreign investment shall be no more than 35%. Within three years of accession, foreign investment shall be no more than 49%. Within five years of accession, there will be no geographic restrictions. As for banking service, upon China's accession, foreign financial institutions will be permitted to provide services in China without client restrictions for foreign currency business. For local currency business, within two years of accession, foreign financial institutions will be permitted to provide services to Chinese enterprises. Within five years of accession, foreign financial institutions will be permitted to provide services to all Chinese clients. As regards insurance, foreign non-life insurers will be permitted to establish either as a branch or as a joint venture with 51% foreign ownership. Within two years of China's accession, foreign non-life insurers will be permitted to establish as a wholly-owned subsidiary. Upon accession, foreign life insurers will be permitted 50% ownership in a joint venture with the partner of their choice. For large scale commercial risk reinsurance, international maritime, aviation and transport insurance and reinsurance, upon accession, joint ventures with foreign equity share of no more than 50% will be permitted; within three years of China's accession, foreign equity share shall be increased to 51%; within five years of China's accession, wholly foreign-owned subsidiaries will be permitted.<sup>82</sup>

In order to fulfil the foregoing commitments, China is experiencing a series of fundamental changes, bringing the impact on not only its legal system, but almost every aspect of its social life. The imminent task for the Chinese government is to amend or revise the existing laws and regulations which are inconsistent with the WTO agreements,<sup>83</sup> and to enact new laws which are necessary in forming a secure and predictable regime for foreign investors. This is a huge work which needs the joint efforts of the legislative bodies and governments at both national and local levels.<sup>84</sup> Among the recently finished work are the revised Chinese-Foreign Joint Ventures Law; Chinese-Foreign Co-operative Ventures Law; Solely Foreign-Funded Ventures Law; Patent Law; Intellectual Property Rights Law and a few others. Meanwhile the government officials,

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<sup>82</sup> : cf. [http://www.wto.org/english/news\\_e/pres01\\_e/pr243\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr243_e.htm)

<sup>83</sup> : According to the Chinese administration law, laws and regulations are referred to both national laws, regulations and local laws, regulations. The national laws are made by the national legislative body, which is the People's Congress. The national regulations are enacted by the State Council. The local laws are referred to those made by the legislative bodies of the provinces, autonomous regions, municipalities directly under the Central Government and some big cities. The local regulations are referred to those enacted by the local governments at all levels. In the event of a conflict between a law and a regulation, the law shall prevail to the extent of the conflict.

<sup>84</sup> : At the moment, there are more than three hundred national laws and regulations which need to be amended or revised. As regards the local laws and regulations, there is no precise figure of how many of which need to be amended or revised. The Chinese State Council has been examining and clearing up current administrative decrees, and is to enact a number of other rules including those against dumping and subsidy practices. Meanwhile, the Chinese legislative body is busy in reviewing those existing laws which are incompatible with the WTO agreements and enacting new laws such as anti-monopoly law, to complete its legal system. It is expected that it will take about ten years for the Chinese legislative body to finish the revision and amending of all these existent laws and regulations.

cf. [http://www1.chinadaily.com.cn/highlights/docs/2001\\_04\\_30/3110.html](http://www1.chinadaily.com.cn/highlights/docs/2001_04_30/3110.html)

judges<sup>85</sup> and lawyers<sup>86</sup> are busy in acquainting themselves with so many revised or amended domestic laws, regulations and the WTO rules.

On the other hand, more and more ordinary Chinese have felt the approaching of the WTO. Many people are worrying about losing their jobs because of the more severe competition brought by those multi-national corporations. The most heavily hit industries include telecoms, automobiles, banking, securities, insurance and agriculture.<sup>87</sup> In fact, the impact could be felt even before China entered the WTO. In April 2000, China accepted the first shipments of US pork and beef to start implementing the deals negotiated with the United States. China's foodstuff producers and processors will be among the major losers since tariff cuts and free imports will place China's domestic meat, fruits and soybeans in the same line to compete with the higher quality imports. Cheaper meat will threaten Chinese livestock industry. High quality imported fruits will make it more difficult for local farmers to sell their products if they do not increase the varieties and improve the quality. Within a feasible future, many small and medium-size enterprises will be merged or closed because of their low efficiency or the adjustment of economic structures. High rate of unemployment will bring China many social problems. Meanwhile the gap between the rich and the poor in China is widening. The Chinese government should put high priority on the solutions of these problems.

While the fruits of globalisation still await to come for many developing countries, the social changes brought by the globalisation have already occurred. These changes, to some countries, mean an evolution, while to others, they are no less than a revolution. As the accession to the WTO may change not only the legal system of a country, but also the base of a society---its economic structures. This will risk the stability of this country. John F. Kennedy once said that if a free society could not help the many who were poor, it could not save the few who were rich. Inequality, growing inequality, is a scourge of our times. It is a problem both among and within countries.<sup>88</sup> People now are appalled and dismayed when they see the few living in splendour and the many in squalor, with half the world dieting and the other half starving. This is not only about a widening gap, with everyone better off than before. Some are absolutely worse off than they were two

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<sup>85</sup> : According to *Chinadaily*, Beijing will recruit more judges who are specialised in intellectual property rights to handle an increase in intellectual property cases after China entered the WTO.

cf. [http://www1.chinadaily.com.cn/highlights/docs/2001\\_04\\_30/3014.html](http://www1.chinadaily.com.cn/highlights/docs/2001_04_30/3014.html)

<sup>86</sup> : An official from the Chinese Ministry of Justice recently urged legal services to prepare for China's entry into the WTO. This official said that judicial administrative departments and government legal advisers should be prepared to aid national and local policy making, and lawyers should make themselves familiar with the WTO dispute settlement mechanism.

cf. [http://www1.chinadaily.com.cn/highlights/docs/2001\\_04\\_30/3082.html](http://www1.chinadaily.com.cn/highlights/docs/2001_04_30/3082.html)

<sup>87</sup> : China plans to cut import tariffs to 60-80 percent in the next two years and to 90 percent by 2006. The domestic auto industry is seen as one of the hardest hit, with a shake-out looming ahead. Cheaper imports could also hurt foreign auto joint ventures with better product quality. Security is a new industry which emerged in China only about ten years ago. At the moment, fledging domestic brokerages are seeking partnerships with foreign security companies to increase their capital strength and acquire the management. cf. [http://www1.chinadaily.com.cn/news/2001\\_09-16/33547.html](http://www1.chinadaily.com.cn/news/2001_09-16/33547.html) As for the impact upon telecoms, banking, and insurance, see *supra* note 82.

<sup>88</sup> : According to the World Bank, per capita incomes in the richest 30 percent of countries rose from a little over \$10,000 in 1970 to \$20,000 in the mid-1990s. In the middle and lower two-thirds of countries, income did little more than stagnate at far lower levels. See Mike Moore, the Director-General of the WTO, *Challenges for the Global Trading System in the New Millennium*---a speech delivered to the US Council on Foreign Relations on 28 September 1999.

or three decades ago. Now the WTO has taken the responsibility to help those developing and least-developed country Members to get rid of their poverty, but examples like Singapore, Korea, or even China have demonstrated that the momentum for development normally comes from inside, not from outside. It is true that integrating into the global economy has speeded up the development of some developing countries, but this does not mean that the fruits of globalisation have automatically come to them without their experiencing any throes from an old system evolving into a new one. Developing countries need to be aware that it is essential to adapt themselves as soon as possible to the new world trade environment, otherwise, entering the WTO is not to bring fortunes, but to call evils for them. Of course, if the developed countries and the international institutions, particularly the WTO, could provide some technical assistance in this adaptation, the developing countries would reduce the risks which, otherwise, might have occurred, and consequently, minimise the social instabilities during the integration into the world economy.

### 2.2.2. Legal reform and technical assistance

One of the contributions of the WTO to international law is the accomplishment of a set of uniform trade rules in global terms. According to Article 26 of the *Vienna Convention on the Law of Treaties*: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith” (*Pacta sunt servanda*).<sup>89</sup> This general principle is reflected in Article II:2 of the *WTO Agreement*. Entering the WTO means accepting a set of uniform international trade rules. Indeed, the implications of these new trade rules are discernible within each WTO Member. Nevertheless, the impact in many developing country Members is more obvious than in others. As professor Mary E. Footer cogently pointed out: “many developing country Members were ‘sponsored’ into the GATT by the former colonial powers with which they maintained preferential trading relations.”<sup>90</sup> Consequently, they did not go through a full working party examination process that the acceding WTO Members currently face.<sup>91</sup> This resulted in many of them, especially sub-Saharan African countries, becoming GATT contracting parties, without knowing anything of substance about the GATT legal system. Furthermore, since many

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<sup>89</sup> : See *Basic Documents in International Law*, fourth edition, edited by Ian Brownlie, Oxford University Press(1995).

<sup>90</sup> : Article XXVI:5(c) of GATT 1947 states: “If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.” Thus, all that a developing country had to do was to certify that it had “full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement”. This process is no longer open to acceding WTO Members(Note added). See supra note 4.

<sup>91</sup> : Article XII:2 of the *WTO Agreement* states: “Decision on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.” See supra note 4. That means any applying country or separate customs territory must negotiate with at least two-thirds of WTO Members on the terms of accession before it becomes a full member of the WTO. This may take an intolerable long time. The 15-year negotiations for China’s accession into the WTO is just one of these examples(Note added).

of these countries kept themselves away from the Uruguay Round negotiations, neither are they familiar with the WTO rules.”<sup>92</sup>

When the WTO rules became to bind on all Members, these developing countries had not fully been prepared to be integrated into the global economy in the context of both their legal culture and economic structure. This time, however, they had no choice, but to accept. Other Members like China are those traditionally plan-oriented countries. The governments of these countries wish to take the opportunity of accession to the WTO to promote the transition of their economy. But it still awaits to assess as to what extent these countries have achieved this ambition.

Implementation of WTO rules is no easy task for most developing countries and those in transitional economy, given the quantity, scope and breadth of such rules.<sup>93</sup> Various factors may account for this difficulty. Long-time marginalisation in the world economy and unfamiliarity with the international trade rules, vulnerable economic basis and lack of expertise, mismanagement by the domestic leaders and lack of innovation for reform, all these factors may affect the efficient implementation of WTO rules in these countries. Furthermore, the lack of participation of many developing countries in the Uruguay Round negotiations makes them perceive that these trade rules are just imposed from the outside. This is, unfortunately, like a vicious circle that the more developing country Members are unfamiliar with the global trade rules, the more they are resentful to these rules and, consequently, unwilling to integrate into the global community. Professor Julio Faundez attempted to explain this unwillingness in her article *Legal Reform in Developing and Transition Countries: Making Haste Slowly*<sup>94</sup> by linking the social reasons of these countries: “In countries where institutional and political systems are weak, legal reform, indeed any major reform, is difficult and at times almost impossible to achieve. In such countries, it is difficult to distinguish the process of lawmaking from the process of institution building. Some publications on this topic point out that in order to strengthen the institutional framework, the rule of law must be observed. In many respects, this statement begs the question as it presents us with the classic chicken and egg dilemma. How can the rule of law be secured in countries where the institutional framework is weak; and how can the institutional framework be strengthened, if the legality and the rule of law are constantly flouted? This dilemma, though frustrating in practice, should not lead us into despair. It should, however, serve as a reminder that in countries where the institutional framework is weak, lawmaking and institution building are processes that cannot always be easily distinguished. Hence the importance of ensuring that managers of legal reform projects do not take the institutional framework for granted.”(Original note omitted).

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<sup>92</sup> : Mary E. Footer: *The WTO, Developing Countries and Technical Assistance for Trade Law Reform*(in *Governance, Development and Globalisation* edited by Julio Faundez, Mary E. Footer and Joseph J. Norton), Blackstone Press Limited(2000), p.354.

<sup>93</sup> : Moon Soo Chung in his contribution on *Implementation of the Results of the Uruguay Round Agreements: Korea* notes that normally international treaties are self-executing but, “given the scope and magnitude” of the legislative action needed for implementation of the WTO agreements, for the first time in the constitutional history of Korea, a special implementing law was passed by the Assembly, id, pp.365-397, at p.374. Almost exactly the same considerations prevailed in Costa Rica, another “self-executing” country, although political considerations prevailed too. This source of this note is from Mary E. Footer, *The WTO, Developing Countries and Technical Assistance for Trade Law Reform*, id, note 34.

<sup>94</sup> : Which is included in *Governance, Development and Globalisation*, see supra note 92, p.36.

Julio Faundez' remarks indicate that an overall legal reform is necessary for some developing countries during their integration into the global economy, no matter whether the momentum comes from the inside or outside. However, the practical situations demonstrate that legal reform cannot be completed overnight, and technical assistance from the outside is necessary, especially during the initial stage. In terms of technical assistance, the most prominent part, of course, should include those coming from the WTO. The current technical assistance programmes under the auspices of the World Trade Organisation are guided by the fundamental objectives of assisting recipient countries in their understanding and implementation of agreed international trade rules, achieving their fuller participation in the multilateral trading system and ensuring a lasting, structural impact, to enable them to derive the full advantages from the new trading environment.<sup>95</sup> Technical assistance is administered by the WTO Secretariat and reviewed by the Member governments, in accordance with operational directives and implementation modalities established by the Committee on Trade and Development. The technical assistance is principally provided to government officials of beneficiary countries who have specific responsibilities with regard to the implementation of the WTO agreements. Officials can be trained and prepared for tasks ahead, both in Geneva or on a national, regional or sub-regional basis. The main types of assistance, at the moment, include seminars, workshops, technical missions, briefing sessions and technical co-operation in electronic form.<sup>96</sup>

It seems still too early to assess the impact of these types of technical assistance, but the delaying of a new round of multilateral trade negotiations has already sent us some discouraging information that many developing country Members are not as enthusiastic about globalisation as they are expected. The resentment or uneasiness generated by the legal reform in some developing country Members may, to a certain extent, account for this inactivity. The implementation of the WTO rules in some countries is criticised as an instrument designed to impose alien legal regulatory schemes upon them, which, in their view, is to undermine their indigenous legal culture.<sup>97</sup> This criticism comes from all sides

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<sup>95</sup> : Some of the main objectives and principles of the WTO technical assistance programmes are to assist in the process of integration of beneficiaries into the multilateral trading system and contribute to the expansion of their trade; strengthen and enhance institutional and human capacities in the public sector for an appropriate participation in the multilateral trading system(which may include representatives of the private sector); be demand-driven and adapted to recipient needs, in particular with respect to the most appropriate modes of delivery. cf. [http://www.wro.org/english/thewto\\_e/teccop\\_e/ctd14\\_e.htm](http://www.wro.org/english/thewto_e/teccop_e/ctd14_e.htm)

<sup>96</sup> : Seminars are organised at a national, regional or sub-regional level. Some seminars are specialised---focusing on a narrowly defined subject, e.g. anti-dumping, customs valuation, subsidies and countervailing measures, while others cover broader aspects of the multilateral trading system, e.g. the functioning of the WTO and Multilateral Trade Negotiations. Workshops are generally focused on a particular area of trade policy. They cover in addition to theoretical explanations, case studies and simulation exercises. Technical missions are designed to assist countries in drafting and preparing legislation and regulations, and in meeting notification requirements as well as to facilitate the understanding of specific trade policy issues of particular interest to them. Briefing sessions are generally held for Geneva-based delegations and visiting officials to up-date them on recent developments in the work programme carried out by the World Trade Organisation. Technical co-operation in electronic form refers to computer-based interactive tools developed to facilitate the dissemination of information on the multilateral trading system.

cf. [http://www.wto.org/english/thewto\\_e/teccop\\_e/tct1\\_e.htm](http://www.wto.org/english/thewto_e/teccop_e/tct1_e.htm)

<sup>97</sup> : For an interesting proposal on how comparative lawyers can avoid undermining local legal cultures, see Nora V. Demleitner: *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, Arizona State Law Journal, No.31, 1999, p.737.



of the political spectrum. Some focus on the economic components of the current process of legal reform, while others focus on its political components. Thus, while some depict the measures that have led to the liberalisation and deregulation of national economies as evidence of a new form of international domination, others see the current stress on human rights as confirmation that imperialism is alive and well.<sup>98</sup> Whether or not this reaction to the globalisation is correct is not the sphere of my study here. What is relevant for us is to bear this fact in our minds that honest and competent officials as well as responsible citizens in the recipient countries of these technical assistance programmes genuinely believe that externally funded projects either are part of an alien political agenda or pose a serious threat to their legal culture and national identity.

Then we come across such a dilemma. On the one hand, the scope of the World Trade Organisation is expanding quickly, with more than 140 full members and dozens of countries and separate customs territories still waiting for their membership.<sup>99</sup> On the other hand, however, there is an increasing dissatisfaction with the WTO rules among the WTO Members, especially the developing and least-developed country Members. This situation may become more complicated after those influential countries, like China and Russia, enter the WTO. The focus of the dissatisfaction is not on the institution itself, but on the applicability and suitability of its rules. The World Trade Organisation has acknowledged the difficulties of developing country Members in implementing the results of the Uruguay Round negotiations, and taken the responsibility to help them in their integration into the world economy. However, the definition of “developing country” itself is so ambiguous that most countries and separate customs territories selected themselves as “developing countries” when they entered the WTO. Under this circumstance, it is not surprising that the special rules and preferential treatment designed to promote the trading capacity of developing country Members could not be so specific and effective in the practical implementations as they are expected. In order to focus the limited sources on those countries in real need,<sup>100</sup> the WTO needs to adjust its technical assistance programmes and the policies towards developing country Members. At the moment, to regroup the developing country Members and to reset the criteria for according special and preferential treatment are among the practicable ways.

### **2.2.3. Contradictions of the definition and the rationale of regrouping**

We have heard a lot about helping developing and least-developed countries to raise their living standard and to fully integrate into the world economy, but few of us have made any substantive research upon the issue of how we can help them in an effective

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<sup>98</sup> : Julio Faundez, see supra note 94, p.37.

<sup>99</sup> : cf. [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)

<sup>100</sup> : The WTO's yearly budget for technical assistance is only half a million US dollars. At the moment, the technical assistance programmes are financed mainly through extra-budgetary voluntary contributions from WTO Members. For example, in 1998 alone, over 80 percent of the WTO technical assistance programmes were made possible through extra-budgetary contributions. Considering the permanent character and the growing financial requirements of WTO technical assistance programmes, a number of WTO Members have decided, as an interim solution, to finance these activities through the establishment of a Global Trust Fund(GTF). The objectives of the GTF are oriented to support and complement the WTO regular budget, to enhance technical assistance with the view to enabling the Secretariat to deliver technical assistance in a flexible, timely and pertinent manner. At the same time, it is intended to minimise the administrative costs and procedures derived from having a multiplicity of trust funds on a national basis.

cf. [http://www.wto.org/english/thewto\\_e/teccop\\_e/tct1\\_e.htm](http://www.wto.org/english/thewto_e/teccop_e/tct1_e.htm)

way. It has been around eight years since the World Trade Organisation came into existence. The real situation is that we are still living in a world which is unsatisfactory---even unacceptable---in many respects. In the words of the former Director-General of the WTO, Renato Ruggiero, "It is a world where...over a quarter of the developing world's people still live in poverty. About a fifth---1.3 billion---live on incomes of less than \$1 a day. And over fifty percent of the global population has less than five percent of global income. These statistics reinforce what our eyes and ears already tell us---that though we are part of an ever more integrated global economy, the distance between the rich and the poor is still intolerably great."<sup>101</sup> This is a tragedy of our times. After we reflect upon why the gap between the rich and the poor is widening instead of narrowing, we may raise such questions: is there anything wrong with the WTO special and preferential rules? how can we help the developing countries in a more effective way?

The World Trade Organisation has chosen to ensure that developing country Members, especially the least-developed country Members among them, secure a share in the growth of international trade as one of its objectives.<sup>102</sup> Most of the multilateral trade agreements annexed to the *WTO Agreement* contain provisions which accord the special and preferential treatment to the developing and least-developed country Members in their implementations of these agreements.<sup>103</sup> However, after these years' operation, the WTO is still confronted with such a dilemma: on the one hand, the WTO is raising more funds for its technical assistance programmes which are designated to help the developing country Members to benefit these new international trade rules; while, on the other hand, many developing country Members are increasingly dissatisfied with the WTO development policy. Here, the crux is, in the view of the author, that the definition of "developing country" has been blurred by the self-selection mechanism of the WTO.<sup>104</sup> At the moment, each country or separate customs territory can select whether it will be taken as a "developing country" or "developed country" when it enters the WTO. This over-flexible method of defining the status of a WTO Member may bring about the following disadvantages. Firstly, the special and preferential rules contained in the WTO agreements, which are designed to help developing and least-developed countries to fully integrate into the global economy and to raise the living standard in these countries, cannot be made in a specific way. There are altogether 144 WTO Members by the end of 2001, eighty percent of them have selected themselves either as developing countries or as economies in transition.<sup>105</sup> With the possibility of so many countries applying these special and preferential rules, the real benefits of these rules should be debatable. Secondly, as there is no clear criteria to define a "developing country",<sup>106</sup> it is understandable why the negotiations upon the accessions of some countries to the WTO have taken such a long time. The issue of China's accession is just one of such examples. Thirdly, the divergent views among the WTO Members upon the criteria of definition

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<sup>101</sup> : Renato Ruggiero: *An Enabling Environment for Development: the Contribution of the Multilateral Trading System*, the address to ECOSOC in Geneva, 2 July 1997.

cf. [http://www.wto.org/english/news\\_e/spr1\\_e/ecosoc\\_e.htm](http://www.wto.org/english/news_e/spr1_e/ecosoc_e.htm)

<sup>102</sup> : See the preamble of the *WTO Agreement*. See supra note 4.

<sup>103</sup> : See supra note 62.

<sup>104</sup> : See supra note 64.

<sup>105</sup> : See *China and the World Trading System*, the speech delivered by Renato Ruggiero, the former WTO Director-General, at Beijing University, China. cf. [http://www.wto.org/english/news\\_e/spr1\\_e/china1\\_e.htm](http://www.wto.org/english/news_e/spr1_e/china1_e.htm)

<sup>106</sup> : The definition of a "least-developed country" is clear in the WTO. See supra note 65.

may challenge the validity of these special and preferential rules and, eventually, undermine the stability of the current international trade order.

In order to make the defining process become more precise and predictable, to reduce the conflicts which arise out of the different views to this definition, and more importantly, to help those countries in real need to benefit from the WTO special and preferential rules, the World Trade Organisation needs to clarify the criteria for countries which wish to apply these special and preferential rules. The factors for consideration should include the economic level, development potential, population and a few others. Before I put forward any further suggestions upon this issue, I use a table to depict a real picture of all WTO Members and the observers (countries and separate customs territories waiting for their WTO membership) in terms of the size of their economy.<sup>107</sup>

Table 1: Size of economy of WTO Members and observers

	Population	Gross national income		Gross national income per capita		Gross domestic product	
	million 1999	\$ billion 1999	rank 1999	\$ 1999	rank 1999	growth (%) 1998-99	per capita growth (%) 1998-99
Albania	3	3.1	135	930	138	7.2	6.1
Algeria*	30	46.5	52	1,550	117	3.3	1.8
Andorra*	...	...	...	...	...	...	...
Angola	12	3.3	130	270	185	2.7	-0.2
Antigua and Barbuda	...	...	...	...	...	...	...
Argentina	37	276.1	17	7,550	58	-3.2	-4.4
Armenia*	4	1.9	150	490	157	3.3	2.9
Australia	19	397.3	15	20,950	27	4.4	3.2
Austria	8	205.7	21	25,430	14	2.1	1.9
Azerbaijan*	8	3.7	124	460	161	7.4	6.4
Bahamas*	...	...	...	...	...	...	...
Bahrain	...	...	...	...	...	...	...
Bangladesh	128	47.1	50	370	170	4.9	3.2
Barbados	...	...	...	...	...	...	...
Belarus*	10	26.3	61	2,620	94	3.4	4.4
Belgium	10	252.1	19	24,650	18	2.5	2.3
Belize	...	...	...	...	...	...	...
Benin	6	2.3	141	380	169	5.0	2.1
Bhutan*	...	...	...	...	...	...	...
Bolivia	8	8.1	94	990	134	0.6	-1.7
Bosnia and Herzegovina*	4	4.7	114	1,210	127	12.8	9.5

<sup>107</sup> : The source comes from the World Bank. cf. <http://www.worldbank.org/data/wdi20001/worldview.htm> The data for some Members and observers are not available.

Botswana	2	5.1	109	3,240	87	4.5	2.8
Brazil	168	730.4	8	4,350	73	0.8	-0.5
Brunei Darussalam	...	...	...	...	...	...	...
Bulgaria	8	11.6	81	1,410	121	2.4	3.0
Burkina Faso	11	2.6	138	240	193	5.8	3.2
Burundi	7	0.8	174	120	205	-1.0	-2.9
Cambodia*	12	3.0	136	260	187	4.5	2.2
Cameroon	15	8.8	88	600	150	4.4	1.6
Canada	30	614.0	9	20,140	30	4.6	3.8
Cape Verde*	...	...	...	...	...	...	...
Central Africa Republic	4	1.0	168	290	181	3.4	1.7
Chad	7	1.6	155	210	197	-0.7	-3.4
Chile	15	69.6	43	4,630	70	-1.1	-2.4
China	1,254	979.9	7	780	142	7.1	6.1
Colombia	42	90.0	37	2,170	100	-4.3	-6.0
Congo Republic	3	1.6	154	550	152	-3.0	-5.6
Costa Rica	4	12.8	79	3,570	80	8.0	6.1
Cote d'Ivoire	16	10.4	84	670	147	2.8	0.1
Croatia	4	20.2	64	4,530	71	-0.3	0.5
Cuba	11	...	...	...	...	...	...
Cyprus	...	...	...	...	...	...	...
Czech Republic	10	51.6	48	5,020	66	-0.2	-0.1
Democratic Republic of the Congo	50	...	...	...	...	...	...
Denmark	5	170.3	23	32,050	6	1.7	1.2
Djibouti	...	...	...	...	...	...	...
Dominica	...	...	...	...	...	...	...
Dominican Republic	8	16.1	74	1,920	105	8.3	6.4
Ecuador	12	16.8	72	1,360	123	-7.3	-9.0
Egypt	63	86.5	39	1,380	122	6.0	4.1
El Salvador	6	11.8	80	1,920	105	3.4	1.4
Estonia	1	4.9	112	3,400	83	-1.1	-0.6
Ethiopia*	63	6.5	99	100	207	6.2	3.6
European Community	...	...	...	...	...	...	...

Fiji	...	...	...	...	...	...	...
Finland	5	127.8	29	24,730	17	4.0	3.8
France	59	1,453.2	4	24,170	21	2.9	2.5
Former Yugoslav Republic of Macedonia*	...	...	...	...	...	...	...
Gabon	1	4.0	118	3,300	85	-6.2	-8.4
The Gambia	1	0.4	190	330	175	6.4	3.4
Georgia	5	3.4	128	620	149	3.3	3.1
Germany	82	2,103.8	3	25,620	13	1.5	1.4
Ghana	19	7.5	97	400	166	4.4	2.1
Greece	11	127.6	30	12,110	46	3.4	3.1
Grenada	...	...	...	...	...	...	...
Guatemala	11	18.6	68	1,680	112	3.6	0.9
Guinea	7	3.6	126	490	157	3.3	1.0
Guinea Bissau	1	0.2	200	160	202	7.8	5.7
Guyana	...	...	...	...	...	...	...
Haiti	8	3.6	125	460	161	2.2	0.2
Holy See (Vatican)*	...	...	...	...	...	...	...
Honduras	6	4.8	113	760	143	-1.9	-4.5
Hong Kong, China	7	165.1	24	24,570	19	2.9	1.8
Hungary	10	46.8	51	4,640	69	4.5	5.0
Iceland	...	...	...	...	...	...	...
India	998	441.8	11	440	163	6.5	4.6
Indonesia	207	125.0	31	600	150	0.3	-1.3
Ireland	4	80.6	40	21,470	24	9.8	8.7
Israel	6	99.6	35	16,310	36	2.2	-0.2
Italy	58	1,162.9	6	20,170	29	1.4	1.3
Jamaica	3	6.3	101	2,430	95	-0.4	-1.2
Japan	127	4,054.5	2	32,030	7	0.2	0.1
Jordan	5	7.7	96	1,630	115	3.1	0.0
Kazakhstan*	15	18.7	67	1,250	126	1.7	2.7
Kenya	29	10.7	83	360	172	1.3	-0.8
Korea, Republic of	47	397.9	13	8,490	54	10.7	9.7
Kuwait	2	...	...	...	...	...	...
The Kyrgyz Republic	5	1.5	158	300	180	3.7	2.2

Lao PDR*	5	1.5	157	290	181	7.4	2.8
Latvia	2	5.9	106	2,430	95	0.1	0.8
Lebanon*	4	15.8	75	3,700	78	...	...
Lesotho	2	1.2	165	550	152	2.5	0.2
Liechtenstein	...	...	...	...	...	...	...
Lithuania	4	9.8	85	2,640	92	-4.2	-4.1
Luxembourg	...	...	...	...	...	...	...
Macao, China	...	...	...	...	...	...	...
Madagascar	15	3.7	123	250	190	4.7	1.5
Malawi	11	2.0	149	180	201	4.0	1.5
Malaysia	23	76.9	42	3,390	84	5.8	3.3
Maldives	...	...	...	...	...	...	...
Mali	11	2.6	139	240	193	5.5	3.0
Malta	...	...	...	...	...	...	...
Mauritania	3	1.0	169	390	167	4.1	1.3
Mauritius	1	4.2	117	3,540	81	3.4	2.1
Mexico	97	428.9	12	4,440	72	3.5	2.1
Moldova	4	1.5	156	410	164	-4.4	-4.0
Mongolia	2	0.9	172	390	167	3.0	2.1
Morocco	28	33.7	55	1,190	129	-0.7	-2.3
Mozambique	17	3.8	122	220	195	7.3	5.2
Myanmar	45	...	...	...	...	...	...
Namibia	2	3.2	132	1,890	107	3.1	0.7
Nepal*	23	5.2	108	220	195	3.9	1.6
Netherlands	16	397.4	14	25,140	16	3.6	2.9
New Zealand	4	53.3	47	13,990	43	4.4	3.9
Nicaragua	5	2.0	147	410	164	7.0	4.3
Niger	10	2.0	148	190	200	-0.6	-3.9
Nigeria	124	31.6	57	260	187	1.0	-1.5
Norway	4	149.3	26	33,470	5	0.9	0.2
Oman*	2	...	...	...	...	...	...
Pakistan	135	62.9	44	470	160	4.0	1.5
Panama	3	8.7	89	3,080	89	3.0	1.2
Papua New Guinea	5	3.8	121	810	140	3.2	0.9
Paraguay	5	8.4	91	1,560	116	-0.8	-3.4
Peru	25	53.7	46	2,130	101	1.4	-0.3
Philippines	74	78.0	41	1,050	133	3.2	1.2
Poland	39	157.4	25	4,070	74	4.1	4.1
Portugal	10	110.2	34	11,030	49	3.0	2.8

Qatar	...	...	...	...	...	...	...
Romania	22	33.0	56	1,470	120	-3.2	-3.0
Russian Federation*	146	329.0	16	2,250	99	3.2	3.6
Rwanda	8	2.0	146	250	190	6.1	3.5
Saint Kitts And Nevis	...	...	...	...	...	...	...
Saint Lucia	...	...	...	...	...	...	...
Saint Vincent And the Grenadines	...	...	...	...	...	...	...
Samoa*	...	...	...	...	...	...	...
Saudi Arabia*	20	139.4	27	6,900	60	0.4	-2.1
Senegal	9	4.7	115	500	156	5.1	2.3
Seychelles*	...	...	...	...	...	...	...
Sierra Leone	5	0.7	180	130	204	-8.1	-9.9
Singapore	4	95.4	36	24,150	22	5.4	4.6
Slovak Republic	5	20.3	63	3,770	77	1.9	1.8
Slovenia	2	19.9	65	10,000	50	4.9	4.7
Solomon Islands	...	...	...	...	...	...	...
South Africa	42	133.6	28	3,170	88	1.2	-0.5
Spain	39	583.1	10	14,800	39	3.7	3.6
Sri Lanka	19	15.6	76	820	139	4.3	3.2
Sudan*	29	9.4	86	330	175	5.2	2.9
Suriname	...	...	...	...	...	...	...
Swaziland	...	...	...	...	...	...	...
Sweden	9	236.9	20	26,750	12	3.8	3.7
Switzerland	7	273.9	18	38,380	3	1.5	1.1
Chinese Taipei	...	...	...	...	...	...	...
Tanzania	33	8.5	90	260	187	4.7	2.2
Thailand	60	121.1	32	2,010	103	4.2	3.4
Togo	5	1.4	160	310	179	2.1	-0.3
Tonga*	...	...	...	...	...	...	...
Trinidad and Tobago	1	6.1	104	4,750	68	6.8	6.1
Tunisia	9	19.8	66	2,090	102	6.2	4.9
Turkey	64	186.5	22	2,900	90	-5.1	-6.6
Uganda	21	6.8	98	320	178	7.4	4.5
Ukraine*	50	42.0	53	840	138	-0.4	0.3

United Arab Emirates	3	...	...	...	...	...	...
United Kingdom	60	1,403.8	5	23,590	23	2.1	1.7
United States	278	8,879.5	1	31,910	8	3.6	2.4
Uruguay	3	20.6	62	6,220	64	-3.2	-3.9
Uzbekistan*	24	17.6	70	720	146	4.4	2.6
Vanuatu*	...	...	...	...	...	...	...
Venezuela	24	87.3	38	3,680	79	-7.2	-9.0
Vietnam*	78	28.7	60	370	170	4.8	3.5
Yemen*	17	6.1	105	360	172	3.8	1.1
Zambia	10	3.2	131	330	175	2.4	0.2
Zimbabwe	12	6.3	102	530	154	0.1	-1.7

Note: Countries with the asterisks are the observers of the WTO

The World Bank used the Gross National Income(GNI) per capita as the criterion to classify its members(183) and all other economies with populations more than 30,00(207 in total).<sup>108</sup> The countries and other economies with their GNI per capita at \$755 or less are classified as the **low-income** group; those with their GNI per capita at \$756-\$2,995 are the **lower-middle-income** group; those with their GNI per capita at \$2,996-\$9,265 are the **upper-middle-income** group; and those with their GNI per capita at \$9,266 or more are the **high-income** group. According to this classification, among the present 144(excluding Chinese Taipei as there are no data available for it) WTO Members as of this writing, forty-three are in the low-income group; thirty-five are in the lower-middle-income group; twenty-nine are in the upper-middle-income group; and thirty-six are in the high-income group. This is a more specific and practicable classifying method, compared with that of the WTO.

From the above table, we can find that all those WTO least-developed country Members with two exceptions,<sup>109</sup> together with some other WTO Members, are in the low-income group. The GNI per capita in these countries is only around two US dollars or even less a day. Furthermore, twenty-seven among the low-income WTO Members are classified by the World Bank as severely-indebted countries, twelve are classified as moderately-indebted countries, only three of them belong to less-indebted countries.<sup>110</sup> In

<sup>108</sup> : cf. <http://www.worldbank.org/data/databytopic/class1.htm>

<sup>109</sup> : The two exceptions are Djibouti and Maldives, which are grouped by the World Bank as lower-middle-income countries, but no specific data are available to show the Gross National Income and the Gross National Income per capita of these two countries as of this writing.

<sup>110</sup> : According to the World Bank, "severely-indebted" means either of the two key ratios is above critical levels: present value of debt service to GNI(80 percent) and present value of debt service to exports(220 percent); "moderately-indebted" means either of the two key ratios exceeds 60 percent of, but does not reach, the critical levels. For economies that do not report detailed debt statistics to the World Bank Debtor Reporting System(DRS), present-value-circulation is not possible. Instead, the following methodology is used to classify the non-DRS economies. "Severely-indebted" means three of four key ratios(averaged over 1997-99) are above critical levels: debt to GNI(50 percent); debt to exports(275 percent); debt service to exports(30 percent); and interest to exports(20 percent). "Moderately-indebted" means three of the key ratios exceed 60 percent of, but do not reach, the critical levels. All other classified low- and middle-income economies are listed as less-indebted. cf. <http://www.worldbank.org/data/databytopic/class1.htm>



the global terms, the total population of the low-income countries amounts to 40 percent of the world population, but their GNI totally is only 3 percent of the world totality. The average GNI per capita of these low-income countries is \$420, compared with \$26,440 of high-income countries, and \$1,980 of middle-income (including lower-middle and upper-middle) countries.<sup>111</sup> Upon this research, the author of this thesis may put forward such suggestions that the WTO special and preferential rules currently applicable to these least-developed country Members should be extended to all those Members grouped as low-income countries. Since the gross national products and exports of these countries are so insignificant that other countries should eliminate all the duties and other trade barriers for the imports from these countries. The WTO should also focus its technical assistance programmes mainly on these low-income Members. Meanwhile, there should be a “graduation” system, which is designated that any country, when it reaches a certain level, e.g. GNI per capita at \$756 or more, will “graduate” automatically from the low-income group.

The situation of the middle-income countries, however, is not so easy to define. The economic level of those countries contrasts so much that the GNI per capita starts from \$756 to \$9,265. Even the difference between the lower-middle-income countries and the upper-middle-income countries is so obvious that it is impracticable to accord same special and preferential treatment to the countries from these two different groups. Most of these listed in the upper-middle-income group are the newly-industrialised countries like Korea, Argentina, Brazil, Mexico, which have diverted their economies of agriculture-orientation to manufacture-orientation and raised the living standard significantly in the recent decades. In contrast, those countries listed in the lower-middle-income group, either encumbered with heavy population as in the case of India, and foreign debt as in the case of most sub-Sahara countries, or impeded by the mismanagement of their leaders, can only acquire a subsistent level in their economic development. At the moment, all these countries, from both the lower-middle-income and upper-middle-income groups, announce themselves as developing countries in the WTO. Some other countries like Singapore, Kuwait, Qatar, which have already been classified by the World Bank as high-income countries, still have the status of developing country Members. Under such a broad perspective, it is no surprise that about sixty percent of the WTO Members are treated as developing countries. If we apply the WTO special and preferential rules to all of these countries, together with other twenty-nine (about twenty-one percent) least-developed countries, it will become clear that the WTO mechanism to accord special and preferential treatment is neither reasonable nor workable. One practicable way is that the application of the special and preferential rules should be limited in scope, for example, only to those low-income and lower-middle-income countries (about fifty-three percent of the WTO Members), most of which are still devoted to agrarian production, therefore, need more help to readjust their economic structures. The other way available is that the multilateral agreements like the *Agreement on Subsidies and Countervailing Measures* may set separate criteria for developing country Members to apply their special and preferential rules.<sup>112</sup>

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<sup>111</sup> : cf. <http://www.worldbank.org/data/wdi2001/worldview.htm>

<sup>112</sup> : Article 27(2) of the *Agreement on Subsidies and Countervailing Measures* stipulates that WTO Members designated as the least-developed countries and those with GNI per capita below \$1,000 are not subject to the prohibition of export subsidies. Other developing country Members get eight years of delay,

The rationale behind the practice of regrouping developing countries is to apply the WTO special and preferential rules in a more efficient way. The increasing marginalisation of some poor countries is a big challenge to all of us in the 21st century. Without them, the globalisation can never be in a full sense. The WTO has set its objective to help developing and least-developed country Members within its ambit, but whether or not these countries did benefit from the current international trade rules is quite another issue which deserves our careful study. To redefine and regroup developing country Members within the WTO is just one of the inspirations based on this study. After we have gained a better understanding of the present situations of the WTO developing and least-developed country Members, it is time for me to deepen my research about the links between the WTO and developing country Members from the institutional and jurisdictional perspectives.

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from the date of entry into force of the *WTO Agreement*, to fully implement this agreement. See *supra* note 4.

## Chapter Three WTO and the Institutional Issues

### Section One Legal Analysis of the WTO Institutional Characteristics

#### 3.1.1. The functional approach towards the classifications of international organisations

Professor Henry G. Schermers and professor Niels M. Blokker, in their influential book *International Institutional Law*,<sup>1</sup> have given us a clear introduction to the origin of the term “international organisation”: “While the term ‘international organisation’ was probably used for the first time in the 19th century,<sup>2</sup> it is only since the Second World War that the terms ‘intergovernmental organisation’ and ‘(public) international organisation’ have received wide acceptance for the phenomenon discussed in this study.”<sup>3</sup> This term, sometimes, is used with another term “international institution” interchangeably. But according to Schermers and Blokker, international institution is also used as a synonym for the organs of an international organisation, or even for international law in general.<sup>4</sup>

International organisations differ widely in a number of respects. Some have only a few members (for example, the Benelux, NAFTA, or the Economic Community of the Great Lakes Countries, having Burundi, Rwanda and Zaire as its members), whereas others include nearly all existing States (for instance the United Nations). Some international organisations have very limited powers (e.g. to function only as a forum for consultations---the International Tin Study Group or the International Whaling Commission), while others can take a majority of decisions which will bind the member States and even individuals within the jurisdiction of the member States (the typical example is the European Union). Each organisation has its own constitution and makes its own rules. There is little coordination of the activities of international organisations. Thus, international organisations vary greatly.

There is no universally accepted definition of what constitutes an international organisation.<sup>5</sup> Different scholars may give their different definitions, although they are

<sup>1</sup> : Henry G. Schermers and Niels M. Blokker: *International Institutional Law*, third revised edition, Martinus Nijhoff Publishers (1995), p.20.

<sup>2</sup> : By the Scottish jurist James Lorimer. See P. B. Potter: *Origin of the term international organisation*, *The American Journal of International Law*, No. 39, 1945, pp.803-806. (Footnote original)

<sup>3</sup> : “Public international organisation” is used, *inter alia*, in: ICJ Statute, Article 34; ILO Constitution, Article 12. “Intergovernmental organisation” is used, *inter alia*, in: OAS Constitution, Article 130. The ILC has preferred the term “intergovernmental organisation” and has decided, on a number of occasions, not to elaborate a precise definition (see in particular: *Yearbook of the ILC*, 1985, Vol. II, Part One, pp.105-107). The ILC approach has been followed in the *Vienna Convention on the Law of Treaties* (1969), the *Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character* (1975), and in the *Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations* (1986), which in their provisions on the use of the terms stipulate: “ ‘international organisation’ means an intergovernmental organisation”. The purpose of this stipulation is indicated in Paragraph 14 of the ILC commentary to Article 2 of the draft articles on the law of treaties (subsequently the *1969 Vienna Convention*): “...in order to make it clear that the rules of non-governmental organisations are excluded” (see *Yearbook of the ILC* 1966, Vol. II, p.190).

<sup>4</sup> : See *supra* note 1, p.21.

<sup>5</sup> : See M. Virally: *Definition and Classification: a Legal Approach*, *International Social Science*, No.29, 1977, pp.58-72, at 59. The fact that there is no such definition also explains why the International Law Commission, in dealing with the topic “Relations between States and international organisations”, decided

more or less analogous to each other.<sup>6</sup> Schermers and Blokker defined international organisations as “forms of cooperation founded on an international agreement creating at least one organ with a will of its own, established under international law”.<sup>7</sup> This is, so far, the most complete definition. However, many scholars including Schermers and Blokker limit their definitions to public international organisations (i.e., governmental organisations), and exclude non-governmental organisations. Although general agreement seems to exist regarding most of the defining elements of public international organisations,<sup>8</sup> the current trend is that non-governmental international organisations are developing even faster than governmental international organisations.<sup>9</sup> Thus, as the Yearbook of International Organisations observed, “a clear and unambiguous theoretically acceptable definition of international non-governmental organisations remains to be formulated”.<sup>10</sup>

The notion “non-governmental” generally refers to the function of these organisations: they are not endowed with governmental tasks. However, some of the non-governmental organisations, like the Amnesty International, the International Chamber of Commerce, are quite influential. Non-governmental organisations are not created by treaty; nor are they established under international law. For example, the International Committee of the Red Cross was established not under international law, but under Swiss law. Apart from these characteristics, non-governmental organisations share little in respect of any sense.

Then, what criterion could be used to classify international organisations, including both governmental and non-governmental organisations? A number of scholars have suggested and applied different criteria for such a classification.<sup>11</sup> The most fundamental criterion and, moreover, the criterion which seems to be the most persuasive in the study of the institutional characteristics of an international organisation, seems to be that suggested by Virally. “...it is an organisation’s function that constitutes its true *raison*

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to adopt a pragmatic approach in this respect, and did not try to elaborate a precise definition of international organisation (see Yearbook of the ILC 1985, Vol. II, p.105).

<sup>6</sup> : See, e.g., Bastid: *Droit des Gens* (lectures-1956-7), p.329; Reuter: *Institutions Internationales* (1975), p.234; Fitzmaurice: *Report on the Law of Treaties*, Yearbook of the ILC, 1956, Vol. II, p.108; C. F. Amerasinghe: *Principles of the Institutional Law of International Organisations*, Cambridge University Press (1996), p.8.

<sup>7</sup> : See supra note 1, p.23.

<sup>8</sup> : According to Schermers and Blokker, there are three constituting elements for a public international organisation. The first element is an agreement between the governments of member States, which excludes the agreements between branches of government or between particular public authorities. The second element is the requirement that the organisation should have at least one organ with a will of its own. This organ should be formed by delegates of two or more States and should not be dependent on any particular State. The third element is that the organisation should be established under international law. International agreements are normally concluded under international law. It can therefore be assumed that this requirement is fulfilled whenever there is an international agreement. Only when an international agreement clearly indicates that the organisation is not established under international law, will it not be considered as an international organisation. See supra note 1, pp.23-31.

<sup>9</sup> : The 1994/95 edition of the Yearbook of International Organisations classifies 263 organisations as public international organisations, whereas the Union of International Associations has recognised 4928 international non-governmental organisations. See Yearbook of International Organisations, 1994/95, Vol. I, p.1624.

<sup>10</sup> : Yearbook of International Organisations, 1992/93, Vol. I, p.1650.

<sup>11</sup> : For example see El-Erian: *First Report*, Yearbook of the ILC, 1963, Vol. II, pp.167-169.

*d'etre*. And it is in order that it may perform this function that its member States have established it and take part in its operation, bearing the costs and accepting the constraints that inevitably derive from it. Moreover, the organisation's structure is directly determined by this function or purpose. The structure is designed to enable the organisation to fulfil the purpose assigned to it as efficiently as possible having regard to the conditions and limitations that the founding States have deemed it necessary to impose, so that it may be achieved in accordance with their interests, as defined by them. In other words, the organisation's structure is itself subordinate to the requirements of its function. Experience also shows that in many cases modifications occur in the structure as and when these requirements change, and in accordance with them".<sup>12</sup>

Derived from Virally's functional approach, Schermers and Blokker classified international organisations into three groups: (a) universal versus closed organisations; (b) intergovernmental versus supranational organisations; (c) special versus general organisations.<sup>13</sup>

Whether the membership is open to all applying countries or limited only to some of them is the division line for the first of the above three groups. The 1975 *Vienna Convention on the Representation of States in Their Relations with International Organisations of a Universal Character* describes international organisations of a universal character as "the United Nations, its specialised agencies, the International Atomic Energy Agency and any similar organisations whose membership and responsibilities are on a world-wide scale". Thus, to be covered by this description, an organisation does not have to be truly universal in membership and responsibilities. In fact, no existing international organisation could fulfil such a condition. Upon the universality, a rapporteur of the International Law Commission once stated: "A universal organisation is one which includes in its membership all the States of the world. This is not the case of any past or present international organisation yet. Thus, it may be more accurate to use the terms 'universalist' suggested by Schwarzenberger or 'of potentially universal character' used in the treatise of Oppenheim. The French term 'avocation universelle' conveys the same meaning as these two terms, which is that while the organisation is not completely universal, it tends towards that direction. This was partially the case of the League of Nations and is, in a much broader sense, the case of the United Nations, especially after 1955, and the specialised agencies".<sup>14</sup> This is a proper description for the universal character of public international organisations. In contrast to universal organisations, there are organisations which aim at membership from a closed group of States. No members are admitted from outside the group. We denominate these organisations as "closed" organisations, to emphasise the closed circle from which the membership is drawn. Schermers and Blokker divided these closed organisations into

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<sup>12</sup> : See supra note 5, p.66. In Virally's view, the function of international organisations, as a criterion for classification, can be considered principally from three points of view: "The first question concerns the extent of the cooperation that it is the organisation's mission to bring about: is it open to the international community as a whole, or reserved for certain of its members only? Second, what is the range covered by this cooperation? Can it extend to all the sectors in which a need for it may be felt, or is it confined to a clearly delimited field of action? Lastly, what are the means used to effect such cooperation, and what type of relations does it institute between the organisation and its members (and between the members themselves in their relations with one another)?" Id, pp.66-67.

<sup>13</sup> : See supra note 1, pp.35-44.

<sup>14</sup> : See supra note 11, p.167.

three categories: regional organisations, organisations of States with a common background(e.g. language or political system), and closed special organisations.<sup>15</sup> Regional organisations are the most common kind of closed international organisations. The typical examples are the Association of South East Asian Nations(ASEAN), the European Union(EU), Organisation of African Unity(OAU) and the like. The member countries in these organisations are located in a particular area, and these organisations usually deal with a wide range of affairs. Organisations of States which share a common background, for example, are those like the Commonwealth(the former British Commonwealth of Nations)<sup>16</sup> and the Organisation for Economic Cooperation and Development(OECD). The member countries in these organisations either have a similar level of economic development, or share a common political, cultural background. Closed special organisations are normally established to perform some specific functions. The Organisation of the Petroleum Exporting Countries(OPEC), one of such examples, consists of countries “with a substantial net export of crude petroleum”.<sup>17</sup> This criterion, as mentioned above, excludes many countries from the possibility of membership in this organisation.

Whether the international organisation has the superior power over the national government of its members is the division line between the intergovernmental and supranational organisations. The term “supranational organisation” is, more often than not, used descriptively rather than prescriptively since, so far, no clear legal meaning about it has been acquired. Even in the cases of the UN Security Council and the EC Council of Ministers which may make decisions that bind their member States,<sup>18</sup> there are still many areas which are within the domain of exclusive domestic regulation. Hence, the term “supranational” is used only in a relative sense as no absolute supranational organisation ever exists. The World Trade Organisation, which has been regarded as to exert much influence upon the national governments of its Members, also stipulates that only the amendments to the provisions of the multilateral trade agreements which would not alter the rights and obligations of the WTO Members shall take effect for all Members upon acceptance by two-thirds of the Members. Amendments to Articles IX and X of the *WTO Agreement*, Articles I and II of GATT 1994, Article II:1 of GATS and Article 4 of the *Agreement on TRIPS*, which will substantially alter the rights and obligations of the WTO Members, shall take effect only upon acceptance by all

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<sup>15</sup> : See supra note 1, p.37.

<sup>16</sup> : Different views have been defended on whether the Commonwealth is an international organisation. Writers taking the more formal position support the view that it is not an organisation. In their view, the Commonwealth is an informal grouping of States with some common historical and cultural ties, primarily used for consultation among the members. It has no written constitution and, moreover, a memorandum agreed at the 1965 meeting of the Prime Ministers of Commonwealth countries explicitly states that “the Commonwealth is not a formal organisation”, and that it does not “require its members to seek to reach collective decisions or take united action”. Others take the view that a written constitution is not a necessary requirement and that the agreement to establish an organisation may also be expressed in other ways, such as, in the case of the Commonwealth, the Declaration of Commonwealth Principles(Singapore, 1971). See J. G. Starke: *Introduction to International Law*, tenth edition(1989), pp.116-118; and W. Dale: *Is the Commonwealth an International Organisation?* *International and Comparative Law Quarterly*, Vol.31, 1982, pp.451-473; *Yearbook of International Organisation*, 1994/95, Vol.1, p.278.

<sup>17</sup> : See Article 7 of the Statute of the OPEC.

<sup>18</sup> : In the case of the EC Council of Ministers, its final decisions may be vetoed by the European Parliament on an absolute majority basis. See the *Treaty of European Union*, Article 189(b).

Members. Therefore, the distinction between supranational and intergovernmental organisations has never received wide acceptance. This conceptual vagueness has led some authors to reject the notion “supranational organisation”.<sup>19</sup>

The difference between the special and general organisations lies on the scope of their responsibilities. Most organisations are established to perform a specific function. For instance, the Universal Postal Union was founded for the development of postal communications and, for improving health, the World Health Organisation. Such special organisations are often called functional or technical organisations.<sup>20</sup> Their main characteristics are the limited scope and technical nature of their tasks. Different from those special organisations, some organisations may discuss any subject matter they see fit, or not excluded in their constitutions. Such organisations are called general or political organisation. The most important general organisations are the United Nations, which is concerned with the universal issues,<sup>21</sup> and a number of other organisations which deal with various regional issues. The latter examples are the Organisation of American States(OAS) and the Organisation of African Unity(OAU).

International organisations may be classified in a number of ways, depending on the purpose for which the classification is being made. Besides the functional classification, others have been made such as that between temporary and permanent organisations or that between judicial and non-judicial organisations,<sup>22</sup> but these are not particularly helpful for the present study. Meanwhile, what we should bear in mind is that all the international organisations may not be in the absolute sense as they are classified. In terms of the classification provided by Schermers and Blokker, for example, we may find that some organisations are universal and general, like the United Nations, while others are universal but special, like the Universal Postal Union and the World Health Organisation. Some organisations are closed but general, like the European Union and the Association of South East Asian Nations, while others are closed and special, like the Organisation of the Petroleum Exporting Countries. Each organisation may have more than one of the features, and the classification, therefore, cannot be exhaustive.

Despite the fears and concerns of some governments that international organisations are increasing too fast and that they are becoming a burden on their exchequers, the present situation is that international organisations are still proliferating at a considerable rate. Generally, it is unusual for a new problem in international relations to be considered without at the same time some sort of international organisation being developed to deal with it. For instance, concerns with the free trade among the north American countries led to the creation of the North American Free Trade Association(NAFTA), the fast economic development in those Pacific rim countries catalysed the establishment of the Asia-Pacific Economic Cooperation(APEC). More recently since the 1990s, the problems arising out of the international trade sphere, which are growing increasingly complex, have resulted in the expansion of scope regulated by the World Trade

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<sup>19</sup> :See A. J. P. Tammes: *What is “supranational”?*, NJB(1953), p.477; P. Hay: *Federalism and supranational organisations*(1966); M. S. Korowicz: *Organisations internationales et souverainete des etats membres*, 1961, pp.283-286.

<sup>20</sup> : See supra note 1, p.43.

<sup>21</sup> : See. Article 1 of the Charter of the United Nations. cf. *Basic Documents in International Law*, fourth edition, edited by Ian Brownlie, Oxford University Press(1995).

<sup>22</sup> : See C. F. Amerasinghe: *Principles of the Institutional Law of International Organisations*, Cambridge University Press(1996), p.9.

Organisation(WTO). The aim of the WTO is to “provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this(WTO) Agreement”.<sup>23</sup> This has determined the special character of the WTO, i.e. this organisation will concentrate its efforts on those trade and trade-related issues. As for the participants, Article XII of the *WTO Agreement* provides that “any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements”<sup>24</sup> may enter the WTO. In view of all these features, the WTO can be deemed as a universal but special intergovernmental organisation.<sup>25</sup>

After we have classified the international organisations from a functional approach, some perplexing issues, concerning both the public international law in general and institutional law, are jumping into our eyes. What are the criteria for the membership in a governmental organisation? and in what extent is the international governance shared by a governmental organisation? These issues involve not only the legal status of the present international organisations, but also the trend of future governmental cooperation.

### **3.1.2. The issues of membership and standing of representation in an international organisation ---a case study of the World Trade Organisation**

In a broad sense, the meaning of “membership” contains three aspects: admission, suspension, termination or expulsion. But because of the limitation of space, and also the fact that the latter two aspects are more procedural than substantial, the study of membership in this thesis is only limited to the criteria of admission in an international organisation.

As a general rule, matters concerning membership depend primarily on the provisions of the constitution of an international organisation and on the practice of each organisation. Whether there are any minimum criteria for membership, under what conditions the membership may be suspended, and what are the legal consequences after a participant is terminated of its membership or expelled, it is not easy to identify some general principles which are relevant to the interpretations of all these constituent issues. On the other hand, however, there are still some consistent practices across many international organisations in the implementation of their constitutions, which could be usefully studied.

In some international organisations, such as the United Nations and its specialised agencies, membership is “universal” in the sense that (a)the organisation is open or has “universal vocation” and, (b)theoretically, all sovereign States are qualified to become either members or observers of them. In others such as the regional or specialised organisations, either political or technical, membership is limited in various ways. Generally, no matter whether membership is “universal” or limited, the original signatories who have formulated the constitution become full members of an organisation automatically without the need for admission, upon their signature and ratification of the

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<sup>23</sup> : See Article II:1 of the *WTO Agreement*. See The Legal Texts: *The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press(1999).

<sup>24</sup> : Id, Article XII:1 of the *WTO Agreement*.

<sup>25</sup> : After China and Chinese Taipei were approved of their accessions to the WTO on 10 November and 11 November 2001 respectively, and became full Members 30 days after that, the number of WTO Members has reached 144. cf. <http://www.wto.org/english/news-e/pres01-e/pr253-e.htm>



constitution. But thereafter, States eligible for membership must be admitted by the decision of one or more organs of the organisation, even in those “universal” organisations.<sup>26</sup> As for those specialised agencies of the United Nations, UN membership gives the applying State a right to membership in these organisations. This is because the United Nations decides not only the legal status of these organisations, but also the conditions of admissions to these organisations. For example, Article II(1) of the UNESCO constitution provides that “Membership of the United Nations Organisation shall carry with it the right to membership of the United Nations Educational, Scientific and Cultural Organisation”.<sup>27</sup> In the case of the International Bank for Reconstruction and Development(World Bank), membership of the International Monetary Fund(IMF) is a condition precedent to membership, while to become a member of the International Development Association(IDA) or the International Finance Corporation(IFC), a State must be a member of the World Bank.<sup>28</sup> Nevertheless, the phenomenon that the membership in one organisation is a precondition to the membership in another one is not so common that it could become a rule. In most cases, the criteria for the membership in one organisation have no relevance to those of another organisation.

At the present sphere of international law, particularly in the context of international institutional law, the World Trade Organisation, which was established in 1995, has attracted more and more attention not only because of the influence it is exerting upon the global trade, but because of its unique institutional characteristics and the potential impact upon the development of international institutional law. In terms of its function and regulated dimension, the WTO is a technical but “universal”(open) organisation. This implies that the WTO is different from those regional organisations like the European Union and the NAFTA whose membership is limited only to particular regions, or even some other international organisations like the OECD, the membership of which is limited only to those developed and newly industrialised countries. The WTO is a global organisation. The influence emanating from this organisation has reached to both developed and developing countries. In terms of its scope, the WTO can be regarded as the “United Nations of Economics”. More significantly, the number of WTO Members is still on the increase despite the limited function of this institution. The present 144 WTO Members consist of two categories. The majority of them(about 120 of them) were transformed from the GATT contracting parties to the WTO original Members in 1995 after they accepted and ratified the *Marrakesh Agreement Establishing the World Trade Organisation*(hereinafter as the *WTO Agreement*).<sup>29</sup> Those which acceded to the WTO

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<sup>26</sup> :There are some organisations which make membership available to all States by adherence. For example, see Codding: *The Universal Postal Union*(1964), p.80(the UPU between 1848 and 1947); and Koers: *Visserij Organisaties*(in *Studies over internationale Economisch Recht*, edited by Van Themaat, 1977, Vol. I, p.25. The suggestion has been made that, where no provision is made in the constitution for admission of new members, this may be done by amendments of the constitution, and that constitution may have to be amended in order to accommodate certain new members in organs. See also Higgins: *The Development of International Law through the Political Organs of the United Nations*(1963), p.14; and Broms: *The United Nations*(1990), p.68.

<sup>27</sup> : See also Article 6 of the IMO constitution.

<sup>28</sup> : See Article II(1)(b) of the IBRD Articles of Agreement; Article II(1) of the IFC Articles of Agreement; and Article II(1) of the IDA Articles of Agreement.

<sup>29</sup> : Article XI:1 of the *WTO Agreement* states: “The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to

thereafter invoked Article XII of the *WTO Agreement*, which states: “(1)Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto. (2)Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO. (3)Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement”(Emphasis added).<sup>30</sup> Article XII indicates that WTO Members include not only sovereign States, but those defined by the World Trade Organisation as “separate customs territories” which have the autonomy in their commercial affairs. At the fourth WTO Ministerial Conference which was held in Doha, Qatar in November 2001, the applications of both China and Taiwan were approved, and they became the 143rd and 144th WTO Members 30 days thereafter.<sup>31</sup> Therefore, within the World Trade Organisation, China, Taiwan, Hong Kong and Macao have all acquired their full memberships.<sup>32</sup>

Traditional views hold that States are the major actors in international relations. As professor Joost Pauwelyn pointed out: “The creators of international law are at the same time the main subjects of international law, namely States”.<sup>33</sup> Therefore, the early international organisations limited the participation only to those sovereign States. However, modern international law develops so fast that there have emerged more and more international organisations(both governmental and non-governmental), in which not only the sovereign States, but other entities may participate. Disagreements tend to arise when debates are focused on what the minimum conditions are for membership in an international organisation in the absence of, or leaving out the account of, specific provisions governing the matter. This has already occurred in history. In an advisory opinion in 1930, the Permanent Court of International Justice addressed itself to that question.<sup>34</sup> The specific issue before the Court was whether the Free City of Danzig could become a Member of the International Labour Organisation. The Constitution of the Organisation as then in force(Part XIII of the Treaty of Versailles) contained no provision on this subject; indeed there was doubt whether entities which were not Members of the League of Nations could become Members of the Organisation.<sup>35</sup> The problem raised by the Free City of Danzig was that its foreign relations were, in accordance with Article 104 of the Treaty of Versailles, conducted by Poland; the Court found that this meant, in practice, that the Polish Government could not impose its policy on the Free City against

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GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO”. See supra note 23.

<sup>30</sup> : Id, Article XII of the *WTO Agreement*.

<sup>31</sup> : Id, Article XIV:1 of the *WTO Agreement* states: “...An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the date of such acceptance”.

<sup>32</sup> : The titles for the memberships of Taiwan, Hong Kong and Macao in the WTO are “Chinese Taipei”, “Hong Kong, China” and “Macao, China” respectively.

<sup>33</sup> : Joost Pauwelyn: *The Role of Public International Law in the WTO: How Far Can We Go?* The American Journal of International Law, Vol.95, 2001, p.535.

<sup>34</sup> : *Free City of Danzig and International Labour Organisation*, P. C. I. J. Series B, No.18(1980), p.1.

<sup>35</sup> : The Court left that issue aside.

its will, but that the Free City could not call upon Poland to take steps regarding its foreign relations which were opposed to Poland's own policy. The Court considered that, in these circumstances, the Free City was not able to undertake such acts as ratifying international labour conventions or filing complaints against other Members. On the ground that there was no constitutional provision "which absolves a Member of the I.L.O. from complying with the obligations of membership or excuses it from participating in the normal activities of the Organisation if it cannot first obtain the consent of some other Members of the Organisation", the Court held that Danzig was not able to become a Member unless there were an agreement under which Poland undertook not to object to any action by Danzig as a Member of the I.L.O.

Despite the fact that the above advisory opinion was delivered by the PCIJ many years ago, it is still relevant to the interpretations of contemporary international institutional law, particularly in view of the unique institutional structure of the WTO. The symbiosis of sovereign States and other entities in the WTO is reminding us of the statement made by professor Donald McRae: "International trade law rests on the starting assumption that economic welfare of individuals is enhanced by promoting economic specialisation and exchange. It is individual-based and views national boundaries as an impediment to the promotion of that specialisation and exchange that enhances economic welfare. International law, by contrast, has rested on the basis of the sovereignty and of the sovereign equality of territorially based States surrounded by national boundaries. The corollary of that conception is that States must co-operate to promote the welfare of their inhabitants. The assumptions of the one(international trade law) are individual and welfare-based; the assumptions of the other(international law) are State and security-based".<sup>36</sup>

The fact that the WTO has both sovereign States and separate customs territories as its Members can be traced back to the GATT history. When the *General Agreement on Tariffs and Trade*(GATT) was signed in 1947, there were only 23 signatories.<sup>37</sup> Many countries, before they won their full independence, were the colonies of some western powers. They became GATT contracting parties by means of the sponsorship of their metropolitan countries under Article XXXIII of GATT 1947.<sup>38</sup> Among this group of GATT contracting parties are Hong Kong and Macao. According to *The Joint Declaration of the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong*(hereinafter as the *Sino-British Joint Declaration*), which was signed on 19 December 1984, after the Chinese government resumes the exercise of sovereignty over Hong Kong with effect from 1 July 1997, "The Hong Kong Special Administrative

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<sup>36</sup> : Donald M. McRae: *The Contribution of International Trade Law to the Development of International Law*, Recueil des Cours, Vol.260, 1996, p.215.

<sup>37</sup> : See the Preamble of GATT 1947. See supra note 23. In the book *The Creation of States in International Law*, Oxford: Clarendon Press(1979), p.1, James Crawford made an estimate that shortly before the World War II, there were only about seventy-five States on the earth.

<sup>38</sup> : Which states: "A government not party to this Agreement, or a government acting on behalf of a separate customary territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority". See supra note 23.

Region will retain the status of a free port and a separate customs territory”(Point Three[6]). “Using the name of ‘Hong Kong, China’, the Hong Kong Special Administrative Region may on its own maintain and develop economic and cultural relations and conclude relevant agreements with States, regions and relevant international organisations”(Point Three[10]).<sup>39</sup> These principles are reaffirmed in similar words in Article 116 of *The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*(hereinafter as *The Basic Law of Hong Kong*).<sup>40</sup>

Then in 1987, the Chinese government and the Portuguese government signed *The Joint Declaration of the Government of the People’s Republic of China and the Government of the Republic of Portugal on the Question of Macao*(hereinafter as the *Sino-Portuguese Joint Declaration*). Point Two(8) of the *Sino-Portuguese Joint Declaration* stipulates that after the Chinese government resumes the exercise of sovereignty over Macao with effect from 20 December 1999, “The Macao Special Administrative Region will remain a free port and a separate customs territory in order to develop its economic activities...” “Using the name ‘Macao, China’, the Macao Special Administrative Region may on its own maintain and develop economic and cultural relations and in this context conclude agreements with States, regions and relevant international organisations”(Point Two[7]).<sup>41</sup> Similar words can also be found in Article 112 of *The Basic Law of the Macao Special Administrative Region of the People’s Republic of China*(hereinafter as *The Basic Law of Macao*).<sup>42</sup>

The issue of Taiwan is different from those of Hong Kong and Macao. The Chinese government, under the control of the Nationalist Party, signed the *General Agreement on Tariffs and Trade* in 1947, and became one of the original contracting parties of the GATT.<sup>43</sup> When the Communists won the control over the mainland of China in 1949, the Nationalist Party retreated to the island of Taiwan and withdrew from the GATT in 1951 under Article XXXI of GATT 1947.<sup>44</sup> Although this withdrawal was always debated by the Chinese government as it claimed that the government in Taiwan could not act on behalf of China, the Chinese government began its negotiations with the GATT for the resumption of its GATT contracting party status in 1986. The negotiations did not succeed, and in 1995 when the World Trade Organisation was created as the successor to the GATT, China’s efforts to be one of the WTO founding Members was rebuffed. Thereafter, China continued the negotiations for its WTO membership. According to the terms agreed upon between the Chinese government and the World Trade Organisation, Taiwan, after China’s application for WTO membership is approved, may accede to the WTO as a separate customs territory, using the title “Chinese Taipei”, enjoying the full rights and implementing the full obligations of a WTO Member.<sup>45</sup> On 10 November and

<sup>39</sup> : cf. <http://www.info.gov.hk/info/jd-full2.htm>

<sup>40</sup> : cf. [http://www.info.gov.hk/basic\\_law/fulltext/content0205.htm](http://www.info.gov.hk/basic_law/fulltext/content0205.htm)

<sup>41</sup> : cf. [http://www.imprensa.macao.gov.mo/dc/declconj1\\_e.htm](http://www.imprensa.macao.gov.mo/dc/declconj1_e.htm)

<sup>42</sup> : cf. <http://english.peopledaily.com.cn/features/Macao/basiclaw1.htm>

<sup>43</sup> : One evidential fact is that China, under the title “The Republic of China”, is one of the 23 signatories of GATT 1947. See the Preamble of GATT 1947. See supra note 23.

<sup>44</sup> : Which states: “Without prejudice to the provisions of paragraph 12 of Article XVIII, of Article XXIII or paragraph 2 of Article XXX, any contracting party may withdraw from this Agreement...The withdrawal shall take effect upon the expiration of six months from the day on which written notice of withdrawal is received by the Secretary General of the United Nations”. See supra note 23.

<sup>45</sup> : See the WTO news briefing *WTO successfully concludes negotiations on entry of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*. cf. [http://www.wto.org/english/news\\_e/pres01](http://www.wto.org/english/news_e/pres01)

11 November 2001, both China and Taiwan were approved for their accession to the WTO at the fourth WTO Ministerial Conference.

Representation of a member State in an international organisation concerns the question of which government is to be recognised as being entitled to represent that State. Issues of representation are to be distinguished from admission to membership. Representation presupposes admission that has already taken place. The question of representation arises, for example, when there is a change of government in a member State by revolution or as a result of a *coup d'état*.<sup>46</sup> In the viewpoint of Amerasinghe, when there is a simple change of government, the issue, though technically posed, does not create problems, as there is no competition for representation.

From an objective standpoint, if a State is to be properly represented in an international organisation, and be subject to the obligations and pressures that the organisation can impose on that State, membership should be limited to the government which is in effective control of the State. This was also the view taken in 1950 by the then UN Secretary General Lie: "It is submitted that the proper principle can be derived by analogy from Article 4 of the (UN)Charter. This Article requires that an applicant for membership must be able and willing to carry out the obligations of membership. The obligations of membership can be carried out only by governments which in fact possess the power to do so. Where a revolutionary government presents itself as representing a State, in rivalry to an existing government, the question at issue should be which of the two governments in fact is in a position to employ the resources and direct the people of the State in fulfilment of the obligations of membership. In essence, this means an inquiry as to whether the new government exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population".<sup>47</sup>

According to professor White, the Secretary General was putting forward an opinion as regards the question of which government was representing China at the UN.<sup>48</sup> The Nationalist Party representative present since the formation of the UN was not removed

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<sup>46</sup> : See supra note 22, p.126. For example, the UN never accept the right of the Taliban regime to represent Afghanistan. Sometimes a refusal of representation can be difficult to distinguish from a refusal of membership: the UN membership of the former Socialist Federal Republic of Yugoslavia was taken away from the Federal Republic of Yugoslavia on 22 September 1992 under UN General Assembly resolution 47/1. But the reasoning proposed by the Federal Republic of Yugoslavia in *Application for Revision of the Judgement of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)*, that it was not then a party to the *Statute of the Court* and that it was not bound by the *Genocide Convention*, was not accepted by the Court. The Court observes that "the difficulties which arose regarding the FRY's status between the adoption of that resolution and its admission to the United Nations on 1 November 2000 resulted from the fact that, although the FRY's claim to continue the international legal personality of the former Yugoslavia was not 'generally accepted'..., the precise consequences of this situation were determined on a case-by-case basis (for example, non-participation in the work of the General Assembly and ECOSOC and in the meetings of States parties to the International Covenant on Civil and Political Rights, etc.)". The Court further states that resolution 55/12 of 1 November 2000 (by which the General Assembly decided to admit the Federal Republic of Yugoslavia to membership in the United Nations) cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-a-vis the United Nations over the period 1992 to 2000, or its position in relation to the *Statute of the Court* and the *Genocide Convention*. See International Court of Justice, Press Release 2003/8.

<sup>47</sup> : See UN Documents, S/1466(1950).

<sup>48</sup> : See N. D. White: *The Law of International Organisations*, Manchester University Press(1996), p.67.

from the seat at the UN, including the permanent seat on the Security Council, until 1971 under the rules of procedures governing credentials. Simply put, the West countries dominated the UN to the extent that it could oppose any attempt to reject the credentials of the Nationalist Party government, which had taken refuge in Taiwan, in favour of the Communist government which had been in effective control of the whole of mainland China. Eventually, the growth in the membership of the UN enabled the General Assembly to adopt a resolution which resolved to “restore all its rights to the People’s Republic of China...and expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy”.<sup>49</sup> The Secretary General reported to the Security Council that he was satisfied under Rule 15 of the Rules of Procedure,<sup>50</sup> and the Council welcomed the Communist Chinese on 21 November 1971, following a change of tack by the United States from a policy of confrontation with China to one of *rapprochement*. The Republic of China(Taiwan) is no longer a Member of the United Nations even though Article 23 of the UN Charter, which sets out the composition of the Security Council, still refers to “the Republic of China” and not “the People’s Republic of China”.

The UN resolution can be seen as a prototype for other intergovernmental organisations in their dealing with the issue of representation concerning China and Taiwan. With the fact that there are more and more States which agree to recognise that there is only one China, and Taiwan is a part of it,<sup>51</sup> there should not have had any ambiguity on such questions: who should be qualified to represent China, and whether Taiwan could be a separate State. Unfortunately, there is always some discordance while in dealing with these issues.<sup>52</sup> In actuality, keeping in line with the principle that there is but one China, and Taiwan is a part of China does not exclude the possibility for Taiwan

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<sup>49</sup> : See General Assembly Resolutions. 2758, 26 UN GAOR Supplement, No.29, 1971. The resolution was adopted by a two-thirds majority instead of a simple majority normally required for issues of representation. See also supra note 1, p.179.

<sup>50</sup> : Which provides that “the credentials of the representatives on the Security Council ...shall be examined by the Secretary General who shall submit a report to the Security Council for approval”.

<sup>51</sup> : For example, Point 12 of the *Joint Communique of the People’s Republic of China and the United States of America*, which was signed on 28 February 1972 and started the normalisation of Sino-American relationship, states: “The U. S. side declared: The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position...” Then in another important document *Joint Communique of the People’s Republic of China and the United States of America on the Establishment of Diplomatic Relations*, which was signed on 1 January 1979, Point 2 states: “The United States of America recognises the Government of the People’s Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other *unofficial relations* with the people of Taiwan”(Emphasis added). Point 7 states: “The Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China”.

cf. <http://www.stimson.org/cbm/CHINA/3cmmnqs/2-28-72.htm>

and <http://www.stimson.org/cbm/CHINA/1-1-79.htm>

<sup>52</sup> : For example, in 1993, representatives of seven Central American countries requested the UN General Assembly to examine the situation of Taiwan and its participation in the UN. See UN Document, A/48/191; see also UN Document, A/49/144. Of course, the Beijing government considered this to be “a serious infringement upon China’s sovereignty and gross interference in China’s internal affairs”, and is “firmly opposed to any attempt to create ‘two Chinas’, or ‘one China, one Taiwan’, or ‘one country, two seats’ both in and outside the United Nations by any country, international organisation or individual under whatever pretext and in whatever form”. See UN Document, A/49/274, p.1.

to participate in some of the international organisations. The questions, then, are: what are they? and upon what conditions?

In order to reduce the disagreement and avoid the confrontations on the criteria of membership and representation in an international organisation, it is necessary to draw some general principles upon these issues. For the sake of convenience, while in dividing international organisations into three categories, the author uses the practice of traffic lights in the context of the particular situation concerning China, Taiwan, Hong Kong and Macao, which, hopefully, will shed some light on similar issues. The first group of international organisations, which is defined as the “red light area”, includes the United Nations and its specialised agencies,<sup>53</sup> other political intergovernmental organisations (“universal” or regional). These international organisations, under the guidance of the UN Charter and the constitutions of those individual organisations,<sup>54</sup> usually consist of sovereign States and have a wide dimension in dealing with international affairs. Undoubtedly, as integrated parts of China, Taiwan, Hong Kong and Macao cannot be members of these international organisations. As regards to those international organisations in which Taiwan had gained its membership before 1971 when the UN membership of Taiwan was replaced by mainland China, they may follow the practice of the United Nations to transfer the entitlement of representation on behalf of China to the Beijing government.

The second group, which includes the bulk of those technical international organisations, may be defined as the “yellow light area”. In principle, parts of a State cannot be independent parties to a treaty which embodies the constitution of an international organisation. Then, in the present world, there are quite a few countries which have some parts of their territories enjoying more autonomous rights than other parts out of the historical, ethnical or even political reasons. If these territories are blocked from any communications with the outside world under the pretext of sovereignty, it is neither reasonable nor possible. Therefore, it is necessary to set some conditions to fit the situation in which separate territories like Taiwan, Hong Kong and Macao could possess their memberships in some international organisations. As a general principle, only where there are clear provisions in the constitution of an international organisation such as GATT Article XXXIII and *WTO Agreement* Article XII:1, can non-State territories become members of this international organisation. As Schermers and Blokker pointed out: “independent membership for non-autonomous territories is valuable for territories which are independent with regard to certain specific public functions, but which are not responsible for the conduct of their general international relations. *It is the independence of the function which is relevant, not the independence of*

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<sup>53</sup> : The UN specialised agencies include International Labour Organisation(ILO); Food and Agricultural Organisation(FAO); United Nations Educational, Scientific and Cultural Organisation(UNESCO); World Health Organisation(WHO); International Bank for Reconstruction and Development(IBRD or World Bank); International Monetary Fund(IMF); International Civil Aviation Organisation(ICAO); International Maritime Organisation(IMO); International Telecommunication Union(ITU); Universal Postal Union(UPU); World Meteorological Organisation(WMO); World Intellectual Property Organisation(WIPO); International Fund for Agricultural Development(IFAD); United Nations International Development Organisation(UNIDO). See the principal organs of the United Nations. cf. <http://www.un.org/aboutun/chart.html>

<sup>54</sup> : Except for the above-mentioned Articles 3, 4 of the UN Charter, see also Article 4 of the constitution of the Organisation of American States(OAS); Article IV of the constitution of the Organisation of African Unity(OAU).

*territory*”(Emphasis added).<sup>55</sup> The World Trade Organisation has set itself as an example to distinguish its Members as “States” and “separate customs territories”. This clear conceptual division will help to avoid the confusions on those subtle issues like statehood and representation in the affairs regulated by the WTO.

One interesting example which deserves noticing, in the context of WTO membership, is the legal status of the European Communities. In terms of its external trade relations, the European Communities works as a single trade unit under the unified EC commercial policy, representing all the current 15 EU members. The legal status of the European Communities in the WTO is not the same as that of a sovereign State, neither is it similar to that of a separate customs territory. To a certain extent, the European Communities looks like a “supranational” organisation, having competence over the member governments in many respects. Nevertheless, the EC has not taken away the sovereignty of its member States. Therefore, despite the fact that all the EC members speak with one voice in the WTO, the European Communities has votes equal to the number of its members. The EC example in the WTO indicates a new trend of relations between two international organisations, i.e., the membership of one international organisation in another international organisation.

The third group, which is defined as the “green light area”, is referred to those non-governmental international organisations. All States and non-State territories may participate in these organisations. In the view of the author, non-governmental international organisations can be divided into constitutional non-governmental international organisations and non-governmental international organisations *de facto*. One example for the former group is the International Olympic Committee(IOC). Article 19(1) of the IOC Charter states: “The IOC is an international non-governmental, non-profit organisation, of unlimited duration, in the form of an association with the status of a legal person, recognised by the Swiss Federal Council”.<sup>56</sup> In fact, there are already members from China, Taiwan and Hong Kong who are serving in the IOC Committee, and the Beijing government has never raised any objection to it.<sup>57</sup> The latter group includes the majority of non-governmental international organisations. These organisations are regulated either by public international law like the International Federation of the Red Cross and Red Crescent Societies(known until 1991 as the League of Red Cross and Red Crescent Societies), or on a voluntary base like Amnesty International. The most significant features of non-governmental international organisations are their neutrality and independence. Membership of these organisations does not involve such subtle issues like sovereignty or statehood. Therefore, memberships of Taiwan, Hong Kong and Macao in these organisations will not meet any challenge.

The study of the criteria for membership and representation in an international organisation can be used to regulate the relationship between the organisation and its members. However, this is only the internal relationship of this organisation. The relationship between two or more international organisations is the external one, which is as equally important as the internal one. As a matter of fact, they are just like the two sides of the same coin. Therefore, after we have acquired a better understanding as to the

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<sup>55</sup> : See supra note 1, p.53.

<sup>56</sup> : cf. [http://www.olympic.org/ioc/e/facts/charter/charter\\_ioc\\_e.html](http://www.olympic.org/ioc/e/facts/charter/charter_ioc_e.html)

<sup>57</sup> : Among the present IOC members, two from China, one from Taiwan, and one from Hong Kong, id.



composition of the WTO, it is only natural for us to extend our study to the relevance of this organisation in the global terms.

## **Section Two The Global Governance and New Agenda of the WTO**

### **3.2.1. The governance of the WTO in the global terms**

Global governance has been defined by one international body as “a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements...There is no single model or form of global governance, nor is there a single structure or set of structures. It is a broad, dynamic, complex process of interactive decision-making”.<sup>58</sup> In the context of international organisations, global governance is nothing new. According to professor Patricia Birnie and professor Alan Boyle, the Congress of Vienna in 1815 and the series of international conferences that followed it were the precursors of the political co-operation in global terms. The creation of international bodies for functional, administrative purposes began with those innovative 19th century public unions, including the Universal Postal Union, the International Telegraphic Union, and the International Railway Union. The first major law-making conferences, the Hague Peace Conferences of 1898 and 1907, represented another major development in the institutionalisation of international co-operation. These nineteenth-century developments in international relations have contributed to and are reflected in modern intergovernmental organisations---their political role deriving from the Congress approach, their regulatory role from the Hague Conferences, and their constitutional powers synthesised from experience with the public unions. All three strands were embodied first in the League of Nations and then further elaborated in the UN Charter, which established the United Nations in 1945.<sup>59</sup>

Parallel to the political pillar supported by the United Nations in the post-war international relations is the economic pillar which was supported by the GATT together with the World Bank and the International Monetary Fund(IMF) under the Bretton Woods System. But the GATT is different from the World Bank and the IMF. Its legal status decided the GATT not as an international organisation, but as a trade agreement. Until the establishment of the World Trade Organisation in 1995, there had not existed an international organisation with its own legal personality, the mission of which is to regulate global trade affairs.

The Uruguay Round of negotiations represented a process “through which conflicting or diverse interests may be accommodated and cooperative action may be taken”. The multilateral agreements are the results of the eight years’ bargaining, negotiations and compromises. Therefore, the first and foremost element of the WTO’s global governance is to ensure the implementation of these multilateral agreements by its Member governments. The legal foundation for this governance derives from two articles of the

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<sup>58</sup> : See Commission on Global Governance: *Our Global Neighbourhood*, Oxford University Press(1995), pp.2-4. For a succinct account of “governance” literature in international relations, see Toope, in Byers(ed): *The Role of Law in International Politics*, Oxford University Press(2000), pp.94-99.

<sup>59</sup> : See Patricia W. Birnie and Alan E. Boyle: *International Environmental Law*, second edition, Oxford University Press(2002), Chapter Two.

*WTO Agreement*. Article II:2 provides that “The agreements and associated legal instruments included in Annexes 1, 2 and 3...are integral parts of this Agreement, binding on all Members”. Article XVI:4 further states: “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the Annexed Agreements”.<sup>60</sup> Meanwhile, the WTO has set up a trade policy review mechanism, the purpose of which is to improve the adherence by all Members to WTO rules and to enable the regular collective appreciation and evaluation of the full range of individual Members’ trade policies and practices and their impact on the functioning of the multilateral trade system. With the forthcoming of a new round of multilateral negotiations, this process will continue to coordinate different views among WTO Members, amend the existing rules and make new rules. Hence, within the WTO legal framework, the relationship between the organisation and its Members is well defined. In other words, its governance is tangible and unquestionable.

In contrast, the role of the World Trade Organisation in regard to non-Members is clearly limited. Neither the *WTO Agreement* nor the multilateral trade agreements contain any specific provisions which touch this issue. As a general rule, Article 26 of the *Vienna Convention on the Law of Treaties* (*Pacta sunt servanda*) should be applicable in this respect, i.e. WTO agreements are, in principle, merely binding upon its Members. Only those WTO provisions which are simultaneously general international law could have universal impact.<sup>61</sup>

According to professor Birnie and professor Boyle in their book *International Environmental Law*, the term “governance”, when applied to those “universal” organisations like the UN and the WTO, implies “rather less than a global government, a task for which no international organisation is equipped, but more than the power to determine policy or initiate the process of international law-making.”<sup>62</sup> Essentially, the WTO’s global governance derives from its competence over law-making on trade affairs and settlement of disputes among the Members; from its negotiating forum and policy review mechanism. It is these functions and its global character which make the WTO relevant in the management of international economic relations. In the view of Birnie and Boyle, global governance, at the very least, should capture the idea of a community of States with responsibility for addressing some common problems through a variety of political processes which are inclusive in character, and which to some degree “embody a limited sense of a collective interest, distinct in specific cases from the particular interests of individual States”.<sup>63</sup> Upon these criteria, the formation of the WTO legal framework is only part of this process of global governance. To realise the unification of international trade rules is just one side of the issue, while to accommodate the different interests of Members is another side of the issue which the WTO has to address. What matters for the WTO in the next round of multilateral negotiations is not the scope, but the efficiency of its governance.

The scope of the WTO’s governance is also connected with the objectives of this organisation, which have been defined in a broad sense in the Preamble of the *WTO Agreement* with a view to “raising standards of living, ensuring full employment and a

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<sup>60</sup> : See supra note 23.

<sup>61</sup> : See *Vienna Convention on the Law of Treaties*, Article 26, Article 34, Article 38. See supra note 21.

<sup>62</sup> : See supra note 59.

<sup>63</sup> : Id. See also supra note 58, pp.2-6.

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".<sup>64</sup> Following these general objectives of "raising the living standards" and "enhancing the sustainable development" among its Member countries, the WTO has embraced some new issues like environment protection under its regulations apart from trade which was the sole regulated area of its predecessor, the GATT, and the trend is that the process of expansion will continue.<sup>65</sup>

However, even in its most effectively regulated areas, the WTO's governance is still not exclusive, in view of the relationship between the WTO and other international organisations, either "universal" or regional, in regulating international trade affairs.<sup>66</sup> Take the example of the United Nations and its specialised agencies, Article III:5 of the *WTO Agreement* only provides that "With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies." No words could be found, either explicitly expressed or implicitly implied, on its exclusive governance with regards to global trade and trade-related affairs. In fact, apart from the World Trade Organisation, there is at least one other "universal" body concerned with international trade, the United Nations Commission on International Trade Law(UNCITRAL).<sup>67</sup> UNCITRAL was established by the UN General Assembly in 1966 according to Resolution 2205[XXI] of 17 December 1966. The General Assembly recognised that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or

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<sup>64</sup> : See supra note 23.

<sup>65</sup> : For example, there were a lot of talks upon the integration of labour standards into the WTO regulated dimension at the fourth Ministerial Conference held in Doha, Qatar in November 2001. The advocates for including labour standards on the WTO's agenda of future work maintain that rights including the freedom to bargain collectively, freedom of association, elimination of discrimination in the workplace and the elimination of workplace abuse(including forced labour and certain types of child labour) are matters which should be considered in the WTO. On the other side, developing countries have another view. Member governments from the developing world believe that attempts to introduce this issue into the WTO represent a thinly veiled form of protectionism which is designed to undermine the comparative advantage of lower-wage developing countries. Officials from these countries say that workplace conditions will improve through economic growth and development, which would be hindered should rich countries apply trade sanctions to their exports for reasons relating to labour standards. Application of such sanctions, they say, would perpetuate poverty and delay development efforts including those aimed at improving conditions in the workplace. cf. [http://www-chil.wto-ministerial.org/english/thewto\\_e/minist\\_e/min01\\_e/br](http://www-chil.wto-ministerial.org/english/thewto_e/minist_e/min01_e/br)

<sup>66</sup> : For example, Article V of the *WTO Agreement* states: "The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organisations that have responsibilities related to those of the WTO". "The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organisations concerned with matters related to those of the WTO". See supra note 23.

<sup>67</sup> : The Commission is composed of thirty-six member States elected by the General Assembly. Membership is structured so as to be representative of the world's various geographic regions and its principal economic and legal systems. Members of the Commission are elected for terms of six years, the terms of half the members expiring every three years.

removing these obstacles.<sup>68</sup> The General Assembly gave the Commission the general mandate to further the progressive harmonisation and unification of the law of international trade. The Commission has since become to be the core legal body of the United Nations system in this aspect of international trade law. The areas in which the Commission has worked or is working and the major results of that work are as the followings:<sup>69</sup> (a) international sale of goods and related transactions;<sup>70</sup> (b) international transport of goods;<sup>71</sup> (c) international commercial arbitration and conciliation;<sup>72</sup> (d) public procurement and infrastructure development;<sup>73</sup> (e) construction contracts;<sup>74</sup> (f) international payments;<sup>75</sup> (g) electronic commerce;<sup>76</sup> (h) cross-border insolvency,<sup>77</sup> and other relevant work. Some of the legal texts made by the UNCITRAL such as the *United Nations Convention on Contracts for the International Sale of Goods* have been widely accepted in the practice of international trade. However, unlike the WTO agreements, the adoption of the UNCITRAL legal texts is not compulsory, but optional.

The global governance of the WTO is further limited with the increasing emergence of those customs unions<sup>78</sup> and free-trade areas<sup>79</sup> which are established by those regional organisations or regional trade agreements. The legal source for these customs unions and

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<sup>68</sup> : cf. <http://www.uncitral.org/english/commiss/geninfo1.htm>

<sup>69</sup> : Id, the source is from the UNCITRAL website.

<sup>70</sup> : Which includes: (a) *Convention on the Limitation Period in the International Sale of Goods* (New York, 1974); (b) *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 1980); (c) *UNCITRAL Legal Guide on International Countertrade Transactions*.

<sup>71</sup> : Which includes: (a) *United Nations Convention on the Carriage of Goods by Sea, 1978* (the "Hamburg Rules"); (b) *United Nations Convention on the Liability of Operators of Transport Terminals in International Trade*.

<sup>72</sup> : Which includes: (a) *UNCITRAL Arbitration Rules*; (b) *Recommendations to assist arbitral tribunals and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules* (1982); (c) *UNCITRAL Conciliation Rules* (1980); (d) *UNCITRAL Model Law on International Commercial Arbitration* (1985); (e) *UNCITRAL Notes on Organising Arbitral Proceedings* (1996); (f) *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958).

<sup>73</sup> : Which includes: (a) *UNCITRAL Model Law on Procurement of Goods, Construction and Services* (1994); (b) *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (2001).

<sup>74</sup> : Which includes *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*.

<sup>75</sup> : Which includes: (a) *United Nations Convention on International Bills of Exchange and International Promissory Notes* (New York, 1988); (b) *UNCITRAL Legal Guide on Electronic Funds Transfers* (1987); (c) *UNCITRAL Model Law on International Credit Transfers* (1992); (d) *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* (New York, 1995).

<sup>76</sup> : Which includes: (a) *Recommendation on the Legal Value of Computer Records* (1985); (b) *UNCITRAL Model Law on Electronic Commerce*.

<sup>77</sup> : Which includes *UNCITRAL Model Law on Cross-Border Insolvency*.

<sup>78</sup> : Article XXIV:8 of GATT 1994 defines "customs union" as "the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union". See supra note 23.

<sup>79</sup> : Article XXIV:8 of GATT 1994 defines a "free-trade area" as "a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories". See supra note 23.

free-trade areas under the WTO system is Article XXIV of GATT 1994(*Territorial Application---Frontier Traffic---Customs Unions and Free-trade Area*).<sup>80</sup> Article XXIV:5 of GATT 1994 states: “the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or a free-trade area; *Provided* that: (a)with respect to customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement as the case may be; (b)with respect to free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be”.<sup>81</sup>

The current trend is that regional cooperation is developing faster than the cooperation in the global terms. Some regional organisations or regional trade agreements have substantially reduced the duties imposed upon the trade across the borders of their member countries or contracting parties. For example, the Single European Act(SEA), which was signed in 1986, required that the European Communities adopt more than 300 measures to remove physical, technical, and fiscal barriers in order to establish a single market, where the economies of the member countries would be completely integrated. In addition to this, the EC member countries agreed to adopt common policies and standards on matters ranging from taxes and employment to health and environment. Each member country also resolved to bring its economic and monetary policies in line with those of its neighbours.<sup>82</sup> The fact that a unified currency(euro) has been put in use since 1 January 2002 in most member countries marks a further integration of the European Union.<sup>83</sup>

Another influential free-trade area is the one among Canada, the United States and Mexico based on the *North American Free Trade Agreement*(NAFTA) which became effective on 1 January 1994. The NAFTA was built upon a 1989 trade agreement

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<sup>80</sup> : As the first paragraph of Article XXIV of GATT 1994 states: “The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application...” See supra note 23. The rationale for those free trade areas or customs unions as the exceptions under the GATT system is based on the fact that, traditionally, some countries impose less duties or no duties upon the trade across the borders of these countries, or between the metropolitan country and its colonies. The *Lome Convention* between the European Union and some African, Caribbean and Pacific(ACP) countries is evolved from the latter situation.

<sup>81</sup> : See supra note 23.

<sup>82</sup> : See the research view about the European Union contributed by Derek W. Urwin.

cf. <http://encarta.msn.com/find/findinpage.asp?&pg=8&ti=761579567&sc=0&pt=1>

<sup>83</sup> : The three member countries still outside the euro system are the United Kingdom, Denmark and Sweden.

between the United States and Canada that eliminated or reduced many tariffs between the two countries. The NAFTA called for immediately eliminating duties on half of all U.S. goods shipped to Mexico and gradually phasing out other tariffs over a period of about 14 years. Restrictions are to be removed from many categories, including motor vehicles and automotive parts, computers, textiles, and agricultural products. The treaty also protected intellectual property rights and outlined the removal of restrictions on investment among these three countries. Mandates for minimum wages, working conditions, and environmental protection were added later as a result of supplemental agreement signed in 1993.<sup>84</sup>

Recently, a new regional co-operation is taking shape, which may have the potential impact upon the global trade structures and legal system. This is the Asia-Pacific Economic Cooperation(APEC). APEC was established in 1989 in response to the growing interdependence among Asia-Pacific economies. Begun as an informal dialogue group, APEC has since become the primary regional vehicle for promoting open trade and practical economic cooperation. Its goal is to advance Asia-Pacific economic dynamism and sense of community. In 1999, APEC's twenty-one member economies had a combined Gross Domestic Product of over US\$ 18 trillions<sup>85</sup> and 43.85 percent of global trade.<sup>86</sup> According to the *Bogor Declaration* which was made in 1994, the APEC economies will complete the achievement of free trade and investment no later than the year 2020. The pace of implementation will take into account differing levels of economic development among APEC economies, with the industrialised economies achieving this goal no later than the year 2010 and developing economies no later than the year 2020.<sup>87</sup>

The expansion and extent of regional cooperation have made it necessary to analyse whether the system of WTO rights and obligations as it relates to regional trade agreements needs to be further clarified. At the fourth WTO Ministerial Conference, no common understanding could be reached among its Members on whether regional trade agreements would enhance or obstruct the development of the multilateral trading system, or in other words, whether they would function as "building blocks" or "stumbling blocks" in the integration of world economy.<sup>88</sup> In the view of the author, the

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<sup>84</sup> : Talks have already begun to expand the NAFTA to include all Latin American countries with the exception of Cuba. These talks include plans to create a free-trade zone throughout the Americas in the 21st century. However, to include more countries in the NAFTA is expected to be difficult. Some countries are far from being able to agree to and implement the stringent economic requirements of a free-trade accord.

cf. <http://encarta.msn.com/index/conciseindex/6F/06F06000.htm?z=1&pg=2&br=1>

<sup>85</sup> : See *The APEC Regional Trade and Investment 2000*, Market Information and Analysis Unit, Department of Foreign Affairs and Trade, Australia, November 2000.

<sup>86</sup> : See United Nations Monthly Bulletin of Statistics, Department of Economic and Social Affairs, Statistics Division, July 2000.

<sup>87</sup> : See *APEC Economic Leaders' Declaration of Common Resolve*(Bogor, Indonesia), 15 November, 1994.

cf. <http://www.apecsec.org.sg/virtualib/econlead/bogor1.html>

<sup>88</sup> : One view is that regional trade agreements, by moving generally at a faster pace than the multilateral trading system, represent a way of strengthening it. The positive effect of regional trade agreements on the integration of developing countries in the world economy is also emphasised . Other Members consider that, in today's circumstances, a redefinition of the relationship between regional trade agreements and the multilateral trading system is required, to achieve a better synergy between the two. It is argued that a further re-interpretation of rules drafted 50 years ago would not suffice to take into account the

question whether the positive impact is more than the negative one, or vice versa, to the multilateral trading system, or even to the global governance role of the WTO as regards the proliferation of regional trade agreements, cannot be answered easily without a careful analysis of the relationship between the two. Therefore, the following research will be focused on the rationale of the regional cooperations and their impact upon the global trading system.

### **3.2.2. Globalisation vs regionalisation: another challenge to the World Trade Organisation**

The objectives to establish the World Trade Organisation, as stated in the Preamble to the *WTO Agreement*, are to raise the standards of living, promote full employment, expand the production of and trade in goods and services, increase real income and effective demands, advocate the optimal use of world's resources in a sustainable way, and ensure that developing countries, especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development. The means whereby these objectives are to be achieved is through the provision of a secure and predictable international trading environment for the business community and a continuing process of trade liberalisation based on the principle of non-discrimination.<sup>89</sup> Thus, preferential regional trading agreements, by definition, are clear violations of the fundamental non-discrimination principle. Ironically, the number of regional trading agreements, however, has increased greatly in recent years. To date, over 200 regional trading agreements have been notified to the GATT/WTO.<sup>90</sup> Out of these agreements, 121 notified under GATT Article XXIV, 19 under the Enabling Clause and 12 under GATS Article V are still in force today. The Committee on Regional Trade Agreements has currently under examination more than 100 agreements.<sup>91</sup>

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fundamental changes observed in the nature and scope---both geographical and in coverage---of regional trade agreements and their increasingly overlapping membership.

cf. [http://www-chil.wto-ministerial.org/english/thewto\\_e/minist\\_e/min01\\_e](http://www-chil.wto-ministerial.org/english/thewto_e/minist_e/min01_e)

<sup>89</sup> : For example, Article I of GATT 1994, Article II of the GATS, Article 4 of the TRIPS. See supra note 23.

<sup>90</sup> : Article XXIV:7(a) of GATT 1994 provides that "any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate". During the GATT years, the examination of regional trading agreements was conducted in individual working parties. In order to ensure the consistency in their examination, the General Council of the WTO established in February 1996 a single Committee, the Committee on Regional Trade Agreements, to oversee all regional trading agreements. In addition to examining individual regional agreements, another important duty of the Committee is to consider the systemic implication of the regional trading agreements for the multilateral trading system and the relationship between them. The Committee is also mandated to develop procedures to facilitate and improve the examination process and to ensure that the reporting on the operation of the regional trading agreements is adequately carried out by the parties to the agreements.

<sup>91</sup> : During the Uruguay Round negotiations, Article XXIV of GATT 1947 was clarified to some extent and updated by an Understanding of Interpretation. Preferential trade arrangements on goods between developing country Members are regulated by an "Enabling Clause" dating from 1979. For trade in services, the conclusion of regional trading agreements is governed by GATS Article V(*Economic Integration*).

Early in the 1950s, shortly after the *General Agreement on Tariffs and Trade* was signed, some economists adopted a rather sceptical attitude towards the benefits of regional trading. Jacob Viner, in 1950, coined the distinction between trade creation (additional trade created through establishing a customs union) and trade diversion (trade being diverted from an efficient producer outside the union to a less efficient producer in a Member country). This theory of customs union found that the overall welfare benefit to Member countries depended on the degree of trade creation as opposed to trade diversion. As regional integration increased the efficiency of an external tariff, the competitive position of a customs union would improve at the expense of the rest of the world. Therefore, the overall impact of regional integration is at best ambivalent.<sup>92</sup> With the development of free trade areas since 1960s, Viner's scepticism about the likely welfare benefits of customs unions gradually gave way to a popular opinion among economists that regional trade blocs generally created rather than diverted trade.

Among the proponents of regional trading agreements are some prominent figures who include Gary Sampson, the former Development Division Director of the World Trade Organisation. In his article *Regional Trading Arrangements and the Multilateral Trading System*, Sampson states: "With the successful conclusion of the (Uruguay) Round, it is fair to speculate that the growth in regionalism---operating in accordance with GATT obligations---has at least the potential to strengthen the rules-based multilateral trading system. The surge of regionalism parallels and complements a rapid expansion in GATT's membership as evidenced by the fact that 28 countries are now in the process of accession to GATT...In short, provided that regionalism remains open---and the rules and procedures of the GATT offer the only generally available means of ensuring that it does---there is no reason why regional trade agreements and multilateral system should not continue to be mutually supportive."<sup>93</sup>

In the view of the author, what Sampson cherishes sounds plausible in theory, but unattainable in practice. When Article XXIV of GATT 1947 was drafted as the exemptions to the general principle of non-discrimination among GATT contracting parties, it was deemed that there should be some strict rules adhered to it. For example, Article XXIV:7(a) requires that "Any contracting party deciding to enter into a customs union or free trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate."<sup>94</sup> But this provision is neither clear nor operable. Different views may arise with respect to the point in time at which notification of a regional trade agreement should occur: whether at the conclusion of negotiations, when the agreement is signed, when it is ratified or when it enters into force. In most cases, an international agreement may enter into force only after it is signed by the governments of its participants, ratified by their legislative bodies, or even approved by a referendum. If the notification process occurs prior to entry into force, then the examination body of the WTO will review the

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<sup>92</sup> : Jacob Viner: *The Customs Union Issue*, New York: Carnegie Endowment for International Peace(1950).

<sup>93</sup> : Sampson's article is contained in the book *Regional Trade Blocs, Multilateralism and the GATT*, edited by Till Geiger and Dennis Kennedy, PINTER(1996), pp.17-18.

<sup>94</sup> : See supra note 23.



agreements which might be rejected eventually by one or more of the participants involved. Alternatively, if agreements are examined only after a protracted and perhaps difficult process of domestic legislative approval, the prospect of amending an agreement to reflect the concerns of the WTO Members will present its own difficulties.

Apart from those apparent procedural problems like the one mentioned above, there are also some more complicated issues which merit our concern. Regional trading agreements are often regarded by some scholars as the quicker way to liberalise international trade as the trade tariffs are lowered further among the participants of these agreements.<sup>95</sup> But the other fact which has been ignored by them is that the trade tariffs of these regional blocs are raised relatively for those non-participants. In the words of Jacob Viner, two opposite forces would result from the creation of a customs union: a trade-creating force generated by the elimination of protection of domestic producers against their counterparts in other countries in the union; and a trade-diverting force resulting from the preferential access granted to partner countries in the union vis-a-vis more efficient third country producers.<sup>96</sup> Therefore, regional trading agreements are *de facto* like a double-edged sword: they embody both free trade and protection since they are inherently preferential and discriminatory.

The situation for the free trade area is no better than that of the customs unions, particularly in the context of those free trade areas with preconditions for their membership. Taking the *North American Free Trade Agreement*(NAFTA) for example, professor Jagdish Bhagwati, in his article *The Agenda of the WTO*, told us that the passage of the NAFTA was subject to Mexico's acceptance of the supplemental agreements on environment and labour standards.<sup>97</sup> This is just a wrong way to go: free trade requires no preconditions, why should the regional trading agreements as in the case of the NAFTA? If it is correct to impose such prior conditions for some participants to join a free trade area, then we would have to revise all our textbooks of international economics which tell us that, no matter what other countries' own policies, we shall generally profit from freeing trade in a non-discriminatory fashion. Therefore, the demands imposed on Mexico could have been successfully resisted, as they were in the GATT(and now as they are in the WTO). However, in view of the overall interests, the Mexican administration had to accept these prior conditions as this was a superpower bargaining in a one-on-one format with a vastly inferior power. In turn, this has strengthened the environmental and labour lobbies into arguing that because the NAFTA did it, so must the WTO. In short, the NAFTA has made the negotiations in the WTO more complex, not less.

In the view of Bhagwati, regional trading agreements have become a process by which a hegemonic power seeks to (and often manages to) satisfy its multiple non-trade demands on other weaker trading nations better than through multilateral trading agreements, and this strategy works so much better than trying to impose these extraneous, indeed harmful, conditions through multilateral trade negotiations where all these weak nations are united together and have more bargaining power.<sup>98</sup> The

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<sup>95</sup> : See Stephen Woolcock: *Regional Integration and the Multilateral Trading System*(contained in the book *Regional Trade Blocs, Multilateralism and the GATT*), see supra note 93, pp.115-130.

<sup>96</sup> : See supra note 92.

<sup>97</sup> : Professor Bhagwati's article is contained in the book *Challenges to the New World Trade Organisation*, edited by Pitou van Dijck and Gerrit Faber, Kluwer Law International(1996), p.54.

<sup>98</sup> : Id, pp.54-55.

proliferation of regional trading agreements despite the success of the WTO must be traced at least partly to an awareness of this reality. Therefore, the author can draw such conclusions: if the foregoing analysis has an element of truth in it, regional trading agreements can be regarded as to exert a more negative impact rather than a positive one upon the global trade liberalisation process by facilitating the extraneous demands which aim, not to reduce trade barriers, but to increase them (as in the case when market access is sought to be denied to the developing countries by some developed countries on the grounds such as the prevention of “eco-dumping” and “social-dumping”).

Patricia Clavin, in the article *The Triumph of Regionalism over Globalism: Patterns of Trade in the Interwar Period*, gives us another perspective to realise the potential threat of regional trade blocs to the world economy. During the Great Depression, the world’s leading capitalist countries---the United States, Britain and France---failed to cooperate in efforts to combat the Depression because their analyses of the causes of the Depression, coupled with the priority of national politics, left little common ground between each other. Although viable internationalist oriented initiatives to save the world economy were proposed, there was a lack of political will to make them work. Instead, countries like National Socialist Germany and Fascist Italy, governed by regimes who argued that conflicts in the political economy could be eliminated, came to pose the gravest threat to capitalist liberal democracy. In the build up to the Second World War, the failure of cooperation among the sterling and franc regions, and the troubled history of trade negotiations left the capitalist economies more vulnerable than axis opponents in preparations on the road to war.<sup>99</sup> Although the present fragmentation of regional trade blocs are not as threatening to the world economic structure as they were in the 1930s, no one can assure us that similar tragedies will not reoccur. Thus, in the preparations of the Uruguay Round of multilateral trade negotiations, many prominent scholars and others advocated to make GATT obligations relating to regional trading agreements stricter and more precise. According to an eminent study group appointed by the then Director-General of the GATT, many existing regional integration arrangements “fall far short of the (GATT) requirements. The exceptions and ambiguities which have thus been permitted have seriously weakened the trade rules, and made it very difficult to resolve disputes (to which GATT obligations are relevant). They have set a dangerous precedent

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<sup>99</sup> : Clavin’s article is contained in the book *Regional Trade Blocs, Multilateralism and the GATT*, see supra note 93, p.33. In the view of Patricia Clavin, the Peace Treatise of Versailles concluded in 1919 helped to underline the divisions between European powers which encouraged States to protect national interests through the adoption and promotion of regional ties. Despite the fact that the nineteenth-century “age of imperialism” appeared to have passed, the peace settlement worked to extend the territorial boundaries of the British and French empires, and while the White Dominions (Canada, New Zealand and Australia) secured self-government, the popularity of notions of imperial economic interdependence among right-wing political groups continued. Although the diminution of Germany’s status as a great power, coupled with the “cuts in its national flesh”, served to limit German influence and custom in eastern Europe during the early 1920s, by 1930s German economic penetration of eastern European had returned in an aggressive form. In fact, it was not only particular members of German society who looked on with envious eyes at the continued imperial ties enjoyed by Britain and France. The apparent economic and strategic benefits enjoyed by the “have” imperial powers encouraged the drive for similar advantages by those “have not” powers as diverse as Japan, the promoter of co-prosperity across South East Asia, and Italy where there was a drive to conquer the Mediterranean. Even the United States, aloof from these imperial pretensions, and disdainful of others’ resort to Empire in the 1930s, was, nevertheless, motivated to strengthen its ties within its own economic backyard in the Americas, both to the North and to the South. See supra note 93, pp.39-40.

for further special deals, fragmentation of the trading system, and damage to the trade interests of non-participants...GATT rules on customs unions and free trade areas should be examined, redefined so as to avoid ambiguity, and more strictly applied".<sup>100</sup>

Despite the long-standing recognition of the shortcomings of GATT obligations and procedures relating to regional trading agreements, the outcome of the Uruguay Round negotiations in improving matters in this area was modest at best. The need for a revision of rules and procedures was well appreciated. The GATT negotiating group in the Uruguay Round which dealt with the updating and improving of the relevant GATT articles addressed the need but without making changes to the original obligations and procedures. Thus, the results of the Uruguay Round negotiations contain an *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* which does not at all amend the original article itself. Nor does it resolve the principal problems that have arisen in the application of this article. At the very best, it usefully clarifies a number of points which have given rise to difficulties in the past.<sup>101</sup> A further development in the Uruguay Round negotiations is the creation of the *General Agreement on Trade in Service*. The GATS includes an article on "Economic Integration"(Article V), which establishes rules that broadly parallel those provided in GATT 1994 for trade in goods, and which serve much the same purpose.

Issues raised by the debaters on regionalisation are pluri-dimensional and inter-linked. Some are primarily legal.<sup>102</sup> Others are more institutional in nature and highlight possible discrepancies between the rules of regional trading agreements and WTO rules concerning the regulated areas. The legal issues may be resolved by strengthening the WTO rules, while the institutional issues should be clarified by means of redefining the WTO agenda.

### 3.2.3. The new agenda of the World Trade Organisation

It is now manifest that the World Trade Organisation should have a new agenda since many implementation periods contained in the multilateral trade agreements either have expired or need to be modified.<sup>103</sup> Meanwhile, the WTO itself also needs to consider

<sup>100</sup> : See F. Leutwiler: *Trade Policies for a Better Future*, GATT, Geneva(1985), p.41.

<sup>101</sup> : For example, the Understanding provides guidelines for calculating the incidence of tariffs and other measures before and after the formation of a customs union (not the free trade areas), as well as for making compensatory adjustments in response to changes in tariff rates that result from the introduction of a common external tariff. The rules on interim agreements make it clear that such agreements "should exceed ten years only in exceptional cases". See supra note 23.

<sup>102</sup> : For example, Article XXIV of GATT 1994 requires that "substantially all the trade" between the constituent members should be covered by the regional trading agreements, and the same condition is laid by GATS Article V which requires a "substantial sectoral coverage" in services. But there is no agreement among WTO Members on the meaning of these wordings, and in fact, many agreements omit from their coverage large and sensitive areas such as agriculture and textiles. This has enhanced the difficulties encountered by WTO Members in assessing the consistency of regional trading agreements with the WTO rules. See Briefing Notes on Regional Trade Agreements at Doha WTO Ministerial Conference 2001.

cf. [http://www-chil.wto-ministerial.org/english/thewto\\_e/minst\\_e/min01\\_e/br](http://www-chil.wto-ministerial.org/english/thewto_e/minst_e/min01_e/br)

<sup>103</sup> : For example, Article 1(f) of the *Agreement on Agriculture* provides: " 'implementation period' means the six-year period commencing in the year 1995, except that, for the purpose of Article 13, it means the nine-year period commencing in 1995". Article 31 of the *Agreement on Subsidies and Countervailing Measures* states: "The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those

whether any new issues may be included within its ambit after these years' success of regulation on global trade in goods, services and trade-related intellectual property rights. On 8 February 2001, when the WTO General Council agreed to accept the offer from the government of Qatar to host the fourth Ministerial Conference, the General Council Chairman and the Director-General received from the Council a mandate to work with WTO Members on formulating organisational and issue-related aspects of the preparation for the conference. Various proposals, coming from both developed and developing country Members, reached the General Council before the conference, which was held from 9 to 13 November 2001.<sup>104</sup>

Among the proposals submitted for discussion during this conference, some are relevant to the concerns of the developed country Members, such as environment protection and labour standards; while others are of more significance to the developing country Members, like trade facilitation issues, removal of trade barriers on textiles and clothing. Although most of these proposals concentrate on amending those existent multilateral trade agreements which are annexed to the *WTO Agreement*, there are some issues which were once debated during the Uruguay Round negotiations and still came out inconclusively this time. The two most prominent among these intensely-debated issues are environment protection and labour standards.

Issues of labour were present in the abortive Charter for an International Trade Organisation (ITO) back in the late 1940's. While exports from developing countries were insignificant, these issues did not attract so much attention during the early GATT years as they do now. In contrast, the issue of environment protection is almost a new one. When the *General Agreement on Tariffs and Trade* was made in 1947, the drafters only agreed that a contracting party might invoke trade-distorting measures in order to conserve the exhaustible natural resources provided that these measures are made effective in conjunction with restrictions on domestic production or consumption (Article XX(g)). Neither from the letter, nor from the spirit of GATT 1947, could we trace the implication of environment protection as it has in the present sense. Only until 1970s and 1980s when both the real wages of the unskilled workers in the United States and employment rate in many European countries declined, did people in these countries begin to turn their attention to the trade-offs with those comparatively poor developing countries. Consequently, the expedient ways for the GATT developed contracting parties (now WTO developed country Members) to invoke are to bring to centre stage the demands which have spread in their countries for inclusion of environment and labour standards in the WTO, requiring that either they should be moved up in the developing country Members or else the developed country Members should be allowed to countervail the "implied subsidy" represented by those lower standards.<sup>105</sup>

Several factors contribute to the emergence of these demands. But a principal one among them surely is the desire to raise, in one way or another, the costs of production of

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provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period." See supra note 23.

<sup>104</sup> : See Members' Proposals and Related Statements.

cf. [http://www-chil.wto-ministerial.org/english/thewto\\_e/minist\\_e/min01\\_e/mi](http://www-chil.wto-ministerial.org/english/thewto_e/minist_e/min01_e/mi)

<sup>105</sup> : Proposals for such legislation have already been introduced in the US Congress, as in Congressman Gephardt's so-called "green" and "blue" bill which would authorise the administration to impose "eco-dumping" duties against lower environment (that is green) standards abroad and "social-dumping" duties against lower labour (that is blue-collar workers') standards abroad.

your rivals abroad, and what is much easier to do than to say that they are deriving unfair trade advantage by having lower environment and labour standards is to bring this issue to the international institution and, to make rules applicable to all its members. In fact, it is surely easier to get a sympathetic ear from the politicians if the appeal to them for assistance is in the shape of protection or otherwise is couched not simply in the terms of an appeal of the intricate issue that one cannot otherwise cope with and wants relief, but in the contention instead that one's distress is the result of one's rival's perfidious, unfair ways.

Why, then, should one object to the differences in different countries' environment protection standards with regard to their same industries? If we exclude those transborder environmental issues, like global warming, ozone layer depletion and acid rain(which raise problems about the WTO of a different, and more compelling, nature), the issue will become much clear that most environmental problems result from polluting production processes, certain kinds of consumption, and the disposal of waste products. If the argument raised by some environmentalists is logical that trade as such is the root cause of environmental degradation, then the conclusion should be that countries like Ethiopia and Sudan are the cleanest countries as they have the least trade with others. Therefore, we should accept such a fact that each country may have its own priority on the national environment policy. Rich Americans and Europeans wish to expand the sphere of their environmental issues to the conservation of natural resources and the protection of animals, while poor developing countries prefer to save their people from starvation and accelerate the amelioration of their horrific living conditions. Perhaps, it could be argued that the horrific lives in some developing countries are due in part to lack of environmental regulation. But easier said than done, most of those developing countries are currently short of financial resources to feed their people, let alone to protect their environment.

Two cases, which were resolved recently under the WTO dispute settlement mechanism, reflect such a diversity among WTO Members in their understanding on the issues concerning environment protection. In the case *United States---Standards for Reformulated and Conventional Gasoline*(hereinafter as *Gasoline*), one of the arguments between the United States and Brazil, Venezuela is whether a policy(implemented by the United States) to reduce the depletion of clean air is a policy to conserve an exhaustible natural resource within the meaning of Article XX(g) of GATT 1994. This is also one of the debated points in the appeal(the Panel Report was appealed by the United States) after the Panel gave a definite answer on this issue.<sup>106</sup> In another case *United States---Import Prohibition of Certain Shrimp and Shrimp Products*(hereinafter as *Shrimp*), a similar argument was raised in the appeal process by India, Pakistan and Thailand(appellees), which contended that a "reasonable interpretation" of the term "exhaustible" is that the term refers to "finite resources such as minerals, rather than biological or renewable resources". In their view, such finite resources were exhaustible "because there was a limited supply which could and would be depleted unit for unit as the resources were consumed". They further argued: if "all" natural resources were considered to be exhaustible, the term "exhaustible" would become superfluous. Conclusively, they insisted that sea turtles could only be considered under Article XX(b) of GATT 1994

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<sup>106</sup> : *United States---Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R(distributed on 29 April 1996), pp.19-21.

which is related to the protection of human, animal or plant life and health, since Article XX(g) was meant for “nonliving exhaustible natural resources”.<sup>107</sup> The Appellate Body, however, did not accept the arguments of the appellees in both cases and decided that the “clean air” and “sea turtles” are “exhaustible” natural resources. If we compare these two cases with the *Tuna-Dolphin* case which was raised under the GATT dispute settlement mechanism,<sup>108</sup> we will notice that the WTO Appellate Body has inclined to the broad interpretation of the exceptions contained in Article XX of GATT 1994, under which a WTO Member may invoke unilateral and trade-distorting actions. Therefore, the implications of the Appellate Body decisions are far beyond these two cases. In the view of the author, many developing country Members need to readjust their national policy priorities thereafter.

Since the World Trade Organisation embraced “sustainable development” as one of its objectives, it has been widely accepted that international trade might have an impact upon environment protection, and vice versa. Being aware of this, we can expect that there will be more disputes, like the *Gasoline* and *Shrimp*, which are brought to the WTO for settlement. But the WTO is an international organisation based on the multilateral trade agreements. To solve those complicated environment issues seems to fit neither its objectives nor its competence. Thus, the pivotal point here is how to delimit the scope of environmental issues which might be dealt with under the WTO jurisdiction. At the Marrakesh Conference which was held to establish the World Trade Organisation on 14 April 1994, ministers of the GATT contracting parties (WTO Members after 1 January 1995) decided to set up a Committee on Trade and Environment (CTE). The mandate of the CTE was first made in the *Decision on Trade and Environment*, which, in a general way, addresses the relationship between the international trade rules and those environment protection measures which may affect the flow of international trade. A further clarification of the WTO role with respect to the regulation of environment issues was provided during the fourth WTO Ministerial Conference, which includes: (a) WTO competence for policy coordination in this area is limited to trade and those trade-related aspects of environmental policies which may result in significant trade effects for its Members. In other words, it is not intended that the WTO should become an environmental agency. Nor should it get involved in reviewing national environmental priorities, setting environment standards or developing global policies on the environment. (b) To increase WTO Members’ national coordination as well as multilateral cooperation in order to address their environmental concerns. (c) To secure the market-access opportunities for developing country Members to help them work towards sustainable development.<sup>109</sup>

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<sup>107</sup> : *United States---Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (distributed on 12 October 1998), p.47.

<sup>108</sup> : The panel in the *Tuna-Dolphin* dispute concluded: “The US could not embargo imports of tuna products from Mexico simply because Mexican regulations on the way tuna was produced did not satisfy US regulations. (But the US could apply its regulations on the quality or content of the tuna imported).” “GATT rules did not allow one country to take trade action for the purpose of attempting to enforce its own domestic laws in another country---even to protect animal health or exhaustible natural resources.” Eventually, the panel report was not adopted but circulated on 3 September 1991. See BISD 39th/155. The US and Mexican governments resolved their dispute on a bilateral agreement.

<sup>109</sup> : See *The Trade and Environment Committee, and Doha Preparations*.  
cf. [http://www-chil.wto-ministerial.org/english/thewto\\_e/minist\\_e/min01\\_e/br](http://www-chil.wto-ministerial.org/english/thewto_e/minist_e/min01_e/br)

The demands for the inclusion of labour standards, and of making them into prerequisites for market access by a social clause in the WTO, have both parallels and contrasts to those upon the environmental issues.

The contrast is that labour standards have nothing equivalent to transborder environmental externalities. Labour standards are more closely connected with the local economic and social development. In this regard, the demands to countervail “social dumping” for lower labour standards parallel the demands to countervail “eco-dumping” for lower environment standards have the same rationale and, hence, must be rejected for the same reasons. But a different aspect to the whole question results from the fact that labour standards, unlike most environment standards, are seen in moral terms. Thus, for example, central to the thinking of people in some developed countries on the question of the social clause is the notion that competitive advantage can sometimes be morally “illegitimate”. In particular, it is argued that if labour standards elsewhere are different and unacceptable morally, then the resulting competition is morally “illegitimate” and “unfair”.

At the current international level, when this argument is made about a practice such as slavery (defined strictly as the practice of owning and transacting in human beings, as for centuries before the Abolitionists triumphed), there will be nearly universal agreement that if slavery produces competitive advantage, that advantage is illegitimate and ought to be rejected. Since slavery has been forbidden as a norm of *jus cogens*, many international conventions contain express statements to ban such practice. Article 4 of the *Universal Declaration of Human Rights* has clearly declared that “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms”.<sup>110</sup> Thus, we have here a “value”-related argument for suspending one country’s trading rights or access to another country’s markets, in a sense similar to (but far more compelling than) the *Shrimp* case when the United States sought to prohibit certain shrimp and shrimp products because they are caught and processed in a way different from that accepted by the United States. The insertion of a social clause for labour standards into the WTO agreements can thus be seen as a way of legitimating an exception to the perfectly-sensible WTO rule that prohibits the suspension of a Member’s trading rights concerning a product simply on the ground that, for reasons of morality asserted by another Member, the process by which that product is produced is considered immoral and therefore illegitimate. The real problem here with this argument, however, is that universally-condemned practices such as slavery are rare indeed. In most cases, the labour standards are connected with the local economic development levels. According to professor Jagdish Bhagwati, even in the most developed country, the United States, it is not difficult to see that some manufacturers are using the cheap labour of those female immigrants to produce sweaters in unacceptable working conditions.<sup>111</sup> The question whether a substantive consensus on anything except well-meaning and broad principles without consequences for trade access in case of non-compliance can be obtained is therefore highly dubious.

Indeed, the reality is that a diversity of labour practices and standards is widespread in practice, which mirrors a diversity of cultural values, economic conditions and analytical beliefs, and theories concerning the economic (and therefore moral)

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<sup>110</sup> : See supra note 21.

<sup>111</sup> : See supra note 97, p.40.

consequences of labour standards. The notion that labour standards can be universalised, like human rights such as liberty and *habeas corpus*, simply by calling them “labour rights” ignores the fact that this easy equation between culture-specific labour standards and universal human rights will have a difficult time surviving deeper scrutiny. If we look at the economic structures of most developing countries, we may notice that there is a much bigger portion of the population in these countries, who are devoted to agriculture than that to industry. To raise the wages of the industry population and improve their working condition would slow down the capital accumulation process necessary for basic constructions which might have absorbed more landless people eventually into gainful employment. Consequently, this would leave the majority of the population in these countries in an even poorer condition. Hence, we may conclude that the idea of inserting the social clause into the WTO agreements is rooted generally in an ill-considered rejection of the general legitimacy of diversity of labour standards and practices across countries. The alleged claim for the universality of labour standards(except for a rarely few cases such as slavery) is generally unpersuasive.

In fact, if a WTO Member finds that the trade advantages of another Member is derived from the “immoral” or “unfair” competition, the former can invoke Article IX:3 of the *WTO Agreement* to ask for a waiver to suspend the application to the latter of concessions or other obligations under the WTO agreements.<sup>112</sup> Therefore, the fears that the “social-dumping” might come from the poor countries to the rich ones are groundless, and the initiatives to insert the labour standards into the WTO agreements are unnecessary. At the first WTO Ministerial Conference which was held in Singapore in December 1996, the WTO Members, in the *Ministerial Declaration*, proclaimed that “We renew our commitment to the observance of internationally recognised core labour standards. The International Labour Organisation(ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalisation contribute to the promotion of these standards. *We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.* In this regard, we note that the WTO and ILO secretariats will continue their existing collaboration”(Emphasis added).<sup>113</sup> This statement was reaffirmed in the *Ministerial Declaration* of the fourth WTO Ministerial Conference. Meanwhile, when in formulating those universal labour standards, the ILO needs to take into account Article 19(3) of the *Constitution of the International Labour Organisation*, which states: “In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisations, or other special circumstances make the

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<sup>112</sup> : Article IX:3 of the *WTO Agreement* states: “In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph. (a)A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time period, any decision to grant a waiver shall be taken by three fourths of the Members. ...”(Original note omitted). See supra note 23.

<sup>113</sup> : cf. [http://www-chil.wto-ministerial.org/english/thewto\\_e/minist\\_e/min01\\_e/br](http://www-chil.wto-ministerial.org/english/thewto_e/minist_e/min01_e/br)



industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries".<sup>114</sup>

The WTO's attempt is commendable, but it is too covetous, for it cannot account for individual nations' social and economic policies. Environment and labour standards should not be set by an organisation whose primary objective is promoting international free-market trade. These tasks should be left to those multilateral environment agreements and other international organisations that are ideologically aligned with and sympathetic to environment and labour issues. Just as one scholar observed: "Every global issue should have its own solution. Environmental and social problems need environmental and social answers---and seeking solutions through trade rules is not a substitute".<sup>115</sup> In the view of the author, there is no urgent need, at the moment, to expand the agenda of the World Trade Organisation so that more efforts may be made on the implementation of those existing multilateral trade agreements and on the expansion of assistance to the developing country Members, particularly those least-developed country Members. Meanwhile, with the increasing of more complicated disputes, it is high time for us to review the applicability and workability of the WTO dispute settlement mechanism. At the end of the Uruguay Round negotiations, ministers of GATT contracting parties(which became WTO Members after 1 January 1995) decided to complete a full review of dispute settlement rules and procedures under the World Trade Organisation within four years after the entry into force of the *WTO Agreement*, and to take a decision on the occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures.<sup>116</sup> Because of the debacle of the Seattle Ministerial Conference in 1999, the review of the *Dispute Settlement Understanding* was not completed in accordance with the original timetable. Again, the review did not achieve significant results at the recent Doha Ministerial Conference. However, these setbacks should not affect the scholarly study on the WTO dispute settlement mechanism and WTO law in general against the perspective of public international law.

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<sup>114</sup> : See supra note 21.

<sup>115</sup> : KimVan der Borgh: *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, Am. U. Int'l. L. R., No.14, 1999, p.1227.

<sup>116</sup> : See *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*. See supra note 23.

# Chapter Four The Inter-Relationship of WTO Law and Public International Law

## Section One International Law in a Multicultural World<sup>1</sup>

### 4.1.1. A retrospective and prospective view of international law

Law can only exist in a society, and there can be no society without a system of law to regulate its members with one another. If then we speak of the “law of nations”, the precedent of modern international law, we are assuming that a “society” of nations exists, and the assumption that the whole of the civilised world constitutes in any real sense a single society or community is one which we are not justified in making without examination. In any case, the character of the law of nations is necessarily determined by that of the society within which it operates, and neither can be understood well without the other.<sup>2</sup>

Modern international law has its origin in the Europe of the sixteenth and seventeenth centuries. Although communities of States regulated by law had previously existed in Europe and elsewhere before then,<sup>3</sup> they are far from the way in modern sense. The law which was originally created to govern the diplomatic, commercial, military and other relations of the society of Christian States forming the Europe of that time provides the basis for the present law. Although the writers<sup>4</sup> who recorded (and, to a large extent, invented) this early “Law of Nations”<sup>5</sup> may have regarded it as having universal application, it was for many generations really no more than the Public Law of Europe. International law was first extended beyond Europe at the end of the eighteenth and at the beginning of the nineteenth centuries to the States that succeeded the rebel European colonies of North and South Americas respectively. By the mid-nineteenth century, Turkey had been accepted as the first non-Christian subject of international law.<sup>6</sup> After the Opium Wars,<sup>7</sup> increasing European penetration into China and other Asian countries had led to the “admission”, though scarcely on terms of equality,<sup>8</sup> of other such subjects.

<sup>1</sup> : The author of this thesis was inspired by the naming of the 1984 Hague Academy Workshop, *The Future of International Law in a Multicultural World*, when the title was chosen for this section. For the sake of succinctness, the author of this thesis is using the term “international law” in this thesis when referring to “public international law”, unless a clear distinction from other terms is necessary.

<sup>2</sup> : See Brierly: *The Law of Nations*, sixth edition, 1963, pp. 41-42.

<sup>3</sup> : Ancient Greece and India can be deemed representatives in that sense, but only in a rudimentary way.

<sup>4</sup> : Most scholars consider Hugo Grotius (1583-1645), a Dutch diplomat, scholar, and jurist, to be the “father of the law of nations.” Grotius, however, was not the first person to theorise about international law. In the later half of the sixteenth century, several other scholars had laid a foundation for Grotius and those who followed. To learn the details on the bases of modern international law, see John W. Williams: *Guide to International Legal Research*, The George Washington Journal of International Law and Economics, Vol. 20, 1986, pp.1-34.

<sup>5</sup> : The term “international law” would appear to have been coined later by Jeremy Bentham (1748-1832), an English philosopher, legal and social reformer, and founder of utilitarianism.

<sup>6</sup> : See D. J .Harris: *Cases and Materials on International Law*, fifth edition, Sweet and Maxwell (London, 1998), p.16.

<sup>7</sup> : Wars occurred between Great Britain and China during the middle of the 19th century, which forced the opening of China to western trade. See James R. Fox: *Dictionary of International and Comparative Law*, Oceana Publications Inc. (1992), p.320

<sup>8</sup> : A system of capitulation, which in some cases lasted well into the twentieth century, was commonly applied by which European nationals present in the territory of the capitulating State were subject not to the

It was the advent in 1920 of the League of Nations, membership of which was open to “any” State,<sup>9</sup> that, as much as any other single event, marked the beginning of the present situation in which international law applies automatically to all sovereign States whatever their location or character. Since that time, the community of States has increased dramatically in number to close to 200.<sup>10</sup>

The past century witnessed many changes in the scope and content of international law. The changes in the balance of interests and values in the world community resulting from the emergence of Communist States and then from the waves of independence since 1945 of colonial and similar territories have had a tremendous effect in shaping or reshaping some international law rules. The collapse of the Soviet bloc marked the end of the Cold War and the emergence of US hegemony in international affairs.<sup>11</sup> The demise of Oppenheim’s doctrine that “States solely and exclusively are the subjects of International Law”<sup>12</sup> is also evident. The growth of public international organisations in particular bears witness to this. If other claimants still have very limited personality, it is nonetheless the case that inter-State treaties are increasingly concerned with the “trans-national” affairs, to use Jessup’s terminology,<sup>13</sup> of private individuals and companies. Of great importance is the increase in the subject-matter of international law to cover what Friedmann has called “the international law of co-operation”.<sup>14</sup> The development of the international law of human rights and international environmental law are notable examples of this more positive, community-minded kind of law.<sup>15</sup> Science too has had considerable impact. It has added two new territory areas—outer space and the deep sea-

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local law or courts, but were subject instead to their national law administered in the territory of the capitulating State by their national consular courts.

<sup>9</sup> : Article 1, paragraph 2 of the *Covenant of the League of Nations* provides that all fully self-governing States, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.

<sup>10</sup> : As of this writing, the total number of the U. N. membership is 191, plus a few observers. cf. <http://www.un.org/Overview/growth.htm>

<sup>11</sup> : See Wilhelm G. Grewe: *The Epochs of International Law*, Walter de Gruyter GmbH and Co. KG, D-10785 Berlin, 2000, pp.701-706.

<sup>12</sup> : *Oppenheim's International Law*(edited by Jennings and Watts), ninth edition, Longman Company(1992), Vol. I, p.13. “States are the principal subjects of international law.” Lassa Francis Lawrence Oppenheim (1858-1919), Professor, Freiburg-in-Breisgau, 1885-92, Basle, 1892-95, LSE, 1895-1908, Cambridge, 1908-1919.

<sup>13</sup> : See Jessup, *Transnational Law*(1956), pp.15-16. Philip Jessup(1897-?), US national, Professor, Columbia University, 1925-61, Judge of the ICJ, 1961-70.

<sup>14</sup> : Wolfgang G. Friedmann(1907-1972), lawyer and judge in Germany, 1933-4, law teacher, UK, Australia and Canada, 1934-55, Professor, Columbia University, 1955-72.

<sup>15</sup> : The references to human rights in the Charter of the United Nations (Preamble, Articles 1, 55, 56, 62, 68 and 76) have provided the basis for elaboration on the content of standards and of the machinery for implementing protection of human rights. See *Universal Declaration of Human Rights*(adopted by the General Assembly of the United Nations on 10 December 1948, U. N. Doc. A/811), *International Covenants on Human Rights*(adopted by the General Assembly of the United Nations on 16 December 1966), *The European Convention of Human Rights*(signed in Rome on 4 November 1950). See *Basic Documents in International Law*, fourth edition, edited by Ian Brownlie, Oxford University Press(1995). See also *Rio Declaration on Environment and Development*(adopted on 14 June 1992, U. N. Doc. A/CONF.151/5/Rev.1, 1992); *Marrakesh Agreement Establishing the World Trade Organisation* (Preamble, signed on 15 April 1994).

bed---for which international law rules are required,<sup>16</sup> and it has produced nuclear weapons, which have revised thinking about some existing rules and caused the introduction of new ones. The fast development of the information technology is catching the concern of the public about the security of the electronic commerce. Recent efforts have been focused on the law-making against the crimes on the internet.<sup>17</sup>

The explosion of new States, the gap-widening between the developed and developing countries(especially the least-developed countries) have made it more difficult to make new international law rules. It has long been established that law of universal applicability can be made only by universal agreement or acquiescence; the likelihood of general agreement decreases, of course, as the number of nations which must agree increases. The multilateral convention has become the principal form of general law-making, but experience suggests that universality(or general acceptance)will be hard to come by.<sup>18</sup> General agreements may be possible only to codify accepted basic principles and practices, or perhaps to adopt some general, imprecise, and ambiguous standards to which time and experience may give some agreed contents. On the other hand, regional law and law for other smaller groupings have become increasingly common, which have already brought much debate on the relations between the regional law and the global law.<sup>19</sup>

With the end of the Cold War, international relations have been characterised by divisions that are pragmatic rather than ideological, economic rather than political. Cooperation, not confrontation, is the mainstream in the modern world. This will pave the way for future law-making, albeit discordance may still exist. This divergence of views has already been exposed in the different attitudes of the developed and developing countries toward international law.

#### **4.1.2. Fundamental differences in the attitudes toward international law**

When we talk of the difficulty to obtain a general acceptance for an international agreement, one factor which cannot be ignored is the difference in attitudes toward

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<sup>16</sup> : See *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*(adopted by the General Assembly of the United Nations on 25 January 1967, U. N. Doc. A/Res/2222, XXI); *Convention on the Law of the Sea*(adopted at the United Nations Conference on the Law of the Sea on 30 April 1982). See *Basic Documents in International Law*, id.

<sup>17</sup> : See *Convention on the Physical Protection of Nuclear Material*, Legal Series, No. 12, International Atomic Energy Agency, Vienna, 1982; *Treaty on the Non-proliferation of Nuclear Weapons*(signed on 1 July 1968); *Nuclear Proliferation: Prospects for Control*(edited by Bennett Boskey and Mason Willrich, Dunellen Publishing Company Inc.(1970); Michael J. Matheson: *The Opinions of the International Court of Justice on the Threat of the Use of Nuclear Weapons*, *The American Journal of International Law*, Vol. 91, 1997, pp.417-435. See also Lilian Edwards and Charlotte Waelde: *Law and the Internet---a framework for electronic commerce*, Hart Publishing(2000); Penelope Lawrence: *Law of the Internet---A Practical Guide*, London: Sweet & Maxwell(2000); Ian J. Lloyd: *Information Technology Law*, Butterworths(1993).

<sup>18</sup> : The extended Uruguay Round of Multilateral Trade Negotiations exemplifies the difficulties to obtain the general acceptance for an international agreement. Another example is the Plurilateral Trade Agreements in Annex 4 of the *WTO Agreement*, which only apply to those WTO Members which have signed.

<sup>19</sup> : As for the relationships between the global law and the regional law, see Jonathan I. Charney: *Universal International Law*, *The American Journal of International Law*, Vol. 87, 1993, pp.529-551. See also *Regional Co-operation, Organisations and Problems*(included in *Encyclopaedia of International Law*), Elsevier Science Publishers B. V. , 1983.

international law. This difference is occurring not only between the developed and developing countries, but even between the developed countries themselves. Some of these differences derive from their legal histories, while others are merely caused by their different constitutional mandates.

First of all, we may turn our look at the attitude of the European countries toward international law. International law in Europe appears to be more pertinent than it does in many other parts of the world.<sup>20</sup> This is partly a result of many centuries' development of international law in Europe, with many small countries which must interact with each other under a framework of international law rules. Now we have the European Union with an extraordinary powerful and growing framework of rules operating on the European continent.<sup>21</sup> The European Union, at least at its outset, could be described as an "international" organisation, although some would say that it is now evolving towards a rather large federal State.<sup>22</sup> As it does so, it could well be that thinking in Europe towards international law (at the point when EU law is assumed no longer to be part of international law) could change. In addition, many lawyers in continental European countries are trained in civil law tradition, which, in a broad brush, is characterised by hierarchical thinking about legal propositions.<sup>23</sup> They are more likely to regard international law as superior to their national law.

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<sup>20</sup> : This viewpoint can be supported at least by one book *National Constitutions and International Economic Law* edited by Meinhard Hilf and Ernst-Ulrich Petersmann, (Kluwer, 1993). In this book, many authors, particularly those from European countries, express their wishes to remove the international trade barriers by constitutional means.

<sup>21</sup> : The rising tide of Community powers is slowly eroding the residual powers of the Member States. Community powers, at first, were usually concurrent with Member State powers, but over time, they have developed into exclusive powers. Beyond the dynamic coexistence of the Community and Member State powers, there is an increasingly important principle which governs Member States' conducts. It is the principle of co-operation stated in Article 10(ex Article 5) of the *EC Treaty*. Article 10(1) of the *EC Treaty* provides: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks." Furthermore, pursuant to Article 10(2) the Member States shall "abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

<sup>22</sup> : John Pinder in his article *A Federal Community in an Ungoverned World*(included in *Federal Solutions to European Issues* edited by Bernard Burrows *et al*, The Federal Trust for Education and Research Ltd, 1978, p.220) states: "The welfare of people will best be served by a powerful Community government which can defend its economy against external shocks that are inevitable in an ungoverned world, while at the same time encouraging any feasible progress towards international government. This implies a federal government for the Community, because other forms of association will be too weak for the heavy tasks of external as well as domestic economic management."

<sup>23</sup> : For example, in the view of Kelsen, international law determines, through the principle of effectiveness, the reason and sphere of validity of the national legal orders. Kelsen further states: "The international law that forms a part of this national law determines, through its principle of effectiveness, the reason for the validity of all national legal order---of those which are not the starting point of the construction and of the one which is and which therefore includes international law as a part. It fulfils this function in the latter case, as a part of the national legal order in a wider sense, only with respect to the national legal order in a narrower sense. Therefore the relationship of the two parts of this national legal order in the wider sense is not to be regarded a relationship of coordination, but as one of sub- and superordination. That part of the national legal order which is the international law is at a higher level than the part that is the national legal order in the narrower sense. Figuratively speaking we may say: the State which recognises international law thereby submits to international law." Hans Kelsen: *Pure Theory of Law*(translated by Max Knight), University of California Press(1970), p.340.

By contrast, the Americans have more faith in their constitution and the stability of their political system than in their government. It is also true that Americans do not share similar faith when they come to international law and international institutions. To some extent, international law is viewed as peripheral, and even dangerous, with a potential for interfering with some of the finer aspects of the US constitutional legal system.<sup>24</sup> International institutions are often viewed as unformed, uninformed, relatively unstable and changing, and subject to the various whims of diplomatic processes. The frequent veto exercised by the Congress on the Executive bills demonstrates the limited competence of the US government in the administration of international affairs.<sup>25</sup>

Then, let us have a look at the attitudes of developing countries toward international law.<sup>26</sup> Developing countries are in many respects very diverse: they differ in their cultural and ideological backgrounds, in their economic or social development levels, in their political alignment, in their respective systems of public order, and so on.<sup>27</sup> What unites their attitudes towards international law is their basic strategies adopted by developing countries in the modern international relations. To them, international law is relevant to the extent that it protects them from undue interference by powerful States and is instrumental in bringing about social changes, with more equitable conditions stimulating economic development.

A major feature of developing countries' attitudes toward international law is their insistence on the need to elaborate general principles as opposed to detailed and precise legal rules. What accounts for this marked preference for general principles? One possible reason is the "dislike of legal technicalities",<sup>28</sup> expressed chiefly by some Asian and African countries. This dislike is partly due to their cultural traditions. To some extent, perhaps, it is also motivated (or was motivated until recently) by the relative lack

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<sup>24</sup> : See John H. Jackson: *National Constitutions, Transnational Economic Policy and International Economic Law: Some Summary Reflections*. See supra note 20, p.573.

<sup>25</sup> : The veto by the US Congress on the Executive bill to establish the International Trade Organisation (ITO) is but one of such examples. For details of the failure of ITO, see John H. Jackson: *The World Trading System*, Chapter Two, the Massachusetts Institute of Technology Press (1989).

<sup>26</sup> : According to Antonio Cassese in his book *International Law in a Divided World* (Oxford: Clarendon Press, 1986, p.116), the term "developing countries" was first launched in 1957-58 by the OECD.

<sup>27</sup> : See P. Ebow Bondzi-Simpson: *The Law and Economic Development in the Third World*, Praeger Publishers, 1992.

<sup>28</sup> : At this point it seems apposite to quote the words of a leading Egyptian international lawyer, G. Abi-Saab who, in commenting on the attitudes of Third World countries (as for the definitions of Third World, see supra note 25, p.115-116) to the development of international humanitarian law, made a few general remarks which are also applicable to the position assumed by those States towards the whole of international law: "...in dealing especially with the Western countries, anything which could be formulated in the very precise terms of an operational rule was considered nonsense by (developing countries), while Third World representatives in general attached great weight to general principles which sometimes could not be refined into operational rules. If we look at the same thing from a different point of view, I would say that in most cases the attitude of the Third World was defined by the total effect of a proposed solution. This is a really special legal outlook: what is law? Is law a principle or a value directive of behaviour, or is it a mere mechanism?...I think that the Western powers put too much emphasis on mechanistic elements while for Third World countries if by going through all the notions and respecting all the procedural rules you end up with an unjust solution, this would be bad law. And if you have a general directive, even if you cannot reduce it to very precise procedural rules, it still is good law, though it may be imperfect in terms of application." See *The New Humanitarian Law of Armed Conflict* (edited by Antonio Cassese, Naples, 1980), pp.249-50. See also J. Sytanw: *Some Newly Established States and the Development of International Law*, Leiden, 1960, p.23.

of skilled lawyers capable of debating with those sophisticated experts from developed countries on points of law.<sup>29</sup> For fear of being outwitted by the experts of those developed countries, developing countries often tend to play down legal sophistication.

Anyone who is familiar with the development of modern international law can discern some specific reasons behind those attitudes of developing countries. Firstly, there is the fact that principles, being general and sweeping in character, are more acceptable to the developed countries than detailed rules in areas where they oppose new developments demanded by developing countries.<sup>30</sup> Meanwhile, when the developed countries wish to introduce new rules to regulate international affairs, developing countries can give their consent on some general principles as a compromise.<sup>31</sup> Another advantage of general principles is that, being loose and flexible, they are more likely to be interpreted and applied in such a way as to allow for future developments and demands. By contrast, detailed rules crystallise and even ossify the circumstances for which they are enacted. In consequence they are often not capable of being adjusted to fresh situations. Connected with the second advantage, a third merit is that general principles leave greater latitude than hard and fast rules. Consequently, the developing countries feel that, by upholding these general principles, they commit themselves in a way permitting greater leeway should unforeseen circumstances arise.<sup>32</sup>

Since most developing countries lag far behind Western countries in the facilitation of international law, it will not come as a surprise that developing countries are the segment of the world community which presses most assertively and consistently for legal change.<sup>33</sup> More clearly than others, developing countries have made the choice between the goals(respect for international law and upholding of justice) set out by the UN Charter

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<sup>29</sup> : Professor Mary E. Footer in her article *The WTO, Developing Countries and Technical Assistance for Trade Law Reform*(included in *Governance, Development and Globalisation* edited by Julio Faundez *et al*, Blackstone Press Ltd, 2000, pp.253-272)explains the dilemma that the developing countries are facing while they are adapting the WTO law, and puts forward some suggestive ways to developing countries for their trade law reform.

<sup>30</sup> Prior to the first conference of UNCTAD in 1964, there was a growing dissatisfaction felt by the developing countries with the rules governing international trade. The GATT rules, which came into effect in 1948, allowed protectionism in agriculture requested by the developed countries. On the other hand, it did not seem beneficial to the developing countries when the reduction of industrial tariffs was concentrated on those products in which developed, not developing countries, had comparative advantage. As a first attempt, the UNCTAD I in its Final Act set out new general principles of international law, one of its first enunciations being the need for preferential and non-reciprocal economic relationships. Thus general principle eight provided: "New preferential concessions, both tariff and non-tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them." See Kamal Hossain: *Legal Aspects of the New International Economic Order*, Frances Pinter(Publishers) Ltd. , 1980.

<sup>31</sup> : One can recall that the original negotiation proposals during the Uruguay Round negotiations included those of environment and labour standards, which were strongly opposed by the developing countries. In the end, the developed and developing countries agreed, as a compromise, to establish a Committee on Trade and Environment as a means for further co-operation on this particular issue.

<sup>32</sup> : See supra note 25, pp.118-119.

<sup>33</sup> : Under the pressure from developing countries, the United Nations Conference on Trade and Development(UNCTAD) convened in Geneva in 1964, New Delhi in 1968, Santiago in 1972, Nairobi in 1976, Manila in 1979, to identify different areas of international economic relations where changes were perceived to be needed if the objectives of development and other legitimate interests of the developing countries were to be realised. See Kamal Hossain, supra note 29, pp.4-5.

for the achievement of better international conditions.<sup>34</sup> They chose justice as their fundamental objective in the confrontations with the developed world. It, therefore, seems only natural that they consistently seek to change international law by making it less unjust. They have already achieved much. They have brought about fairly satisfactory changes in the rules governing such important areas as treaty-making, the law of the sea, the humanitarian law controlling armed conflicts, the law of State succession.<sup>35</sup> Nevertheless, they still have a long way to go if they wish to insert more equitable conditions into the international economic arena and to acquire greater political power in international affairs.

#### 4.1.3. International law, international economic law, and WTO law

There have already been a lot of literature which is used to define the term "international law".<sup>36</sup> A generally acceptable definition is: "international law may be defined as the rules which determine the conduct of the general body of civilised States in their mutual dealings".<sup>37</sup> In international law, as in other sciences, a good definition is one of the last results to be reached. Until the nature and scope of any study are clearly seen, its boundaries cannot be determined with perfect accuracy. A definition, in order to be satisfactory, ought to give with precision the marks whereby the thing to be defined is distinguished from all other things; and unless it does so it is either incomplete or misleading. We may expect that different definitions of a science will be given, not only in its infancy, before its nature and limits are clearly understood, but even in its maturity, if those who cultivate it differ as to their methods and as to the extent of the subject-matter with which they deal. International law is in this latter predicament. It has been studied for ages; but although its expounders are gradually approaching the adoption of a consistent body of doctrine, they have not been able to come to an agreement upon such questions as the exact character of the processes to be followed in their reasoning, or the relation of their science to Ethics and Jurisprudence. Accordingly, each writer's definition is coloured, to a certain extent, by his or her own view; and the definition in this thesis is no exception to this general rule.

Two important factors, together with others, determine that the definition of international law is changeable.

The first factor is the increasing participants in the domain regulated by international law. About sixty years ago, when the United Nations was founded, there were only fifty-one member countries. With the lapse of a bit more than half a century, the number has

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<sup>34</sup> : *Charter of the United Nations*, Article 1, paragraph 1, provides that the purpose of the UN is to "maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and *in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". (Emphasis added) See *Basic Documents in International Law*, supra note 15.

<sup>35</sup> : See supra note 25, p.122.

<sup>36</sup> : For example: "International law provides a system of rules governing the conduct of inter-State relations." D. W. Greig: *International Law*, Salem, New Hampshire: Butterworths(1970), p.1; "It is the essence of public international law that it operates across State boundaries and, broadly speaking, the same rules and principles are accepted as binding by all States and operate to govern their relations inter se." L. G. Green: *International Law: A Canadian Perspective*, second edition, The Carswell Company Ltd.(1988), p.1.

<sup>37</sup> : T. J. Lawrence: *The Principles of International Law*, Macmilan and Co. Ltd.(1923), p.1.



more than tripled. The UN Member countries range from the most developed to the least developed in terms of their economic strength, from the largest to the smallest in terms of size and population. Meanwhile, the proliferation of other international organisations is leading international law towards a more diversified and specialised direction, which corresponds to the fast development of science and technology.<sup>38</sup>

The second factor which affects the development of international law is the subjects which international law are dealing with. The time when any one scholar could give a definitive overview of the whole area of public international law has passed. Nowadays, scholars and practitioners tend to choose to specialise in the subjects such as commercial contracts; prevention of money laundering or war crimes; human rights, and others. Accordingly, international law is subdivided into international economic law; international criminal law, the law of human rights, etc. This gives us a new approach to understanding modern international law.

Recently, one of these aforesaid subdivisions of international law, the international economic law, is increasingly catching the attention from both scholars and practitioners,<sup>39</sup> not only because of the expanding scope which comes under the regulation of international economic law, but also because of the ever-increasing influence which it is exerting upon our daily lives. Although there still exists some disagreement as to the boundaries of international economic law,<sup>40</sup> a more restrained definition would embrace those areas such as trade in goods, investment, trade in services when they are involved in transactions that cross national borders, and those subjects that involve an establishment on a national territory of economic activity of persons or firms originating from outside that territory.<sup>41</sup>

Since both international law and international economic law are dealing with affairs which cross national boundaries concerning at least two States, then, what is the significance to divide them? Two conclusive points can be drawn for this question. Firstly, as a general rule, international law regulates a wide range of affairs which include almost every field concerning different States. However, the current international relations are developing in a more complex and specialised way, it seems necessary that some technical treaties are made to regulate those specific affairs. Secondly, whereas traditional international law is mainly limited in regulating the public affairs between States, international economic law extends the categories of subjects of international law as to include individuals,<sup>42</sup> and which takes into account the possibility of other sources

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<sup>38</sup> : See Manfred Lachs: *Thoughts on Science, Technology and World Law*, The American Journal of International Law, Vol. 86, 1992, pp.673-699.

<sup>39</sup> : Unfortunately, this phrase is not well defined. Various scholars and practitioners have differing ideas about the meaning of this term. Some would have it cast a very wide net, and embrace almost any aspect of international law that relates to any sort of economic matter. Considered this broadly, almost all international law could be called international economic law, because almost every aspect of international relations touches in one way or another on economics. Indeed, it can be argued from the latter observation that there cannot be any separate subject dominated as "international economic law".

<sup>40</sup> : Upon the sources of international economic law, see Timothy Hillier: *Principles of Public International Law*, Cavendish Publishing Ltd(1999), p.307. See also Hazel Fox: *The Definition and Sources of International Economic Law*(included in *International Economic Law and Developing States*, edited by Hazel Fox), the British Institute of International and Comparative Law(1992), pp.3-24.

<sup>41</sup> : See John H. Jackson: *The World Trading System*, supra note 24, p.21.

<sup>42</sup> : See Louis Henkin *et al*: *International Law*(Chapter 5, Section 6: *Individuals in International Law*), West Publishing CO(1993), pp.374-394.

of international law than those enumerated in Article 38(1) of the *Statute of the International Court of Justice*,<sup>43</sup> at least, the possibility of reinterpreting these sources.<sup>44</sup>

By thus stretching the notion of international law in order to accommodate the facts of the present-day international economic life, we are confronted with such an unwieldy mass of materials from which we are obliged to make a choice. Many current inter-State economic relations are handled within the framework of the law of one particular international organisation, and the World Trade Organisation is such a representative, which has its own framework of law and dispute settlement mechanism.

Broadly speaking, WTO law is part of international economic law, which particularly regulates the transactions concerning trade in goods, trade in services(including finance, tourism, telecommunication), investment, and trade-related intellectual property rights among WTO Members. In addition, it also touches the issues of Members' trade policy and environment protection, albeit at a preliminary level. To be more specific, WTO law is referred to the "single package" results of the Uruguay Round of Multilateral Trade Negotiations(1986-1994). These results are embodied in a "document" of some 26,000 pages. Most of these pages are detailed schedules of tariff reduction, concessions in service trade and other sectors. Even the basic texts alone approximate to 500 pages.<sup>45</sup> The leading portion of these documents is the *Marrakesh Agreement Establishing the World Trade Organisation* (hereinafter as the *WTO Agreement*), which is regarded by some scholars as the "Charter" or "Constitution" of the new organisation.<sup>46</sup> It is feasible that the scope of WTO law will be expanding with the domain regulated by this organisation extending to the new areas. Hence, before we start any discussion on the relationship between WTO law and international law, it is necessary for us to enumerate the sources of WTO law.

## Section Two The Sources of WTO Law

### 4.2.1. General agreements

The *WTO Agreement* is a "particular" international convention within the meaning of Article 38(1)(a) of the *Statute of the International Court of Justice*, and so are those annexed multilateral trade agreements and legal instruments.<sup>47</sup> Altogether, they are often

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<sup>43</sup> : Modern discussion of the sources of international law usually begins with a reference to Article 38(1) of the *Statute of the International Court of Justice*, which provides: "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 recognised by the contesting States; (b)international custom, as evidence of a general practice accepted as law; (c)the general principles of law recognised by civilised 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". See *Basic Documents in International Law*, supra note 15.

<sup>44</sup> : See Ignaz Seidl-Hohenveldern: *International Economic Law*, second revised edition, Martinus Nijhoff Publishers(1992), p.2.

<sup>45</sup> : See the legal texts of the World Trade Organisation: *The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press(1999).

<sup>46</sup> : See John H. Jackson: *The World Trade Organisation, Constitution and Jurisprudence*, The Royal Institute of International Affairs(1998), pp.36-48.

<sup>47</sup> : To be specific, Annex 1A is *Multilateral Agreements on Trade in Goods*; Annex 1B is *General Agreement on Trade in Services*; Annex 1C is *Agreement on Trade-Related Aspects of Intellectual Property Rights*. Annex 2 is *Understanding on Rules and Procedures Governing the Settlement of Disputes*(hereinafter as *Dispute Settlement Understanding* or DSU). Annex 3 is *Trade Policy Review*

referred to as the “WTO agreements” or “covered agreements.” Disputes concerning the substantive rights and obligations of the WTO Members<sup>48</sup> are governed by the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter as the *Dispute Settlement Understanding* or DSU). In the words of Article 38(1)(a) of the ICJ Statute, the WTO agreements including the DSU are “establishing rules expressly recognised by the contesting States” that are parties to the WTO dispute settlement procedures.

The fundamental source of WTO law is therefore the texts of the relevant covered agreements themselves. All legal analyses should begin from here. The WTO Appellate Body, which is established according to Article 17 of the DSU,<sup>49</sup> once stated clearly upon this issue: “...the words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms. The proper interpretation of the Article is, first of all, a textual interpretation.”<sup>50</sup>

While there is no explicit equivalent to Article 38(1)(a) of the ICJ Statute in the *Dispute Settlement Understanding* or any other of the covered agreements, Article 7(1) of DSU performs a somewhat similar function. It specifies that the terms of reference for WTO panels shall be “to examine, in 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<sup>51</sup> 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)”. Then, working as a safety valve, Article 17(6) of the DSU confines that an appeal “shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel”.

The most relevant part of all the covered agreements in a WTO dispute settlement procedure is Annex 1 of the *WTO Agreement*, Annex 1A, which is entitled *Multilateral Agreements on Trade in Goods*, includes *General Agreement on Tariffs and Trade 1994* (hereinafter as GATT 1994), six Understandings,<sup>52</sup> *Marrakesh Protocol to the*

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*Mechanism*. Annex 4 is Plurilateral Trade Agreements (which are binding only on WTO Members which have accepted them). Besides, there are dozens of Ministerial Decisions and Declarations which are also binding on WTO Members. See supra note 45.

<sup>48</sup> : The term “country Members” under the WTO law should be understood to cover both the sovereign States and those separate customs territories. See Article XXVI(5) of GATT 1994 and Article XII:1 of the *WTO Agreement*. Besides, the European Community is acting on behalf of its member States within the WTO. See also Article IX:1 and Article XI:1 of the *WTO Agreement*. See supra note 45.

<sup>49</sup> : Article 17 states: “A standing Appellate Body shall be established by the DSB (Dispute Settlement Body). 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.” Article 17(2) states: “The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be re-appointed once...” See supra note 45.

<sup>50</sup> : *Japan--Taxes on Alcoholic Beverages*, Report of the Appellate Body (distributed on 4 October 1996), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p.18.

<sup>51</sup> : The “DSB” is referred to the Dispute Settlement Body which is established according to Article 2 of the DSU. The DSB is, *de facto*, the General Council of the WTO with a different chapeau. The DSB has “the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorise suspension of concessions and other obligations under covered agreements.” See supra note 45.

<sup>52</sup> : To be specific, they are *Understanding on the Interpretation of Article II:1(b) of GATT 1994*; *Understanding on the Interpretation of Article XVII of GATT 1994*; *Understanding on Balance-of-Payment*

*General Agreement in Tariffs and Trade 1994*, and twelve multilateral agreements.<sup>53</sup> GATT 1994 has incorporated GATT 1947 after it had been “rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the *WTO Agreement*”.<sup>54</sup> Besides this, GATT 1994 also includes the legal instruments that have entered into force under GATT 1947 before the date of entry into force of the *WTO Agreement*,<sup>55</sup> and the aforementioned Understandings and Protocol. Therefore, Annex 1A constitutes the backbone of the legal framework within the WTO. Most of the multilateral agreements in Annex 1A are the revisions of the previous ones, either from GATT 1947 or the Tokyo Round codes. They not only serve to regulate international trade in goods, but also provide necessary supplementation on the interpretation of the provisions of the two new agreements *General Agreement on Trade in Services*(GATS)<sup>56</sup> and *Agreement on Trade-Related Aspects of Intellectual Property Rights*(TRIPS),<sup>57</sup> which are in Annex 1B and Annex 1C respectively. As the major achievements of the Uruguay Round negotiations, these two new agreements have extended WTO law into two important areas: services and intellectual property. Under the mandate of Article II:2 of the *WTO Agreement*, the multilateral agreements in Annexes 1,2,3, are binding on all WTO Members.<sup>58</sup>

The “covered agreements”, however, are only “first of all” resorted to in the WTO dispute settlement procedures. They do not exhaust the recourse to other relevant sources. To the contrary, all the other subparagraphs of Article 38(1) of the ICJ Statute, apart from paragraph (a), are relevant in our seeking the potential sources of WTO law, among which, the reports of prior GATT/WTO panels and the Appellate Body are extraordinarily important.

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*Provisions of GATT 1994; Understanding on the Interpretation of Article XXIV of GATT 1994; Understanding in Respect of Waivers of Obligations under GATT 1994; Understanding on the Interpretation of Article XXVIII of GATT 1994.* See supra note 45.

<sup>53</sup> : To be specific, these multilateral agreements include *Agreement on Agriculture; Agreement on the Application of Sanitary and Phytosanitary Measures; Agreement on Textiles and Clothing; Agreement on Technical Barriers to Trade; Agreement on Trade-Related Investment Measures; Agreement on Implementation of Article VI of GATT 1994; Agreement on Implementation of Article VII of GATT 1994; Agreement on Preshipment Inspection; Agreement on Rules of Origin; Agreement on Import Licensing Procedures; Agreement on Subsidies and Countervailing Measures; Agreement on Safeguards.* See supra note 45.

<sup>54</sup> : See GATT 1994, paragraph 1(a). (Emphasis added). See supra note 45.

<sup>55</sup> : Which include protocols and certifications relating to tariff concessions, protocols of accession, decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the *WTO Agreement*, other decisions of the CONTRACTING PARTIES to GATT 1947. See GATT 1994, paragraph 1(b). See supra note 45.

<sup>56</sup> : Article I:2 defines that the GATS applies to the supply of a service(a) from the territory of one Member into the territory of any other Member; (b)in the territory of one Member to the service consumer of any other Member; (c)by a service supplier of one Member, through commercial presence in the territory of any other Member; (d)by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. See supra note 45.

<sup>57</sup> : Article 1(2) of TRIPS specifies that “intellectual property” of this Agreement is referred to (1)copyright and related rights; (2)trademarks; (3)geographical indications; (4)industrial designs; (5)patents; (6)layout-designs(topographies) of integrated circuits; (7)protection of undisclosed information. See supra note 45.

<sup>58</sup> : Article II:2 of the *WTO Agreement* states: “The agreements and associated legal instruments included in Annexes 1,2,3,...are integral parts of this Agreement, binding on all Members.” Article II:3 supplements that “...The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.” See supra note 45.

#### 4.2.2. Reports of prior panels and the Appellate Body

Other than the texts of the WTO agreements, no source of law is as important in the WTO dispute settlement as the prior adopted reports which include the adopted reports of GATT panels as well as WTO panels, and now, of course, include the adopted reports of the WTO Appellate Body.

“Judicial decisions” are among the “subsidiary” means for the determination of international law rules. This mandate is specified in Article 38(1)(d) of the ICJ Statute. Read together with Article 59,<sup>59</sup> Article 38(1)(d) has produced a system of precedent under which the International Court of Justice essentially refers to and considers its prior decisions, but is not legally required to follow them.<sup>60</sup> The attitude of the ICJ toward its previous decisions is appropriately described by Judge Mohamed Shahabuddeen who once observed: “though having the power to depart from them, (the Court) will not lightly exercise that power.”<sup>61</sup> The WTO dispute settlement mechanism effectively duplicates this system.

The *WTO Agreement* specifies that the World Trade Organisation shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.<sup>62</sup> In the Implementation of this provision in the context of trade in goods, GATT 1994 further specifies that this General Agreement should include “other decisions of the CONTRACTING PARTIES to GATT 1947” as an addition to all other GATT documents.<sup>63</sup>

The question whether adopted GATT panel reports represent “decisions” of the CONTRACTING PARTIES to GATT 1947 arose in the dispute *Japan---Taxes on Alcoholic Beverages*. The Panel in its final report concluded that “...panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to adopt them. Article 1(b)(iv) of GATT 1994 provides institutional recognition that adopted panel reports constitute subsequent practice. Such reports are an integral part of GATT 1994, since they constitute ‘other decisions of the CONTRACTING PARTIES to GATT 1947’”.<sup>64</sup>

The Appellate Body, however, did not agree with the Panel on this point. “Although GATT 1947 panel reports were adopted by the decisions of the CONTRACTING PARTIES, a decision to adopt a panel report did not under GATT 1947 constitute agreement by the CONTRACTING PARTIES on the legal reasoning in that panel report. The generally-accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report.” The Appellate Body further stated: “We do not

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<sup>59</sup> : Which states: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” See. *Basic Documents in International Law*, supra note 15.

<sup>60</sup> : See David Palmeter and Petros C. Mavroidis: *The WTO Legal System: Sources of Law*, The American Journal of International Law, Vol. 92, 1998, p.400.

<sup>61</sup> : Mohamed Shahabuddeen: *Precedent in the World Court* 3, 1996.

<sup>62</sup> : *WTO Agreement*, Article XVI:1. See supra note 45.

<sup>63</sup> : Paragraph 1(b)(iv) of GATT 1994. See supra note 45.

<sup>64</sup> : *Japan—Taxes on Alcoholic Beverages*, Report of the Panel(distributed on 11 July 1996), WT/DS8/R, WT/DS10/R, WT/DS11/R, para.6.10.

believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in the *WTO Agreement*. Article IX:2 of the *WTO Agreement* provides: 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements'. Article IX:2 provides further that such decisions 'shall be taken by a three-fourths majority of the Members'. The fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the *WTO Agreement* is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere."<sup>65</sup> The Appellate Body is correct in this deliberation because that is the only way to ensure the necessary deference to the exclusive authority of the Ministerial Conference and General Council to interpret WTO agreements. If a decision made by GATT CONTRACTING PARTIES to adopt a panel report is covered by paragraph 1(b)(iv) of the introduction to GATT 1994, then, all the adopted panel reports would become, *de facto*, *stare decisis*. Although Article 59 of the ICJ Statute has no direct effect on the WTO Members, the panel and the Appellate Body, in practice, have followed the doctrine that adopted reports have no binding force except between the parties and in respect of that particular case.

From a historical viewpoint, the decisions to adopt panel reports under Article XXIII of GATT 1947<sup>66</sup> were different from the joint actions by the CONTRACTING PARTIES under Article XXV of GATT 1947. Under Article XXIII and GATT practice, the CONTRACTING PARTIES used "positive consensus" to adopt a panel report, implying that there was no contracting party present at the meeting against adopting the report; while Article XXV:4 provides that "Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast".<sup>67</sup> Today, the decisions made by the Dispute Settlement Body to adopt the panel or Appellate Body report continue to differ in nature from the interpretations of GATT 1994 and other multilateral trade agreements under the *WTO Agreement* by the WTO Ministerial Conference or the General Council. This will become much clear after we read Article 3(9) of the DSU, which states: "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."<sup>68</sup>

Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of GATT 1994 have brought the GATT legal history and experience into the new realm of the WTO in a manner which ensures continuity and consistency in the transition from the GATT legal system to the WTO legal system. This affirms the importance to the WTO Members of the experience acquired by the CONTRACTING PARTIES to GATT 1947, and acknowledges the continuing relevance of that experience to the new trading system

<sup>65</sup> : See supra note 50, pp.13-14.(Original notes omitted).

<sup>66</sup> : Under the title *Nullification and Impairment*, Article XXIII is the base for dispute settlement within the GATT legal system. The *Dispute Settlement Understanding*, which is the elaboration of Article XXIII, now regulates, together with Article XXIII, the WTO dispute settlement mechanism.

<sup>67</sup> : Under the title *Joint Action by the Contracting Parties*, Article XXV is designed to facilitate the operation and further the objectives of GATT 1947. See supra note 45.

<sup>68</sup> : See supra note 45.

served by the WTO. Having taken this into account, the Appellate Body in the dispute *Japan---Taxes on Alcoholic Beverages* concluded: “Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.”<sup>69</sup>

The role of unadopted panel reports is somewhat less important than that of the adopted ones, but they remain relevant. The Appellate Body agreed with the Panel in the dispute *Japan---Taxes on Alcoholic Beverages* on the point that unadopted reports “have no legal status in either the GATT or the WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members.”<sup>70</sup> However, the Appellate Body also agreed with the Panel that “a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant.”<sup>71</sup> This conclusion is similar to the statement made by Shabtai Rosenne: “Precedents may be followed or discarded, but not disregarded”.<sup>72</sup>

All the above discussions are limited to the GATT panel reports. However, the same reasoning would, *mutatis mutandis*, apply to those adopted WTO panel reports.<sup>73</sup> Although we still need wait to see it as, in practice, there is a lack of such experience in the WTO jurisdictional history. Article XVI:1 of the *WTO Agreement* has ensured that the WTO dispute settlement system will not depart too much from that of its predecessor on this point. Since the disputing parties may still appeal if they are not satisfied with the panel report under the WTO dispute settlement mechanism, it is more likely that the future disputing parties may seek support from the Appellate Body reports.

Like panel reports, Appellate Body reports bind only the parties to the particular dispute, and do not create binding precedents. Unlike panel reports, the Appellate Body reports, under Article 17(14) of the *Dispute Settlement Understanding*,<sup>74</sup> will be almost automatically adopted. The real question, therefore, is the extent to which the future panels and the Appellate Body itself will treat adopted Appellate Body reports as authoritative.

The answer to this question must await more experience. However, it is reasonable to predict that, absent unusual circumstances, panels will follow the decisions of the Appellate Body in much the same way that a lower court follows the decisions of a

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<sup>69</sup> : See supra note 50, p.14.(Original note omitted).

<sup>70</sup> : *Japan—Taxes on Alcoholic Beverages*, Report of the Panel, see supra note 64, para.6.10; Report of the Appellate Body, see supra note 50, p.15.

<sup>71</sup> : Id, Report of the Panel, para.6.10; Report of the Appellate Body, p.15.

<sup>72</sup> : Shabtai Rosenne: *The Law and Practice of the International Court*, second revised edition, 1985, quoted in Mohamed Shahabuddeen, supra note 61, p.131.

<sup>73</sup> : The WTO panel reports will cover not only those disputes concerning GATT 1994, but also those concerning the *General Agreement on Trade in Services* and the *Agreement on Trade-Related Aspects of Intellectual Property Rights*.

<sup>74</sup> : Which states: “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 Members...” See supra note 45. It is unlikely to occur that a winning party will join the consensus not to adopt the Appellate Body report.

higher court. This is a mandatory practice in some legal systems. In others it occurs as a practical matter.<sup>75</sup>

The members of the Appellate Body, by contrast, working on a “collegial” basis, have already paid much deference to the decisions made by their colleagues. In the dispute *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter as *Shrimp*), while in enunciating the application of “customary rules of interpretation of public international law” as required by Article 3(2) of the DSU, the Appellate Body stated: “As we have emphasised numerous times,<sup>76</sup> these rules call for an examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved.”<sup>77</sup> When in discussing the appropriate method for applying Article XX of GATT 1994,<sup>78</sup> the Appellate Body even quoted part of a previous Appellate Body report.<sup>79</sup> Again in the *Shrimp* case, after having reversed the Panel’s legal conclusion that the United States measure at issue “is not within the scope of measures permitted under the chapeau of Article XX,”<sup>80</sup> the Appellate Body illustrated several previous Appellate Body reports to support its duty and responsibility to complete the legal analysis in this case in order to determine whether the American measure qualifies for justification under Article XX.<sup>81</sup>

Established according to Article 17(1) of the DSU,<sup>82</sup> the WTO Appellate Body is a standing juridical body, which is different from the composition of a panel.<sup>83</sup> While only

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<sup>75</sup> : See Rene David: *French Law: Its Structure, Sources, and Methodology*, (translated by Michael Kindred, 1972), p.186.

<sup>76</sup> : See the Appellate Body Reports in the following disputes: *United States—Standards for Reformulated and Conventional Gasoline* (adopted on 20 May 1996), WT/DS2/AB/R, p.17; *Japan—Taxes on Alcoholic Beverages* (adopted on 1 November 1996), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp.10-12; *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* (adopted on 16 January 1998), WT/DS50/AB/R, paras.45-46; *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (adopted on 13 February 1998), WT/DS56/AB/R, para.47; and *European Communities—Customs Classification of Certain Computer Equipment* (adopted on 22 June 1998), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para.85. (Original note 82).

<sup>77</sup> : *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (distributed on 12 October 1998), WT/DS58/AB/R, para.114.

<sup>78</sup> : Under the title *General Exceptions*, Article XX of GATT 1994 allows WTO Members to deviate from their obligations under some circumstances listed in that article. See supra note 45.

<sup>79</sup> : Quoted from *United States—Standards for Reformulated and Conventional Gasoline*, which stated: “In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions—paragraphs(a) to (j)—listed under Article XX; it must also satisfy the requirements imposed by the opening clause of Article XX. *The analysis is, in other words, two-tiered: first, provisional justification by reason of characterisation of the measure under XX(g); second, further appraisal of the same measure under the introductory clause of Article XX.*” (Emphasis added). Supra note 77, para.118.

<sup>80</sup> : *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Panel Report, para.7.62. For Report of the Appellate Body, see supra note 77.

<sup>81</sup> : The Appellate Body referred to the prior Appellate Body reports in: *European Communities—Measures Affecting the Importation of Certain Poultry Products* (adopted on 23 July 1998), WT/DS69/AB/R, para.156; *Canada—Certain Measures Concerning Periodicals* (adopted on 30 July 1997), WT/DS31/AB/R, pp.23-24; *United States—Standards for Reformulated and Conventional Gasoline* (adopted on 20 May 1996), WT/DS2/AB/R, p.19.

<sup>82</sup> : Which states: “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.” See supra note 45.



three of the seven Members sit on any one of the “divisions”<sup>84</sup> to hear a particular appeal, and that division retains full authority to decide the case, views on the issues are shared with the other Appellate Body Members before a decision is reached.<sup>85</sup> Consequently, Members of the Appellate Body, while in confronting prior decisions, are far more likely to be confronting their own decisions, or those of their close colleagues, than are WTO panelists. This relationship seems likely to lead to a stronger attachment to the reasoning and results of those decisions. “Once standing judicial bodies have come into existence,” Judge Shahabuddeen once observed, “they provide an additional mechanism for the further development of the law”.<sup>86</sup> Thus, although the Appellate Body reports are not legally binding except to the parties in the dispute, they seem unlikely to be discarded, not to say to be disregarded, by future panels, especially future Appellate Body divisions.

The nature of the panel examination and the Appellate Body review is, *de facto*, a process to interpret the relevant provisions in any covered agreement or agreements cited by the parties to the dispute. Upon these interpretations, the panel or the Appellate Body will make its recommendations or give its rulings to the disputing parties. Therefore, the rules which the panels and the Appellate Body adopt in their interpretation become crucial to the result of the dispute settlement.

#### 4.2.3. Customary rules of interpreting international law

The legal reasoning to adopt customary rules for interpreting international law lies in Article 3(2) of the *Dispute Settlement Understanding*, which specifies that one of the objectives of the WTO dispute settlement system is to “clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” In practice, Article 3(2) of the DSU has guided WTO panels and the Appellate Body to invoke Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*,<sup>87</sup> which have been held to codify customary international law on this subject.

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<sup>83</sup> : Panels are chosen *ad hoc* from a roster of individuals whose names have been put forward by WTO Members. They are generally present or former members of non-party Geneva delegations to the WTO, or academics—law professors and economists. Those sitting on a particular panel have probably never served together before, and are likely never to serve together again, although a number of persons have served on several panels. As for the composition of panels, see Article 8 of DSU. See *supra* note 45.

<sup>84</sup> : Which means a particular group of three Members who are selected to serve on any one appeal in accordance with paragraph 1 of Article 17 of the DSU and paragraph 2 of Rule 6 of the *Appellate Body Working Procedures for Appellate Review*. cf. <http://www.wto.org/english/tratop-e/dispu-e/ab3-e.htm>

<sup>85</sup> : Paragraph 1 of Rule 4 of the *Working Procedures for Appellate Review* (as amended on 28 February 1997) states: “To ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Member, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure.” Paragraph 3 of Rule 4 further states: “In accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with the other Members before the division finalises the appellate report for circulation to the WTO Members...” WTO Doc. WT/AB/WP/3. cf. <http://www.wto.org/english/tratop-e/dispu-e/ab3-e.htm>

<sup>86</sup> : Shahabuddeen, *supra* note 61, p.45.

<sup>87</sup> : Article 31 (under the title *General rule of interpretation*) states: “(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. (3) There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the

These customary rules of interpretation are, so far, the only portions of customary international law to have found their way meaningfully into the WTO dispute settlement. In the words of the Appellate Body, these rules are the “most authoritative and succinct.”<sup>88</sup>

While keeping in mind the basic principle of interpretation that the words of a treaty like GATT 1994 are to be given their ordinary meaning, in their context and in the light of the treaty’s object and purpose, the Appellate Body in the dispute *United States—Standards for Reformulated and Conventional Gasoline* (hereinafter as *Gasoline*) observed that the Panel Report failed to take adequate account of the words actually used by Article XX of GATT 1994 in several paragraphs.<sup>89</sup> After enumerating the different terms<sup>90</sup> contained in Article XX in respect of the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate State policies or interests outside the realm of liberalisation, the Appellate Body concluded: “It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the State interest or policy sought to be promoted or realised.”<sup>91</sup>

One of the arguments in this appeal is whether or not the American baseline establishment rules constitute a “measure” “relating to” the conservation of clean air within the meaning of Article XX(g) of GATT 1994.<sup>92</sup> Following the spirit of Article 31 of the *Vienna Convention on the Law of Treaties*, the Appellate Body further concluded that “Article XX(g) and its phrase, ‘relating to the conservation of exhaustible natural resources,’ need to be read in context and in such a manner as to give effect to the purposes and objects of the *General Agreement*. The context of Article XX(g) includes the provisions of the rest of the *General Agreement*, including in particular Articles I, III and XI (of GATT 1994); conversely, the context of Articles I and III and XI includes

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application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding to interpretation; (c) any relevant rules of international law applicable in the relations between the parties. (4) A special meaning shall be given to a term if it is established that the parties so intended.” Article 32 (under the title *Supplementary means of interpretation*) states: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” See *Basic Documents in International Law*, supra note 15.

<sup>88</sup> : *United States—Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (adopted on 20 May 1996), WT/DS2/AB/R, p.16.

<sup>89</sup> : Id, Report of the Panel, WT/DS2/R, paras.6.20-6.41.

<sup>90</sup> : For example: “necessary”—in paragraphs(a), (b) and (d); “relating to”—in paragraphs(c), (e) and (g); “for the protection of”—in paragraph(f); “in pursuance of”—in paragraph(h); “involving”—in paragraph(i); “essential”—in paragraph(j). GATT 1994, Article XX(*General Exceptions*). See supra note 45.

<sup>91</sup> : See supra note 88, p.17.

<sup>92</sup> : Article XX states: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption...” See supra note 45.

Article XX(of GATT 1994). Accordingly, the phrase ‘relating to the conservation of exhaustible natural resources’ may not be read so expansively as seriously to subvert the purpose and object of Article III:4 (of GATT 1994). Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g)(of GATT 1994) and the policies and interests it embodies”.<sup>93</sup>

The Appellate Body is correct in adopting the rules of interpretation. Under the WTO jurisprudence, the relationship between the affirmative commitments set out by the WTO Members in, e.g., Articles I, III, XI of GATT 1994 and the policies and interests embodied in the “General Exceptions” listed in Article XX, can be given meaning within the framework of GATT 1994 and its object and purpose by a treaty interpreter only on a case-by-case basis, by careful scrutiny of the factual and legal content in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose. Only in this way, can the contents of GATT 1994 meet the complicated reality of international economic situations.

The purpose to interpret WTO agreements in accordance with the international law rules on treaty interpretation is to clarify the existing WTO law and to fill the gap of law lacuna. But the interpretation is not necessarily limited to those international law rules. As professor Joost Pauwelyn pointed out, many other rules of general international law not explicitly confirmed in the WTO agreements should also be applicable with respect to the WTO agreements; that is, as long as they do not contract out of these rules.<sup>94</sup> His approach is confirmed in a latter WTO panel report. The Panel’s deliberation is expressed as the followings: “We take note that Article 3(2) of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO agreements to customary international law is broader than this. *Customary international law applies generally to the economic relations between the WTO Members.* Such international law applies to the extent that the WTO treaty agreements do not ‘contract out’ from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that *the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO*”.<sup>95</sup> Following this reasoning, the Panel correctly rejected the argument that the reference in DSU Article 3(2) only to rules of treaty interpretation of customary international law means that all other international law is excluded.

Nevertheless, customary rules are not WTO law. They are only a means used to clarify stipulations of WTO law which are “ambiguous” or “obscure”. The WTO, like its

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<sup>93</sup> : Article III:4 of GATT 1994 is the core provision of the national treatment, which provides that “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product”. See supra note 45. See also supra note 88, pp.17-18.

<sup>94</sup> : See Joost Pauwelyn: *The Role of Public International Law in the WTO: How Far Can We Go?* The American Journal of International Law, Vol.95, 2001, p.543.

<sup>95</sup> : *Korea---Measures Affecting Government Procurement*, Panel Report(not appealed, adopted on 19 June 2000), WT/DS163/R, para.7.96.(Footnote omitted)(Emphasis added).

predecessor the GATT, is based on agreements, not on customary rules, and questions of the use of customary rules are therefore likely to be rare. Even GATT's first and the most basic provision, the most-favoured-nation clause(MFN), was not a codification of customary international law; nor did it establish a customary rule.<sup>96</sup> On the contrary, GATT's MFN obligation extended only to the contracting parties, and GATT contracting parties frequently denied their MFN obligation to other non-contracting-parties.<sup>97</sup> This remains true for the WTO agreements. Other potentially relevant are those general principles of law abstracted from domestic legal systems of all civilised nations. As professor Ian Brownlie pointed out: "What has happened is that international tribunals have employed elements of legal reasoning and private law analogies in order to make the law of nations a viable system for application in a judicial process...An international tribunal chooses, edits, and adapts elements from better developed systems: the result is a new element of international law the content of which is influenced historically and logically by domestic law".<sup>98</sup> Following this vein, the WTO panels and Appellate Body will treat general principles of law as part of WTO law in their deliberations.

#### 4.2.4. General principles of law

Before starting the discussion on this issue, the author of this thesis admits that it is not an easy task to define and enumerate general principles of law. Article 2 of the *Charter of the United Nations* provides seven paragraphs which can be deemed as the basic principles of international relations between States. However, the dimension of Article 38(1)(c) of the ICJ Statute is much broader than that of Article 2 of the UN Charter as the "general principles of law recognised by civilised nations" may apply to more than affairs between States. Furthermore, different writers may well have their different understandings as to the delimitation of a general principle of law. The purpose of the discussion on this issue here is only to raise such a proposition that as a general matter, in addition to the "covered agreements" and customary rules for interpretation of these agreements, those general principles of law may also be relevant in a WTO dispute settlement. This is because in WTO law as in any system of law, a situation may arise where the panel or the Appellate Body is considering a dispute before it realises that there is no law covering exactly that point, neither a customary rule nor a judicial precedent. In such instances, the panelist or Appellate Body member may proceed to deduce a rule that will be relevant by analogy from the general principles that guide the legal system. A relevant example of this kind is Article 31 of *Commission's Provisional Rules for Claims Procedure*, which provides that the Commissioners of the UN Compensation Commission "will apply Security Council resolution 687(1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In

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<sup>96</sup> : See supra note 60, p.407. See also Schwarzenberger: *Equality and Discrimination in International Economic Law*, *Yearbook of World Affairs*, Vol.25(1971), p.163.

<sup>97</sup> : Before China entered the WTO in 2001, the United States often connected its MFN treatment with the human rights condition of China, and consequently made it become a subtle political issue between these two countries. See Russell H. Stern: *A Most Favoured Nation or a Most Feared Nation---The PRC's Latest Anti-Crime Campaign and a Possible U.S. Response*, *The George Washington Journal of International Law and Economics*, Vol.31, No.1(1997), pp.119-140.

<sup>98</sup> : Ian Brownlie: *Principles of Public International Law*, fifth edition, Oxford University Press(1998), p.16(Original note omitted).

addition, where necessary, Commissioners shall apply other relevant rules of international law.”<sup>99</sup> Such a situation is perhaps more likely to arise in WTO law because of the relative underdevelopment of this system in relation to the needs with which it is faced.

In the WTO dispute settlement practice, the Appellate Body has already used a number of customary rules and general principles of law to interpret the “covered agreements”. In relation to the general principle of “good faith”, the Appellate Body in the *Shrimp* case stated that “The chapeau of Article XX(of GATT 1994) is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by States. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a State’s rights and enjoins that whenever the assertion of a right ‘impinges on the field covered by a treaty obligation, it must be exercised bona fide, that is to say, reasonably.’<sup>100</sup> An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, *seeking additional interpretative guidance, as appropriate, from the general principles of international law*”.<sup>101</sup>

In the dispute *European Communities---Measures Concerning Meat and Meat Products*(hereinafter as *Hormones*), the European Communities argued that the “precautionary principle” was a general principle of law that should be used to interpret the provisions of the *Agreement on the Application of Sanitary and Phytosanitary Measures*. The Appellate Body declined to reach any conclusion on this point, and stated: “The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallised into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation”.<sup>102</sup> The attitude of the Appellate Body reflects such a fact that a general principle of law needs a long-time practice and universal acceptance of the international community of States. In view of its superior status to any international treaty, it is understandable that the Appellate Body appears to be prudent in adopting a general principle of law.

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<sup>99</sup> : Governing Council Decision 10, UN Doc. S/AC. 26/1992/10.

<sup>100</sup> : B. Cheng: *General Principles of Law as Applied by International Courts and Tribunals*, Stevens and Son, Ltd.(1953), Chapter 4.(Original note 156).

<sup>101</sup> : See supra note 77, para.158.(Original note omitted)(Emphasis added).

<sup>102</sup> : *European Communities---Measures Concerning Meat and Meat Products(Hormones)*, Report of the Appellate Body(distributed on 16 January 1998), WT/DS26/AB/R, WT/DS48/AB/R, para.123. In original note 93, the Appellate Body referred to the deliberations of the ICJ in the case *Gabcikovo-Nagymaros Project* in which the ICJ refused to accept the precautionary principle as one of the general principles of law. See I.C.J. Judgement, 25 September 1997, paras.111-114, 140.

Recently, there is a development of a new principle, “sustainable development”,<sup>103</sup> which is also contained in the first paragraph of the *WTO Agreement* Preamble as one of the World Trade Organisation’s objectives.<sup>104</sup> Sustainable development cannot be interpreted in isolation from the existing international treaties on the subject-matter. It concerns the areas of human rights, State responsibility, environmental law, economic and industrial law, equity, territorial Sovereignty, etc. The corollary of this concept derives from the conflicts of the right to development and the protection of environment. As there is not yet a definitive agreement on the meaning of the term “sustainable development”, the Appellate Body in the *Shrimp* case referred to this principle and concluded that “it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*”.<sup>105</sup> In his Article *Sustainable Development and Unsustainable Arguments*, professor Vaughan Lowe told us that “the process of developing a precise and coherent concept of sustainable development has a way to go before it is well suited to application by tribunals as a component of judicial reasoning. Yet even now it is possible to discern some threads common to the majority of the formulations of the concept. These threads seem to be more of a procedural than of a substantive character”.<sup>106</sup> Lowe’s view vindicates, in another way, that, although it has been constantly referred in the reports of WTO panels and Appellate Body, sustainable development, as a general principle of international law, is still in the process of development.

The emergence of new principles of law explains, in one way, that international law is not “static”, but “evolutionary”. In this evolutionary process, international law needs not only to keep pace with the development of international affairs, but to absorb some useful elements from the academic study as well.

#### 4.2.5. Teachings of the most highly qualified publicists

Article 38(1)(d) of the ICJ Statute provides that the judicial decisions and the teachings of the most highly qualified publicists of the various nations(subject to the provisions of Article 59 of the ICJ Statute) may work as subsidiary means for the determination of rules of law. As the legal status of judicial decisions of other tribunals

<sup>103</sup> : This concept has been generally accepted as integrating economic and social development and environmental protection. In the recent World Summit on Sustainable Development 2002(Johannesburg), this concept has been reinforced by world leaders. See *Rio Declaration on Environment and Development*, adopted on 14 June 1992, U. N. Doc. A/CONF.151/5/Rev.1, 1992; and *UN Report of the World Summit on Sustainable Development(Johannesburg)*, U. N. Doc. A/CONF.199/20. See also G. Handl: *Sustainable Development: General Rules versus Specific Obligations*(included in *Sustainable Development and International Law*, edited by W. Lang, 1995), p.35; *World Commission on Environment and Development, Our Common Future*, Oxford University Press(1987), p.43.

<sup>104</sup> : The paragraph reads as: “(The Parties to this Agreement,) Recognising that their relations in the field of trade and economic endeavour 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 *objectives 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.”(Emphasis added). See supra note 45.

<sup>105</sup> : See supra note 77, para.153.

<sup>106</sup> : See *International Law and Sustainable Development*, edited by Alan Boyle and David Freestone, Oxford University Press(2001), p.26.

will be given a full elaboration in the next section, the discussion in this part is mainly focused on the teachings and writings of publicists.

Sporadic references can be found in panel reports to the teachings and writings of highly qualified publicists in the GATT dispute settlement proceedings,<sup>107</sup> but this sort of references is rare. The reason for this rarity is mainly due to the GATT's diplomatic heritage. Not only were diplomats less likely than lawyers to be aware of or to be influenced by the writings of legal scholars; GATT diplomats for many years were even averse to turning the conciliation-based dispute settlement mechanism into a legal proceeding.<sup>108</sup> The views of publicists, however qualified, impressed few "old GATT hands."<sup>109</sup>

The WTO dispute settlement mechanism has changed a lot on this issue.<sup>110</sup> Authors of the WTO dispute settlement reports, particularly Members of the Appellate Body, seem to be far more willing than GATT panelists to refer to the teachings and writings of those highly qualified publicists in justifying their positions. In the *Shrimp* case, the Appellate Body, before deciding whether the phrase "exhaustible natural resources" as defined in Article XX(g) of GATT 1994 covers both the living and non-living resources, cited extensively the views of publicists in order to keep in line with the principle of effectiveness in treaty interpretation.<sup>111</sup> In the dispute *Japan---Taxes on Alcoholic Beverages*, the Appellate Body used the views of publicists to support its standing that "object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions". In other words, "the treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of treaty' and not as an independent basis for interpretation".<sup>112</sup>

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<sup>107</sup> : For example, *United States—Measures Affecting Alcoholic and Malt Beverages*(adopted on 19 June 1992), GATT BISD, 39th Supplementary(1993), at paras.206, 285(the Panel cited the works of Professor John H. Jackson and Professor Robert E. Hudec).

<sup>108</sup> : This period of history is recounted in two volumes written by Robert E. Hudec: *The GATT Legal System and World Trade Diplomacy*, second edition, Salem, New Hampshire: Butterworths(1990); *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, Salem, New Hampshire: Butterworths(1993).

<sup>109</sup> : This sceptical attitude toward law is apparent from the very title of a book written by GATT's second Director-General, Olivier Long: *Law and Its Limitations in the GATT Multilateral Trade System*, Graham & Trotman/Martinus Nijhoff(1987).

<sup>110</sup> : See Michael K. Young: *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*. *The International Lawyer*, Vol.29, No.2, 1995, pp.389-409.

<sup>111</sup> : For example, *Oppenheim's International Law*, ninth edition, edited by Jennings and Watts, Longman Company, Vol. I, pp.1280-1281; M. S. McDougal, H. D. Lasswell and J. Miller: *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure*, New Haven/Martinus Nijhoff(1994), p.184; I. Sinclair: *The Vienna Convention on the Law of Treaties*, second edition, Manchester University Press(1984), p.118; D. Carreau: *Droit International*, edited by A. Pedone, 1994, para.369; P.Daillier and A. Pellet: *Droit International Public*, fifth edition, L. G. D. J.(1994), para.172; L. A. Podesta Costa and J. M. Ruda: *Derecho Internacional Publico*, Tipografica Editora Argentina(1985), pp.109-110 and M. Diez de Velasco: *Instituciones de Derecho Internacional Publico*, eleventh edition, Tecnos(1997), p.169. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, see supra note 77, para.131 and note 116.

<sup>112</sup> : The Appellate Body referred to the following publicists and their writings: D. J. Harris: *Cases and Materials on International Law*, fourth edition, Sweet and Maxwell: London(1991), p.770; Jimenez de Arechaga: *International Law in the Past Third of a Century*, *Recueil des Cours*, Vol.159, 1978-I, p.1 at 44; I. Sinclair, id, p.130. *Japan—Taxes on Alcoholic Beverages*, see supra note 50, p.12 and note 20.

This development convincingly reflects a recognition of the increasing importance of law to the international trading system, which is made clear by the very establishment of the WTO Appellate Body. The Appellate Body, although confined to considering issues of law and legal interpretations of panel reports, necessarily brings a legal perspective to the WTO dispute settlement proceedings. Panels, advised by lawyers (as was not the case for the first few decades of the GATT history), will increasingly deal with complex issues of law, such as standing, adequacy of notice and admissibility of evidence.<sup>113</sup> All these will surely contribute to the development of WTO dispute settlement mechanism.

Although a WTO panel has jurisdiction only over claims concerning the breach of those “covered agreements”, it should be recalled that some WTO agreements have explicitly confirmed and incorporated a few other pre-existing non-WTO agreements. These non-WTO agreements have thereby become another source of WTO law which can be judicially enforced by a panel.

#### 4.2.6. Other international agreements

The texts of several WTO agreements have explicitly referred to other international agreements, which may therefore serve as direct sources of law in the WTO dispute settlement proceedings. The specific references are included in Article 1(3) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS);<sup>114</sup> Article 3(4) of the *Agreement on the Application of Sanitary and Phytosanitary Measures*;<sup>115</sup> Annex 3 of the *Agreement on Technical Barriers to Trade*;<sup>116</sup> Article 2(4) of the *Agreement on Preshipment Inspection*;<sup>117</sup> and Annex I(k) of the *Agreement on Subsidiary and Countervailing Measures*;<sup>118</sup>

One question which may arise is whether the rights and obligations brought into the WTO law framework by these other agreements are only those that were in effect at the time the WTO agreements became effective, or whether the WTO rights and obligations

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<sup>113</sup> : See supra note 60, p.408.

<sup>114</sup> : Which states: “Members shall accord the treatment provided for in this Agreement to the nationals of other Members. In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the *Paris Convention* (1967), the *Berne Convention* (1971), the *Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits*, were all Members of the WTO members of those Conventions. ..”(Original notes omitted)(Emphasis added). See supra note 45.

<sup>115</sup> : Which states: “Members shall play a full part, within the limits of their resources, in the relevant international organisations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organisations operating within the framework of the *International Plant Protection Convention*, to promote within these organisations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.”(Emphasis added). See supra note 45.

<sup>116</sup> : *Code of Good Practice for the Preparation, Adoption and Application of Standards*, which is administered by ISO/IEC Information Centre in Geneva.

<sup>117</sup> : Which states: “User Members shall ensure that quantity and quality inspections are performed in accordance with the standards defined by the seller and buyer in the purchase agreement and that, in the absence of such standards, relevant international standards apply.(Original note omitted). See supra note 45.

<sup>118</sup> : Which provides, somewhat indirectly, that the grant by governments of export credits in conformity with the provisions of the Arrangement on Guidelines for Officially Supported Export Credits of the Organisation for Economic Co-operation and Development(OECD) shall not be considered an export subsidy. See supra note 45. See also “OECD Arrangement,” OECD Doc. OCDE/GD(92)95(1992).



will change as these agreements change. This, perhaps, is a lacuna in the WTO law. Footnote 2 to the TRIPS states that references to the intellectual property conventions are meant to the specific versions of those conventions.<sup>119</sup> Presumably, therefore, any rights and obligations negotiated later by WTO Members in those other international agreements, before going through the WTO amendment proceedings, will not affect the current rights and obligations of WTO Members and thus should not become the sources of WTO law.

To summarise the previous discussion: the World Trade Organisation is the product of an international agreement. The *WTO Agreement* and its annexed agreements constitute the basic source of WTO law. The reports of panels and the Appellate Body, however, are of increasing importance to the source of WTO law. Most WTO disputes will be resolved primarily, if not solely, with references to the “covered agreements” and to prior reports and, in this sense, the WTO legal system may be thought of as largely self-contained. However, it is not entirely self-contained. On the contrary, it is an important part of the larger system of public international law, as reflected not only by the general body of its own agreements that are binding on all WTO Members, but also by its increasing recourse to the other traditional sources of public international law: customary rules of interpretation of international law, general principles of law, the teachings of publicists, and other international agreements, particularly those incorporated by reference into the WTO agreements. Therefore, the sources of WTO law will change with the development of public international law.

### Section Three The Role of WTO Law in the Development of International Law

#### 4.3.1. WTO law is not a closed system

With one possible exception, no academic author (or any WTO decision or document) disputes that WTO law is part of the wider corpus of public international law.<sup>120</sup> Like international criminal law or human rights law, WTO law is just a branch of public international law. In the *Gasoline* case, the Appellate Body noted that “the general rule of interpretation” set out in Article 31 of the *Vienna Convention on the Interpretation of*

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<sup>119</sup> : Footnote 2 states: “In this Agreement, ‘Paris Convention’ refers to the *Paris Convention for the Protection of Industrial Property*; ‘Paris Convention(1967)’ refers to the *Stockholm Act of this Convention of 14 July 1967*. ‘Berne Convention’ refers to the *Berne Convention for the Protection of Literary and Artistic Works*; ‘Berne Convention(1971)’ refers to the *Paris Act of this Convention of 24 July 1971*. ‘Rome Convention’ refers to the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, adopted at Rome on 26 October 1961. ‘Treaty on Intellectual Property in Respect of Integrated Circuits(IPIC Treaty) refers to the *Treaty on Intellectual Property in Respect of Integrated Circuits*, adopted at Washington on 26 May 1989...”(Emphasis added). See supra note 45.

<sup>120</sup> : See generally John H. Jackson: *The World Trading System*, The MIT Press(1989); Donald M. McRae: *The WTO in International Law: Tradition Continued or New Frontier?* *Journal of International Economic Law*, No.3, 2000; Donald M. McRae: *The Contribution of International Trade Law to the Development of International Law*, *Recueil des Cours*, Vol.260, 1996; Ernst-Ulrich Petersmann: *Dispute Settlement in International Economic Law---Lessons for Strengthening International Dispute in Non-Economic Areas*, *Journal of International Economic Law*, No.2, 1999. For earlier sources confirming that the GATT was no more than a specialised branch of public international law, see Ignaz Seidl-Hohenveldern: *International Economic Law*, 1989; George Schwarzenberger: *The Principles and Standards of International Economic Law*, *Recueil des Cours*, Vol.87, 1955. The possible exception is Judith Hippler Bello: *The WTO Dispute Settlement Understanding: Less Is More*, *The American Journal of International Law*, Vol.90, 1996.

*Treaties* has been relied upon by all contesting parties and third parties in the WTO dispute settlement procedures, although not always in relation to the same issue. That general rule of interpretation “has attained the status of a rule of customary or general international law”. As such, it forms part of the “customary rules of interpretation of public international law” which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the WTO agreements.<sup>121</sup> Furthermore, in doing so, the Appellate Body acknowledged that the WTO is not a hermetically closed regime,<sup>122</sup> impermeable to the other rules of international law. In other words, the Appellate Body has “connected” the GATT/WTO sub-system of law to the rest of international legal order and imposed on panels and WTO Members the obligation to interpret the WTO agreements as any other international treaty, thereby putting an end to what Kuyper has termed “GATT Panels’ ignorance”<sup>123</sup> of the basic rules of treaty interpretation.

A number of factors support the conclusion that WTO law is not a closed system. Firstly, the dimension regulated by WTO law has been expanded, compared with that regulated by GATT 1947. The existence of environmental, health, social, security and other exceptions to WTO obligations links WTO law with other systems of law and policy. The fact that these exceptions such as Article XX of GATT 1994 fail to provide WTO Members, panels and the Appellate Body adequate criteria for judging those subtle issues does not permit them to avoid their responsibility to adjudicate upon these issues.<sup>124</sup> As recognised by the Appellate Body in the *Shrimp* case: “Pending any specific recommendations by the CTE(Committee on Trade and Environment) to WTO Members on the issues raised in its terms of reference, and *in the absence up to now* of any agreed amendments or modifications to the substantive provisions of GATT 1994 and the *WTO Agreement* generally, *we must fulfil our responsibility in this specific case*, which is to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX.”<sup>125</sup> (Emphasis added). Obligated to adjudicate disputes arising from WTO Members, even when involving the interpretation of the most obscure provisions of the WTO agreements, and to do so in an “objective manner”,<sup>126</sup> panels and the Appellate Body have no alternative other than to

<sup>121</sup> : See supra note 88, p.17.(Original note omitted).

<sup>122</sup> : The original words in the Appellate Body Report are “the *General Agreement* is not to be read in clinical isolation from public international law”. Id, p.17.

<sup>123</sup> : P. J. Kuyper: *The Law of the GATT As a Special Field of International Law*, N.Y.I.L.(1994), p.227.

<sup>124</sup> : See J. Bourgeois: *WTO Dispute Settlement in the Field of Anti-Dumping Law*, Journal of International Economic Law, 1998, No.1, p.259. As noted by Jacques Bourgeois, a distinction here must be made between concepts that were left vague by WTO negotiators and those that were left unregulated. Only the latter would permit a panel or the Appellate Body to refuse jurisdiction on the basis of a *non-liquet*(i.e. issue not accessible to legal adjudication due to the absence of law on the matter or for other reasons such as political impediment). The existence of Article XX, and exceptions elsewhere in the WTO agreements, implies that panels and the Appellate Body are charged with a duty to balance international trade and national interests, even in the presence of significant uncertainty about how the relevant WTO provisions apply. Id, p.271.

<sup>125</sup> : See supra note 77, para.155.

<sup>126</sup> : Article 11 of the DSU requires that “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...” See supra note 45.

look for information that will lead them to the reasonable and objective meaning of the terms of the treaty that they must ultimately interpret, apply and enforce. The scarcity of information within the WTO agreements, such as when dealing with environment issues, necessarily obliges the honest and objective interpreter to take into account any relevant information, even outside the WTO agreements themselves.

Secondly, as noted already, Article 3(2) of the *Dispute Settlement Understanding* requires that the WTO agreements should be interpreted with the customary rules of interpretation, and as the Appellate Body stated in the *Gasoline* case that these agreements must not be interpreted "in clinical isolation from public international law", the reference to the massive body of rules existing in public international law cannot be denied. In the dispute *European Communities---Regime for the Importation, Sale and Distribution of Bananas* (hereinafter as *Bananas*), the Panel stated that the Lome Waiver<sup>127</sup> should be interpreted so as to waive not only compliance with the obligations of Article I:1, but also compliance with the obligations of Article XIII of GATT 1994. The Appellate Body, despite the fact that it recognised the Lome Waiver as part of GATT/WTO law, considered that the Panel's conclusion was difficult to reconcile with the limited GATT practice in the interpretation of waivers,<sup>128</sup> the strict disciplines to which waivers are subjected under the *WTO Agreement*,<sup>129</sup> the history of the negotiations of this particular waiver<sup>130</sup> and the limited GATT practice relating to granting waivers from the obligations of Article XIII of GATT 1994,<sup>131</sup> then, concluded that "the Panel erred in finding that 'the Lome Waiver waives the inconsistency with Article XIII:1 to the extent necessary to permit the EC to allocate shares of its bananas tariff quota to

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<sup>127</sup> : The relevant paragraph of the Lome Waiver reads as the following: "Subject to the terms and conditions set out hereunder, the provisions of paragraph 1 of Article I of the *General Agreement* shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treaty for products originated in ACP (African, Caribbean and Pacific) States as required by the relevant provisions of the Fourth Lome Convention". See *The Fourth ACP-EEC Convention of Lome*, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994.

<sup>128</sup> : There is little previous GATT practice on the interpretation of waivers. In the Panel report of the dispute *United States—Sugar Waiver*, the Panel stated: "The Panel took into account in its examination that waivers are granted according to Article XXV:5 (of GATT 1947) in 'exceptional circumstances', that they waive obligations under the basic rules of the *General Agreement* and that their terms and conditions consequently have to be interpreted narrowly". Adopted on 7 November 1990. BISD 37S/228, para.5.9.

<sup>129</sup> : Although the *WTO Agreement* does not provide any specific rules on the interpretation of waivers, Article IX of the *WTO Agreement* and the *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994*, which provide requirements for granting and renewing waivers, stress the exceptional nature of waivers and subject waivers to strict disciplines. Thus, waivers should be interpreted with great care. See *supra* note 45.

<sup>130</sup> : With regard to the history of the negotiations of the Lome Waiver, we note that the GATT CONTRACTING PARTIES limited the scope of the waiver by replacing "preferential treatment *foreseen* by the Lome Convention" with "preferential treatment *required* by the Lome Convention". This change clearly suggests that the CONTRACTING PARTIES wanted to restrict the scope of the Lome Waiver. (Emphasis added).

<sup>131</sup> : From 1948 to 1994, the GATT CONTRACTING PARTIES granted only one waiver from Article XIII of GATT 1947. This is *Waiver Granted in Connection with the European Coal and Steel Community*. Decision of 10 November 1952, BISD 1S/17, para.3. In view of the truly exceptional nature of waivers from the non-discrimination obligations under Article XIII, it is all the more difficult to accept the proposition that a waiver which does not explicitly refer to Article XIII would nevertheless waive the obligations of that Article. If the CONTRACTING PARTIES had intended to waive the obligations of the European Communities under Article XIII in the Lome Waiver, they would have said so explicitly.

specific traditional ACP banana supplying countries in an amount not exceeding their pre-1991 best-ever exports to the EC”<sup>132</sup>.

Thirdly, it can be argued that Article 32 of the *Vienna Convention of the Law of Treaties*, in terms of the WTO dispute settlement, requires any interpreting body, such as panels and the Appellate Body, to use or to take into account outside legal materials when interpreting those WTO obligations. In the *Hormones* case, the European Communities considered that the Panel, in seeking information from experts individually rather than from an expert group, violated Article 11(2) of the *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*<sup>133</sup> and Article 13(2) of the *Dispute Settlement Understanding*.<sup>134</sup> The Appellate Body did not accept this claim of the European Communities and stated that “in disputes involving scientific or technical issues, neither Article 11(2) of the *SPS Agreement* nor Article 13 of the DSU prevents panels from consulting individual experts. Rather, both the *SPS Agreement* and the DSU leave to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate.”<sup>135</sup> It should be noted that some of the WTO agreements are very technical, therefore, recourse may be had to supplementary means of interpretation when the provisions of these agreements “leave the meaning ambiguous or obscure”.

Fourthly, the *WTO Agreement* Preamble commits WTO Members to the “optimal use of the world’s resources in accordance with the objectives of sustainable development”. The objective of sustainable development can only be understood in light of contemporary law and policy that defines and supports this goal. In this context, it may be worth noting the *Marrakesh Decision on Trade and Environment*<sup>136</sup> in which the WTO Members has taken note of the *Rio Declaration on Environment and Development*,<sup>137</sup> *Agenda 21*,<sup>138</sup> and “its follow-up in GATT, as reflected in the statement of the Chairman of the Council of Representatives to the CONTRACTING PARTIES at

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<sup>132</sup> : *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body (distributed on 9 September 1997), WT/DS27/AB/R, para.188.

<sup>133</sup> : Which states: “In a dispute under this Agreement involving scientific or technical issue, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organisation, at the request of either party to the dispute or on its own initiative.” (Emphasis added). See supra note 45.

<sup>134</sup> : Which states: “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 the dispute, a panel may request an advisory report in writing from expert review group...” (Emphasis added). See supra note 45.

<sup>135</sup> : See supra note 100, para.147.

<sup>136</sup> : See supra note 45.

<sup>137</sup> : Principle 3 of the *Rio Declaration on Environment and Development* states: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” Principle 4 states: “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.” UN Doc. A/CONF. 151/5/Rev.1, 13 June 1992, 31 International Legal Materials 874.

<sup>138</sup> : *Agenda 21* is replete with references to the shared view that economic development and the preservation and protection of natural resources should be mutually supportive. Adopted by the United Nations Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF. 151/26/Rev.1, 1992.

their 48th Session in 1992...”<sup>139</sup> Although all these international declarations and policy statements contained in the *Marrakesh Decision* are not legally binding, they have provided a widely-accepted parameter for the concept of sustainable development.

Finally, if interpreted and developed in isolation from the rest of international law, WTO law would risk “conflicts” with other international law rules, contrary to the general international law presumption against conflicts and for effective interpretation of treaties. More importantly, if WTO law cannot update itself with the social development, it will obstruct international trade, and eventually, fall into being disregarded and discarded by the WTO Members. In the *Hormones* case, before deciding whether the SPS (sanitary and phytosanitary) measures maintained by the European Communities are based on a risk assessment required by Article 5(1) of the *SPS Agreement*.<sup>140</sup> the Appellate Body needed, first of all, to consider what factors were included in carrying out a risk assessment. The Panel intended to exclude all the matters “not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences”.<sup>141</sup> The Appellate Body, however, disagreed and stated: “There is nothing to indicate that the listing of factors that may be taken into account in a risk assessment of Article 5(2)(of the *SPS Agreement*)<sup>142</sup> was intended to be a closed list.”<sup>143</sup> This approach sounds persuasive, as the risk that is to be evaluated in a risk assessment under Article 5(1) of the *SPS Agreement* is not only the risk ascertainable in a science laboratory operating under strictly controlled conditions, but also the risk in human societies as they actually exist. In other words, all the actual and potential factors leading to adverse effects on human health should be considered if we need to make a risk assessment.

To state that WTO law is part of international law is one thing. Nevertheless, it is quite another thing to admit that there is nothing special in WTO law. In many respects, WTO law is *lex specialis* as opposed to the general rules of international law. But contracting out of some rules of general international law does not necessarily mean that one has contracted out of all of them, nor a *fortiori* that WTO law is created completely outside the system of international law. Thus, with the development of general international law, WTO law itself also needs development.

#### 4.3.2. WTO law needs development

Compared with its predecessor the GATT, the World Trade Organisation, through the successful settlement of the *Gasoline* dispute and the *Shrimp* dispute, has taken a giant step forward on the subtle issue *trade and environment*. Under the GATT’s jurisdiction, a

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<sup>139</sup> : Preamble of the *Decision on Trade and Environment*. See supra note 45.

<sup>140</sup> : Article 5(1) of the *SPS Agreement* provides: “Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or death, taking into account risks assessment techniques developed by the relevant international organisations.”(Emphasis added). See supra note 45.

<sup>141</sup> : US Panel Report, WT/DS26/R/USA, para.8.107; Canada Panel Report, WT/DS48/R/CAN, para.8.110.

<sup>142</sup> : Which states: “In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.”(Note added). See supra note 45.

<sup>143</sup> : See supra note 102, para.187.

number of cases, including *Salmon-Herring*,<sup>144</sup> *Thai Cigarettes*<sup>145</sup> and *Tuna-Dolphin*,<sup>146</sup> were referred to GATT Article XX exceptions. However, the GATT panels generally adopted fairly conservative interpretations of the Article XX exceptions. They were reluctant to use external sources of law, including other treaties and general principles of international law, to assist in the interpretation of GATT provisions.

The creation of the World Trade Organisation has brought with it a change in our approach to the trade and environment matters. A number of factors may be invoked to account for this change. Firstly, the drafters of the WTO agreements have replaced the reference of “full use of the world’s resources” in the GATT Preamble with a new undertaking of “optimal use of the world’s resources in accordance with the objective of sustainable development” in the *WTO Agreement* Preamble. Secondly, the Uruguay Round negotiators decided to expand the dimension of the multilateral trade system to such new areas like intellectual property rights and services, and to add new disciplines over national laws in a number of areas including health and technical regulations. This, in turn, has increased the need for a careful balance to be struck between WTO disciplines and other national laws and policies. Thirdly, the Uruguay Round negotiations occurred alongside the United Nations Conference on Environment and Development(UNCED), which reflected a growing international concern over the increasing and unsustainable impacts of human society on the Earth’s ecosystems and the

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<sup>144</sup> : *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*(adopted on 22 March 1988), GATT BISD 35th Supplement(1989), p.98(hereinafter as “*Salmon-Herring*”). In *Salmon-Herring*, the Panel upheld the United States’ claim that Canada’s ban on unprocessed herring and salmon exports violated the prohibition on quantitative restrictions in Article XI:1 of GATT 1947 and rejected Canada’s argument that, as part of a fisheries management programme, its export ban was permissible under GATT Article XX(General Exceptions).

<sup>145</sup> : *Thailand—Restrictions on Importation of and International Taxes on Cigarettes*(adopted on 7 November 1990), GATT BISD, 37th Supplement(1991), pp.200-228(hereinafter as “*Thai Cigarettes*”). In *Thai Cigarettes*, the Panel upheld a challenge by the United States to Thailand’s restrictions on the import of cigarettes under Article XI:1 of GATT 1947. It also determined that Thailand’s excise, business and municipal taxes on cigarettes were inconsistent with the national treatment obligations under Article III:1 and Article III:2 and that the trade restrictions could not be justified under Article XX(b) of GATT 1947 as a measure “necessary to protect human ...life or health”. The Panel noted that the requirement of “necessity” would only be met if “there was no alternative measure consistent with the *General Agreement*, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives”. Id, at para.75. The Panel went on to note that “A non-discriminatory regulation implemented on a national basis in accordance with Article III:4(of GATT 1947) requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the *General Agreement*. The Panel considered that Thailand could reasonably be expected to take such measures to address the quality-related policy objective it now pursues through an import ban on all cigarettes whatever their ingredients.” Id, at para.77.

<sup>146</sup> : *United States—Restrictions on Imports of Tuna*(distributed on 3 September 1991, but not adopted), BISD 39S/155(hereinafter as “*Tuna I*”); *United States—Restrictions on Imports of Tuna*(distributed on 10 June 1994, but not adopted), DS29/R(hereinafter as “*Tuna II*”). The unadopted panel decisions in *Tuna I* and *Tuna II* addressed the vexed process and production method(PPM) issue when the panels examined the United States’ ban on tuna imports caught by methods that endangered dolphins. In *Tuna I*, the Panel determined that because the GATT is concerned with trade in products, any regulatory distinction not reflected in the physical characteristics of products(for example, a distinction based on the manner in which tuna was caught) was incompatible with Article III of GATT 1947. It stated: “Article III:4(of GATT 1947) calls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product...” *Tuna I*, at para.5.15. *Tuna II*, at para.5.27.

growing inequality in the patterns of development. Finally, the Appellate Body, after receiving the comprehensive acceptance from the WTO Members for its initial work, has acquired enormous power in clarifying WTO law and, eventually, in developing WTO law.

In the appellate review of the *Gasoline* dispute, the Appellate Body upheld the Panel's decision that the US measures, i.e. the baseline establishment rules, ultimately failed to qualify for the protective application of GATT Article XX, but used a different legal reasoning. Whereas the Panel found that the US measures were not justified under GATT Article XX(b),<sup>147</sup> (d)<sup>148</sup> or (g),<sup>149</sup> the Appellate Body allowed the measure under Article XX(g) and went on to examine the consistency of the measure with the Article XX chapeau.<sup>150</sup> According to some scholars,<sup>151</sup> this is the first thorough examination of the Article XX chapeau in the 50-year GATT/WTO dispute settlement history. The Appellate Body concluded that the US measure did not satisfy the chapeau requirements, in that it was applied in a discriminatory and abusive manner, and constituted a disguised restriction on trade.<sup>152</sup> By examining the chapeau of Article XX, the Appellate Body noted the need to balance the market-access commitments embodied in the substantive GATT provisions against the right of WTO Members to invoke the Article XX exceptions.

After the *Gasoline* case, the next WTO trade dispute concerning GATT Article XX is the *Shrimp* case. This dispute arose from a challenge by some developing countries to a US import ban on shrimp products from countries without certain national policies to protect endangered sea turtles from drowning in shrimp trawling nets. On this occasion, the Appellate Body considered that the US measure was based on a policy covered by GATT Article XX(g), but then determined that the law was inconsistent with the language of the Article XX chapeau on the basis that it was applied in a manner that led

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<sup>147</sup> : "necessary to protect human, animal or plant life or health".

<sup>148</sup> : "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices".

<sup>149</sup> : "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

<sup>150</sup> : The chapeau functions *de facto* as the precondition for the following exceptions, which states: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same condition prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures..." See supra note 45.

<sup>151</sup> : For example, Gabrielle Marceau: *A Call for Coherence in International Law*, Journal of World Trade, Vol. 33, No.5, 1999, p.96.

<sup>152</sup> : The Appellate Body gives its legal reasoning for examining the chapeau of Article XX as the following: "The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clause of Article XX is generally the prevention of 'abuse of the exceptions' of (what was later to become) Article (XX). This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned." See supra note 88, p.22.

to an arbitrary and unjustifiable trade discrimination.<sup>153</sup> The legal reasoning of the Appellate Body to support this conclusion marks the most complete discussion of GATT Article XX so far, and therefore deserves careful consideration. Moreover, it made extensive reference to other sources of international law when interpreting GATT 1994,<sup>154</sup> thereby reinforcing its conclusion in the *Gasoline* case that the *WTO Agreement* must not be interpreted in clinical isolation from public international law.

From the trade and environment perspective, regardless of whether the Appellate Body's approaches in the aforementioned cases are welcomed by the WTO Members, it is now open to the membership to define which measures are permitted as valid environmental actions, and which actions should be prohibited as disguised protectionism pursuant to GATT Article XX. The Appellate Body in the *Shrimp* dispute noted that the standards of the chapeau projected both procedural and substantive requirements.<sup>155</sup> However, as a practical matter, the Appellate Body has provided national governments of WTO Members with little guidance about what is required before a measure is invoked under GATT Article XX. What kinds of production and process methods (PPMs) are permitted under GATT Article XX? To what extent, for example, must the WTO Members engage in multilateral discussions, provide financial and technical assistance or exhaust other options before implementing trade sanctions? What kinds of special efforts must be made to the rights of developing countries? What other disciplines should be placed on unilateral action to ensure that powerful countries do not use it as a way of transferring the cost of environmental protection to the weaker members of the international community of nations?<sup>156</sup>

It has become clear that WTO law will continue to develop with enrolling more new Members and covering more affairs. WTO law, like general international law, does not reflect a once-and-for-all expression of consent. As one scholar noted: "It would be absurd and inconsistent with the genuine will of States to 'freeze' such rules into the mould of the time to, say, April 15, 1994".<sup>157</sup> Therefore, to keep WTO law workable, we

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<sup>153</sup> : The Appellate Body stated in its report: "It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory programme, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members." See supra note 77, para.164.

<sup>154</sup> : The Appellate Body examined the use of the term "natural resources" in a number of international conventions, including the 1982 *United Nations Convention on the Law of the Sea* (Done at Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122; 21 International Legal Materials 1261, original footnote 110), the *Convention on Biological Diversity* (Done at Rio de Janeiro, 5 June 1992, UNEP/Bio.Div/N7-INC5/4; 31 International Legal Materials 818, original footnote 111), the *Resolution on Assistance to Developing Countries* adopted in conjunction with the *Convention on the Conservation of Migratory Species of Wild Animals* (Done at Bonn, 29 August 1979, 19 International Legal Materials 11, p.15, original footnote 113), and the *Convention on International Trade in Endangered Species of Wild Flora and Fauna* (Done at Washington, 3 March 1973, 993 U. N. T. S. 243, 12 International Legal Materials 1085 original footnote 117). See supra note 77, paras.130-132.

<sup>155</sup> : See supra note 77, para.160.

<sup>156</sup> : See supra note 149, p.105.

<sup>157</sup> : Joost Pauwelyn, see supra note 94, p.546. (Original note omitted). As the author explained in original note 32, the term "State", in the context of WTO agreements, should include separate customs territories. See also Article XII:1 of the *WTO Agreement*. See supra note 45.



may borrow the Appellate Body's concept of a "line of equilibrium"<sup>158</sup> as it reinforces the need for a careful balance to be struck between WTO obligations and the right of WTO Members to pursue their own policies. However, defining the "line of equilibrium" is no easy task. The challenge for future WTO law will be to establish this balance in a way that promotes multilateral co-operation, predictability and the rule of law, and that ensures the coherence of international trade and national policies.

To refer to other international agreements in the situations where WTO agreements are not clear or even silent is just one way to develop WTO law; while to refer to the decisions of other international tribunals is another meaningful way in which the WTO dispute settlement bodies may deduce some relevant conclusions, although these decisions have no legally binding effect on WTO dispute settlement. This practice is also in line with the situations set forth in Article 38(1)(d) of the ICJ Statute.

#### **4.3.3. The relevance of the decisions made by other international tribunals**

Before discussing the relevance of the decisions made by other international tribunals to the WTO dispute settlement, we first need to clarify one important issue, i.e., the relationship of WTO law with those other legal sources including the decisions of other international tribunals. Since the WTO covered agreements have established rules which are expressly recognised by the contesting parties, it is only natural when a dispute arises to apply the rights and obligations from these agreements binding on both parties to the dispute.<sup>159</sup> However, this rule of priority does not exclude the considerations of other legal sources. In practice, the ICJ judges tend to make an extensive reference to other sources of law in their decisions. The situation in the WTO is different from that of the ICJ. There are no clear provisions in WTO law like Article 38 of the ICJ Statute. Therefore, it is generally perceived that there are no legal obligations for the WTO panelists and Appellate Body members to apply legal sources outside WTO law. The "covered agreements" have laid the core foundations for the WTO dispute settlement system. All the interpretations of law should begin from here. It is only through the decisions of panels and the Appellate Body that decisions of other tribunals and publicists' teachings are taken into account "as subsidiary means for the determination of

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<sup>158</sup> : In the *Shrimp* case, the Appellate Body noted that "The task of interpreting and applying the chapeau(of GATT Article XX) is, hence, essentially the delicate one of locating and marking out a line of *equilibrium* between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions(e.g. Article XI) of GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."(Emphasis as original). See supra note 77, para.159.

<sup>159</sup> : Article II:2 of the *WTO Agreement* states that WTO covered agreements are "binding on all Members". Article 7(1) of the DSU provides that the terms of reference of a WTO panel(unless the parties to the dispute agree otherwise) is "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)." Article 17(6) of the DSU limits an appeal in the appellate review to the "issues of law covered in the panel report and legal interpretations developed by the panel." See supra note 45. Therefore, the main task of the WTO dispute settlement bodies is to clarify the rights and obligations of the parties to a dispute through the provisions of the covered agreements.

rules of law”.<sup>160</sup> Therefore, the proper interpretation of the WTO agreements for a panel or the Appellate Body is, “*first of all*, a textual interpretation”.<sup>161</sup>

Despite the fact that the “covered agreements” have constituted the basic framework of WTO law, it is still possible that there might be some lacunae in the resolutions of some specific disputes, or some particular aspects of a dispute. Furthermore, it should be recalled that the WTO dispute settlement mechanism does not contain a remanding system,<sup>162</sup> nor does it permit the disputed party to raise its counter-complaint in the same dispute settlement proceeding.<sup>163</sup> In other words, a WTO panel or the Appellate Body has to make its recommendations and rulings on any dispute if it is raised. Under these circumstances, recourse to the sources outside the WTO agreements has to be possible. As the previous section has expounded the other outside sources, the evaluation in this part is focused on the decisions made by other international tribunals. There are no clear references in the WTO agreements as to which international tribunals might be considered of their decisions. The practice of the WTO panels and the Appellate Body, however, has shown that the decisions made by the International Court of Justice(ICJ) and its predecessor, the Permanent Court of International Justice(PCIJ), are of most frequent references.

In the first appellate review of the WTO dispute settlement history, the *Gasoline* appeal, the Appellate Body adopted the “general rule of interpretation” of the *Vienna Convention on the Law of Treaties*, which has been reinforced by the ICJ in several of its decisions,<sup>164</sup> and stated that “interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”<sup>165</sup> In the dispute *Japan—Taxes on Alcoholic Beverages*, the Appellate Body, following the mandate applied in its appellate review of the *Gasoline* case, repeated that the interpretation of Article 31 of the *Vienna Convention on the Law of Treaties* “must be based above all upon the text of the treaty”.<sup>166</sup> The provisions of the treaty are “to be given their ordinary

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<sup>160</sup> : Article 38(1)(d) of the ICJ Statute. See *Basic Documents in International Law*, supra note 15.

<sup>161</sup> : *Japan—Taxes on Alcoholic Beverages*, Report of the Appellate Body, see supra note 50, p.18. (Emphasis added).

<sup>162</sup> : See David Palmeter: *The WTO Appellate Body Needs Remand Authority*, Journal of World Trade, Vol.32, No.1, 1998.

<sup>163</sup> : Article 3(10) of the DSU partly states: “It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked”. See supra note 45.

<sup>164</sup> : The ICJ decisions which the Appellate Body referred to include: *Corfu Channel Case*(1949), I.C.J. Reports, p.24; *Territory Dispute Case*(Libyan Arab Jamahiriya v. Chad)(1994), I.C.J. Reports, p.23. See supra note 88, p.22, original note 45. In original note 34, the Appellate Body referred to two relevant decisions made by other tribunals: *Golder v. United Kingdom*, European Court of Human Rights, ECHR, Series A(1995); *Restrictions to the Death Penalty Cases*(1986), Inter-American Court of Human Rights, International Law Reports, No.70, p.449. See supra note 88, p.17.

<sup>165</sup> : See supra note 88, p.22. This rule has been followed by the Appellate Body in its later rulings including the one in the dispute *Japan—Taxes on Alcoholic Beverages*, see supra note 50, p.10.

<sup>166</sup> *Japan—Taxes on Alcoholic Beverages*, Report of the Appellate Body, see supra note 50, p.12, original note 18. Besides *Territory Dispute Case*(Libyan Arab Jamahiriya v Chad)(1994), *Judgement*, I.C.J. Reports, p.6 at 20, the Appellate Body also referred to the dispute *Maritime Delimitation and Territory Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgement*, (1995) I.C.J. Reports, p.6 at 18.

<sup>164</sup> : The Appellate Body here referred to the dispute *Competence of the General Assembly for the Admission of a State to the United Nations*(*Second Admission Case*)(1950), I.C.J. Reports, p.4 at 8, in

meaning in their context”.<sup>167</sup> The object and purpose of the treaty are also “to be taken into account in determining the meaning of its provisions”.<sup>168</sup> In the words of the Appellate Body, “A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness”.<sup>169</sup>

In the *Bananas* case, the European Communities argued that the Panel infringed Article 3(2) of the DSU<sup>170</sup> by finding that the United States had a right to advance its claims under GATT 1994. The European Communities asserted that, “as a general principle, in any system of law, including international law, a claimant must normally have a legal right or interest in the claim it is pursuing”.<sup>170</sup> Furthermore, the European Communities used the ICJ and PCIJ judgements to support its argument that the concept of *actio popularis* “is not known to international law as it stands at present”.<sup>172</sup> The Appellate Body did not agree on this point, and stated: “We do not read any of those judgements as establishing a general rule that in all international litigation, a complaining party must have a ‘legal interest’ in order to bring a case. Nor do these judgements deny the need to consider the question of standing under the dispute settlement provisions of any multilateral treaty, by referring to the terms of that treaty.” In the view of the Appellate Body, the United States “has broad discretion in deciding whether to bring a case against another Member under the DSU.”<sup>173</sup> Since the United States is a producer of bananas, the potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world suppliers and world prices of

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which the International Court of Justice stated: “The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning and in the context in which they occur”.(Quotation original).

<sup>167</sup> See supra note 50, p.12, original note 19.

<sup>168</sup> : That is to say, the treaty’s “object and purpose” is to be referred to in determining the meaning of the “terms of the treaty” and not as an independent basis for interpretation. Here, the Appellate Body referred to *Competence of the ILO to Regulate the Personal Work of the Employer*(1926), P.C.I.J., Series B, No.13, p.6 at 18; *International Status of South West Africa* (1962), I.C.J. Reports, p.128 at 336. See supra note 50, p.12, original note 20.

<sup>169</sup> : *Japan—Taxes on Alcoholic Beverages*, Report of the Appellate Body, see supra note 50, p.12. See also the similar words in the *Yearbook of International Law Commission*(1966), Vol. II, p.219: “When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.”

<sup>170</sup> : Which states: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law...” See supra note 45.

<sup>170</sup> : See supra note 130, para.15.

<sup>172</sup> : The EC appellant’s submission in paras.9-10 referred to the ICJ and PCIJ Judgements in: the *South West Africa Cases*(Second Phase), I.C.J. Reports 1966, p.4; the *Case Concerning the Barcelona Traction, Light and Power Company Limited*(Second Phase), I.C.J. Reports 1970, p.4; the *Mavrommatis Palestine Concessions Case*, P.C.I.J.(1925) Series A, No.2, p.1; the *S. S. “Wimbledon” Case*, P.C.I.J.(1923) Series A, No.1, p.1; and the *Case Concerning the Northern Cameroon*, I.C.J. Reports(1963), p.4. The complaining parties’ appellee’s submission, in para.364, also refers to the ICJ Judgement in the *South West Africa Cases*. See supra note 132, pp.64-65, original note 66.

<sup>173</sup> : See supra note 130, para.133.

bananas. Having taken into account all these considerations, the Appellate Body decided that the United States has its standing in the *Bananas* case.

The *Bananas* case, to a certain extent, reflects the attitude of the Appellate Body towards the decisions made by other international tribunals, particularly those made by the ICJ and the PCIJ. The Appellate Body pays deference to these decisions, but it does not mean that it is necessarily bound by them, particularly when the Appellate Body is still able to find some reasoning from the WTO agreements. After rejecting the EC's arguments, the Appellate Body succeeded in drawing the legal reasoning from the chapeau of Article XXIII:1 of GATT 1994<sup>173</sup> and Article 3(7) of the DSU<sup>175</sup> to uphold the Panel's conclusion that the United States had a legal right to advance its claims in this case.<sup>176</sup>

Despite the fact that the WTO panels and the Appellate Body have much freedom in their selections of the decisions made by other tribunals, the ICJ is still the most authoritative judicial body at the contemporary international level. Established according to Article 92 of the UN Charter,<sup>177</sup> the ICJ makes its decisions which may involve not only Members of the United Nations,<sup>178</sup> but also the non-Members of the United Nations.<sup>179</sup> In contrast, the World Trade Organisation is only a technical organisation<sup>180</sup> which mainly deals with the trade affairs among its Members.<sup>181</sup> The WTO dispute settlement mechanism is only relevant to the Members.<sup>182</sup> Therefore, with its authoritative decisions and the coverage of affairs, the International Court of Justice will continue to influence other international tribunals including WTO panels and the

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<sup>173</sup> : Which states: "If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded..." See supra note 45.

<sup>175</sup> : Which states: "Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful..." See supra note 45.

<sup>176</sup> : The Appellate Body concluded in its report as the following: "Taken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under GATT 1994. This does not mean, though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case." The last sentence reflected the prudence of the Appellate Body in its deliberations on this subtle issue. See supra note 132, para.138.

<sup>177</sup> : Which states: "The International Court of Justice shall be the principal judicial organ of the United Nations. ..." See *Basic Documents in International Law*, supra note 15.

<sup>178</sup> : Id, Article 93(1) states: "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."

<sup>179</sup> : Id, Article 93(2) states: "A State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."

<sup>180</sup> : The legal status of the WTO has been defined in Article VIII:4 of the *WTO Agreement*, which states: "The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the *Convention on the Privileges and Immunities of the Specialised Agencies*, approved by the General Assembly of the United Nations on 21 November 1947." See supra note 45.

<sup>181</sup> : Id, Article II:1 of the *WTO Agreement* states: "The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement."

<sup>182</sup> : Id, Article 3(3) of the DSU states: "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."

Appellate Body. Except for the ICJ decisions, the decisions made by other international tribunals have been, so far, rarely referred to. However, neither the *WTO Agreement* nor its annexed agreements excludes such possibilities. In other words, it is only a matter of time that future WTO panels and the Appellate Body will use the decisions made by other international tribunals than the ICJ to support their legal reasoning.

The WTO was not created in a vacuum(it emerged in the context of general international law and other treaties), nor does its legal existence continue in a vacuum.<sup>183</sup> The influence in the inter-relationship of WTO law and general international law is mutual. On the one hand, international law has played its role in the formation and development of WTO law; on the other hand, the emergence of WTO law has also altered the general landscape of international law.

#### **4.3.4. The contributions and implications of WTO law to the development of international law**

The *WTO Agreement* has laid the basis for a highly complex international treaty system which consists of some 20 multilateral trade agreements, with supplementary "Understandings", "Protocols", "Ministerial Decisions", "Declarations" and more than 30,000 pages of "Schedules of Concessions" for trade in goods, and "Specific Commitments" for trade in services. The legal complexity of WTO law is increased by its numerous references to other international agreements and general international law rules, such as the *Charter of the United Nations*,<sup>184</sup> international financial agreements such as the *International Monetary Fund Agreement*,<sup>185</sup> international environmental agreements such as the *International Plant Protection Convention*,<sup>186</sup> international "standards" promulgated by other "relevant international organisations open for membership to all (WTO)Members";<sup>187</sup> international services agreements on matters including air transport and telecommunications,<sup>188</sup> international agreements on intellectual property rights,<sup>189</sup> and the "customary rules of interpretations of public international law"(Article 3[2] of the DSU). The WTO legal system is, thus, to consist of more "rules of law" than any other international treaty system.<sup>190</sup> It also requires each Member to "ensure the conformity of its laws, regulations and administrative procedures

<sup>183</sup> : See Joost Pauwelyn, supra note 94, p.547.

<sup>184</sup> : Article XVI:6 of the *WTO Agreement* states: "This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations." See supra note 45.

<sup>185</sup> : Id, Article III:5 of the *WTO Agreement* states: "With a view to achieving greater coherence in global economic policy-making, the WTO shall co-operate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies."

<sup>186</sup> : See supra note 115.

<sup>187</sup> : Paragraph 3 of Annex A of the *Agreement on the Application of Sanitary and Phytosanitary Measures* states: "International standards, guidelines and recommendations (are referred to)...(d)for matters not covered by the above organisations, appropriate standards, guidelines and recommendations promulgated by other relevant international organisations open for membership to all Members, as identified by the Committee(on Sanitary and Phytosanitary Measures)." See supra note 45.

<sup>188</sup> : Id, *Annex on Air Transport Services* and *Annex on Telecommunications* to the *General Agreement on Trade in Services*.

<sup>189</sup> : See supra note 114.

<sup>190</sup> : Ernst-Ulrich Petersmann: *How to Promote the International Rule of Law? Contributions by the WTO Appellate Review System*(included in *Dispute Resolution in the World Trade Organisation*, edited by James Cameron and Karen Campbell), Cameron May(1998), p.75.

with its obligations as provided in the annexed Agreements”,<sup>191</sup> thereby integrating the WTO rules into the domestic law of Members.

In terms of the contributions of WTO law to the development of international law, several points can be drawn out from the writings in the previous parts. Firstly, the decision-making mechanism provides an elaborate matrix of procedures to ensure that the implementation of WTO rules will be carried on in a more predictable way. In general, the WTO has followed the GATT practice of “consensus” in making the decisions of the Ministerial Conference and the General Council. But the term “consensus” was not defined in the GATT and the word “consensus” was not used. As professor John Jackson pointed out: “The practice of consensus voting developed partly because of the uneasiness of governments about the loose wording of GATT decision-making powers, particularly that in GATT Article XXV”.<sup>192</sup> In the *WTO Agreement*, however, “consensus” is defined as the situation when the decision occurs and “no Member, present at the meeting when the decision is taken, formally objects to the proposed decision”(Article IX:1). It should be noted that consensus is different from unanimity as the former does not need to take into account the views of those absent. This is a more efficient way. If consensus is not reached, a fall-back is the majority voting authority. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of votes cast. Decisions to adopt interpretations of the *WTO Agreement* including those multilateral trade agreements in Annex 1 and decisions to grant a waiver to a WTO Member shall be taken by three-fourths of the Members.<sup>193</sup> Amendments to the provisions of WTO agreements shall take effect for the Members that have accepted them by two-thirds or three-fourths of the Members and thereafter on each other Member upon acceptance by it.<sup>194</sup> What is significant in Article X of the *WTO Agreement* is that it authorises the Ministerial Conference to decide by a three-fourths majority of the Members whether the Member which has not accepted the amendment within a specified period should withdraw from the WTO or remain as a WTO Member. This gives the Ministerial Conference extraordinary power to influence the WTO Members although it seems unlikely that the Ministerial Conference will exercise this power quite often. With regard to the voting system, Article IX:1 of the *WTO Agreement* states: “...At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote.”<sup>195</sup> This is an advantage to many small countries, particularly those small developing countries, as they can use their combined force to achieve the goals which their individual power is unable to do so.

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<sup>191</sup> : See Article XVI:4 of the *WTO Agreement*. See supra note 45.

<sup>192</sup> : John H. Jackson: *The World Trade Organisation Constitution and Jurisprudence*, The Royal Institute of International Affairs(1998), p.46.

<sup>193</sup> : A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus. See note 4 of the *WTO Agreement*. See supra note 45.

<sup>194</sup> : Amendments of Article IX, X of the *WTO Agreement*, Articles I and II of GATT 1994, Article II:1 of GATS, Article 4 of the Agreement on TRIPS shall take effect only upon acceptance by all Members.

<sup>195</sup> : Article IV:1 of the *WTO Agreement* states: “...The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements...” Article IV:2 states: “...In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council...” Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the *Dispute Settlement Understanding*. See supra note 45.

The second contribution is the appellate jurisdiction which is contained in the WTO dispute settlement mechanism. The transposition of the appellate function to the international arena is a relatively novel development.<sup>196</sup> There have been few examples of international tribunals exercising an appellate jurisdiction over international judicial bodies,<sup>197</sup> and thus there is no guidance in international law on such matters as the scope of the appellate function, the nature of appellate procedures and the role of appellate judges. The practice in this field is particularly contributory to the development of international law. Furthermore, the fact that the Appellate Body has no remand authority implies that each appealed dispute has to be dealt with carefully. The practice of the appellate review makes the WTO dispute settlement mechanism quite unique and significant in the development of international jurisdiction.

Thirdly, the compensation mechanism in the WTO dispute settlement system looks quite unique, if we compare it with that of other international organisations. In view of its whole structure, the compensation mechanism in the WTO dispute settlement works as a “cross-retaliation” process, making the compensation available to the suffered party even from outside the field where its benefits have been impaired or nullified, or where the attainment of any objective of the “covered agreements” has been impeded. The specific provisions for compensation are included in Article 22 of the DSU. Although whether or not this compensation mechanism has really benefited most developing country Members still awaits some time to see,<sup>198</sup> the consequential fact is that this reform has helped WTO law to become more disciplined and authoritative. One possible effect is that such a mechanism will scare some potential Members who dare to breach the trade rules. With no doubt, this will bring significant impact upon the rule-orientation of WTO law.

The global integration of States requires a more effective “international rule of law”. This can be achieved only by rendering international law more effective and by interpreting and integrating “the national rule of law” and “the international rule of law” in a mutually consistent manner. The unified WTO law and the requirement that Members’ national laws, regulations and administrative procedures should be in conformity with WTO law have served as models for the “legalisation” and “judicialisation” of international relations for the benefit of all members in an international organisation. The practice of the Appellate Body, while interpreting WTO law in the light of general international law principles and with due regard to the jurisprudence of the ICJ, has enhanced legal security and consistency in the WTO legal system. Its case law, though still very limited, has already visibly strengthened the

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<sup>196</sup> : The other example is the *North American Free Trade Agreement*. See Article 1904.13 and Annex 1904.13.

<sup>197</sup> : The International Court of Justice has made a review rather than exercised an appellate function in respect of certain international administrative tribunals. As professor Elihu Lauterpacht pointed out, in the example of the UIN Administrative Tribunal, “Initially, there was no appeal from this tribunal, though it was always possible, if the case aroused sufficient interest, for the General Assembly of the UN (or comparable organ of the Specialised Agencies) upon their own initiative to request an advisory opinion from the ICJ as to whether a specific question of jurisdiction or even of substance had been correctly dealt with by the Tribunal. This course has never been pursued and, if it had been, it would not really have been an appeal. It could not have been initiated by either the staff member or the UN Secretariat at their sole options” (Original notes omitted). Elihu Lauterpacht: *Aspects of the Administration of International Justice*, Cambridge: Grotius Publications Limited (1991), p.106.

<sup>198</sup> : Upon the detailed discussion of the compensation mechanism within the WTO dispute settlement system, see Part Four of Section Three. Chapter Five.

“international rule of law”, for instance by the regular adoption and implementation of its dispute settlement findings to date, and by inducing other WTO bodies (such as the Textiles Monitoring Body) and Member governments to apply international law more strictly. While the emphasis on literal interpretations of the WTO texts in the panel and Appellate Body reports so far is typical of the early jurisprudence for a new international tribunal, these developments have shown that WTO law is already an important part of international law.

WTO law has equally illustrated how important the “international law of cooperation” has become in the modern world. Its focus on economic welfare is particularly important to many developing countries. Since the World War Second, the participants of interstate relations are no longer a small club of Western nations, but a much larger number of nations representing different civilisations. Correspondingly, a new dimension has been given to the concern of international relations with matters of welfare. This is the public concern with international economic development. States, despite all their differences of political ideology, have acknowledged it as their indispensable task to enhance the welfare of their people. This change of views determines the change of structure of international law. As professor Friedmann pointed out, modern international law moves essentially on three different levels: “(a) The international law of existence, i.e., the classical system of international law regulating diplomatic interstate relations, orders the coexistence of States regardless of their social and economic structure. (b) The universal international law of cooperation, i.e., the body of legal rules regulating universal concerns, the range of which is constantly extending, extends from matters of international security to questions of international communication, health and welfare. (c) Close-knit regional groupings can proceed further with the common regulation of their affairs because they are linked by a greater degree of community of interests and values, and usually also of regional proximity, than mankind at large. They can therefore act as pioneers in the transition from international to community law.”<sup>199</sup> These changes have expanded the dimension of international law both horizontally and vertically, bringing about a reflection of those fundamental issues such as the allocation of power in this world, about democracy and accountability, and most important of all, about the objective of international law.

## **Section Four Fairness, the Objective of International Law**

### **4.4.1. Legitimacy and distributive justice: two components of fairness**

The modern analysis on the origins of international law tends to go back to the social contract theory which was first put forward in the sixteenth and seventeenth centuries. Beginning with Hobbes’ *The Leviathan*,<sup>200</sup> social contract theory was progressively refined by Locke’s *The Second Treatise of Civil Government*,<sup>201</sup> Rousseau’s *Social*

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<sup>199</sup> : Wolfgang Friedmann: *The Changing Structure of International Law*, London: Stevens & Sons(1964), p.367.

<sup>200</sup> : Thomas Hobbes: *The Leviathan*(1651), reprinted in *The English Works of Thomas Hobbes*(edited by W. Molesworth, 1841). Thomas Hobbes(1588-1679), English political philosopher and thinker.

<sup>201</sup> : John Locke: *Two Treatises of Government*(1690)(edited by W. Carpenter, 1955). John Locke(1632-1704), English philosopher.



*Contract*,<sup>202</sup> and Kant's *The Foundations of the Metaphysics of Morals*.<sup>203</sup> The social contract theory advocated that persons are by nature free, equal and autonomous beings, restrictions on persons' liberty and autonomy can only be the consequence of their agreement to empower a common authority. This is precisely how Grotius and succeeding generations of international lawyers have described States in the global system: free, equal and autonomous. As Locke observed, persons agree to empower a common authority in order to ensure that common concerns for safety and peace can be satisfied by their community collective protective measures.<sup>204</sup> A State, on the same reasoning, gives up its sovereignty in certain degree in order to secure its safety and to promote its prosperity with common protective measures and institute institutional processes.

The social contract theory only explains the legitimacy<sup>205</sup> of international law, that international law is based on the consent of sovereign States. International law, however, should be more than legitimate. It should also ensure a distributive justice.<sup>206</sup> In a global community of some 200 sovereign States, the differences reflected in cultures, income, political inclinations of the residents are larger than those of any individual State. It is difficult, if not impossible, to apply a universal rule which can meet the basic demands of all States. Thus, international law, more than any individual State's legal system, needs an element of promotion of voluntary compliance because of the relative paucity of modes of compulsion. In any community, however, whether national, local, or international, the sense of community is buttressed by a high level of voluntary rule compliance. If a rule can enjoy both a legitimacy as a right process and distributive justice as a desired consequence, it will reinforce the perception of *communitas* on the part of community members.

Legitimacy may coincide with distributive justice and thereby create a harmonious framework for the objective of international law---fairness. Or it may not. The fairness claim advanced from the perspective of legitimacy may clash with a fairness claim based on distributive justice. They are two independent variables in the concept of fairness.

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<sup>202</sup> : Jean-Jacques Rousseau: *On the Social Contract*(1762)(translated and edited by D. Cress, 1983). Jean-Jacques Rousseau(1712-1778), French social philosopher and writer.

<sup>203</sup> : Immanuel Kant: *The Foundations of the Metaphysics of Morals*(1785)(translated by T. Abbott, 1873), reprinted in *The Essential Kant*(edited by A. Zweig, 1970), pp.295-360. Immanuel Kant(1724-1804), German philosopher.

<sup>204</sup> : Locke describes our natural condition---i.e. our State as free and equal beings---as the State of nature. It is a State of perfect freedom, whereby we order our actions and dispose of our possessions as we see fit. It is a State of equality, "wherein all the power and jurisdiction is reciprocal" and creatures of the same species are "equal one among another without subordination or subjection." See Locke, *supra* note 198, p.118. The State of nature is only bound by the laws of nature, which proscribe each person from divesting another of the inalienable rights to life, liberty, and property. Id, p.119-120.

<sup>205</sup> : For a different approach to this definition, see David Beetham: *The Legitimation of Power*(1991). There is a large and rapidly growing legal literature on legitimacy in the global literature. Recent examples include: Martti Koskenniemi: *From Apology to Utopia: The Structure of International Legal Argument*(1989); David Kennedy: *International Legal Structures*(1987); D. Georgiev: *Politics or Rule of Law: Deconstruction and Legitimacy in International Law*, European Journal of International Law, No.4, 1993.

<sup>206</sup> : For a good discussion of the difficulty encountered in any abstract attempt to define "justice" across cultural barriers, see David Miller: *Social Justice*(1976), especially the discourse "On Three Types of Justice".

Then it comes to this. The notion of “fairness” encompasses two different and potentially adversary components: legitimacy and distributive justice. These components are indicators of law’s, and especially *fair* law’s, primary objective: to achieve a negotiated balance between the need for order and the need for change. As Martti Koskenniemi has observed, the international legal system “derives...both its intuitive plausibility and vulnerability from the tension between such notions.”<sup>207</sup> What matters is how this tension is managed discursively through what Koskenniemi calls “the social conception” of the legal system. This “social conception” manifests itself in the discursive pursuit of fairness.

#### 4.4.2. Economic fairness: terms of development

The well documented gap between the rich and the poor in the contemporary international community of States resembles, but far exceeds, that between the rich and the poor persons in some developed countries. There is no globally agreed statistical poverty level for the world’s peoples, but the line separating developed countries from the rest provides an approximate analogue. According to the recent survey of the World Bank, up to 1999, there are still 64 countries grouped as low-income countries whose gross national product(GNP) per capita is only \$755 or less. In contrast, the GNP per capita of these 23 high-income OECD members is \$9266 or more. This figure is more than twelve times of the former. Developing countries make up about eighty-five percent of the world’s population, but this population only generates about twenty-one percent of the world’s gross domestic product.<sup>208</sup> Furthermore, if there are no substantial measures to help some developing countries, especially the least-developed countries, to get rid of the poverty and to catch up with the developed world, the gap between them will become even wider in the future.<sup>209</sup>

In most developed countries, the gap between the rich and the poor is addressed through extensive, if still inadequate, remedial programmes regulated by the local governments, which are widely accepted by all classes as a necessary part of the social compact. True, the rich everywhere remain much richer than the poor---in part as a by-product of deliberate incentives to foster excellence, innovative enterprise, and risk-taking, but those more fortunate do not generally cavil at re-distributive and remedial programmes, which range from graduated income tax to extensive social security and healthcare system to avoid the most egregious consequences of poverty. In most developed countries, elaborate systems of wealth-transfer seek to give an educational head start to children from those deprived or broken families, provide educational scholarship and loans, or free education, to those in need, supply basic healthcare for all, and deploy subsidised buildings and social services to assist the neediest with the requisites of shelter and food. Where the motivation to succeed has dimmed, most

<sup>207</sup> : M. Koskenniemi: *Theory: Implications for the Practitioner*(included in *Theory and International Law: an Introduction*, edited by P. Allot, T. Carty, M. Koskenniemi, 1991), p.7.

<sup>208</sup> :These figures are from the World Bank Group/Data, classification economies.

cf. <http://www.worldbank.org/external/dgprofile.asp?RMDK=110&SMDK=1&W=0>

<sup>209</sup> : The low-income countries lack the potential to further develop their economies. The value added from agriculture in those countries is about twenty-five percent of GDP, compared with five percent of the world average level. Foreign trade is only eight percent of GDP in those countries, compared with twenty-seven of the world average level.

cf. <http://devdata.worldbank.org/external/dgprofile.asp?RMDK=0&SMDK=1&W=0>

developed countries, at least, provide their citizens with programmes to rekindle and re-socialise human functionality and aspiration.

As yet, the international community provides very little of those rudiments of economic and social fairness for its most deprived. As professor Franck observed, this is due to a number of factors.<sup>210</sup> Among them, two factors are the most prominent. Firstly, the magnitude of the global gap between the rich and the poor is far more daunting than its counterpart in any developed country. Secondly, the number of rich persons, as a proportion of total population, is far smaller in the international community than that in developed countries. Internationally, therefore, even a radical redistribution from the rich to the poor would have a quite limited remedial effect.

Except for the foregoing two, there are also many other factors which account for the present tragic situations in many developing countries. The predatory exploitation of natural resources during the colonial times and the lack of expertise after their independence are the chief ones among them.<sup>211</sup> Before the World Trade Organisation, the legal framework of international trade defined by the GATT, which came into effect in 1948, was seen as producing results which were either injurious or not beneficial to the developing countries.<sup>212</sup> Pressures for change in the rules governing international trade led to the concerted efforts of developing countries, which brought about the first convening of the United Nations Conference on Trade and Development(UNCTAD) in Geneva in 1964.<sup>213</sup>

Motivated by this new international economic order after the first UNCTAD conference, the GATT started a new mechanism, first introduced in 1971 and then made permanent in 1979, the Generalised System of Preferences(GSP),<sup>214</sup> to effect greater distributive justice in the international trading system. Under the GSP, preferences may be given to specified goods coming from developing countries "without according such treatment to other contracting parties".<sup>215</sup> This changed the previous international trade disciplines required by the GATT most-favoured-nation treatment clause between the developing and developed countries. The GSP is a more practical way to regulate international trade since there is no equality if we implement the same rules between those unequal trading partners. Meanwhile, the *Lome Convention*<sup>216</sup> and the United Nations Common Fund for Commodities<sup>217</sup> similarly seek to inject equity into the global commodities market. The *Lome Convention*, between the EEC and some African,

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<sup>210</sup> : See Thomas M. Franck, *Fairness in International Law and Institutions*, Oxford Clarendon Press(1995), p.414.

<sup>211</sup> : One example is that, up to 1999, the illiteracy rate of adult male and female in those low-income countries is twenty-nine percent and forty-eight percent respectively.

cf. <http://devdata.worldbank.org/external/dgprofile.asp?RMDK=108&SMDK=1&W=0>

<sup>212</sup> : For example, the GATT allowed an increase in agricultural and other commodity protectionism requested by the developed countries, while the reduction of tariffs was concentrated on those industrial products in which developed, not developing, countries had comparative advantage. See B. Gosovic: *UNCTAD: Conflict and Compromise*, Leiden: Sijthoff(1971), p.12.

<sup>213</sup> : As for the successive UNCTADs, see supra note 32.

<sup>214</sup> : See GATT Contracting Parties' Decision: *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, GATT Doc. L/4903(28 November 1979).

<sup>215</sup> : Id.

<sup>216</sup> : See the *Fourth ACP-EEC Convention of Lome*(15 December 1989), No. 29 ILM, p.783.

<sup>217</sup> : See *Agreement Establishing the Common Fund for Commodities*(27 June 1980), 1992 UKTS 5(Cm. 1797).

Caribbean, and Pacific(ACP) countries, seeks to palliate the effects of the fluctuations in the international commodity market through a compensatory fund. Most of the those ACP countries are the former colonies of some European powers. Before independence, these countries depended heavily on the imports from and exports to their metropolitan countries. When they were “sponsored” into the GATT after their independence, these former metropolitan countries were required to provide most-favoured-nation treatment to all other GATT contracting parties. This brought a lot of difficulties to these ACP countries as their economic structures could not be changed overnight. The purpose of the *Lome Convention* is to protect these ACP countries from too much turbulence simply because of the change of trade rules. Although the GATT and the WTO recognised the legality of the *Lome Convention*, how far those ACP countries have really benefited from this convention remains debatable. The Common Fund for Commodities, implemented in 1991, is also intended to operate on the margins of the commodities marketplace. Unlike the *Lome Convention*, the purpose of the fund is intended to be corrective, rather than compensatory.<sup>218</sup> While accepting the inevitability of market-driven price fluctuations, the Fund aims to keep these fluctuations within certain parameters.<sup>219</sup> This is helpful, particularly, to those countries with only a single or a few products available for export.

These international remedial programmes have helped some developing countries in avoiding the risks of price fluctuations while selling their products, but the earnings from those commodities are far insufficient for the economic development of these countries. Facing the rapid globalisation of world economy, many developing countries, especially the least-developed countries, feel that they are still deprived of the benefits of the world economic development. A common understanding, which is attracting more and more people, is that if the international community could help the developing countries to reform their economic structures, strengthen their economic facilities, and participate more fully in the world economic activities, then the productive and consumptive capacity of most developing countries are possible to rise gradually but significantly. Everyone, including those of the developed countries, would ultimately benefit through greater mutual trade and investment opportunities, thereby making the gap between developing countries and developed countries easier to close by means of these redistributive and remedial initiatives. The help of the whole international community is necessary in realising this huge task, but first of all, the organisation work by a universally international institution, like the World Trade Organisation, is indispensable.

#### **4.4.3. Combining legitimacy and distributive justice: from the GATT to the WTO**

The implementation of the *General Agreement on Tariffs and Trade* ended the *laissez-faire* situation of international trade,<sup>220</sup> and created an economic order built on the principles of equal and non-discriminatory treatment of all countries in matters of trade

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<sup>218</sup> : See R. T. Tait and G. N. Spear: *The Common Fund for Commodities*, The George Washington Journal of International Law and Economics, Vol. 16, 1982, pp.486-487.

<sup>219</sup> : The Fund is primarily intended to help international commodities organisations(ICOs), comprising both producer and consumer countries, to purchase buffer stocks when prices fall below the fairly wide(and sometimes flexible) margin established for that commodity by the ICOs. After prices rebound, ICOs are to sell these stocks, helping to ensure that prices do not exceed the prescribed margin and generating the cash necessary to repay their debt to the fund, with interest.

<sup>220</sup> : See Michael J. Trebilcock and Robert Howse: *The Regulation of International Trade*, second edition, Routledge(1999), pp.20-21.

and economic relations. However, experience was to show that “no matter how valid the principle of the most-favoured-nation may be in trade relations among equals, it is not an acceptable and adequate concept for trade among countries with highly unequal economic power”.<sup>221</sup> Although the Generalised System of Preferences consists of various preference schemes favourable to developing countries, the preference-giving country has the right to choose the countries entitled to preferential treatment and the products to be covered. In addition, it may also set import target levels. Tariff preferences are granted unilaterally and may be withdrawn or altered,<sup>222</sup> giving the importer considerable leverage, not immune to improprieties.<sup>223</sup> The *Lome Convention* is implemented only between the EEC and some African, Caribbean, Pacific countries which were principally ex-colonies of the European donors. Its compensatory fund known as “STABEX” only covers forty-eight agricultural products.<sup>224</sup> Eligibility for STABEX funding is determined by two criteria, both of which must be met.<sup>225</sup> Meanwhile, the practice of the Common Fund for Commodities also proved a failure because some developed countries claimed that the price protection policy distorted the signals which a free market sent to producers through fluctuating consumption, and that this in turn led to miscalculations by producers.<sup>226</sup>

Regional and international aid programmes, commodity price stabilisation policies, trade preferences, resource transfers and sharing, and the creation of equal or equitable distribution of new resources: these are the new entitlements which mark a global awareness that distributive justice as fairness is never off the agenda during the development of international law. This awareness culminated in the provisions of the *WTO Agreement* Preamble, which state: “there is need for *positive efforts* designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development”(Emphasis added).<sup>227</sup>

The creation of the World Trade Organisation brings about a more unified international trade order. The WTO rules require that international trade should be based on a non-discriminatory ground and each Member should ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the WTO agreements, toward which many developing countries have an ambivalent attitude. Facing the aggressive unilateral actions of some developed countries, developing countries can use the new dispute settlement mechanism to contend with these economic

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<sup>221</sup> : R. Prebisch: *Preferential Treatment: A New Standard for International Economic Relations*, Harvard International Law Journal, Vol. XVIII(1977), p.113.

<sup>222</sup> : See N. Kofele-Kale: *The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System*, Vol. 18, 1988, Cal W Intl LJ, p.302.

<sup>223</sup> : See Robert E. Hudec: *Developing Countries in the GATT Legal System*, Gower Publishing Company Limited(1987), p.112.

<sup>224</sup> : See European Report File: *Commission Rejects Requests for STABEX Seminars in ACP Countries*, European International Service, 3 July 1991, available in LEXIS, NEXIS Library.

<sup>225</sup> : A country is eligible for a transfer if a product represents at least 5 percent of its total export earnings in the year preceding application. The export earnings of the product must also have dropped at least 4.5 percent from the average calculated over a six-year reference period. See *Lome Convention IV*, supra note 216, Articles 196(1), 197(3), 197(2).

<sup>226</sup> : See Thomas M. Franck: *Minimum Standards of Public Policy and Order Applicable to Collective International Commodity Negotiations*, Recueil des Cours, Vol.160, 1978-II, pp.403-430.

<sup>227</sup> : See supra note 45.

powers. The move towards a mandatory legitimacy in applying the unified rules to disputes marks a potentially long step towards the infusion of genuine fairness into the global trading system. Meanwhile, the unification of trade rules means that developing countries will compete with developed countries on the same parameters. This is a big challenge to many developing countries, as their economic strength is no match to that of developed countries.

Considering the significant gap in terms of economic strength between developed countries and developing countries, the negotiators of the WTO agreements continued to keep the preferential treatment for developing country Members. For example, the *Sanitary and Phytosanitary Agreement* permits to grant developing country Members, upon request, the “specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.”<sup>228</sup> The *TRIPS Agreement* permits developing country Members to delay for a period of four years, and least-developed country Members for ten years, in the application of the rules of TRIPS, while other countries “shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.”<sup>229</sup> However, many other agreements just give the general directions which encourage the WTO organs and developed country Members to provide preferential treatment to developing country Members, but no specific requirements are available.<sup>230</sup> Thus, in combining the process legitimacy with the distributive justice, the panels and the Appellate Body, under the WTO dispute settlement mechanism, will play a crucial role. Under the general guidance of the *WTO Agreement* and the *Dispute Settlement Understanding*,<sup>231</sup> together with the provisions of relevant agreement(s), the panels and the Appellate Body will judge case by case how the legitimacy and distributive justice can best be united without degrading the WTO rules. Practice has shown that the reports deliberated by the WTO panels and the Appellate Body have won respect from both the developed country Members and developing country Members.

What moves the international community to agree to distributive formulas in which fairness is a significant element? The factor of conscience is underrated by some cynics and exploited by others; but it does play a role, particularly when appeal to it is based on firm data and fundamental principles of legitimacy. Another factor is the closing interdependence and the increasing awareness that poverty has become the major obstacle in the development of world economy. A third factor is the growing shared commitment of States to a democratic, open, and discursive process, not only within but among States. “Just as the 1832 Reform Act empowered the emerging British commercial class, so the empowerment of a new Third World majority in decision-making institutions and arenas can help refocus and redefine fairness discourse.”<sup>232</sup> In the

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<sup>228</sup> : Id, *Agreement on the Application of Sanitary and Phytosanitary Measures*, Article 10(3).

<sup>229</sup> : Id, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Articles 65(1), 65(2) and 66(1).

<sup>230</sup> : For example, *General Agreement on Trade in Services*, Article IV(Increasing Participation of Developing Countries). See supra note 45.

<sup>231</sup> : See *WTO Agreement*, Preamble; *Dispute Settlement Understanding*, Articles 3(12), 4(10), 8(10), 12(10), 12(11), 21(2), 21(7), 21(8). See supra note 45.

<sup>232</sup> : See Thomas M. Franck, supra note 210, p.437.

context of the WTO, this, if well managed, will be best accomplished in dispute settlement process.

## Chapter Five The WTO Dispute Settlement Mechanism: Power-Oriented or Rule-Oriented?

### Section One From Power-Oriented to Rule-Oriented: A Historical Evolution

#### 5.1.1. Power-orientation and rule-orientation: a political dichotomy

One of the major achievements of the Uruguay Round negotiations is the establishment of a rule-based dispute settlement mechanism under the legal framework of the World Trade Organisation. Guided by the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter as the *Dispute Settlement Understanding* or DSU), the WTO dispute settlement mechanism deals with disputes involving trade in goods, trade in services, trade-related aspects of intellectual property rights, and even the issues concerning the DSU itself.<sup>1</sup>

On the modern international law level, one may have recourse to various means for a peaceful settlement if a dispute between States arises.<sup>2</sup> Among these peaceful dispute settlement means, the most frequently-invoked are, however, either those with a power-orientation or those with a rule-orientation. This dichotomy perhaps puts the issue too simple because most of the current international institutions and legal systems in practice involve some mixture of both of them. Nevertheless, it is still a useful way to help us to understand the nature of the policy issues of modern international organisations, especially one with a comprehensive membership like the World Trade Organisation.

As professor John Jackson pointed out, this dichotomy, in a broad perspective, can be explained as the followings: “one can roughly divide the various ways for the peaceful settlement of international disputes into two types: settlement by negotiation and agreement with reference (explicitly or implicitly) to relative power status of the disputing parties; or settlement by negotiation or decision with reference to norms or rules to which both parties have previously agreed.”<sup>3</sup> Obviously, in the former scenario, power (both political and economic) plays a major role, while in the latter, the rule of law is the major parameter in the dispute settlement.

The foregoing dichotomy in the international trade dispute settlement can also be illustrated by the following example. Presumably, countries A and B have a trade dispute regarding B's treatment of importation from A to B of TV sets. The first means mentioned above would involve a negotiation between A and B by which the more powerful of the two would have the advantage. Foreign aid, investment initiative,

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<sup>1</sup> : The agreements covered by the DSU include: *WTO Agreement*; Multilateral Trade Agreements (including Multilateral Agreements on Trade in Goods; *General Agreement on Trade in Services*; *Agreement on Trade-Related Aspects of Intellectual Property Rights*); *Dispute Settlement Understanding* and Plurilateral Trade Agreements (which apply only to the WTO Members who have accepted them). See Appendix 1 of the *Dispute Settlement Understanding*. cf. The Legal Texts of the World Trade Organisation: *The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press (1999).

<sup>2</sup> : Article 33(1) of the *Charter of the United Nations* states: “The parties to any dispute... shall, first of all, seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement*, resort to regional agencies or arrangements, or other peaceful means of their own choice.” (Emphasis added). See *Basic Documents in International Law*, edited by Ian Brownlie, fourth edition, Oxford University Press (1995).

<sup>3</sup> : John H. Jackson: *Restructuring the GATT System*, Royal Institute of International Affairs (1990), p.51.



diplomatic coercion, or retaliation measures on the other's key export goods by means of import restrictions would all figure in the negotiation. A small country, especially a small developing country, would hesitate to challenge a large one upon which its trade heavily depends. Even an economic giant, like Japan, used to negotiate with its trading partners, mainly the United States and the European Economic Community(now the European Union), to resolve some of their subtle trade disputes.<sup>4</sup> Implicit or explicit threats, for example, to impose quantitative restrictions on some other products,<sup>5</sup> would be a major part of the technique employed. Domestic political influences would probably play a greater part in the approach of the respective negotiators in this system, particular on the negotiators for the more powerful party.<sup>6</sup>

On the other hand, the second suggested means---reference to agreed rules would see the negotiators arguing about the application of those rules or the selection of rules, rather than exercising the power of the disputing parties. For example, was country B obligated under a treaty(bilateral or multilateral) to allow free entry of country A's TV sets in question? During this negotiation process, it would be necessary for the disputing parties to understand that an unsettled dispute would ultimately be resolved by impartial third-party judgements based on the pre-agreed rules or customary rules and general principles of law in the absence of agreed rules so that the disputing parties would be negotiating with reference to their respective predictions as to the outcome of those judgements, and not with reference to potential unilateral retaliation or actions exercising power of one or more of the parties to the dispute.<sup>7</sup>

In both of the aforesaid means, negotiations and private settlement of disputes are the dominant mechanism for resolving difference. The distinction between them is the perceptions of the negotiators, or to be more precisely the disputing parties, as to what are the "bargaining chips".<sup>8</sup> Insofar as agreed rules for governing the economic relations between the disputing parties exist, a system which predicates negotiations on the

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<sup>4</sup> : Before the Uruguay Round negotiations, one of the troublesome practices between Japan and the United States upon their trade disputes was the arrangement outside the GATT surveillance. One of the reasons for this phenomenon was that some of the key Japanese export products depended heavily on the US market. For example, in 1987, the European Economic Community brought a complaint under GATT Article XXIII:2 relating to certain aspects of a bilateral arrangement between Japan and the United States concerning their trade of semiconductor products. See GATT BISD, 35th Supplement(1987), p.116.

<sup>5</sup> : For example, in the GATT early years, the trade of textiles and clothing were not subject to the surveillance of the GATT. Many developing countries, mainly the exporters of textiles and clothing, often faced the threats of restrictions from some developed countries. In 1974, the *Arrangement Regarding International Trade in Textiles*(the *Multifibre Arrangement*, or MFA) was signed, between the major exporters and importers of textiles and clothing, to govern most of world's trade in textiles and clothing. The MFA enabled developed countries to negotiate quotas on imports of textiles and clothing mainly from developing countries and economies in transition. The Arrangement's safeguard procedures permitted the introduction of restraints on textiles and clothing imports when these imports were causing market disruption, subject to a number of strict conditions. All unilateral restrictions and bilaterally-agreed quotas were subject to the multilateral surveillance. Since 1 January 1995, the MFA has been replaced by the *WTO Agreement on Textiles and Clothing* which provides *inter alia* for the winding down of the MFA trade restrictions over a ten-year period. See *supra* note 1.

<sup>6</sup> : The ups and downs of the negotiations for China's resumption of its GATT contracting party position and the entry of the WTO between China and the United States can be regarded as one such example.

<sup>7</sup> : See John H. Jackson: *The World Trading System*, the Massachusetts Institute of Technology Press(1989), p.86.

<sup>8</sup> : Id, this term is first used by professor John Jackson to refer to all those elements which can be invoked to enhance the negotiation power.

implementation of those rules would seem for a number of reasons to be preferred. Firstly, the pre-agreed rules themselves are the outcome of compromise of all participants.<sup>9</sup> An international agreement reflects such a basic understanding that a peaceful international community can only be established on the consent of its participants that certain rules must be obeyed by all. Secondly, the risk of being isolated and retaliated by the injured parties always scares those who attempt a breach of the agreed rules. Thirdly, the disputing parties believe that if their negotiations reach an impasse, the dispute settlement mechanism which takes over for the disputing parties will be designed to apply the rules fairly or to interpret them precisely.

Power-oriented or rule-oriented, the choice depends not only on the wills of the disputing parties, but on the balance of interests of all concerned parties. If the international trade order is based on a well-balanced system of interests of all participants, the rules which govern international trade will more possibly meet voluntary compliance, and the trade disputes are more ready to be resolved on the agreed rules. If no such system exists, then the parties to a dispute are left basically to rely upon their respective "power positions", tempted(it is hoped) by the good will and good faith of the more powerful party(cognisant of his long-range interests).

### **5.1.2. Rule-orientation: a rational option**

In the current international relationships, there are very few cases which may go to the very extreme of either power-orientation or rule-orientation.<sup>10</sup> Almost all diplomacy, and indeed all governments, involves a mixture of these techniques. To a large degree, the history of civilisation may be described as a gradual evolution from a power-oriented approach, in the state of nature, towards a rule-oriented approach, during which exists a perpetual problem of proportion of these two approaches. In the present Western world, from where modern science and democracy originate, power continues to play a major role in the domestic affairs, particularly political power of voter acceptance, but also to a lesser degree of economic power such as that of labour unions or large corporations. However, the governments of most democratic countries have passed far along the scale towards a rule-oriented approach, and generally have an elaborate legal system involving court procedures and a monopoly of force, through the police and the military, to ensure that rules will be followed.<sup>11</sup> The history of England over the last thousand years will

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<sup>9</sup> : The negotiation history from the GATT to the WTO tells us that, in an international community, conflicts of interests are unavoidable. The realistic option is that each participant needs to sacrifice its interests to a certain degree if a multilateral agreement is to be reached.

<sup>10</sup> : See Michael J. Trebilcock and Robert Howse: *Perspectives on dispute settlement*(in *The Regulation of International Trade*, second edition), Routledge(1999), pp.54-58.

<sup>11</sup> : The development from the European Economic Community(EEC) to the European Union(EU) gives us another mode of an evolving political structure and legal system. The European Union law has touched almost all aspects of peoples' lives within its member States. In most cases, the European Union law prevails over its domestic counterparts. As for the political structure, the European Council of Ministers based in Brussels represents the governments of the current 15 EU members, while the European Parliament based in Strasbourg represents the citizens of the EU members, who elect directly the representatives of the European Parliament. The European Court of Justice based in Luxembourg deals with not only the lawsuits under the Treaty in the first instance, but also the appeals from the Court of First Instance in areas such as competition law, staff cases and in judicial review cases.

support this evolutionary hypothesis from power-orientation to rule-orientation.<sup>12</sup> Even in most newly independent States, one can find that power is fairly divided among the governing bodies according to an elaborated legal system.<sup>13</sup> Few States, today, can exercise their authority upon the raw power.

The rule-oriented tendency does not rest on the domestic level alone. Many international institutions, political and economic, also develop in this way and the pace is speeded up after the World War II. Although international law rules may be somewhat less effective than their domestic counterparts, at least as for those nations with stable legal systems and a generally effective central government, it is not always the case that domestic laws are implemented more efficiently. It is practical for the policy advisers, the statesmen and practitioners to evaluate accurately the real impact of the international rules, recognising that some of the rules do have considerable effect and influence on real government and business decisions.<sup>14</sup> With the growing transnational economic interdependence upon each other, it is generally accepted that no State could exist and develop without relying on the other in one way or another. No State could dominate the world either politically or economically. Therefore, the best way to regulate international relations rests upon the well-elaborated and generally-accepted laws and rules.

The making of international law rules is usually realised by two means: one is to expand the regulated dimension of those existing international institutions; the other is to establish new international institutions by agreements to deal with these new issues concerning international relations. The example of the former category is the United Nations, which, under the mandate of Articles 55 and 56 of UN Charter, has extended its regulation from the diplomatic area to the economic and cultural areas through its specialised agencies like UNESCO, WHO and IMO. The United Nations has also played an important role in promoting the global economic development in a rule-oriented way through its programmes and commissions like UNCTAD and UNCITRAL. The later category example is the World Trade Organisation, which, despite its short history, has already become the most important institution in regulating international trade relations. These developments have changed the characteristics of modern international relations from the political confrontation to economic cooperation, thereby making the global governance through international institutions like the UN and WTO proceed to the more diversified areas.<sup>15</sup>

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<sup>12</sup> :The interminable debate in the United Kingdom between the Eurosceptics and pro-Europeans is a recent example. According to professor Julio Faundez, the Eurosceptics oppose deepening the process of European integration because they do not want to surrender control of key political decisions, mainly the monetary policy, to a federal type of organisation or to a group of un-elected officials of the European Union. See Julio Faundez: *Legal Reform in Developing and Transition Countries: Making Haste Slowly*(in *Governance, Development and Globalisation* edited by Julio Faundez et al), Blackstone Press Limited (2000), pp.37-38.

<sup>13</sup> : Despite the fact that wars are still prevalent in some newly independent countries, few of them adopted the form of a totalitarian government.

<sup>14</sup> : International law originates from the agreements of sovereign States. Just as professor Louis Henkin states: "Every nation derives some benefits from international law and international agreements. Law keeps international society running, contributes to order and stability, provides a basis and a framework for common enterprise and mutual intercourse." Louis Henkin: *How Nations Behave*, New York Council on Foreign Relations, Inc.(1979),pp.29-87.

<sup>15</sup> : As for the discussion of global governance, see Part One of Section Two, Chapter Three.

From an economic(perhaps political in some way) perspective, the demands for rule-orientation are not coming out of the willingness of the statesmen or the law-makers, but from the practical needs of the citizens. Economic affairs tend to(at least in peace time) affect the common people more directly than it may be the case for political and military affairs. Particularly, as the world becomes more economically interdependent, more and more private citizens have found that their jobs, their businesses, and their quality of life are being affected, if not controlled, by forces from outside their country's boundaries.<sup>16</sup> Hence, they are more than ever concerned about the economic policies pursued by their government on their behalf. Meanwhile, the relationships in regulating peoples' political and economic lives have become increasingly complex---to the point of being incomprehensible to even the most brilliant human mind. As a result, citizens assert themselves, at least within a democracy, and require their representatives and government officials to respond to their needs and their perceived complaints. The consequence of this is the increasing participation by the citizens in their governmental decision-making, more parliamentary or congressional participation in the process of international economic policy-making, thus restricting the degree of power and discretion which the executive possesses.<sup>17</sup>

This development makes international negotiations and bargaining increasingly difficult.<sup>18</sup> However, if the citizens are going to make their demands be heard and have their influence be felt, a "power-oriented" negotiation process(often requiring secrecy) becomes more difficult if not impossible. As a result, the only appropriate way to turn seems to be towards a rule-oriented system, whereby the various layers of citizens, parliaments, executives and international organisations will all have their inputs, arriving tortuously to a rule, which however, when established, will enable business and other decentralised decision-makers to rely upon the stability and predictability of governmental activity in relation to the rule.

Parallel to this evolution is the change of the approach in the dispute settlement within the GATT. The expansion of membership partly accounts for this change, but the perception of the participants for a more democratic and "transparent" dispute settlement system is surely the legal basis for this change.

### **5.1.3. GATT dispute settlement mechanism: a practice evolving towards rule-orientation**

Originally, the GATT was intended to be placed in the institutional setting of the proposed International Trade Organisation(ITO),<sup>19</sup> and the draft of the *ITO Charter*

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<sup>16</sup> : This has become ever more obvious since the establishment of the World Trade Organisation, as the *WTO Agreement* requires the WTO Members "shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." The entry of the WTO seems, to many developing countries, as a double-edge sword. On the one hand, developing countries can benefit from exporting their products on a tax-reduced and barrier-removed bases, but on the other hand, in many areas, developing countries will compete with developed countries on the same parameter, although they are granted some years of delay in the implementation of WTO rules.

<sup>17</sup> : The frequent veto by the US Congress on the executive bills can be deemed as one of such examples.

<sup>18</sup> : This can be supported by the fact of the time-consuming Uruguay Round negotiations and the too many expectations for a new round of global trade negotiations.

<sup>19</sup> : The Bretton Woods conference, held in 1944, was devoted to monetary and banking issues, and it established the Charters of the International Monetary Fund(IMF) and the World Bank (International Bank for Reconstruction and Development), but it did not take up the problems of trade as such because this

called for a rigorous dispute settlement mechanism which contemplated the effective use of arbitration(not always mandatory, however), and even the appeal to the International Court of Justice(ICJ) in some circumstances.<sup>20</sup> Clair Wilcox, vice-chairman of the US delegation to the Havana Conference in 1948,<sup>21</sup> noted that the possibility of suspending trade concessions under this mechanism was “regarded as a method of restoring a balance of benefits and obligations that, for any reason, may have been disturbed. It is nowhere described as a penalty to be imposed on members who violate their obligations or as a sanction to ensure that these obligations will be obeyed. But even though it is not so regarded, it will operate in fact as a sanction and a penalty.”<sup>22</sup> He further noted the procedure for obtaining an advisory opinion from the ICJ on the law involved in a dispute, and said: “A basis is thus provided for the development of a body of international law to govern trade relationships.”<sup>23</sup>

While the ITO Charter would have established a rather elaborate dispute settlement mechanism, GATT 1947, because of its provisional status, had only a few paragraphs devoted to this subject. One can argue that there are a number of “dispute settlement” procedures distributed throughout GATT 1947(raising the question of what we mean by that phrase),<sup>24</sup> but the central and formal procedures are clearly those found in Articles XXII and XXIII. The first objective of these two Articles is simply to establish the right for a contracting party<sup>25</sup> to consult with any other contracting party on matters related to the GATT---a right that does not impose a major obligation, but this is nevertheless useful.

While Article XXII provides for consultation as a prerequisite to invoke the GATT dispute settlement mechanism,<sup>26</sup> Article XXIII is the core provision for the dispute

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conference was held under the jurisdiction of ministries of finance, while trade was under the competence of different ministries. Initiated by the United States, together with its allies, particularly the United Kingdom, a draft of Charter of the proposed International Trade Organisation(ITO) was published in 1946, and a preparatory committee was formed at the same year. Ironically, the ITO did not come into existence eventually, mainly because of the veto from the US Congress.

<sup>20</sup> : See the *Charter of the International Trade Organisation*, Chapter VIII, Articles 92-97, UN, Final Act and Related Documents, UN Conference on Trade and Employment, held at Havana, Cuba, 21 November 1947---24 March 1948; Interim Commission for the International Trade Organisation, Lake Success, NY, April 1948, UN Doc. E/Conf. 2/78.

<sup>21</sup> : It is the principal meeting for the preparation of the International Trade Organisation(ITO), which was held in Geneva from April to November 1947, and was followed by a meeting to complete the ITO Charter in Havana, Cuba in 1948.

<sup>22</sup> : Clair Wilcox: *A Charter for World Trade*, New York: Macmillan(1949), p.159.

<sup>23</sup> : Id, p.160.

<sup>24</sup> : See John H. Jackson: *World Trade and the Law of GATT*, Indianapolis: Bobbs-Merrill(1969), pp.164-166.

<sup>25</sup> : As GATT 1947, from the perspective of international law, is only a provisional agreement, not an organisation, therefore, the participants of the GATT are only contracting parties, not members. Article XXXII:1 of GATT 1947 states: “The contracting parties to this Agreement shall be understood to mean those governments which are applying the provisions of this Agreement under Articles XXVI or XXXIII or pursuant to the Protocol of Provisional Application.” See supra note 1.

<sup>26</sup> : Article XXII:1 states: “Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.” Article XXII:2 further states: “The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter in which it has not been possible to find a satisfactory solution through consultation under paragraph 1.” See supra note 1.

settlement in the GATT legal system. Three features can be drawn from these two articles: (a) They are usually invoked on the grounds of “nullification or impairment” of benefits expected under the multilateral agreements, and do not depend on actual breach of legal obligation.<sup>27</sup> (b) They establish the power for the CONTRACTING PARTIES<sup>28</sup> not only to investigate and recommend actions, but to give a ruling on the matter. (c) They give the CONTRACTING PARTIES the power in appropriately serious cases to authorise a contracting party or parties to suspend its(or their) GATT obligations to the other contracting party or parties.<sup>29</sup> Each of these features has important interpretations and implications, and although Article XXIII of GATT 1947 does not say much about them, the procedures followed to implement these principles did evolve over more than four decades of practice into a rather elaborate process.

During the first decade of the GATT history, the key factor to invoke the GATT dispute settlement mechanism was almost always the claim of “nullification or impairment”, an unfortunately ambiguous phrase, and one that might connote a “power” or “negotiation”-oriented approach. It was neither sufficient nor necessary to find a “breach of obligation” under this language, although later practice made doing so important. A ruling for an early case in the GATT history defined the “nullification or impairment” phrase as “including actions by a contracting party that harmed the trade of another,” which “could not reasonably have been anticipated” by the other “at the time it negotiated for a concession.”<sup>30</sup> But the concept of “reasonable anticipation” is still not clearly stated.

The first major reform in the GATT dispute settlement mechanism occurred in 1955,<sup>31</sup> when the original diplomatic-negotiated dispute settlement procedure was replaced by a working party or a panel.<sup>32</sup> The three or five experts would be specifically

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<sup>27</sup> : According to Article XXIII:1, the bases on which a contracting party may be able to raise a complaint are either the nullification or impairment of its benefits under GATT 1947, or the impediment to its attainment of any objective of GATT 1947. See supra note 1.

<sup>28</sup> : In the GATT practice, the term “CONTRACTING PARTIES” is referred to the joint action of the contracting parties, while the term “Contracting Parties” is referred to the GATT. Article XXV:1 of GATT 1947 states: “...Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.” See supra note 1.

<sup>29</sup> : See John H. Jackson: *The World Trade Organisation Constitution and Jurisprudence*, the Royal Institute of International Affairs(1998), p.66.

<sup>30</sup> : The concept “reasonable anticipation”(originally as “reasonable expectation”) first appeared in the dispute *Chile–Australian Subsidy on Ammonium Sulphate*(The report of the working party was adopted on 3 April 1950. See GATT BISD, 2nd Supplement[1950], p.188), in the context of determining “nullification” or “impairment” under GATT Article XXIII. However, the working party did not indicate the source or rationale of this concept. It is contained neither in the text of GATT 1947 nor in the interpretative notes adopted by the parties.

<sup>31</sup> : It is considered that this was largely because of the influence of the then Director-General, Eric Wyndham White. See John H. Jackson, supra note 7, p.95.

<sup>32</sup> : At the Seventh GATT Review Session(1955), the proposal to institutionalise the procedures of panels was not adopted by the CONTRACTING PARTIES mainly because they preferred to preserve the existing situation and not to establish judicial procedures which might put excessive strain on the GATT. This consideration is even reflected in the *1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*(hereinafter as *1979 Understanding*). Point 1 of the Annex(Entitled *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement*[Article XXIII:2]) to this Understanding states: “...Article XXIII:2 does not indicate whether disputes should be handled by a working party or by a panel.” The difference between a GATT working party and a panel is that the citizens from the disputing parties cannot be members of the panel(Rule 11 of the *1979 Understanding*),

named and were to act in their own capacities and not as representatives of any government.<sup>33</sup> Although the composition of the working parties or panels was far from satisfactory,<sup>34</sup> this development, however, represented an important shift from primarily a “negotiation” atmosphere of multilateral diplomacy to a more “arbitrational” or “judicial” procedure, designed to arrive impartially at the truth of the facts and the best interpretations of the law.<sup>35</sup> The increasing use of the dispute settlement mechanism in the late 1950s justified this tendency.

In 1962, an influential ruling pushed the GATT dispute settlement mechanism going further in the direction towards rule-orientation. This happened in the case of Uruguay against 15 industrialised countries’ violations of their GATT obligations.<sup>36</sup> The panel grappled with the language of GATT Article XXIII, which defined “nullification or impairment” as the basis of a complaint, but decided to push the GATT jurisprudence beyond the language, and determined in its report that any “violation” of the GATT obligations would be considered a “*prima facie* nullification or impairment” which required the defending contracting party to carry the burden of proving that “nullification or impairment” did not exist.<sup>37</sup> This case, followed by many subsequent GATT panels, reinforced a shift in the focus of GATT cases towards the treaty obligations of the GATT, that is in the direction of rule orientation.<sup>38</sup>

During the Tokyo Round negotiations(1973-1979), some initiatives were adopted to improve the GATT dispute settlement mechanism. The so-called Consultative Group of

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while the members of a working party include those from the disputing parties(Point 6[ i ] of the Annex to the 1979 Understanding). See GATT BISD, 26th Supplement(1980), p.212; p.215; p.216.

<sup>33</sup> : Rule 14 of the 1979 Understanding states: “Panel members would serve in their individual capacities and not as government representatives, nor as representatives of any organisation...” See GATT BISD, 26th Supplement(1980), p.212.

<sup>34</sup> : Dispute settlement panel members in the GATT were mostly junior to middle-level trade diplomats, or retired trade diplomats, expected to take advice from the technocrats/experts in the GATT Secretariat while in drafting their legal rulings, In fact, it is the Secretariat, not the panels, that deliberated those rulings.

<sup>35</sup> : Rule 16 of the 1979 Understanding states: “The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2. 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 General Agreement and, if so requested by the CONTRACTING PARTIES, make such other findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2...” See GATT BISD, 26th Supplement(1980), p.213.

<sup>36</sup> : See Pierre Pescatore: *WTO/GATT Dispute Settlement Digest*, Transnational Publishers Inc.(1997), p.98.

<sup>37</sup> : The “*prima facie*” concept was also applied in situations involving quotas or domestic subsidies on products subject to agreed upon tariff limitations(for example, tariffs bound under Article II of GATT 1947, “Schedules of Concessions”). See John H. Jackson, *supra* note 24, p.182.

<sup>38</sup> : The development of this jurisprudence culminated in Point 5 of the Annex(Entitled *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement[Article XXIII:2]*) to the 1979 Understanding, which states: “In practice, contracting parties have had recourse to Article XXIII only when in their view a benefit accruing to them under the General Agreement was being nullified or impaired. In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. A *prima facie* case of nullification or impairment would *ipso facto* require consideration of whether the circumstances are serious enough to justify the authorisation of suspension of concessions or obligations, if the contracting party bringing the complaint so requests. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases, it is up to the contracting parties against whom the complaint has been brought to rebut the charges...” See GATT BISD 26th Supplement(1980), p.216.

Eighteen was given this task, among others.<sup>39</sup> However, partly because of the strong objection of the European Communities to any changes in the existing dispute settlement mechanism, this effort did not get very far. The result was a document officially entitled *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* (hereinafter as the *1979 Understanding*), which was adopted by the CONTRACTING PARTIES at their Thirty-fifth Session in Geneva in November 1979. This Understanding, which was for the first time a separate document apart from GATT Articles XXII and XXIII, provided a comparatively detailed procedure for the dispute settlement.<sup>40</sup> It reinforced the concept of the “*prima facie* nullification or impairment” and permitted the use of non-government persons for panels while stating a preference for government persons.<sup>41</sup>

In the 1980s, as the dispute settlement mechanism was becoming more legally precise and juridical in nature, there developed the idea that there are generally two types of cases in the GATT: the violations cases, which are based on the *prima facie* concept, and certain non-violation cases, but nevertheless alleging “nullification or impairment”. In fact, the non-violation cases were relatively few in the history of the GATT. Some scholars estimated that there were only between three to eight cases of this type out of several hundreds in totality.<sup>42</sup> Nevertheless, some of these non-violation cases were quite influential.<sup>43</sup>

A 1988 panel report strengthened more the *prima facie* concept. The case (sometimes called the “super-fund” case) was a complaint by the European Communities, Mexico and Canada against the United States for the effects of the US 1986 legislation which taxed imported petroleum products.<sup>44</sup> Since the tax on the imported products was admittedly higher than that for domestic products, the United States did not deny that the national treatment obligation contained in GATT Article III<sup>45</sup> had been violated. But it then prepared to prove that the small tax had not caused nullification or impairment on the exporters, by using trade flow statistics to show that no negative effects on the flow of imported petroleum products occurred because of the tax. The panel, however, refused to

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<sup>39</sup> : The Consultative Group of Eighteen, composed of high-level representatives with responsibilities in the formulation of their countries’ trade policies, was established on a provisional basis in 1975 to help GATT’s contracting parties carry out some of their major responsibilities more effectively. See GATT Decision of the Council of 11 July 1975, *GATT Activities*, Geneva(1979), pp.53-55.

<sup>40</sup> : Which is provided in the Annex(Entitled *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement[Article XXIII:2]*) to the *1979 Understanding*. See GATT BISD, 26th Supplement(1980), pp.215-218.

<sup>41</sup> : Rule 11 of the *1979 Understanding* states: “...The members of a panel would preferably be governmental...” Rule 13 states: “In order to facilitate the constitution of panels, the Director-General should maintain an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement, and who could be available for serving on panels...” See GATT BISD, 26th Supplement(1980), p.212.

<sup>42</sup> : See Jackson, Davey and Sykes: *Legal Problems of International Economic Relation*, third edition, West Publishing Co.(1995), p.362.

<sup>43</sup> : For example, *United States—European Communities Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Protein*. See Pierre Pescatore, *supra* note 36, p.108.

<sup>44</sup> : See Pierre Pescatore, *supra* note 36, pp.114-116.

<sup>45</sup> : Article III:2 of GATT 1947 states: “The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products...” See *supra* note 1.



examine this proof. It noted that: “there was no case in the history of the GATT in which a contracting party had successfully rebutted the presumption that a measure infringing obligations causes nullification and impairment.” It then also noted that: “although the CONTRACTING PARTIES had not explicitly decided whether the presumption...could be rebutted, the presumption had in practice operated as an irrefutable presumption.” The panel said that GATT Article III:2, first sentence “obliges the CONTRACTING PARTIES to establish certain competitive conditions for imported products in relation to domestic products. Unlike some other provisions in the General Agreement, it does not refer to trade effects...A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement.” Therefore, the panel concluded: “The circumstance that the tax differential was so small that its trade effects were minimal or nil, as was alleged by the United States, was no rebuttal of this presumption, which came close in practice to an irrefutable presumption. In any case, the impact of a measure inconsistent with the General Agreement is not relevant for a determination of impairment. The basic rationale of GATT Article III:2, like the rationale of Article XI, is to protect expectations not of export volumes, but of the competitive relationship between imported and domestic products. Unlike some other provisions in the General Agreement, GATT Article III:2 does not refer to trade effects. A change in the competitive relationship contrary to that provision must consequently be regarded in that respect as an impairment of benefits in the sense of GATT Article XXIII.”<sup>46</sup>

When one reflects on this evolving history of the GATT dispute settlement mechanism, some generalisations seem both apparent and quite remarkable. With very meagre treaty language as a start, plus divergent alternative views about the policy goals of the system, the GATT, like so many other human institutions, to some extent took on a life of its own. Regarding both the dispute procedures(a shift from working parties to panels), and the substantive focus of the system(a shift from general ambiguous ideas about “nullification or impairment” to more analytical or “legalistic” approaches to the interpretation of rules of treaty obligation), the GATT dispute settlement mechanism moved in the direction to a more rule-oriented goal. The super-fund case may be a high-water in this regard, since it arguably turns the treaty language “on its head”: by stating that a “*prima facie* case” cannot be rebutted, it makes the presumption that “nullification or impairment” derives *ipso facto* from a violation, thus almost discarding the “nullification or impairment” concept in favour of a focus on whether or not a “violation” or “breach” of obligation exists. The GATT jurisprudence was therefore, through the gradual case-by-case development of the dispute settlement mechanism, brought almost in full circle at the time when the World Trade Organisation was established.<sup>47</sup>

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<sup>46</sup> : In the view of the author, the panel has gone a little farther on this point, because neither the 1979 *Understanding* nor its Annex explicitly states that “the presumption that a measure infringing obligations causes nullification and impairment cannot be rebutted.” This deliberation can be deemed as a high-water of the GATT approach to the rule-orientation.

<sup>47</sup> : Article I of the *Marrakesh Agreement Establishing the World Trade Organisation*(hereinafter as the *WTO Agreement*) states: “The World Trade Organisation(hereinafter referred to as “the WTO”) is established.” Article XVI:1 of the *WTO Agreement* states: “Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies

## Section Two The Rationale for a Rule-Oriented and the Pragmatism in Reality

### 5.2.1. The legal analysis of and the rationale for a rule-orientation

The approaches which the WTO Members<sup>48</sup> adopt in dealing with trade disputes are essential to a good functioning of the WTO dispute settlement mechanism. This requires a close correlation and an optimal balance between a rule-oriented approach and a pragmatic approach<sup>49</sup> ---between the multilateral legal order and Members' national trade interests. The WTO dispute settlement mechanism has both the juridical and pragmatic features. On the one hand, the *Dispute Settlement Understanding*<sup>50</sup> contains detailed rule-oriented provisions inspired by the basic WTO principles and, on the other hand, flexible procedures concerning developing country and least-developed country Members reflect a recognition of the current political reality.<sup>51</sup>

The phrase "rule-orientation" is used here to contrast with phrases such as "rule of law", and "rule-based system". Rule-orientation implies a less rigid adherence to the "rules" and connotes some fluidity in the rule approaches,<sup>52</sup> which seems to accord with the current reality (especially when it needs to accommodate some bargaining or negotiation between the developing and developed country Members). Phrases that emphasise too much the strict application of rules sometimes scare the policy-makers, especially those from developing and the least-developed countries which have fewer "bargaining chips" in hand, although, in reality, the different phrases may amount to the same thing. Any legal system must contain some inherent ambiguities of its rules which may accommodate the constant changes of practical needs of human society. The focal point is that the procedures of rule application, which often centre on a dispute settlement

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established in the framework of GATT 1947." This reflects the continuity from the GATT to the WTO in the approach of rule-orientation. See supra note 1.

<sup>48</sup> : Explanatory note (a) of GATT 1994 states: "The reference to 'contracting party' in the provisions of GATT 1994 shall be deemed to read 'Member'. The references to 'less-developed contracting party' and 'developed contracting party' shall be deemed to read 'developing country Member' and 'developed country Member'. The reference to 'Executive Secretary' shall be deemed to read 'Director-General of the WTO'." See supra note 1.

<sup>49</sup> : In the Article *The Domain of WTO Dispute Resolution* (Harvard International Law Journal, Vol.40, 1999, No.2, pp.333-377), professor Joel P. Trachtman put forward a formula of rules versus standards, in which he defines that "a law is a 'rule' to the extent that it is specified in advance of the conduct to which it is applied", while "a standard establishes general guidance to both the person governed and the person charged with applying the law but does not, in advance, specify in detail the conduct required or proscribed". These references can be used to explain correspondingly the approaches which the WTO takes: rule-oriented approach and pragmatic approach. However, the pragmatic approach discussed in this article has a broader dimension than that of the standard concept, which includes, in the WTO agreements, not only the general guidance to encourage developing and least-developed country Members to participate more in the global economy, but also the delays granted to them in their implementations of the WTO agreements.

<sup>50</sup> : Which is Annex 2 to the *WTO Agreement*.

<sup>51</sup> : The Articles of the *Dispute Settlement Understanding*, which concern developing country and the least-developed country Members, are Article 3(12), Article 4(10), Article 8(10), Article 12(10), Article 12(11), Article 21(2), Article 21(7), Article 21(8), Article 27(2). See supra note 1.

<sup>52</sup> : Although the developing and developed country Members will eventually implement WTO rules on the same parameters, many of the multilateral agreements grant some years of delay for developing and least-developed country Members in their implementations of these rules. This, in the words of professor Thomas M. Franck, is a combination of legitimacy and distributive justice. See Thomas M. Franck: *Fairness in International Law and Institution*, Oxford: Clarendon Press(1995).

mechanism, should be designed so as to promote as much as possible the stability and predictability of the rules and laws.<sup>53</sup> For this purpose, the dispute settlement mechanism must be both legitimate and reasonably efficient.<sup>54</sup>

For a long time before the Uruguay Round negotiations, the GATT had been blamed for its inefficiency and lack of transparency in dealing with international trade disputes.<sup>55</sup> There were neither explicit procedures for the disputing parties to abide by, nor assumed procedures to implement the adopted recommendations and rulings.<sup>56</sup> The frequent blocking of panel reports by the losing party was its fatal weakness.<sup>57</sup> This situation, however, has been changed fundamentally with the establishment of the World Trade Organisation and its new dispute settlement mechanism under the auspices of the *Dispute Settlement Understanding*. Article 23(1) of the DSU states: "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." The *Dispute Settlement Understanding*, for the first time, provides a set of procedures for both parties to a dispute to proceed with clear rights and obligations. The time-frame ensures the efficiency and predictability of a dispute settlement. The standing Appellate Body is the place where the issues of law and interpretations will be examined if any party to a dispute decides to appeal the panel

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<sup>53</sup> : According to Trachtman, rules are generally thought to provide greater predictability. There are two moments at which to consider predictability. The first moment refers to the persons subject to the law to be able to plan and conform their conducts with law *ex ante*. The second moment in which predictability is important is *ex post*, after the relevant conducts have taken place. The predictability can reduce the cost of rule implementation. But Trachtman further states that some degree of unpredictability may enhance the ability of the disputing parties to bargain to a lower-cost solution. Thus, simple predictability is not the only measure of a legal norm. One must also be concerned with the ability of the legal norm to provide satisfactory outcomes. In economic terms, one must be concerned with the allocative efficiency of the outcome. Joel P. Trachtman: *The Domain of WTO Dispute Resolution*, see *supra* note 49, p.352.

<sup>54</sup> : See John H. Jackson, *supra* note 29, p.61.

<sup>55</sup> : In order to strengthen the GATT dispute settlement mechanism, the *Punta del Este Declaration*, which marked the start of the Uruguay Round negotiations, states: "In order to ensure prompt and effective resolution of disputes to the benefits of all contracting parties, negotiations shall aim to improve and strengthen the rules and procedures of the dispute settlement process, while recognising the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations." See *GATT Activities*(1986), Geneva, p.23.

<sup>56</sup> : The only reference to the implementation of recommendations or given rulings in the *1979 Understanding* is Rule 22, which states: "The CONTRACTING PARTIES shall keep under surveillance any matter on which they have made recommendations or given rulings. If the CONTRACTING PARTIES' recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution." See *GATT BISD*, 26th Supplement(1980), p.214.

<sup>57</sup> : Point 6(i) of the Annex to the *1979 Understanding* states: "...Since the tendency is to strive for *consensus*, there is generally some measure of negotiation and compromise in the formulation of the Working Party's report. The Council adopts the report. The reports of working parties are advisory opinions on the basis of which the CONTRACTING PARTIES may take a final decision."(Emphasis added). See *GATT BISD*, 26th Supplement(1980), p.217. In the GATT practice, the adoption of a panel report needs the positive consensus, i.e. consensus of all members of the General Council, including the losing party.

report.<sup>58</sup> The most obvious change of the new dispute settlement mechanism compared with its predecessor in the GATT, perhaps, is the impossibility for either party to a dispute to block the adoption of a panel or Appellate Body report.<sup>59</sup> This is a giant step in the shift from power-orientation towards rule-orientation, although there is still much to be improved for the new dispute settlement mechanism.<sup>60</sup> As for the relationship between Articles XXII, XXIII of GATT 1947 and the DSU, Article 3(1) of this Understanding states: "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." The DSU, in other words, is the expanded provisions of GATT Articles XXII and XXIII for dealing with trade disputes among WTO Members. The history from the GATT to the WTO has demonstrated a fact: that is, the more international trade develops, the more people wish to have a stable and predictable legal system.

The increasing use of the new dispute settlement mechanism since the establishment of the World Trade Organisation has shown that WTO Members have been determined to constrain their power influence and accord their support in developing the rule-orientation.

### 5.2.2. Pragmatism in developing the rule-orientation

As of this writing, there are altogether 144 WTO Members(excluding the European Communities),<sup>61</sup> together with dozens of countries and separate customs territories<sup>62</sup>

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<sup>58</sup> : Article 17(6) of the DSU states: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." See supra note 1.

<sup>59</sup> : Contrary to the practice of the GATT, Article 16(4) of the DSU states that "Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting 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..." Again, Article 17(14) of the DSU stipulates that "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..."(Original footnotes omitted)(Emphases added). See supra note 1.

<sup>60</sup> : Upon the need to improve the WTO dispute settlement mechanism, see J.C. Thomas and David Palmetter: *The Need for Due Process in WTO Proceedings*, Journal of World Trade, Vol.31, 1997, No.1, pp.45-57; Rutsel Silvestre J. Martha: *World Trade Dispute Settlement and the Exhaustion of Local Remedies Rule*, Journal of World Trade, Vol.30, 1996, No.4, pp.105-130; Nick Covelli: *Public International Law and Third Party Participation in WTO Panel Proceedings*, Journal of World Trade, Vol.33, 1999, No.2, pp.125-139; Jonathan I. Charney: *Third Party Dispute Settlement and International Law*, Columbia Journal of Transnational Law(1997-98), Vol.36, pp.65-89; Edwini Kessie: *Enhancing Security and Predictability for Private Business Operators under the Dispute Settlement System of the WTO*, Journal of World Trade, Vol.34, 2000, No.6, pp.1-17; Panel discussion moderated by Petros C. Mavroidis and others: *Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?* Journal of World Trade, Vol.32, 1998, No.2, pp.147-165; David Palmetter: *The WTO Appellate Body Needs Remand Authority*, Journal of World Trade, Vol.32, 1998, No.1, pp.41-44.

<sup>61</sup> : cf. [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)

<sup>62</sup> : According to Article XII:1 of the *WTO Agreement*, "Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided in this Agreement and Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto." Therefore, the WTO Members include not only the sovereign States, but the separate customs territories like Hong Kong, Macao etc. See supra note 1.

waiting for their WTO membership. In such a universal institution with its Members of so diversified political and economic backgrounds, ranging from the richest to the poorest in the economic sense, and from almost the biggest to the smallest in the geographic sense, it is almost impossible to demand all WTO Members to apply a dispute settlement mechanism on the same parameter without leaving any flexibility. The drafters of the *WTO Agreement* understood that, if a dispute settlement mechanism is administered in a rigid manner, or if it is proved impervious to change, this legal system will meet the resistance from some of the Members, and then gradually lose its influence upon them in making their trade policies. The task for the drafters is to find an optimal balance between a strictly juridical pursuit of the basic GATT/WTO principles and a pragmatic recognition of the political and economic realities.

Pragmatism in the WTO dispute settlement mechanism manifests itself in many different ways. In a broad sense, it can operate generally to influence WTO Members in their approaches to different trade policies and the latest developments in international trade relations, especially in the absence of universally accepted norms. More specifically, pragmatism can find a basis in, and be derived from, those legal provisions of the *WTO Agreement*, the Multilateral Trade Agreements, and the *Dispute Settlement Understanding*. As a result of the pragmatic and realistic approach of those drafters, a number of particular procedures have been built into the Agreements and the Understanding. Their purpose is to give added flexibility and to mitigate any undue rigidity in the application of the WTO dispute settlement mechanism, so as to make the implementation of the provisions of the *WTO Agreement* and its covered agreements more feasible and more practicable in terms of trade policies. For instance, the second paragraph of the *WTO Agreement* Preamble states as one of the reasons for establishing the WTO is the recognition that “there is need for positive efforts designed to ensure that developing countries, especially the least developed among them,<sup>63</sup> secure a share in the growth in international trade commensurate with the needs of their economic development.” The specific provisions concerning developing countries in the DSU can be found in the following. For example, 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, either the relevant provisions of the DSU, or the corresponding provisions of the GATT Decision of 5 April 1966<sup>64</sup> (DSU Article 3[12]). To the extent that there is a difference between the rules and procedures of the DSU and the corresponding rules and procedures of that Decision, the latter shall prevail (DSU Article 3[12]). In the consultation stages, WTO Members should give their special attention to the particular problems and interests of

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<sup>63</sup> : The WTO recognises as least-developed countries (LDGs) those countries which have been designated as such by the United Nations. There are currently 48 least-developed countries on the UN list, 29 of which to date have become WTO Members. (Note added).

cf. [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm)

<sup>64</sup> : This Decision is referred to in paragraphs 41-47 of the Report of the Committee on Trade and Development. As the preamble states, this Decision is based on the recognising of the GATT contracting parties that the impairment of trade benefits “can cause severe damage to the trade and economic development of the least-developed contracting parties”. Thus, the contracting parties affirm their resolve to solve such problems “while taking fully into account the need for safeguarding both the present and potential trade of the least-developed contracting parties” affected by such problems. See GATT BISD, 14th Supplement (1966), pp.18-20.

developing country Members(DSU Article 4[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(DSU Article 8[10]). In terms of panel procedures, the time for a developing country Member to prepare its complaint or argument may be extended if necessary(DSU Article 12[10]). Where one or more of the parties is a developing country Member, the panel report shall explicitly indicate the form in which account has been taken of relevant provisions on a differential and more favourable treatment for developing country Members that form part of the “covered agreement”, which have been raised by the developing country Member in the course of the dispute settlement procedures(DSU Article 12[11]). As for the implementation, the Dispute Settlement Body(DSB)<sup>65</sup> may consider what action may be appropriate for a developing country Member to take and what impact of an action may have upon the developing country Member concerned(DSU Article 21[7], [8]). Although the above provisions are hortatory in nature, and it is difficult to assess that, to what extent, these special treatments have benefited developing country Members in practice, they have indicated that, in the formulation of rule-orientation, WTO Members have begun to take a pragmatic approach towards the issues of development. Meanwhile, these provisions have provided the guidelines for the panelists and Appellate Body members in dealing with the disputes concerning developing country Members.

To get a balance between the rule-orientation and pragmatism has been and, perhaps will be, the optimal choice for the GATT/WTO dispute settlement mechanism as the current globalisation of world economy cannot narrow the gap between the developing and developed countries in the feasible future. The rich are becoming richer, and the poor are becoming poorer. This situation has brought the difficulties for any human institution to establish a universally acceptable international trade order. On the one hand, there has to be the necessary degree of pragmatism and flexibility to enable those difficult and often crucial issues to be dealt with efficiently and realistically. The DSU has offered some possibilities for a legally controlled pragmatism, and throughout the history from the GATT to the WTO, contracting parties/country Members have responded constructively and positively to these international economic and political situations, without having undue regard to legal technicalities. This has been an important source of its strength. While on the other hand, however, the dispute settlement mechanism must not be, through the tolerance of deviations, so weakened as to deprive it of its major functioning as a legal system. If so, it would be harmful to international trade relations. From the economic viewpoint, the goal of a temporary deviation, to a certain extent, of the developing country Members from the WTO rules is to enhance their economic development, then to give them a further help to integrate into the global economy, and in the long-term, to propel the WTO dispute settlement mechanism developing in a more rule-oriented direction.

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<sup>65</sup> : Article IV:3 of the *WTO Agreement* states: “The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the *Dispute Settlement Understanding...*” Thus, the Dispute Settlement Body is *de facto* the WTO General Council in another chapeau. See supra note 1.

### 5.2.3. A new international trade order with the rule-orientation concept

The WTO legal system reveals the fundamental nature of law in achieving economic objectives. This system, after decades of evolution and refinement based on the original GATT, has expanded the body of rules covering not only the trade of goods, but the trade of services and those trade-related intellectual property rights, which are embodied in GATT 1994,<sup>66</sup> GATS and TRIPS. In the sense that a legal order follows the expression of a generalised political will in any society to achieve an ideal existence for its members, the WTO law and rules represent the will of all its Members upon the international trade system, which is a subset of the international society, to achieve an ideal global economy. This process is replete with confrontation and compromise, negotiations and mediations, making those highly complex inter-State issues concerning the real world economic development be simplified to schedules of concessions.<sup>67</sup> This contracting-making process is marked by pragmatic deals using the language of self-interest. That notwithstanding, one is still able to observe in the last fifty years of the GATT, and now the WTO, the progressive attainment of a systemic legal ideal.

When the International Trade Organisation(ITO) became stillborn because of the US Congress's refusal to ratify the *1947 Havana Charter*, the GATT maintained a focus on the removal of tariff barriers, in large part motivated by a desire to avoid the destructive consequences of trade protectionism. There was a generation of historians, economists, trade specialists, diplomats and sundry experts who believed, with a passion, that national protectionism caused war.<sup>68</sup> They built the GATT with a "never again" zeal which helped to sustain the organisation when it was small and often neglected by powerful political entities. The detailed, laborious work of negotiating concessions always had the support of declared ideals albeit often couched in the sparse, disciplined language of classic economics.

The GATT's history and the first few years' practice of the WTO have demonstrated that economic interdependence, globalisation and more open participatory democracies are contemporary tenors which demand a critical evaluation of the World Trade Organisation. The WTO is a new institution and is still in its development. It should cope with the current trend of globalisation, under which, it will, through its law-making and practice, play an important role in developing a new international trade order. The progressive reduction of tariffs and non-tariff barriers to trade has greatly increased international trade volume, promoted global economic interdependence, and most importantly, increased the capacity of WTO Members to exchange goods and services across their national borders so that the concept of the "global market" is now actual.<sup>69</sup>

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<sup>66</sup> : GATT 1994 consists of: (a)GATT 1947; (b)the provisions of the legal instruments that have entered into force under GATT 1947 before the date of entry into force of the *WTO Agreement*; (c)six Understandings; (d)the Marrakesh Protocol to GATT 1994. Therefore, the coverage of GATT 1994 is bigger than that of GATT 1947. See supra note 1.

<sup>67</sup> : The results of the Uruguay Round negotiations are embodied in a "document" of some 26,000 pages. Most of these pages are detailed schedules of tariffs, service trade and other concessions.

<sup>68</sup> : In the view of the drafters of GATT 1947, one of the reasons leading to the World War II is the global trade protectionism which made the economy of many countries collapse in the pre-war years. See Michael J. Trebilcock and Robert Howse, supra note 10, pp.20-21.

<sup>69</sup> : In the Article *Towards a True Transitional Law*(Journal of World Trade, Vol.29, 1995, No.3, pp.83-90), professor Alberto Tita described that: "From international investment to international trade, from international business to international indebtedness, the international community has seen the rise of a network of relations such as to configure, both in terms of quantity and quality, a truly global market."

The pressure upon the WTO as an international institution to accommodate traditional notions of sovereignty, and at the same time, to respond to the real world fact of globalisation and increased economic interdependence, is reflected in the conflicts among its Members which, eventually, find their way to resort to the WTO dispute settlement mechanism.

The new dispute settlement mechanism is now serving as the basis to ensure the implementation of the *WTO Agreement* and its covered agreements. After reviewing its first few years' practice, one can readily see its attractiveness: compulsory jurisdiction,<sup>70</sup> clear procedural steps towards resolution, a swift procedural timetable,<sup>71</sup> fact finding and adjudication combined in a panel process,<sup>72</sup> the chance to appeal on a point of law or the legal interpretations of the panel report to the newly created Appellate Body,<sup>73</sup> and the availability of meaningful and significant compensation and suspension of concession.<sup>74</sup> No other juridical order in an international institution so far can compete with that of the WTO on these terms.

Looking back on the first few years' practice of the WTO dispute settlement mechanism, one can draw the following conclusions. Firstly, there is a dramatic increase in the number of cases coming before the new dispute settlement mechanism. This is a very important trend since the good functioning of the dispute settlement mechanism in a new institution is founded on the confidence put to it by its members. The cases under the new dispute settlement mechanism are mainly brought by those major economic powers, particularly the United States and the European Communities, against each other. But notably, there is also a greater participation by developing countries, both against other developing countries and against developed countries. Secondly, as a result of the more binding and automatic process elaborated by the DSU, there is a strong incentive for the disputing parties to negotiate mutually acceptable solutions within the WTO dispute

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<sup>70</sup> : Article 2 of the DSU states: "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 authorise suspension of concessions and other obligations under the covered agreements..." See supra note 1.

<sup>71</sup> : See Appendix 3(Working Procedures) and Appendix 4(Expert Review Groups) of the DSU. See supra note 1. See also *Working procedures for appellate review*. cf. [http://www.wto.org/english/tratop\\_e/dispu\\_3](http://www.wto.org/english/tratop_e/dispu_3)

<sup>72</sup> : Article 11 of the DSU states that "...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..." See supra note 1.

<sup>73</sup> Article 16(4) of the DSU states that "...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..." Article 17(6) of the DSU states that "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." See supra note 1.

<sup>74</sup> : Article 3(7) of the DSU states that "...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 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-a-vis the other Member, subject to authorisation by the DSB of such measures." See supra note 1.



settlement mechanism.<sup>75</sup> In fact, the first trade dispute after the new dispute settlement mechanism was set up was settled between Singapore and Malaysia without invoking the panel process.<sup>76</sup> This tendency bodes well for a multilateral trading system, as the primary objective of a dispute settlement mechanism is to prompt the resolution of disputes. Thirdly, it is clear that WTO Members are showing a strong inclination to use the new dispute settlement mechanism rather than the alternatives of resorting to unilateral measures or bilateral arrangements outside the multilateral trade rules. Even in some politically sensitive cases, like *EC Measures Concerning Meat and Meat Products(Hormones)*<sup>77</sup> and *United States---The Cuban Liberty and Democratic Solidarity Act(Helms-Burton Act)*,<sup>78</sup> albeit that this Act itself is arguable, parties on both sides used the rules and procedures of the DSU to resolve their dispute. Last but not least, the developing country Members are taking their obligations seriously, and are actively seeking to enforce the rights and obligations vis-a-vis others under the WTO jurisdiction. This tendency is very positive for the new global trade order.

The combination of equal commitments to the agreed trade rules together with some flexibility in the implementation of these rules is the key to success for the WTO in building a respected and credible dispute settlement mechanism, which has helped to establish a new international trade order. What is clear is that WTO Member governments now have their choices: they can either use diplomatic means to deal with disputes in a mutually acceptable manner, or they can choose the more judicial route by bringing their disputes to the panels and, ultimately, to the Appellate Body. As is the case in all litigation, complaints are sometimes brought for the purpose of obtaining a leverage to achieve the negotiated objectives. This is particularly beneficial to some small developing countries, as without the rules and procedures of the WTO dispute settlement mechanism and the extensive obligations stipulated in the covered agreements, they would not have the necessary bargaining power face-to-face the developed countries. The active participation of the developing countries in the new dispute settlement mechanism

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<sup>75</sup> : This is in conformity with the objectives of the DSU. Article 3(7) of the DSU states that "...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..." See supra note 1.

<sup>76</sup> : See *WTO Focus Newsletter*, No.3, p.15.

<sup>77</sup> : See *EC Measures Concerning Meat and Meat Products(Hormones)*, Report of the Appellate Body (distributed on 16 January 1998), WT/DS26/AB/R, WT/DS48/AB/R.

<sup>78</sup> : See *United States---The Cuban Liberty and Democratic Solidarity Act*(complained by the European Communities on 3 October 1996), WT/DS398. A panel was established on 20 November 1996. It suspended work on 25 April 1997 at the request of the EC. The Helms-Burton Act or the "Cuba Liberty and Democratic Solidarity Act of 1996" contains provisions under which any individuals or companies that "trafficked" in property confiscated by the Cuba government on or after 1 January 1959 can be sued for damages in US courts and provisions regarding the denial of entry to the United States of foreign nationals "trafficking" in such property. See *WTO Focus Newsletter*, No.11, p.7. At the EU-US summit on 18 May 1998, the parties resolved their dispute through negotiations. The parties agreed on (1)the establishment of the Transatlantic Partnership on Political Cooperation, which would promote the more effective attainment of shared goals through economic and political cooperation; and (2)a package relating to the Act, by which the United States would limit the impact of certain provisions on European companies and citizens. In return, the European Union agreed to freeze any further action in the WTO on the alleged US violation of the organisation's rules through the implementation of this Act. See Stefaan Smis and Kim Van der Borgh: *The EU-US Compromise on the Helms-Burton and D'Amato Acts*, *The American Journal of International Law*, Vol.93, 1999, p.231.

is a good omen signalling that more and more Member countries are determined to ensure their compliance with the WTO rules and to work within the WTO legal system. Mr. Renato Ruggiero, the former WTO Director-General, summarised the significance of this rule-orientation in the WTO dispute settlement mechanism as the following: “The attention that the WTO dispute settlement system now receives from the world at large is evidence of its importance and relevance, and this can only increase as trade issues intersect more frequently with other public concerns. Everyone recognises, at the dawn of the third millennium, that rule of law must become the main pillar of an improved management of our globalising world.”<sup>79</sup> True as it is, the WTO dispute settlement body, through constant practice and improvement since its inception, has already developed into a unique international tribunal, where the rule of law is becoming the legal basis of the jurisdiction.

### **Section Three Rule-Orientation Under the WTO Jurisdiction**

#### **5.3.1. The uniqueness of the GATT/WTO dispute settlement mechanism**

There is a widespread assumption that in a successful legal system, disputes<sup>80</sup> should be avoided, or at least resolved quickly and peacefully. Different international institutions have their different dispute settlement mechanisms. Some of them settle disputes through judicial means, while others fulfil this through quasi-judicial means or arbitration. Each has its own procedures in resolving the disputes. Since it was established, the World Trade Organisation has drawn a lot of academic study on its legal system, its impact upon the international trade order, and its relationships with developing countries. However, what fascinates scholars most is still the uniqueness of its dispute settlement mechanism. In the World Trade Organisation, there is no formal judicial body like the International Court of Justice(ICJ) of the United Nations, but the trade disputes can be settled swiftly, and the recommendations and rulings made by panels or the Appellate Body(after they are adopted by the Dispute Settlement Body) are binding on both parties to the dispute.<sup>81</sup> Although the WTO is only a newly-established institution, its dispute settlement mechanism has already won the support from both the developed and developing country Members. To sum up, there are at least four aspects which distinguish the WTO dispute settlement mechanism from its counterparts of other international institutions.

The first different aspect is the premise on which a dispute can be brought to the WTO Dispute Settlement Body(DSB), which is the permanent body to deal with trade disputes between WTO Members. The procedures for the settlement of disputes arising

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<sup>79</sup> : Excerpts from Mr. Renato Ruggiero’s parting statement to the WTO General Council on 14 April, 1999. See *WTO Focus Newsletter*, No.40, p.3.

<sup>80</sup> : John Collier and Vaughan Lowe, both from Cambridge, have given us a clear definition about disputes. They define that the term “dispute” is used to “signify a specific disagreement relating to a question of rights or interests in which the parties proceed by way of claims, counter-claims, denials and so on”. A dispute is different from a conflict which is “a general state of hostility between the parties”. Conflicts may still exist even after disputes have been resolved. See John Collier and Vaughan Lowe: *The Settlement of Disputes in International Law*, Oxford University Press(1999), p.1.

<sup>81</sup> : In view of the characteristics and nature of the WTO Dispute Settlement Body, the author of this thesis defines the DSB as a “quasi-judicial” body.

under the GATT,<sup>82</sup> and now under the WTO<sup>83</sup> that has replaced it, are remarkable for their departure from the general principle that disputes resolved by formal mechanism should be settled on the basis of what is an essentially retrospective analysis of the rights and obligations of the parties at the time that the dispute arose. Different from this tenet, the GATT/WTO system proceeds by an analysis of whether benefits (rather than rights) that the parties expected to derive from the substantive rules of GATT 1947 (now the WTO agreements including GATT 1994) have been nullified or impaired, or the achievement of any objective of the relevant agreement is being impeded, and then to an essentially prospective analysis of what measures might produce a workable solution to the dispute for the future. A more obvious difference is the non-violation complaints in the WTO dispute settlement procedures. Article XXIII(1) of GATT 1994 states: "If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of... (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement... the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it."<sup>84</sup> The non-violation complaints originated from GATT 1947, but now it has been practically applicable to all other WTO agreements. Article 26(1) of the *Dispute Settlement Understanding* states: "...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..."<sup>85</sup> This wide regulated dimension reflects a fact that the World Trade Organisation applies the dispute settlement mechanism not only to deal with those claims of violation of trade rules, but to maintain a proper balance between the rights and obligations of its Members.<sup>86</sup>

Connected with the foregoing analysis is the right to a bring a complaint to the Dispute Settlement Body. This is the second distinctive aspect of the WTO dispute settlement mechanism. International institutions, like the United Nations, tend to require an agreement between the disputing parties on the terms of dispute settlement before their

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<sup>82</sup> : A useful overview of the development of the GATT and the WTO dispute settlement system can be found in John H. Jackson: *Dispute Settlement and the WTO: Emerging Problems*, Journal of International Economic Law, No.1, 1998, p.329.

<sup>83</sup> : See John H. Jackson: *Law and Policy of International Economic Relations*, second edition, MIT, Cambridge, Massachusetts (1997); John H. Jackson, W. J. Davey and A. O. Sykes: *Legal Problems of International Economic Relations*, third edition, St Paul, Minnesota (1995); A. Qureshi: *The World Trade Organisation*, Manchester University Press (1996).

<sup>84</sup> : See supra note 1.

<sup>85</sup> : Id, see Articles 22, 26 of the *Dispute Settlement Understanding*. Upon the detailed analysis of non-violation provisions and cases, see the third part in this section.

<sup>86</sup> : Article 3(3) of the *Dispute Settlement Understanding* states: "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." See supra note 1.

judicial bodies initiate the dispute settlement procedures. This is the heritage from arbitration. Article 33(1) of the *Charter of the United Nations* states: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."<sup>87</sup> The *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* further states: "...In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute. The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them."<sup>88</sup> While the *Dispute Settlement Understanding* only requires a WTO Member to "exercise its judgement as to whether action under these procedures would be fruitful" before it brings a case to the DSB(Article 3[7]). In other words, the invocation of the WTO dispute settlement mechanism is not necessarily based on the agreement of the disputing parties. In view of the lenient wording in the UN Charter and other international agreements, to bring a case for settlement in the WTO seems almost an automatic action.<sup>89</sup> Furthermore, each stage of the dispute settlement in the WTO, from the establishment of the panel to the implementation of rulings and recommendations, is clearly timed, making this proceeding more practicable and predictable.<sup>90</sup>

Then comes the third distinctive aspect of the WTO dispute settlement mechanism, which is the appealing process carried out in the Appellate Body. In the strict sense, the Appellate Body is not a judicial body. At most, it may be regarded as a quasi-judicial body. So the persons who are serving the Appellate Body are not "judges", but "members". The seven members, unlike the judges of the ICJ who are elected by the General Assembly and the Security Council,<sup>91</sup> are appointed by the Dispute Settlement Body,<sup>92</sup> and their term is much shorter(four years) compared with that of the ICJ judges(nine years). Again, unlike the judges of the ICJ who are bound, unless they are on leave or prevented from attending by illness or other serious reasons, to hold themselves permanently at the discharge of the Court,<sup>93</sup> the Appellate Body members are not

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<sup>87</sup> : See supra note 2.

<sup>88</sup> : Id.

<sup>89</sup> : Although Article XXII of GATT 1994 and Article 4 of the DSU require a WTO Member to hold consultations first with any other Member concerned if a dispute arises, this, however, will not prevent the requesting Member from bringing the case to the further stages of dispute settlement procedures. If the requested 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 requesting Member may proceed directly to request the establishment of a panel. 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. In cases of urgency, the consultation period is only 20 days. Id.

<sup>90</sup> : See Articles 12, 16, 17, 20, 21, 22 of the *Dispute Settlement Understanding*. See supra note 1.

<sup>91</sup> : See Article 4(1) of the *Statute of the International Court of Justice*. See supra note 2.

<sup>92</sup> : See Article 17(2) of the *Dispute Settlement Understanding*. See supra note 1.

<sup>93</sup> : See Article 23(3) of the *Statute of the International Court of Justice*. See supra note 2.

required to reside at Geneva. They are only required “to be available at all times and on short notice” and “to stay abreast of dispute settlement activities and other relevant activities of the WTO”.<sup>94</sup> As a general rule, the Appellate Body proceedings will not exceed 60 days (in exceptional situations 90 days).<sup>95</sup> Compared with that of the ICJ where a case may drag on several years before settlement, this proceeding is quite short. However, all these above factors will not reduce the binding effect of the decisions made by the Appellate Body. Article 17(14) of the *Dispute Settlement Understanding* states: “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.”<sup>96</sup> It can be expected that no winning party will join the consensus to block the adoption of the Appellate Body report. In light of the enforcement under the WTO dispute settlement mechanism,<sup>97</sup> the Appellate Body report may bring much impact upon the governments of the disputing parties in their policy-making. Compared with this, the decision made by the ICJ cannot be regarded as so “straightforward”. Article 94(2) of the *Charter of the United Nations* provides that “If a party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement.”<sup>98</sup>

The fourth distinctive aspect of the WTO dispute settlement mechanism is its potential impact upon the developing country Members. Seldom can so many provisions particularly made for developing country Members be found in any other dispute settlement mechanisms as they are in the WTO dispute settlement mechanism. Of the total 27 articles of the *Dispute Settlement Understanding*, seven articles contain provisions according special and preferential treatment to the developing country Members.<sup>99</sup> Among them, Article 24 accords particular considerations to the least-developed country Members when they participate in the WTO dispute settlement mechanism. Although most of these provisions are procedural rather than substantial, they reflect a fact that the issue of developing countries is among the fundamental ones in the WTO. The other significance of the WTO dispute settlement mechanism, from the developing countries’ perspective, is its adjudicative nature. It is generally believed that the rule-based adjudicative method of dispute settlement in the WTO is more beneficial to developing countries than a negotiation-based and non-adjudicative one. In the view of professor John Jackson, “power positions” and “bargaining chips” play a great role in the negotiation-based dispute settlement process. Hence, they may not be of great interest to weaker developing country Members with lesser trade leverage.<sup>100</sup> Emphasis on negotiations is likely to lead some countries to use their relative political and economic strength to take advantage of this process at the expense of weaker countries, a situation

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<sup>94</sup> : See Article 17(3) of the *Dispute Settlement Understanding*. See supra note 1.

<sup>95</sup> : Id, see Article 17(5).

<sup>96</sup> : Id.

<sup>97</sup> : Upon the detailed analysis of enforcement under the WTO dispute settlement mechanism, see the fourth part in this section.

<sup>98</sup> : See supra note 2.

<sup>99</sup> : They are Article 3(12), Article 4(10), Article 8(10), Article 12(10),(11), Article 21(2),(7),(8), Article 24, and Article 27(2). See supra note 1.

<sup>100</sup> : John H. Jackson: *The World Trading System*, MIT, Cambridge, Massachusetts(1989), pp.85-86.

fundamentally incompatible with a system that places much importance on the law of rules. Rules tend to treat everyone in the same fashion. This is probably why smaller countries often support a legalistic system, as they perceive they will be treated more fairly under such a system.

The list of the distinctive features of the WTO dispute settlement mechanism can not be exhaustive. Nevertheless, the above mentioned four aspects are the most prominent ones. The WTO is a new institution. Its dispute settlement mechanism has made only a short history of no more than one decade and, still needs practice and improvement. However, the dispute settlement mechanism has already attracted both the developed and developing country Members. This is a positive tendency. The following study, starting from the inherent cohesion between GATT Articles XXII, XXIII and the *Dispute Settlement Understanding*, will further the review of how the WTO dispute settlement mechanism operates from the developing country perspective.

### 5.3.2. The inherent cohesion between GATT Articles XXII, XXIII and the *Dispute Settlement Understanding*

As part of the “single package”<sup>101</sup> accomplished during the Uruguay Round negotiations, the *Dispute Settlement Understanding* is an indispensable instrument to the legal frame of the World Trade Organisation.<sup>102</sup> GATT 1947 was originally designed to be set in the Charter of the International Trade Organisation(ITO), which would have provided detailed procedures for the dispute settlement.<sup>103</sup> Because of the failure of the ITO, Article XXII and Article XXIII of GATT 1947 had been used as the backbone of the GATT dispute settlement mechanism in the evolution from the power-orientation towards the rule-orientation for almost four decades until they were incorporated into the WTO dispute settlement mechanism. Meanwhile, the GATT jurisprudence developed through all these years’ panel deliberations. With only a few new additional elements, the DSU is just like the crystallised work of these four decades’ practice within the GATT jurisdiction. Therefore, it is only natural that there still remains some inherent cohesion between Articles XXII, XXIII of GATT 1947 and the *Dispute Settlement Understanding*. Article 3(1) of the DSU reflects such a cohesion, which states: “WTO Members affirm their adherence to the principles for the management of disputes heretofore applied under

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<sup>101</sup> : Article II:2 of the *WTO Agreement* states: “The agreements and associated legal instruments included in Annexes 1, 2 and 3(hereinafter referred to as ‘Multilateral Trade Agreements’) are integral parts of this Agreement, binding on all Members.” Article XII:1 states: “Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. *Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.*”(Emphasis added). See supra note 1. Therefore, upon the accession to the WTO, a State or a separate customs territory must accept the *WTO Agreement* and the Multilateral Trade Agreements as a “single package”.

<sup>102</sup> : According to Article 1 of the DSU, the rules and procedures of this Understanding apply to the disputes brought pursuant to the consultations and dispute settlement provisions of the *WTO Agreement*, the Multilateral Trade Agreements, Plurilateral Trade Agreements(which apply to those Members who have accepted them) and the DSU taken in isolation or in combination with any other agreement. See supra note 1.

<sup>103</sup> : See the detailed descriptions in the first paragraph of Part Three, Section one of this Chapter.

Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.”<sup>104</sup>

Article XXII:1 of GATT 1947 stipulates consultation as the precondition to start a dispute settlement process, which states that “each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.” However, GATT Articles provide no further detailed procedures for the parties to a dispute for their consultations.<sup>105</sup> Under such circumstances, paragraphs 1 to 9 of DSU Article 4 not only specify the obligations for WTO Members to seek consultations as the first step towards a settlement for their trade disputes, but also provide explicit time frames during the consultation stage.<sup>106</sup> In order to make the consultations more efficient, paragraphs 7 and 8 of DSU Article 4 set 60 days since the receipt of the request for consultations, and 20 days in urgent cases, as the time limits for consultation. This is more promptly, compared with that stipulated in the *1979 Understanding*.<sup>107</sup>

When a WTO Member other than the consulting Members considers that it has substantial trade interests in the consultations being held pursuant to Article XXII:1 of GATT 1994, GATS Article XXII:1,<sup>108</sup> or the corresponding provisions in other covered agreements,<sup>109</sup> such Member may notify the consulting Members and the DSB, within 10 days after the request for consultations is circulated among the WTO Members, of its desire to join in the consultations. If the request to join in the consultations is not accepted, the requesting Member is free to start another consultation process under

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<sup>104</sup> : See supra note 1.

<sup>105</sup> : Article XXII:2 of GATT 1947 provides the opportunity for the CONTRACTING PARTIES, at the request of either party, to consult with any party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1 of the same Article. Again, there are no detailed procedures for this kind of consultation.

<sup>106</sup> : For example, a WTO Member receiving a request for consultation is required to meet two deadlines: (a) It must respond to the request within 10 days of the receipt of such request; and (b) in that response, it must agree to consult within 30 days after receiving such request, or within a time frame mutually agreed. If the receiving Member does not respond within 10 days, or if it fails to start the consultation within 30 days after receiving such request or a period otherwise agreed, the Member requesting consultation may proceed immediately to request the DSB to establish a panel.

<sup>107</sup> : Rule 4 of the *1979 Understanding* only demands the contracting parties “to respond to requests for consultations promptly and to attempt to conclude consultations expeditiously, with a view to reaching mutually satisfactory conclusions”, but gives no time limits. See GATT BISD, 26th Supplement(1980), p.211.

<sup>108</sup> : This is the enlarged scope for consultations under the WTO jurisdiction, as GATT 1947 only regulated trade in goods. See supra note 1.

<sup>109</sup> : The corresponding consultation provisions in the covered agreements are *Agreement on Agriculture* (Article 19); *Agreement on the Application of Sanitary and Phytosanitary Measures*(Article 11[1]); *Agreement on Textiles and Clothing*(Article 8[4]); *Agreement on Technical Barriers to Trade*(Article 14[1]); *Agreement of Trade-Related Investment Measures*(Article 8); *Agreement on Implementation of Article VI of GATT 1994*(Article 17 [2]); *Agreement on Implementation of Article VII of GATT 1994*(Article 19 [2]); *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 compete bodies of each Agreement and as notified to the DSB. See supra note 1.

GATT Article XXII:1 and Article 4 of the DSU. Therefore, if a third party wishes to protect its own interests in a dispute settlement in progress, it can either request to join in the consultations of other Members, or start a new one with these disputing Members. This has never been so clearly stated either in GATT 1947 or in the *1979 Understanding*.

Article XXIII of GATT 1947 is the foundation of the GATT dispute settlement mechanism. Almost all the disputes start from the complaints of “nullification or impairment” of benefits or the impediment of attaining any objective under the General Agreement, which are usually caused by “(a)the failure of another contracting party to carry out its obligations under this Agreement, or(b)the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or(c)the existence of any other situation.”<sup>110</sup> These three scenarios are often described as the “violation” cases, “non-violation” cases, and other “situation” cases. However, the concept of “nullification or impairment” is not well defined in Article XXIII of GATT 1947. The *1979 Understanding*, for the first time, codifies it as “in cases where there is an infringement of the obligation assumed under the General Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment.”<sup>111</sup> The *Dispute Settlement Understanding* uses the similar words as those of the *1979 Understanding*. The only difference between them is that, under the WTO jurisdiction, the concept of “nullification or impairment” applies not only to the “General Agreement”, but to any one of the “covered agreements”.<sup>112</sup> This is because the WTO dispute settlement mechanism has a much wider regulating dimension than its predecessor did.

While examining the three factors which bring about “nullification or impairment” illustrated in GATT Article XXIII:1, we may find that the first factor is easy to define. Besides some exceptional measures like restrictions to safeguard the balance of payments or for security reasons which are permissible under the WTO agreements, a failure to carry out one’s obligations under the General Agreement or any other covered agreement is *ipso facto* a violation of rules and law under the GATT/WTO legal system. Under such a complaint, the respondent Member must show that the violation does not exist, otherwise it will lose the case. As for the second factor, however, the situation is a little complicated since the application of a measure may not conflict with the provisions of the General Agreement or other covered agreements, but still causes “nullification or impairment” of others’ benefits or impedes the attainment of any objective under a relevant agreement. This may also lead to much argument between the disputing parties. After the practice of panel deliberations under the GATT jurisprudence, the *Dispute Settlement Understanding* has distinguished these two kinds of situations as “violation” and “non-violation” cases.<sup>113</sup>

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<sup>110</sup> : Article XXIII:1 of GATT 1947. See *supra* note 1. Since GATT 1947 has been incorporated into GATT 1994, the application of the concept “nullification and impairment” is not limited to GATT 1947, but to all WTO agreements. See *supra* note 66.

<sup>111</sup> : *1979 Understanding*, Rule 5. See GATT BISD, 26th Supplement(1980), p.216.

<sup>112</sup> : *Dispute Settlement Understanding*, Article 3(8). See *supra* note 1.

<sup>113</sup> : The *Dispute Settlement Understanding*, as a whole, applies both to violation cases and non-violation cases. Article 26(1) of the DSU, however, is a special provision which applies to non-violation cases. See *supra* note 1. As for the burden of proof in the “violation” and “non-violation” cases, see Part Four of this Chapter.



In view of the broad scope of application of violation complaints, as well as the possible invocation of non-violation complaints, there is hardly any need for additional “situation” complaints pursuant to Article XXIII:1(c) of GATT 1947. The subsequent non-invocation of this vague and outdated dispute settlement clause in the GATT practice seems to vindicate this predicament. Because of the lack of predictable and justifiable standards for interpreting the concept of “situation” and for adjusting the rights and obligations under the WTO law on the basis of such a vague provision, we can anticipate that the WTO Members will continue not to invoke GATT Article XXIII:1(c) and not to use this inadequate legal basis for their dispute settlement purposes.<sup>114</sup>

To draw up the *Dispute Settlement Understanding* is only a meaningful way to clarify the existing provisions of GATT Articles XXII, XXIII, and to codify the decades’ practice of GATT dispute settlement. It is not designated to revise fundamentally the previous practice. Thus, the DSU has not settled those issues which puzzled the disputing parties even before the establishment of the WTO dispute settlement mechanism. Furthermore, new practice has also brought about new problems which equally merit our attention and need our intelligence to solve them.

### **5.3.3. Non-violation complaint: a “panacea” or a “Pandora’s box”?**

Under general international law, a violation by one State of its obligation established under international law in favour of another State or a community of States engages the international responsibility of the defaulting State for its “internationally wrongful act” and gives rise to “secondary” obligations and rights to legal remedies designed to ensure the fulfilment of the breached “primary” obligations and corresponding rights and to wipe out the consequences of the wrongful act.<sup>115</sup> Today, one can regard State responsibility as a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorised as illegal by reference to the rules establishing rights and duties. Shortly, the law of responsibility is concerned with the incidence and consequences of a State’s illegal acts, and particularly the payment of compensation for the loss caused. In the context of the WTO jurisdiction, the dispute settlement mechanism has been so structured as to deal with a Member’s complaint of the nullification or impairment of its benefits, or the impediment of its attainment of any objective under the WTO agreements, which is caused by another WTO Member’s failure to carry out its obligations. If the complained Member refuses to withdraw the measures concerned, the WTO implementation mechanism will either authorise the complaining Member to suspend its own concessions towards that complained Member or help it to get a compensation.<sup>116</sup>

<sup>114</sup> : Some scholars even suggest abolishing the “situation” complaints in the WTO dispute settlement mechanism. See Ernst-Ulrich Petersmann: *The GATT/WTO Dispute Settlement System—International Law, International Organisations and Dispute Settlement*, Kluwer Law International(1997), p.176.

<sup>115</sup> : Article 1 of the *Articles on the Origin of State Responsibility* states: “Every internationally wrongful act of a State entails the international responsibility of that State.” Article 3 further states: “There is an internationally wrongful act of a State when: (a)conduct consisting of an action or omission is attributable to the State under international law; and (b)that conduct constitutes a breach of an international obligation of the State.” As for the existence of a breach of an international obligation, Article 16 states: “There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.” See supra note 2.

<sup>116</sup> : See Article 22(*Compensation and the Suspension of Concessions*) of the *Dispute Settlement Understanding*. See supra note 1.

While the concept of a violation complaint and the legal obligations of the violating contracting party had well been defined in the GATT practice, the notion of a non-violation complaint and the legal obligations of the violating contracting party (and now the WTO Member) therein was and is still controversial in the State practice and legal doctrine.

After tariff reduction, through the first GATT negotiations, was achieved, the GATT drafters were considering how to preserve the negotiation results and prevent any backsliding. One of the measures established is to make the tariff concessions binding on all GATT contracting parties through Article II. Furthermore, all the contracting parties are required to keep their concessions under GATT Article I (*General Most-Favoured-Nation Treatment*) and Article III (*National Treatment on Internal Taxation and Regulation*). Any breach of one's obligation to keep the tariff concessions will be considered as *ipso facto* violating the GATT rules and, consequently, settled through Article XXIII:1(a) of GATT 1947. However, as pointed out previously, the GATT rules are part of the still-born ITO legal system, they are not designated to contain the provisions for all sorts of disputes. Therefore, the GATT drafters put Article XXIII:1(b) as a general provision to cope with those disputes not arising out of the breach of GATT rules, which is the legal source of the non-violation complaints.<sup>117</sup>

In the half-century GATT history, the dispute settlement mechanism had oscillated between two positions or tendencies---one that encouraged minimal use of non-violation complaints and another that advocated more extensive use of non-violation complaints.<sup>118</sup> The parties in a dispute had inconsistently but naturally swung between the two positions, depending on which position served their purposes more at a particular time. The ambiguity in concept has induced the GATT contracting parties and now the WTO Members to invoke the non-violation nullification or impairment provision when they face a situation in which another contracting party/Member country does not "technically" breach any obligation under the GATT/WTO regime, but still should be considered "responsible" for the action. Thus, to a complainant in this situation, the non-violation provision is a source of hope.<sup>119</sup>

In 1985, Nicaragua requested the establishment of a panel under Article XXIII of GATT 1947 to review certain trade measures implemented by the United States, which were alleged to have affected Nicaragua. The terms of reference made by these two countries explicitly instructed the Panel not to examine or judge the validity of or

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<sup>117</sup> : It is not surprising that concerns remained in the minds of the GATT 1947 drafters that GATT contracting parties might take actions to circumvent binding tariff reductions, whose integrity could not be fully protected by the agreement's general obligations. The fear was that this would dilute "reciprocity" between GATT contracting parties. In view of this potential risk, the drafters of GATT 1947 devised this expansive and ambiguous yet convenient provision. This "non-violation" provision entitled a contracting party---even in the absence of a breach of obligations by another contracting party---to argue that its benefits had been nullified or impaired under GATT 1947.

<sup>118</sup> : This tension seems to elucidate the reason why the GATT failed to develop an "extensive jurisprudence" of non-violation nullification or impairment. For a historical background of the GATT legal system, see two books written by Robert E. Hudec: *The GATT Legal System and World Trade Diplomacy* (second edition), Salem, New Hampshire: Butterworth Legal Publishers (1990), and *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, Salem, New Hampshire: Butterworth Legal Publishers (1993).

<sup>119</sup> : See Sung-joon Cho: *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?* Harvard International Law Journal, Vol.39, 1998, No.2, p.329.

motivation for the invocation of GATT Article XXI:(b)(iii).<sup>120</sup> In its complaint, Nicaragua stressed that “whether the invocation of Article XXI:(b)(iii) was justified or not, in either case benefits accruing to Nicaragua under the General Agreement had been seriously impaired or nullified as a result of the embargo. As recognised by the CONTRACTING PARTIES in the *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement(Article XXIII:2)*,<sup>121</sup> recourse to Article XXIII was permitted if nullification or impairment resulted from measures taken by other contracting parties whether or not these measures conflicted with the provisions of the General Agreement.”<sup>122</sup> As for the relationships between Article XXI and Article XXIII, Nicaragua further stated that “it had also been recognised both by the drafters of the General Agreement and by the CONTRACTING PARTIES that an invocation of Article XXI did not prevent recourse to Article XXIII.”<sup>123</sup>

The Panel noted that the embargo had virtually eliminated all opportunities for trade between these two countries and that it had consequently seriously upset the competitive relationship between the embargoed products and other directly competitive products. Under such circumstances, the Panel noted that Article XXIII:2 would give the CONTRACTING PARTIES essentially two options if the embargo were found to have nullified or impaired benefits accruing to Nicaragua under the General Agreement independent of whether or not it was justified under Article XXI. They could either (a) recommend that the United States withdraw the embargo (or, which would amount in the present case to the same, that the United States offer compensation), or (b) authorise Nicaragua to suspend the application of concessions and other obligations under the General Agreement towards the United States.<sup>124</sup>

When the Panel drafted its recommendations in this case, it came across such a dilemma: as for the first option, the Panel was not certain how effective its recommendations would be to the United States. It is clear from the GATT drafting history that in case of recommendations on measures not found to be inconsistent with the General Agreement, the contracting parties “are under no specific and contractual obligations to accept those recommendations”.<sup>125</sup> As for the second option, the Panel

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<sup>120</sup> : Under the title *Security Exceptions*, Article XXI:(b)(iii) states: “Nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations.” See supra note 1. This is the excuse of the United States for its embargo of trade between these two countries.

<sup>121</sup> : This is the Annex to the 1979 *Understanding*, see supra note 40. (Note added).

<sup>122</sup> : See *United States—Trade Measures Affecting Nicaragua* (hereinafter as *Nicaragua*), GATT Document, L/6053(1986), para.4.8.

<sup>123</sup> : *Id.*

<sup>124</sup> : Article XXIII:2 of GATT 1947 partly states: “If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate...If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorise a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances...” See supra note 1.

<sup>125</sup> : The report of the Sixth Committee during the Havana Conference notes with respect to the power of the Executive Board to make recommendations to member States in any matter arising under Article

observed that, under the embargo imposed by the United States, not only all imports from Nicaragua into the United States were prohibited, but also exports from the United States to Nicaragua were virtually eliminated. Under these circumstances, an authorisation to Nicaragua to suspend its trade concessions to the United States is almost meaningless. Therefore, the Panel concluded: "even if it were found that the embargo nullified or impaired benefits accruing to Nicaragua independent of whether or not it was justified under Article XXI, the CONTRACTING PARTIES could, in the circumstances of the present case, take no decision under Article XXIII:2 that would re-establish the balance of advantages which had accrued to Nicaragua under the General Agreement prior to the embargo."<sup>126</sup> In light of the foregoing considerations, the Panel decided not to propose a ruling in this case on the basic question of whether actions under Article XXI could nullify or impair GATT benefits of the adversely affected contracting party.

The presumed function of non-violation complaints is to prevent the circumvention of GATT provisions and negotiated tariff concessions through GATT consistent trade measures. It prevents a party from withdrawing a concession *de facto* instead of withdrawing it *de jure* in exchange for compensation or equivalent withdraws of concessions by affected parties. The *Nicaragua* case shows that the resolution of a non-violation case can not always avoid the loss of the affected party. This is particularly true when a dispute occurs between a small country like Nicaragua and an economic power like the United States.

The recent *Fuji—Kodak* dispute shows the continuance of the ambiguous concept of non-violation complaint under the WTO jurisdiction.<sup>127</sup> In this dispute, the United States argued that a series of Japanese government measures deterred access for US colour photographic materials to the Japanese market, nullified or impaired benefits accruing to the United States under the WTO agreements. This case again raised the question of whether a Member country could nullify or impair benefits of another without breaching any trade obligations. Furthermore, even if the Panel in this case believed that U.S. benefits were nullified or impaired without any violation by the Japanese government's regulations, it would be difficult for the Panel to make such a finding when the non-violation provisions in GATT 1994 and the GATS<sup>128</sup> themselves do not directly address

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93:1(b) or (c) of the *Havana Charter* (which corresponds to Article XXIII:1(b) and (c) of the General Agreement): "It was agreed that subparagraph 2(e) of Article 94 does not empower the Executive Board or the Conference to require a Member to suspend or withdraw a measure not in conflict with the Charter". The 1950 Working Party of the first GATT non-violation case *Australia Subsidy on Ammonium Sulphate* took the same view as to the powers of the CONTRACTING PARTIES. See GATT BISD, 2nd Supplement, p.195. In their 1982 Ministerial Declaration, the CONTRACTING PARTIES stated that the dispute settlement process could not "add to or diminish the rights and obligations provided in the General Agreement". See GATT BISD, 26th Supplement(1980), p.16.

<sup>126</sup> : See supra note 122.

<sup>127</sup> : See *Japan—Measures Affecting Consumer Photographic Film and Paper* (hereinafter as *Fuji—Kodak*), Request for Consultations by the United States(20 June 1996), WT/DS44/1, G/L/87; *Japan—Measures Affecting Distribution Services*, Request for Consultations by the United States(21 June 1996), WT/DS45/1, S/L/22.

<sup>128</sup> : Article XXIII of GATS uses the similar words as that of GATT Article XXIII:1(b), which states: "If any Member considers that any benefits it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU..." See supra note 1.

this issue.<sup>129</sup> As one scholar pointed out, “if the Japanese government argues that it has the sovereign right to implement any domestic policy as long as it observes the international obligations under international agreements like the WTO agreements, it is debatable whether the Panel should or could rule against Tokyo.”<sup>130</sup>

This persistent ambiguity of the non-violation provisions will inevitably lead to heavy burdens on future panels. Furthermore, the uncertainties surrounding the non-violation provisions will be exacerbated when some countries try to take advantage of this uncertainty by seeking to apply the non-violation concept to those newly emerging areas, such as environment and competition policies, which the current WTO law cannot effectively regulate. From the developing countries’ perspective, the non-violation clause may operate like a double-edged sword. On the one hand, developing country Members can complain, under the non-violation clause, of the WTO-consistent measures implemented by some developed country Members, particularly under the provisions of GATT Article XX(*General Exceptions*) and Article XXI(*Security Exceptions*), which, nevertheless, have already affected the exports of some developing country Members. On the other hand, the ambiguity in concept of those non-violation provisions will engage developing countries in many unexpected disputes. This is a disadvantage to many developing countries, both in economic and legal terms. If the complained measure is found to be permitted under the WTO rules, albeit the harmful effect on the exports of a developing country Member, the consequential result will fall back to the negotiations between the disputing parties for the possible compensation, which will put many developing countries in a disadvantageous position as the limited varieties of and heavy dependence on their exports make them almost have no “bargaining chips” to negotiate. This is again reminiscent of the significance of a rule-oriented trade system to many developing countries. In order to prevent the adverse effects of the non-violation nullification or impairment complaints and keep the WTO legal system still on a rule-oriented track, the WTO dispute settlement mechanism should be reformed in such a way as to restrict the invocation of non-violation provisions and delimit the non-violation concept on a more precise basis. Two options are available at the moment.

One is to encourage the WTO panels and the Appellate Body to apply the “technical agreements”<sup>131</sup> while interpreting the GATT provisions. The recent *Hormones* case indicates this tendency. The Appellate Body did not adhere to the GATT provisions only. While giving the conclusions in its report, the Appellate Body upheld the panel’s finding that the EC measures at issue were inconsistent with the requirements of Article 5(1) of the *Sanitary and Phytosanitary Agreement*.<sup>132</sup> This method will help the panel and the Appellate Body give their deliberations on a more exact basis and reduce the controversy on the references of the panel or Appellate Body report between the disputing parties.

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<sup>129</sup> : On 31 March 1998, the *Fuji—Kodak* Panel released its final report in which it rejected almost all the arguments made by the United States, both violation (under Article III:4 and Article X:1 of GATT 1994) and non-violation (under Article XXIII:1[b] of GATT 1994) claims. See *Japan—Measures Affecting Consumer Photographic Film and Paper*, Panel Report (distributed on 22 April 1998), WT/DS44.

<sup>130</sup> : See Sung-joon Cho, *supra* note 119, p.313.

<sup>131</sup> : Within the WTO legal system, there are some agreements, such as *Agreement on the Application of Sanitary and Phytosanitary Measures*, *Agreement on the Implementation of Article VII of the GATT 1994 (Valuation for Customs Purposes)*, designed to cope with those complicated technical problems. See *supra* note 1.

<sup>132</sup> : See *EC Measures Concerning Meat and Meat Products (Hormones)*, see *supra* note 77, para.253(1).

The other is to turn some non-violation nullification or impairment complaints into violation ones, or as some scholars advocate to *violationise* them.<sup>133</sup> Under the current WTO regime, if a measure regulated by another Member country does not explicitly commit a breach of obligation, the Member which feels deprived of its legitimate benefits by this measure can easily bring a non-violation nullification or impairment complaint.<sup>134</sup> However, even if a regulatory measure is on its face not inconsistent with general obligations under the WTO agreements, it still could have some import-restrictive impact on the exporters, thus violating the national treatment obligation in the form of a disguised discrimination.<sup>135</sup> In other words, many future complaints that may be raised under the non-violation provision can be interpreted as violation complaints if a panel or the Appellate Body fully exercises its interpretative power in the context of the general obligations embodied in the WTO agreements.<sup>136</sup>

After we have clarified the legal sources for different sorts of complaints under the WTO jurisdiction, an efficient enforcement mechanism is the last resort to ensure the disputes to move on a rule-based and well-defined way. However, the practice of the WTO dispute settlement mechanism in these years has made us aware that there still exist some confusing provisions and even loopholes in the *Dispute Settlement Understanding* on this issue.

#### **5.3.4. Enforcement under the WTO jurisdiction: compensation or retaliation?**

In the GATT practice, the CONTRACTING PARTIES could authorise a contracting party or parties to suspend the application to any other contracting party or parties of its(their) GATT concessions or other obligations as a sort of “sanction”, if they considered that the circumstances were serious enough to justify such “sanction”(Article XXIII:2 of GATT 1947). However, since there are no specific provisions in GATT 1947 as to what extent the suspension of concessions is permissible and how to evaluate the damages caused by the complained contracting party or parties, the CONTRACTING PARTIES would give their authorisation only as they “determined to be appropriate in the circumstances”(Article XXIII:2 of GATT 1947). In contrast to this cursory provision, the *Dispute Settlement Understanding* has at least three articles to ensure the

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<sup>133</sup> : See Sung-joon Cho, supra note 119, pp.333-335.

<sup>134</sup> : See Edwin Vermulst and Bart Driessen: *An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements*, Journal of World Trade, Vol.29, 1995, No.2, p.136.

<sup>135</sup> : If the panelists could read more carefully Article III:1 of GATT 1947, which requires the internal taxes, charges, laws and regulations of contracting parties “should not be applied to imported or domestic products so as to afford protection to domestic production”, there would have been fewer non-violation cases in the GATT history.

<sup>136</sup> : In the case *United States—Standards for Reformulated and Conventional Gasoline*(hereinafter as *Gasoline*), the Appellate Body concluded that even if the American baseline establishment rules fell within the terms of Article XX(g) of the General Agreement, they failed to meet the requirements of the chapeau of Article XX of the General Agreement and accordingly were not justified under Article XX of the General Agreement. Report of the Appellate Body(distributed on 29 April 1996), WT/DS2/AB/R, p.29. This is a good example that WTO juridical bodies can exercise their interpretative power to *violationise* at least some of the potential non-violation cases.

implementations of the adopted panel or Appellate Body report,<sup>137</sup> forming an almost complete structure to achieve the negotiated results.

Among the aforesaid three articles, Article 22 of the DSU is of paramount importance, which defines the purpose and preconditions for compensation and suspension of concessions. Article 22(3) is the core provision of the whole article, which deserves a close study, not only because of its importance but of its complexity. When a WTO Member is authorised by the DSB to suspend its concessions or other obligations towards another Member, it 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 non-violation nullification or impairment caused by the complaining Member(Article 22[3][a]). If the complaining Member 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 sector(s) under the same agreement(Article 22[3][b]). If that Member considers that it is not practicable or effective to suspend concessions or other obligations even with respect to other sector(s) under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement(Article 22[3][c]). In view of this broad applicability of WTO law, that Member is able to find that some sort of suspension of concessions or other obligations is always practicable or effective under this enforcement mechanism.

Then, there are several questions which need to be clarified before a WTO Member wishes to succeed in invoking Article 22 of the DSU to protect its trade interests. The first question is the order of invoking these provisions contained in Article 22(3). Although there is no clear statement in this Article that these provisions should be invoked in a hierarchical way, one can still infer from the general jurisprudence that they are. In fact, one of the early disputes arbitrated under the WTO jurisdiction *European Communities---Regime for the Importation, Sale and Distribution of Bananas---Recourse to Arbitration by the European Communities Under Article 22(6) of the DSU*(hereinafter as *Bananas*) has already given us a sound reasoning about this issue. In their final decisions, the arbitrators stated: “We believe that the basic rationale of these disciplines and procedures(of Article 22[3] of the DSU) is to ensure that the suspension of concessions or other obligations across sectors or across agreements(beyond those sectors or agreements under which a panel or the Appellate has found violations) remains the exception and does not become the rule. In our view, if Article 22(3) of the DSU is to be given full effect, the authority of Arbitrators to review upon request whether the principles and procedures of subparagraphs(b) or (c) of that Article have been followed must imply the Arbitrators’ competence to examine whether a request made under subparagraph(a) should have been made—in full or in part—under subparagraphs(b) or (c). If the Arbitrators were deprived of such an implied authority, the principles and procedures of Article 22(3) of the DSU could easily be circumvented. If there were no review whatsoever with respect to requests for authorisation to suspend concessions made under subparagraph(a), Members might be tempted to always invoke that subparagraph in order to escape multilateral surveillance of cross-sector suspension of

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<sup>137</sup> : They are Article 21(*Surveillance of Implementation of Recommendations and Rulings*), Article 22 (*Compensation and the Suspension of Concessions*) and Article 23(*Strengthening of the Multilateral System*). See supra note 1.

concessions or other obligations, and the disciplines of the other subparagraphs of Article 22(3) of the DSU might fall into disuse altogether.”<sup>138</sup> The arbitrators are correct in this analysis. If Article 22(3) of the DSU is used at a random way, it will bear a heavy burden on both of the disputing parties and the dispute settlement body as well to clarify which sector(of the same agreement) or agreement is most relevant to the compensation. This is a prolonging and, in some instances, arbitrary process. Under this circumstance, the author of this thesis is with such a view that the same reasoning should apply when a WTO panel or the Appellate Body makes the recommendations and rulings in its report to the DSB to authorise the suspension of concessions or other obligations to an applying Member.

The second question concerning Article 22 of the DSU is the nature of the suspension of concessions or other obligations in a non-violation nullification or impairment dispute. Article 22(1) of the DSU states that “compensation and 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...”<sup>139</sup> The point here is that, when a non-violation nullification or impairment complaint is raised, there is no obligation for the complained Member to “conform with”, but only an obligation to negotiate with the complaining Member for an appropriate compensation to redress the “nullification or impairment”. Since the benefits of the complaining Member are nullified or impaired, or the attainment of any objective of the WTO agreements is impeded, by the measures of the complained Member, which might not be in conflict with the provisions of the WTO agreements, there are no obligations upon the complained Member to withdraw these measures concerned. In other words, if an appropriate compensation from the complained Member is not available in a non-violation nullification or impairment dispute, the suspension of concessions or other obligations towards it by the complaining Member is *de facto* a sort of retaliation.<sup>140</sup>

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<sup>138</sup> : *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22(6) of the DSU*(hereinafter as *Bananas*), Decision by the Arbitration(distributed on 9 April 1999), WT/DS27/ARB, para.3.7.

<sup>139</sup> : We can find the similar words in Article 3(7) of the DSU, which states: “...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 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 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-a-vis the other Member, subject to authorisation by the DSB of such measures.” See supra note 1.

<sup>140</sup> : The nature of a suspension of concessions or other obligations in a violation nullification or impairment dispute is a little complicated. Since the measures of the complained Member has breached its general obligations under the WTO agreements, the author of this thesis takes the suspension of concessions or other obligations in such circumstances as a sort of compensation. For example, when someone has committed a criminal offence that caused personal injury , loss, or damage, and he has been convicted for his offence or it was taken into account when sentencing for another offence, the court may



Apart from these aforesaid conceptual questions, there is another “sequencing” problem which may bring about disputes in the implementation of adopted reports or arbitration awards. Article 22 of the DSU allows the complaining Member in a dispute to suspend its concessions or other obligations when the complained Member has failed to comply with the decisions of an adopted report or arbitration award. However, this article is silent on two critical points: (a) who determines whether the complained party has failed to comply; and (b) when the right to suspend (or retaliate) arises.

According to Cherise Valles and Brendan McGivern, these two issues were the essential points in the dispute between the United States and the European Communities over the implementation of the *Bananas* decision. The United States claimed that the EC had failed to implement the *Bananas* rulings and recommendations, and therefore sought WTO authorisation to suspend its concessions or other obligations towards the European Communities and its member States. The EC argued strongly that the United States had not followed the “sequencing” principle required by the *Dispute Settlement Understanding*. In the view of the European Communities, a multilateral determination of non-conformity had to precede any request to suspend concessions or obligations. Similar arguments occurred in some later cases like the Canada-Australia dispute over salmon, the US-Australia dispute over leather subsidies, and the two cases between Canada and Brazil on aircraft subsidies.<sup>141</sup>

These arguments originate from the ambiguous wording of Article 21(5) of the DSU, which states: “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.”<sup>142</sup> The point here is that the *Dispute Settlement Understanding* does not say clearly whether the dispute settlement procedure mentioned in Article 21(5) is a special one. In other words, it is not stated in the DSU whether the preliminary procedures before the dispute is referred to the panel could be eliminated, and how to deal with this panel report if the complained party, in the view of the complaining party, fails again to comply with the recommendations and rulings after the panel report is circulated. Thus, there will presumably be such arguments as whether the consultation process, as stipulated in Article 4 of the DSU, should precede this dispute settlement procedure, and whether the panel report concluded under this procedure could be appealed. In order to avoid unnecessary prolongation of the dispute settlement procedures, Article 21(5) should be precise on this point.

The other point concerning these arguments is whether the adoption of the panel report under this dispute settlement procedure is the precondition for the complaining Member to request from the DSB the suspension of concessions and other obligations.

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make a *compensation order* requiring the offender to pay compensation to the person suffering the loss (with interest, if need be). See *Oxford Dictionary of Law*, Oxford University Press (Fourth edition), 1997, p.90.

<sup>141</sup> : See Cherise M. Valles and Brendan P. McGivern: *The Right to Retaliate under the WTO Agreement-- The “Sequencing” Problem*, Journal of World Trade, Vol.34, 2000, No.2, p.63.

<sup>142</sup> : See supra note 1.

Article 22(2) of the DSU only states: “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 expiration 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 expiration of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorisation from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.”<sup>143</sup> If the answer to this question of precedence is positive, which means that the complaining Member cannot request suspension of concessions and other obligations during this dispute settlement procedure and, even in another “reasonable period” after the adoption of the panel report concluded under this procedure, then the complained Member could possibly make successive minor changes to its implementing measures and start such a dispute settlement procedure one after another. This could result in an endless loop of litigation. In the view of the author of this thesis, the right for the complaining Member to suspend (or retaliate) should start 20 days after the expiration of the reasonable period if no satisfactory compensation has been agreed. If the dispute is referred to the panel according to Article 21(5) of the DSU, this right should start after the Panel report is adopted without the possibility of being appealed. In other words, this sort of review is only limited to the panel (if possible the original panel) and can be invoked only once. If the disputing parties still cannot agree on the compliance of the measures implemented by the complained party with the recommendations and rulings of the adopted panel or Appellate Body report, the complaining party can suspend its concessions or other obligations towards the complained party according to its understanding of the panel or Appellate Body report. In that case, the complained party may start a new dispute settlement procedure if it considers that its benefits are nullified or impaired in this suspension of concessions or obligations.

Article 22(4) of the DSU states that “the level of suspension of concessions or other obligations authorised by the DSB shall be equivalent to the level of nullification or impairment.” In other words, the level of suspension of concessions is counted in quantity, not in consequence, of the nullification and impairment. This builds into the WTO a considerable asymmetry of compensatory/suspensory activity among WTO Members. As of writing, the top three countries in terms of import/export capacity are the United States, Germany and Japan with the annual value of US\$2040,1052, and 859 billions respectively.<sup>144</sup> A small country, especially a small developing country will notice that the mutually agreed compensation or the authorised suspension of concessions or obligations is not likely to have much impact upon a large one. Although WTO Members are permitted to withdraw from this organisation if it considers that it cannot fulfil the obligations imposed upon it by the WTO agreements,<sup>145</sup> the practice of the GATT and the WTO indicates that no one wishes to isolate itself from the global trade

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<sup>143</sup> : Id.

<sup>144</sup> : cf. <http://www.jfdaily.com.cn/epublish/gb/paper39/734/class.../hwz389457.ht>

<sup>145</sup> : See Article XV of the *WTO Agreement* and Article XXIII:2 of GATT 1994. See supra note 1.

community. This, again, suggests that it is important to recognise a treaty obligation to perform and not just to compensate or endure suspension of concessions in maintaining an orderly international trade relationship.

Under the WTO jurisdiction, the enforcement mechanism applies not only to the implementations of the adopted panel or Appellate Body reports, but to the arbitration awards. Article 25(4) of the *Dispute Settlement Understanding* states that “Article 21(*Surveillance of Implementation of Recommendations and Rulings*) and 22(*Compensation and the Suspension of Concessions*) of this Understanding shall apply *mutatis mutandis* to arbitration awards.”(Notes added).<sup>146</sup> Therefore, before we move on to study the nature of the WTO panels and Appellate Body, it is a meaningful way to review first the WTO arbitration procedures.

### 5.3.5. Arbitration: to be or not to be?

International commercial arbitration plays an important role in resolving a multitude of international trade disputes involving States and State entities. Notwithstanding the confidentiality accorded to many arbitration awards,<sup>147</sup> there is still substantial evidence that arbitration has in general experienced sustained growth and popularity and that States and State enterprises have frequently been parties to such actions.<sup>148</sup> Arbitration as a method of settling disputes combines elements of both diplomatic and judicial procedures. It depends for its success on a certain amount of good-will between the parties in drawing up the *compromis* and constituting the tribunal, as well as actually enforcing the award subsequently made. A large part depends upon negotiating processes. On the other hand, arbitration is an adjudicative technique in that the award is final and binding and the arbitrators are required to base their decision on law.<sup>149</sup>

The legal basis for the invocation of arbitration under the WTO jurisdiction is Article 25 of the DSU. As an alternative means contained in the dispute settlement mechanism, arbitration can be used to facilitate the solution of certain disputes which concern issues “that are clearly defined by both parties”(Article 25[1] of the DSU). Following this language, an arbitration under the WTO jurisdiction is usually raised upon these following factors. Firstly, the issues brought for arbitration are normally those simple ones in terms of the fact finding and the standard of review. One of the early disputes resorting to the WTO arbitration mechanism, the *Bananas* dispute, involves the request of the United States to the Dispute Settlement Body to authorise suspension of the application to the European Communities and its member States of US tariff concessions and related obligations under GATT 1994, covering trade in an amount of US\$520

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<sup>146</sup> : See supra note 1.

<sup>147</sup> : Most arbitration awards are confidential and not systematically published(with the exception of the Iran-U.S. Claims tribunal decisions). Some parties, however, consent to such publication or, in many cases, consent is given on the condition that the parties’ identities are extracted.

<sup>148</sup> : Gerhard Wegen and Thomas Welch in their article *The Role of International Commercial Arbitration, in Particular of the International Chamber of Commerce, in Dispute Settlement in International Economic Law*(contained in the book *Adjudication of International Trade Disputes in International and National Economic Law*, edited by Ernst-Ulrich Petersmann and Gunther Jaenicke, University Press Fribourg Switzerland, 1992) compared the number of arbitration in 1977(205 arbitration cases) and in 1989(309 arbitration cases) administered by the International Chamber of Commerce(ICC). See p.385, note 2.

<sup>149</sup> : See the definition of arbitration in the *Yearbook of the ILC*, 1953, Vol. II, p.202.

million.<sup>150</sup> Prior to this arbitration process, the WTO Appellate Body in the same dispute had already concluded that “the European Communities has not succeeded in rebutting the presumption that its breaches of GATT 1994 have nullified or impaired the benefits of the United States”.<sup>151</sup> Thus, there was not much contending upon those facts as whether the European Communities regime for the importation, sale and distribution of bananas had breached its obligations under GATT 1994 and whether the United States had suffered from this breach. Secondly, recourse to arbitration should be subject to a mutual agreement between the disputing parties which shall agree on the procedures to be followed, the choice of arbitrators, the location of arbitration and the time limits (Article 25[2] of the DSU). If there is no such agreement, any one of the contending parties may start a formal dispute settlement process.<sup>152</sup> Thirdly, like the panelists and the Appellate Body members, arbitrators act in their individual capacity, not as government representatives. They should be neutral to the case at hand. Arbitrators may be nationals of the disputing parties.

The advantages of the arbitration are easily to be discerned. Promptness is the first one among them. Compared with that of a formal dispute settlement process,<sup>153</sup> the time frame for an arbitration is generally shorter. This is because the arbitration procedures are normally decided by the disputing parties beforehand in order to make the arbitration proceed more expeditiously.<sup>154</sup> One can presume that it is the common wish that a dispute should be settled the sooner the better. As for a special arbitration under the WTO jurisdiction concerning the level of suspension of concessions or other obligations, or the principles and procedures set forth in Article 22(3) (order of the suspension of concessions or other obligations), the time limit is only 60 days.<sup>155</sup>

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<sup>150</sup> : The arbitrators decided in their decisions that the level of nullification or impairment suffered by the United States was US\$191.4 million per year. Accordingly, the arbitrators decided that the suspension by the United States of the application to the European Communities and its member States of tariff concessions and related obligations under GATT 1994 covering trade in a maximum amount of US\$191.4 million per year would be consistent with Article 22.4 of the DSU. See supra note 138, para.8.1.

<sup>151</sup> : See *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body (distributed on 9 September 1997), WT/DS27/AB/R, para.255(x).

<sup>152</sup> : Here, the author of this thesis uses the concept “formal dispute settlement process” to refer to a complete dispute settlement process, from consultations to panel examination or even appellate review.

<sup>153</sup> : According to Article 20 of the DSU, 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. Since this is only a general rule. The fact in real situations is that the time for deliberating the panel or Appellate Body report is frequently extended because of the complications of the issues.

<sup>154</sup> : This conclusion is based on the fact that arbitration under the WTO jurisdiction is usually limited in “issues that are clearly defined by both parties” (Article 25[1] of the DSU). In reality, arbitration is seldom speedier than litigation. According to Gary B. Born, outside of some specialised contexts, disputes often require between 18 and 36 months to reach a final award, with only limited possibilities for earlier summary dispositions. Procedural mishaps, challenges to arbitrators, and litigation over jurisdictional issues in national courts can delay even these fairly stately timetables, as can crowded diaries of busy arbitrators and counsels. See Gary B. Born: *Planning for International Dispute Resolution*, *Journal of International Arbitration*, Vol.17, 2000, No.3, pp.66-67.

<sup>155</sup> : Article 22(6) states: “...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 authorisation 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 appointed by the Director-General and shall be completed within

The second advantage is the flexibility in an arbitration process. Here, the principles of the Modal Law on International Commercial Arbitration(hereinafter as Modal Law) adopted by the United Nations Commission on International Trade Law(UNCITRAL), in the view of the author of this thesis, are relevant in the case of the absence of relevant provisions in Article 25 of the DSU.<sup>156</sup> Simple process means time-saving, money-saving<sup>157</sup> and even face-saving. In some cases, the arbitrators are the original panelists(Article 22[6] of the DSU). They are more familiar with the issues in dispute than others. Therefore, they are in a better position to conciliate the disputing parties to accept the decisions of the arbitration award. More importantly, since the procedures for arbitration under the WTO jurisdiction are usually simple, this can save time to reduce the damage which might have occurred during a formal dispute settlement process. This is very important in some circumstances because some commercial opportunities may never come again.

The third advantage is the expertise of the arbitrators. WTO agreements consist of different portions which cover different areas of international trade. Some of them, like sanitary and phytosanitary, customs valuation, are very “technical”, which are understandable only to a handful of people who are specialised in those areas. To select those experts for one particular arbitration is an expedient way to settle the trade dispute. Although the Appellate Body members are selected from the persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally(Article 17[3] of the DSU), they may not have a good command of one particular area. Furthermore, the Appellate Body division works in rotation, which means that the disputing parties cannot choose the Appellate Body members. On this point, the selection of arbitrators is similar to the practice to select panelists.

Last but not least, the arbitration award is final and binding on both parties to a dispute.<sup>158</sup> It cannot be, like a panel report, appealed. If either of the parties to this proceeding refuses to implement the arbitration award, it will face the same punishment as to the complained party when it refuses to implement the adopted panel or Appellate Body report, that is, recommended by the DSB, either to withdraw its actions or to compensate the suffered party, or to meet the suspension of concessions by the suffered party under the authorisation of the DSB. This is a quite unique feature compared to the implementation mechanism designed for the arbitration awards issued by other international commercial arbitration tribunals. In the international commercial arbitration sphere, the enforcement of an arbitration award is always a subtle issue, which, to a

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60 days after the date of expiration of the reasonable period of time...”(Original note omitted). See *supra* note 1.

<sup>156</sup> : Adopted by UNCITRAL on 21 June 1985.

<sup>157</sup> : Gary B. Born views this issue in a different way. He thinks that international commercial arbitration is seldom cheap. The parties are required(subject to later allocation of arbitration costs by the tribunal) to pay the fees of the arbitrator(s) and, usually, an arbitration institution. The parties will also have to pay the logistical expenses of renting hearing rooms, travel to the arbitration sites, lodging, and the like. See Gary B. Born, *supra* note 154, p.66. In the view of the author of this thesis, not all of these situations will occur in a WTO arbitration process since there are not such possibilities for the disputing parties to choose the site other than Geneva for their arbitration and, the costs for arbitration under the WTO dispute settlement mechanism are unlikely as high as those charged in most international commercial arbitration tribunals.

<sup>158</sup> : Article 25(3) of the DSU states: “...The parties to the proceeding shall agree to abide by the arbitration award...” See *supra* note 1.

certain extent, reduces the application of arbitration. This issue was partly resolved when the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958* (the *New York Convention*) was made, under which each participant agrees to recognise written agreements to arbitrate, to recognise and enforce foreign (or international) arbitration awards, and to limit the circumstances under which awards may be challenged.<sup>159</sup> Nevertheless, the enforcement of an arbitration award in a non-participant of the *New York Convention* is still subject to either the local law which the arbitration award is relied upon, or the bilateral agreement. In contrast, the WTO legal system provides the arbitration under its jurisdiction a “pro-enforcement” regime.

Since there are no similar provisions concerning arbitration in GATT 1947, the *Dispute Settlement Understanding* provides only some guidelines which the arbitrators need to elucidate and develop in each specific case. In the *Bananas* arbitration, the arbitrators first needed to define the scope of the discretion granted under Article 22(3) of the DSU to a WTO Member seeking the authorisation to suspend its concessions or other obligations and, then to distinguish it from the scope of the authority of arbitrators to review, pursuant to paragraphs 6 and 7 of Article 22 of the DSU, the choice made by that Member. Article 22(7) of the DSU authorise the arbitrators to examine claims concerning the principles and procedures in suspending concessions or other obligations set forth in Article 22(3) of the DSU in its entirety, whereas Article 22(6) of the DSU seems to limit the competence of arbitrators in such examination to cases where a request for authorisation to suspend concessions or other obligations is made under subparagraphs (b) or (c) of Article 22(3) of the DSU.<sup>160</sup>

The other concern from those who may put their dispute for arbitration is the collegiality of the arbitration awards. Similar to the selection of panelists, but different from the formulation of an Appellate Body division, arbitrators, in most cases,<sup>161</sup> are selected by the parties to the proceeding or appointed by the Director-General randomly. Whether or not the precedent arbitration awards will be respected by the later arbitrators is still not clear as, so far, there is not much such practice recorded. In the *Bananas* arbitration, one of the US arguments is, as a time base for the EC to allocate MFN tariff

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<sup>159</sup> : Article III of the (*New York Convention*) states: “Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” cf. <http://www.adr.org/rules/international/990819ae.html>

<sup>160</sup> : The arbitrators believe that there is no contradiction between Article 22(6), (7) and Article 22(3) of the DSU, and that these provisions can be read together in a harmonious way. Their reasoning for these conclusions is that if a panel or the Appellate Body report contains findings of WTO-inconsistencies only with respect to one and the same sector in the meaning of Article 22.3(f) of the DSU, there is little need for a multilateral review of the choice with respect to goods or services or intellectual property rights, as the case may be, which a WTO Member has selected for the suspension of concessions subject to the authorisation of the Dispute Settlement Body. However, if a WTO Member decides to seek authorisation to suspend concessions under another sector, or under another agreement, outside the scope of the sectors or agreements to which a panel’s findings relate, paragraphs (b)-(d) of Article 22(3) of the DSU provide for a certain degree of discipline such as the requirement to state reasons why that Member considers the suspension of concessions within the same sector(s) as that where violations of WTO law were found as not practicable or effective. See supra note 138, para.3.6.

<sup>161</sup> : In some exceptional circumstances, arbitration may be carried out by the original panel, if members are available. See Article 22(6) of the DSU. See supra note 1.

quota to shares to substantial suppliers, whether the 1994-1996 period is “restricted” or “unrepresentative” for purposes of Article XIII of GATT 1994.<sup>162</sup> As a first step, the arbitrators cited the panel deliberations in the disputes *European Communities—Regime for the Importation, Sale and Distribution of Bananas*,<sup>163</sup> *EEC—Restrictions on Imports of Apples from Chile*,<sup>164</sup> *Japan—Restriction on Imports of Certain Agricultural Products*.<sup>165</sup> Then, the arbitrators concluded that “while Members have a degree of discretion in choosing a previous representative period, it is clear in this case that the period 1994-1996 is not a ‘representative period’”. The arbitrators even referred to the Appellate Body findings in the *Bananas* case that the Lome waiver did not justify EC’s inconsistencies with Article XIII of GATT 1994.<sup>166</sup> Since the decisions made by the arbitrators cannot be appealed, the demand for qualified arbitrators and the greatest degree of clarity and collegiality of the arbitration awards should be high.<sup>167</sup>

In view of the promptness, expertise and flexibility, arbitration should attract WTO Members to deal with their disputes in some circumstances, especially when the disputed issues are more “technical” than legal, and both parties wish to solve their dispute in a friendly way. However, since there are only limited provisions in the DSU which are designated for arbitration, WTO Members will possibly meet some “technical problems” as mentioned before in their future arbitration. Among those feasible problems, one is concerning the applicable law for the arbitrators to rely upon. One of the major features of international commercial arbitration is that the parties to a dispute are free to choose the applicable substantive law.<sup>168</sup> If they have failed to do so, either because that point has been forgotten to be considered by them when negotiating the contract or because no agreement could be reached, the arbitrators, it is felt, ought to apply that particular national substantive law which, with some certainty, could have been expected by the disputing parties. Different rules exist as to which law should be applied by the arbitrators if the parties have not chosen it in their contract. The Modal Law provides that

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<sup>162</sup> : Article XIII:2(d) of GATT 1994 provides that if a Member decides to allocate a tariff quota, it may seek agreement on the allocation of shares in the quota with those Members having a substantial interest in supplying the product concerned. In the absence of such an agreement, the Member “shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a *previous representative period*, of the total quantity or value of imports of the products, due account being taken of any *special factors* which may have affected or may be affecting the trade in the product”. (Emphasis added). See supra note 1.

<sup>163</sup> : *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Report of the Panel, WT/DS27/R/ECU; WT/DS27/R/GTM; WT/DS27/R/HND; WT/DS27/R/MEX; WT/DS27/R/USA, para.7.68.

<sup>164</sup> : *EEC—Restrictions on Imports of Apples from Chile*, Report of the Panel(adopted on 10 November 1980), GATT BISD, 27th Supplement(1981), p.98.

<sup>165</sup> : *Japan—Restrictions on Imports of Certain Agricultural Products*, Report of the Panel(adopted on 22 March 1988), GATT BISD, 35th Supplement(1989), paras.5.1.3.7.

<sup>166</sup> : The Appellate Body stated: “In view of the truly exceptional nature of waivers from the non-discrimination obligations under Article XIII, it is all the more difficult to accept the proposition that a waiver that does not explicitly refer to Article XIII would nevertheless waive the obligations of that Article. If the CONTRACTING PARTIES had intended to waive the obligations of the European Communities under Article XIII in the Lome Waiver, they would have said so explicitly.” See supra note 151, para.187.

<sup>167</sup> : It seemed that the arbitrators in the *Bananas* arbitration were aware of this demanding. They stated in their decisions that “given that our own decisions cannot be appealed, we considered it imperative to achieve the greatest degree of clarity possible with a view to avoiding future disagreements between parties.” See supra note 138, para.2.12.

<sup>168</sup> : See Article 28(1), first sentence of Modal Law.

that law should govern the contract and consequently be applied by the arbitrator, which is indicated by the conflict of law rules which he considers applicable.<sup>169</sup> According to Article II:2 of the *WTO Agreement*, the WTO agreements are binding on all Members. In the absence of otherwise choice, the task leaving for the arbitrators is to seek the legal basis for their decision from the relevant WTO agreement(s). If the disputing parties are incidentally both participants of another international agreement, which conflicts with the WTO agreements, then Article 30 of the *Vienna Convention on the Law of Treaties* is available for the resolution of such a conflict. Article 30(3) states: “When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty”. Article 30(4) further states: “When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State Party to both treaties and a State Party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations”<sup>170</sup> Thus, when a conflict of law arises, the arbitrators need to clarify not only the WTO agreements, but also those non-WTO agreements, of which the disputing parties are both participants.

The other “technical problem” which will puzzle those who wish to settle their disputes through arbitration is the procedures. Although Article 25 of the DSU has already provided some provisions on this issue, the aforesaid cases have demonstrated that they are still insufficient. At present, two options are available in practice. One is to enlarge Article 25 of the DSU to specify the arbitration procedures under the WTO jurisdiction. Presumably, it may draw some provisions from the existing international arbitration law. The other is the reference in Article 25 of the DSU to the invocation of Modal Law. Considering the complexities of the amendment mechanism in the WTO regime, one could imagine that neither of these two options will be easily adopted. In the view of the author of this thesis, WTO Members should be careful in choosing whether they will put their disputes to the panelists or arbitrators, especially at the moment, as there are not sufficient provisions regulating the arbitration process. In contrast to the sparse language about arbitration, the detailed provisions on the panel examination and appellate review in the DSU indicate that these procedures seem more attractive and manageable.

## **Section Four The Function and Vocation of the WTO Panel Process**

### **5.4.1. The legacies from and improvements upon the GATT panel process**

While referring to the WTO dispute settlement mechanism, one cannot begin to appreciate the way in which WTO panels approach their tasks without analysing the role of panels in the operation of the GATT system. The GATT dispute settlement mechanism was concerned with two main objectives. One is to ensure that the commercial bargains struck in successive rounds of trade negotiations were not upset by the actions of

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<sup>169</sup> : See Article 28(2) of Modal Law.

<sup>170</sup> : See supra note 2.



individual contracting parties.<sup>171</sup> The other is to ensure contracting parties' observance of the general obligations that governed their regulation of trade.<sup>172</sup> Thus, GATT 1947 not only incorporated the results of the seven rounds of trade negotiations, but set out an array of rules which were designed to protect the integrity of the concessions that had been negotiated, and to protect the trading interests of the contracting parties generally.

It warrants noting that GATT 1947 neither used the word "panel" nor prescribed procedures to govern panel proceedings.<sup>173</sup> Rather, the initial practice of the CONTRACTING PARTIES was either to have the Director-General issue a ruling on the question put to him, or to refer the matter to a working party comprising of the disputants and other interested parties. The use of panels in place of working parties only emerged at the Seventh Session of the CONTRACTING PARTIES(1955), when Norway advanced a claim of nullification or impairment against the Federal Republic of Germany. Notwithstanding the disputants' concurrence on the establishment of a "working party", the Director-General noted that it had been agreed to establish a "panel to hear the various complaints that might be referred to it by the CONTRACTING PARTIES".<sup>174</sup>

One important feature of the GATT panel process was that the parties to the dispute played a decisive role in the whole process. This reflected GATT's diplomatic and negotiated characteristics. The disputants made agreements on the choice of panelists, and on the terms of reference for the panels. This, to a certain extent, resembles the conciliation in terms of the procedures of dispute settlement and the finality of the panel report. Since the CONTRACTING PARTIES made decisions by consensus, the losing party had within its means, subject to institutional pressure of course, the power to block the adoption of a panel report. Thus, GATT panels normally would be mindful of the fact that their reports would become the subject of scrutiny, not only by disinterested contracting parties but by the parties to the dispute and third parties who had participated in this proceeding. "The desire to maximise the report's prospects for acceptance could

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<sup>171</sup> : The first paragraph of GATT Article XXVIII(*bis*) states: "The contracting parties recognise that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and concluded with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The CONTRACTING PARTIES may therefore sponsor such negotiations from time to time." See supra note 1. Before the Uruguay Round negotiations, the other seven rounds of multilateral trade negotiations under the GATT auspices are Geneva(1947), Annecy(1949), Torquay(1950), Geneva(1956), Dillon(1960-61), Kennedy(1962-67), Tokyo(1973-79). See John H. Jackson, supra note 29, pp.15-22.

<sup>172</sup> : For example, the Working Party on the *Brazilian Internal Taxes* dispute found that Article III:2 of GATT 1947 applied "whether or not the contracting party in question had undertaken commitments in respect of the goods concerned." See GATT BISD, 2nd Supplement(1949), p.181. Thus, benefits under Article III and other Articles accrued regardless of whether there is a negotiated expectation of market access.

<sup>173</sup> : Even Article XXIII:2 of GATT 1947 only states that a dispute "may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate." See supra note 1.

<sup>174</sup> : See Robert Hudec: *The GATT Legal System and World Trade Diplomacy*, see supra note 118.

be expected to motivate a panel and, if so, would seem to restrain the panel from being overly assertive in the hope of avoiding an adverse reaction from the losing party.”<sup>175</sup>

The WTO dispute settlement mechanism adopts the basic form of the GATT panel process, but goes much further along the rule-oriented direction. The terms of reference for a WTO panel are clearly stated in Article 7(1) of the *Dispute Settlement Understanding*.<sup>176</sup> Although the parties to the dispute may agree otherwise within 20 days from the establishment of the panel,<sup>177</sup> this is only a secondary choice and based on a mutual agreement. Following the procedure for selection of panelists in GATT practice,<sup>178</sup> the WTO Secretariat maintains an indicative list of persons, from which panelists may be chosen (Article 8[4] of the DSU). This list consists of those 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 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 (Article 8[1] of the DSU). Therefore, the nature of this list is prescriptive. In other words, the demand for a panelist is very high. If the disputing parties can not agree on the nominations of panelists, either party may request the General-Director for help. This has happened on occasion. In the case *Argentina---Measures Affecting Textiles and Clothing*, for example, the panel was established and the terms of reference were agreed upon on 16 October 1997, but the parties to the dispute were unable to agree on the choice of panelists. On 9 December, the European Communities requested the Director-General to determine the composition of the panel, which he did on 18 December.<sup>179</sup> As a general rule, citizens of WTO Members whose governments<sup>180</sup> are parties to the dispute or interested third parties may not serve on a panel concerned with this dispute, unless the parties to the dispute agree otherwise (Article 8[3] of the DSU).

One of the new elements in the *Dispute Settlement Understanding* is Article 8(10), which states: “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.” This, in the view of the author of this thesis, is more nominal than substantial, since “panelists shall serve in their

<sup>175</sup> : Christopher Thomas: *Litigation Process under the GATT Dispute Settlement System---Lessons for the World Trade Organisation?* Journal of World Trade, Vol.30, 1996, No.2, p.57.

<sup>176</sup> : Which states: “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].” See supra note 1.

<sup>177</sup> : This does not mean that the modifications made by the parties to the dispute are under no scrutiny. If other than standard terms of reference are agreed upon, any other WTO Member may raise any point relating thereto in the DSB (Article 7[3] of the DSU). See supra note 1.

<sup>178</sup> : The 1979 *Understanding* stipulates in Rule 13 that the Director-General should maintain an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement, and who could be available for serving on panels. See supra note 32, p.212.

<sup>179</sup> : See *Constitution of the Panel Establishment at the Request of the European Communities*, Note by the Secretariat, WT/DS77/4, 7 January 1998.

<sup>180</sup> : In the case where custom unions or common markets are parties to a dispute, this rule applies to citizens of all member countries of the custom unions or common markets. See note 6 of the *Dispute Settlement Understanding*. See supra note 1.

individual capacities and not as government representatives, nor as representatives of any organisation. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.”(Article 8[9] of the DSU). With a developing country background, the panelist may have a better understanding of the economic levels and national policies of many developing country Members and, hopefully, have more familiarity in the application of those special and preferential provisions contained in the WTO agreements. But the relative lack of experience in the WTO litigation makes it clear that it is not an easy job for the lawyers from developing countries to acquire a better understanding of WTO agreements and the dispute settlement mechanism. Even during the Uruguay Round of multilateral trade negotiations, the representatives of many developing countries were not as active as those from the developed countries. They just followed the negotiated results of other contracting parties under the most-favoured-nation clause. Thus, there are not so many qualified persons in the developing country Members, who have acquired such expertise as to serve on a panel.

The WTO panel process, compared with that under the GATT jurisdiction,<sup>181</sup> seems more expeditious and predictable. Article 12 of the DSU, together with the *Working Procedures* in Appendix 3, has set a timetable for each phase of the panel proceedings, from the submissions of complaints and rebuttals by the disputing parties to the fact-examining of the panel. The general period for a panel process is no more than six months, and three months in cases of urgency(Article 12[8] of the DSU). These periods may be extended under some circumstances, but in no case should the period, from the establishment of the panel to the circulation of the panel report to other WTO Members, exceed nine months(Article 12[9] of the DSU).<sup>182</sup> In light of the complexity of some disputing issues, the panels in some cases are really pressed for time. Meanwhile the concept of “urgency cases” in Article 12(8) of the DSU still needs to be clarified. If the panels or the Appellate Body cannot delimit the invocation of this provision, the potential abuse of this provision is feasible.

The most significant feature of the WTO dispute settlement mechanism, however, is that it is no longer possible for either party to the dispute to block the panel report or the Appellate Body report for adoption by the DSB. According to Article 16(4) of the DSU, the panel report “shall be adopted at a DSB meeting 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”.(Emphasis added).<sup>183</sup> Again, Article 17(14) of the DSU stipulates that “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 it...”(Emphasis

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<sup>181</sup> : The CONTRACTING PARTIES never established precise deadlines for the different phases of the dispute settlement process. In most cases, the proceedings of the panels were completed within a period of time, extending from three to nine months. See Point 6(ix) of the Annex to the *1979 Understanding*. See *supra* note 32.

<sup>182</sup> : As a buffer, Article 12(12) of the DSU permits a panel to 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 for the panel process shall be extended by the amount of time that the panel work was suspended. However, if the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse. See *supra* note 1.

<sup>183</sup> : See *supra* note 1.

added).<sup>184</sup> The significance lies in the shift of the meaning “consensus”. “Consensus” in the GATT is a practice used to decide the establishment of a panel or to adopt the panel report. This is a “positive” consensus. A defending party which wished to block the establishment of a panel or the adoption of the panel report could easily abuse this power by defeating the consensus. In contrast to that, the practice of “consensus” is used in the WTO dispute settlement mechanism in a reverse way, which is used by the DSB only when to decide not to establish a panel or to adopt the panel/Appellate Body report. This is a “negative” consensus. It is presumable that no winning party will join the blocking of a panel or Appellate Body report. Under these circumstances, the adoption of the panel or Appellate Body report is almost automatic. Since WTO panelists are not concerned about the blocking by the losing party of the adoption of their reports, they can give their deliberations in a more impartial and rule-oriented way. This bodes well for a new institution like the WTO.

The formal function of panels is to assist the Dispute Settlement Body in discharging its responsibilities under the DSU and the WTO agreements. Given the near automaticity of the WTO process for adopting reports, however, it is more realistic to say that it is the panels, together with the Appellate Body, which effectively discharge the responsibilities of the DSB. While panels control the dispute settlement process within the confines of the rules set out in the DSU and become capable of working in a more independent way, they may come across some other puzzling questions such as how to collect and assess the evidence necessary for the deliberations of panel reports and, how to distribute the burden of proof and establish a standard of review in the panel examination. These issues, in their nature, are as equally important as the independence of the panels.

#### **5.4.2. Evidence-presenting and expert-supporting**

With the WTO disputes becoming rather “technical” and complicated, evidence presented by both parties to the dispute and expert review sought by the panel are becoming more and more crucial in the deliberations of a panel report. Two factors are likely assumed to account for this tendency. Firstly, as the appellate review is only “limited to issues of law covered in the panel report and legal interpretations developed by the panel”(Article 17[6] of the DSU), the panel examination, in fact, becomes the only process in which the disputing parties may present evidence to support their claims or defences. Secondly, the technicality and complexity of some disputing issues often make the panelist even with a “universal” mind necessary to seek advice from the persons outside the panel, especially those who are specialised in those particular areas.

Although Article 12(2) of the DSU states that panel procedures should provide “sufficient flexibility” so as to ensure high-quality panel reports, the whole text of the *Dispute Settlement Understanding* contains no specific rules concerning the production, admissibility, or sufficiency of evidence. Paragraph 4 of Appendix 3(Working Procedures) to the DSU specifies only that, before the first substantive meeting of the panel with the parties to the dispute, the parties shall transmit to the panel written submissions in which they present the “facts of the case” and their arguments. If the party which has brought the complaint fails to present the pertinent evidence, the panel shall ask it to do so. Subsequently, the party against which the complaint has been brought shall be asked to present its point of view(Paragraph 5 of Appendix 3). Then, at the

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<sup>184</sup> : Id.

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 to the dispute shall submit, prior to that meeting, written rebuttals to the panel (Paragraph 7 of Appendix 3). One can infer from these provisions that, within the WTO dispute settlement mechanism, a claim cannot be refused by the panel simply under the excuse of insufficient evidence presented by the parties to the dispute.

Since most WTO disputes have dealt with the “measures” of Member governments, the text of the measures at issue generally has been the factual basis for the proceedings. Accordingly, panel proceedings have tended to emphasise legal arguments---the trade consequences of the “measure” at issue---rather than disputes over points of fact. In the case *Japan---Taxes on Alcoholic Beverages*, the Panel took note of the statement by Japan that the Panel of the previous GATT case *Japan---Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* erred in concluding that shochu was “essentially” a Japanese product.<sup>185</sup> The Panel accepted the evidence submitted by Japan according to which a shochu-like product was produced in various countries outside Japan. The Panel noted, however, that Japanese import duties on shochu were set at 17.9 percent. At any rate what is at stake, in the Panel’s view, is the market share of the domestic shochu market in Japan that was occupied by Japanese-made shochu. The high import duties on foreign-produced shochu resulted in a significant share of the Japanese shochu market held by Japanese shochu producers. Consequently, in the Panel’s view, the combination of customs duties and internal taxation in Japan has the following impact: on the one hand, it makes it difficult for foreign-produced shochu to penetrate the Japanese market and, on the other hand, it does not guarantee equality of competitive conditions between shochu and the rest of “white” and “brown” spirits.<sup>186</sup>

As the disputes under the WTO jurisdiction become more and more technical and complex, the factual component in the panel deliberations is increasing concomitantly. One such example is the dispute concerning the claim of anti-dumping. Since the determination of whether the domestic industry has been injured by the imports is a matter for the national authorities, the *Anti-dumping Agreement* only permits the WTO panel to review the fairness and objectivity of these determinations (Article 17.6[i]). Article 3(1) of the *Anti-dumping Agreement* also provides that “A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.”<sup>187</sup> But whether the foregoing two points for consideration are positive enough is still debatable. In the view of the author of this thesis, what should be “examined” “positively” in many anti-dumping claims upon the exports from developing countries to developed countries is the comparative advantages in production between them. Some complainants tend to overlook an important fact that the production cost, including labour force and raw materials in many developing countries, is much cheaper than that of the developed

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<sup>185</sup> : *Japan---Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, Panel Report (adopted on 10 November 1987), GATT BISD, 34th Supplement (1988), para. 5.11.

<sup>186</sup> : *Japan---Taxes on Alcoholic Beverages*, Report of the Panel (adopted as modified by the Appellate Body on 4 October 1996), WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.35.

<sup>187</sup> : See supra note 1.

countries. Furthermore, different statistical methods will make different conclusions in the evaluation of production cost. In this context, developing countries face a heavier burden in presenting evidence to rebut the dumping claims for their exports.

The other example is the complaint concerning the sanitary and phytosanitary measures. Article 5(2) of the *Sanitary and Phytosanitary Agreement* states: "In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine treatment."<sup>188</sup> The huge difference in respect of science and technology levels between developing and developed countries will bring about disputes on the methods as how to assess the risks to human, animal or plant life or health. Even the United States and the European Communities have different views on some of those issues. The *Hormones* dispute is just one of such examples.

It is clear that there is now significant room for factual disputes in the WTO dispute settlement process. In this regard, Article 13(1) of the DSU makes clear the right of panels "to seek information and technical advice from any individual or body it deems appropriate". It goes on to state that "A WTO Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate." David Palmeter and Petros Mavroidis compared this requirement with the normal practice of international tribunals in collecting evidence, and stated that "the responding parties in the WTO proceedings have an affirmative obligation to co-operate in providing evidence to panels".<sup>189</sup> Meanwhile, Article 13(2) of the DSU, as an addition, permits that panels may seek information from "any relevant source". All these can be viewed that there are, in practice, no legal obstacles to the WTO panels in their evidence-findings.

Information and evidence developed after the challenged action has occurred normally will not be considered by the panel. In the case *EC Measures Concerning Meat and Meat Products(Hormones)*, the Panel rejected the evidence that was not used in making the determination upon the challenged action. The Panel then gave the reasoning for this rejection: "According to the terms of reference given to us as a dispute settlement panel, we have no mandate to re-examine the risk assessment referred to by the European Communities in light of this 'new evidence', nor to make our own risk assessment."<sup>190</sup> This prohibition is effective in holding back the abuse of trade-restricting measures by some WTO Members without sound scientific grounds. Nevertheless, this prohibition should be distinguished from the practice of the panel to collect additional evidence after the first substantive meeting. In the case *Argentina---Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, the Panel stated: "We note that the rules of procedures of panels do not prohibit the practice of submitting additional evidence after the first hearing of the Panel. Until the WTO Members agree on different and more specific rules on this regard, our main concern is to ensure that 'due process' is respected

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<sup>188</sup> : Id.

<sup>189</sup> : David Palmeter and Petros C. Mavroidis: *Dispute Settlement in the World Trade Organisation, Practice and Procedure*, Kluwer Law International(1999), p.76.

<sup>190</sup> : *EC Measures Concerning Meat and Meat Products(Hormones)*, Report of the Panel(adopted as modified by the Appellate Body on 13 February 1998), WT/DS26/R/USA, WT/DS48/R/Can, para.8.115(USA) and 8.118(Canada).

and that all parties to a dispute are given all the opportunities to defend their position to the fullest extent possible”.<sup>191</sup>

In addition to authorising WTO panels to seek information from “any relevant source”, Article 13(2) of the DSU also authorises them “to consult experts to obtain their opinion on certain aspects of the matter”. With respect to a factual issue concerning scientific or other technical matters raised by a party to the dispute, a panel may “request an advisory report in writing from an expert review group”. Appendix 4 of the DSU sets out rules for establishing an expert review group, and the procedures that such groups should follow. Expert review groups are under the panel’s authority. Their terms of reference and working procedures shall be decided by the panel, and they shall report to the panel(Paragraph 1 of Appendix 4).

Considering the lack of relevant expertise in most developing country Members, the draftsmen of the *Dispute Settlement Understanding* made a particular provision which may benefit the developing country Members. Article 27(2) of the DSU states: “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 co-operation service 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.” From the above wording, it can be inferred that Article 27(2) is not intended to be used by developing countries to acquaint themselves with the WTO system of dispute settlement. Instead, this article offers a limited sort of technical cooperation to WTO developing and least developed country Members, once a complaint has been filed, which means that no advice may be given on strategies or procedures that such a Member may follow in bringing a dispute.<sup>192</sup> Thus, in terms of WTO legal assistance on this respect, there is still a lot of work to do.

The title of Appendix 4(*Expert Review Group*) seems to indicate that the expert work is normally carried out in the form of a group. But the Panel in *Hormones* dispute goes in a different way. Instead of consulting with the expert group, the Panel seeks advice from the experts individually.<sup>193</sup> This practice was affirmed by the Appellate Body, which stated: “once the panel has decided to request the opinion of individual scientific experts, there is no legal obstacle to the panel drawing up, in consultation with the parties to the dispute, *ad hoc* rules for those particular proceedings.”<sup>194</sup>

In the context of Appendix 4 of the DSU, paragraph 6 states: “The expert review group shall submit a draft report to the parties to the dispute with a view to obtaining

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<sup>191</sup> : *Argentina---Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, complaint by the United States, Report of the Panel, WT/DS56, at 97-98, para.6.55. See also paras.6.63-6.64 of the same Panel Report where a claim of non-admissibility of evidence(because it had been submitted after the consultations) was rejected.

<sup>192</sup> : The author of this thesis takes this view from one of the examiners, Mary E. Footer. In the first review of the *Dispute Settlement Understanding* which was held in the Seattle Ministerial Conference in 1999, many developing country Members expressed their concern about the shortage of resources to participate in the dispute settlement system. cf. [http://www.wto.org/english/thewto\\_e/minist/\\_min99\\_e/english](http://www.wto.org/english/thewto_e/minist/_min99_e/english)

<sup>193</sup> : See supra note 191, paras.87, 88, and 89. The Panel also proceeded under Article 11 of the *Sanitary and Phytosanitary Agreement* which also provides for the use of experts. See supra note 1.

<sup>194</sup> : *EC Measures Concerning Meat and Meat Products*(Hormones), see supra note 77, para.148.

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.” This gives each party the opportunity to correct misconceptions or omissions and minimises the likelihood of a subsequent appeal. Even if the expert review report adopted by the panel were unreasonable and unacceptable, the parties to the dispute would still have the opportunity to appeal the panel report. But this is only one side of the issue. The other side of this issue is how to distribute the burden of proof, which is as equally important as the evidence itself. This is because, in a litigation regardless of being domestic or international, any party which bears the burden of proof will lose the case if it fails to present sufficient evidence to support either its claim or its defence.

### 5.4.3. Burden of proof and standard of review

The burden of proof has been called “the law’s response to ignorance”.<sup>195</sup> It “compensates for many uncertainties of litigation, allowing the judicial system to reach determinate outcomes in the absence of relevant information”.<sup>196</sup> As the dispute proceedings, first in the GATT, and now in the WTO, are growing more complex and more judicial, the necessity of fact-proving has become an increasingly important factor of the panel process. Gone are the days when panels were able to adjudicate on a “cluster of undisputed facts” yielded, without great effort, after two sets of submissions and oral hearings. The current panels are often flooded with evidence, not only so in disputes under these new, rather technical, WTO agreements such as the *Sanitary and Phytosanitary Agreement* or the *Agreement on Customs Valuation*, but also under those more conventional GATT provisions, for example, when a non-violation dispute arises.

International litigation procedures tend to be free from technical and detailed rules on evidence-presenting and evidence-collecting known in municipal law.<sup>197</sup> International tribunals have frequently enjoyed the privilege of deciding for themselves what is admissible as evidence and of evaluating the probative value of each piece of material evidence submitted.<sup>198</sup> They will also determine which party carries the burden of proof. The WTO dispute settlement system forms no exception in that respect.

The issue of burden of proof is not directly addressed in the *Dispute Settlement Understanding*, except for Article 3(8) which is a statement of prior GATT practice, as

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<sup>195</sup> : David Palmeter and Petros Maroidis, see supra note 190, p.81.

<sup>196</sup> : Id.

<sup>197</sup> : In his Article *Evidence, Proof and Persuasion in WTO Dispute Settlement*, Joost Pauwelyn compares the difference in the concept of “burden of proof” in common law and civil law. According to Pauwelyn, the phrase of “burden of proof” in common law countries has a two-tier meaning, which includes (a) in the event that the evidence submitted by the parties is incomplete or with the evidence in equipoise, the party with the burden of proof loses. The “benefit of the doubt” plays in favour of the opposing party; (b) a duty resting on the proponent of a claim to present a *prima facie* case, i.e., to adduce enough evidence in order to convince the court that there is a case to answer. While in civil law countries, the notion of “burden of proof” simply refers to a duty of the parties to the dispute to prove their allegations (*actori incumbit probatio*). See *Journal of International Economic Law*, Vol.1, 1998, pp.229-230.

<sup>198</sup> : See, for example, the following statement of the International Court of Justice (ICJ) in the case *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgement of 27 June 1986, ICJ Report at 40, para.60(1986): “(The Court,) within the limits of its Statute and Rules,...has freedom in estimating the value of the various elements of evidence, though it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved”.



developed in numerous panel rulings: "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."<sup>199</sup> Normally this provision can be understood in a two-tier way. Firstly, the fact of the breach of WTO obligations is sufficient enough for a claimant to raise a complaint.<sup>200</sup> Then, it is the responsibility of the respondent to provide evidence and argument to rebut this complaint.<sup>201</sup>

In the case *United States---Restrictions on Imports of Cotton and Man-made Fibre Underwear*, the parties to the dispute had divergent views on the question of burden of proof. The United States essentially argued that it was not its duty to re-establish the consistency of its restriction measures with the relevant rules of the *Agreement on Textiles and Clothing* (hereinafter as the ATC), since it had already established that in the March Statement.<sup>202</sup> Costa Rica, on the other hand, insisted that in accordance with Article 6(2)<sup>203</sup> and 6(4)<sup>204</sup> of the ATC, it was incumbent upon the United States to

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<sup>199</sup> : See supra note 1.

<sup>200</sup> : The rule that it is up to the complaining party to prove the breach of WTO obligations it alleges was first explicitly confirmed in the panel report of the case *Japan---Taxes on Alcoholic Beverages*. When addressing the claim under GATT Article III:2, first sentence, the Panel noted that: "...complainants have the burden of proof to show first, that products are like and second, that foreign products are taxed in excess of domestic ones."(Emphasis added). When turning to the claim under GATT Article III:2, second sentence, the Panel made clear that: "...the complainants have the burden of proof to show first, that the products concerned are directly competitive or substitutable and second, that foreign products are taxed in such a way so as to afford protection to domestic production."(Emphasis added). See *Japan---Taxes on Alcoholic Beverages*, Report of the Panel, supra note 186, para.6.14 and para.6.28.

<sup>201</sup> : In the case *United States---Standards for Reformulated and Conventional Gasoline*, the Panel found that a US gasoline regulation violated GATT Article III:4 by treating imported gasoline less favourable than domestic gasoline. The Panel then addressed the defences invoked by the United States under GATT Article XX(b), (d) and (g): "The Panel noted that as the party invoking an exception(*in casu* Article XX[b]) the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to establish the following elements..." The Appellate Body in the same case elaborated on the burden of proof with respect to the general introduction(or "chapeau") to GATT Article XX, which rests on the party invoking an exception under Article XX, as follows: "The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraph of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue". See *United States---Standards for Reformulated and Conventional Gasoline*, Report of the Panel, WT/DS2, para.6.20. Report of the Appellate Body, see supra note 136, pp.22-23.

<sup>202</sup> : Which is the Annex of the Panel Report. See *United States---Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Report of the Panel(adopted as modified by the Appellate Body on 10 February 1997), WT/DS24/R, pp.93-106.

<sup>203</sup> : Which states: "Safeguard action may be taken under this Article when, on the basis of a determination by a Member, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage or actual threat thereof must demonstrably be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference."(Original footnote omitted). See supra note 1.

<sup>204</sup> : Which states: "...The Member or Members to whom serious damage, or actual threat thereof...is attributed shall be determined on the basis of a sharp and substantial increase in imports, actual or

establish to the Panel's satisfaction that the conditions required before imposing a restriction had in fact been met. The Panel recalled in this context that one of the central elements of the ATC was the prohibition, in principle, for WTO Members to have recourse to any new restrictions beyond those notified under Article 2(4) of the ATC.<sup>205</sup> In the view of the Panel, Article 6(2) of the ATC is an exception to the rule of Article 2(4) of the ATC. It is a general principle of law, well-established by panels in prior GATT practice, that the party which invokes an exception in order to justify its action carries the burden of proof that it has fulfilled the conditions for invoking the exception. Consequently, the Panel decided that it was up to the United States to demonstrate that it had fulfilled the requirements contained in Article 6(2) and 6(4) of the ATC in the March Statement which, as the parties to the dispute had previously agreed, constituted the scope of the matter properly before the Panel.<sup>206</sup>

WTO panels, despite the stipulations of Article 3(8) of the DSU, are not confined to the evidence presented by both parties. A panel may seek information "from any individual or body which it deems appropriate"(Article 13[1] of the DSU). In this regard, they follow the practice of courts in the civil law system, as do most international tribunals. In the case *Indonesia---Certain Measures Affecting the Automobile Industry*, the panel was faced with the question of whether the governmental measures under Indonesia's National Car Programme constituted "specific subsidies" within the meaning of Articles 1 and 2 of the *Agreement on Subsidies and Countervailing Measures*(hereinafter as the *SCM Agreement*).<sup>207</sup> The complaining parties, the European Communities and the United States, claimed that they were and the responding party, Indonesia, did not deny it. However, this was not enough for the panel to make its deliberations. Under such circumstances, the panel applied Article 6(8) of the *SCM Agreement*, which states: "In the absence of circumstances referred to in paragraph 7,<sup>208</sup> the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel..." The panel then concluded: "In light of the views of the parties, and *given that nothing in the record would compel a different conclusion*, we find that the measures in question are specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*."<sup>209</sup>

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imminent, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction; none of these factors, either alone or combined with other factors, can necessarily give decisive guidance..."(Original footnote omitted). See supra note 1.

<sup>205</sup> : Which reads as follows: "...No new restrictions in terms of products or Members shall be introduced *except* under the provisions of this Agreement or relevant GATT 1994 provisions..."(Original footnote omitted)(Emphasis added). See supra note 1.

<sup>206</sup> : See supra note 202, para.7.16.

<sup>207</sup> : Article 1(1) provides an illustrative list of subsidies which are under the regulation of this Agreement. In order to determine whether a subsidy, as defined in Article 1(1), is specific to an enterprise or industry or group of enterprises or industries(referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, Article 2(1) provides three general principles for this determination. See supra note 1.

<sup>208</sup> : Paragraph 7 of Article 6 of the *SCM Agreement* illustrates several situations in which serious prejudice can be deemed as exceptional, but it is the responsibility of the party to which these situations occur to provide the proof.(Note added). See supra note 1.

<sup>209</sup> : *Indonesia---Certain Measures Affecting Automobile Industry*, Report of the Panel(distributed on 23 July 1998), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, p.212.(Emphasis added).

The fact that questions on burden of proof have attracted full attention in recent WTO disputes is a positive development. An objective distribution of burden of proof, together with sufficient evidence presented by both the complainant and the defendant, is surely helpful to the panel in its deliberations, but this is not the end of the vocation of the WTO panel process. Connected with and, in fact, as equally important as the burden of proof is the approach taken by the panel when it reviews the measures imposed by the Member governments concerned.

The *Dispute Settlement Understanding* contains no explicit provisions upon the issue of standard of review. Article 11 simply exhorts panels to “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”.<sup>210</sup> The sparse language may lead to disagreements when a panel is examining the domestic law of a Member as interpreted by domestic authorities and tribunals to determine whether the law, or the actions of those authorities and tribunals (including fact-finding), or both are in compliance with the provisions of the covered agreements. To pose a concrete example: Suppose that a Member government applies certain domestic product standards, perhaps for reasons of domestic environment policy, in a manner that causes some foreign exporters to argue that the government action is inconsistent with certain WTO norms, such as rules in the *Agreement on Technical Barriers to Trade*. Suppose also, however, that a national government agency (or court) determines that the government action is *not* inconsistent with WTO rules, and another Member decides to challenge that determination in a WTO dispute settlement proceeding. It would seem clear that WTO agreements do not permit a Member government’s determination *always* to prevail (otherwise the WTO rules could be easily evaded or rendered ineffective). But should the WTO panel approach the issues involved (including factual determinations) *de novo*, without any deference to the Member government? This standard-of-review question, in the view of Steven Croley and John Jackson, has become something of a touchstone regarding the relationship of “sovereignty” concepts to the GATT/WTO rule system. “In many ways this relationship reflects a central problem for the future of the international trading system---how to reconcile competing views about the allocation of power between national governments and international institutions on matters of vital concern to governments, as well as the domestic constituencies of some of those governments.”<sup>211</sup>

Within the WTO agreements, only the *Antidumping Agreement* addresses explicitly the issue of standard of review.<sup>212</sup> A certain degree of deference to the *findings of fact* made by domestic authorities in antidumping matters is provided in Article 17(6)(i) of

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<sup>210</sup> : See supra note 1.

<sup>211</sup> : Steven P. Croley and John H. Jackson: *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, The American Journal of International Law, Vol.90, 1996, p.194.

<sup>212</sup> : According to Steven Croley and John Jackson, the desire of some of the Uruguay Round negotiators to deal explicitly with this subject (standard of review) was influenced by their reaction (or that of their constituencies) to some GATT panel cases, especially antidumping cases, in which observers felt that the panels had overreached their authority and been too intrusive in disagreeing with national government authorities. As a compromise with those opponents, the only success of these proponents is to put standard of review in the *Antidumping Agreement*. This, in the view of Croley and Jackson, is based on the *Chevron* doctrine developed by the US Supreme Court and the degree of deference accorded to certain US domestic authorities with investigative powers without fully thinking through the ramifications thereof at the international level. Id, pp.195-206.

that Agreement, which states: “in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.”<sup>213</sup> But in what circumstances the evaluation can be deemed as “unbiased” and “objective”? This Agreement does not say about that. It is at the discretion of the panel. Then, Article 17(6)(ii) further states: “the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.”<sup>214</sup> This subsection seems to establish a two-step process for the panel examination. First of all, the panel must consider whether the provision of the Agreement in question admits of more than one interpretation. If not, the panel must vindicate the provision’s only permissible interpretation. If, on the other hand, the panel determines that the provision indeed admits of more than one interpretation, the panel shall proceed to the second step of the analysis and consider whether the national interpretation is within the set of “permissible” interpretations. If so, the panel must defer to the interpretation given the provision by the national government.

Article 17(6) is not the only provision bearing on the standard of review. Also relevant are two Ministerial Decisions which were taken at the end of the Uruguay Round negotiations in 1994. *Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* states: “The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application.”<sup>215</sup> *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures* states: “Ministers recognise, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from antidumping and countervailing duty measures.”<sup>216</sup> As both of these passages suggest, the antidumping provisions were not uncontroversial, for the Ministerial Decisions seem both to limit the application of those provisions, and to raise questions about how they fit into the overall jurisprudence of the WTO. The true significance of Article 17(6) of the *Antidumping Agreement* to the WTO dispute settlement procedures still needs to await more future panel decisions.

In other WTO agreements, however, there are no similar stipulations as that in the *Antidumping Agreement*. In the case *United States---Restrictions on Imports of Cotton and Man-made Fibre Underwear*, one of the arguments between the United States and

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<sup>213</sup> : See supra note 1.

<sup>214</sup> : Id.

<sup>215</sup> : See supra note 1.

<sup>216</sup> : Id.

Costa Rica is the standard of review applied by the Panel. The United States advocated a standard of review similar to that applied in the *Fir Felt Hat* case,<sup>217</sup> in which the Working Party, while examining a US escape clause measure in light of the requirements of Article XIX of GATT 1947, afforded to the US authorities considerable discretion by concluding that the United States was not called upon to prove conclusively that the degree of injury caused or threatened in that case should be regarded as serious. Costa Rica argued in favour of a five-step procedure whereby the Panel would certify whether the administrative authorities of the importing country, when imposing the restriction, had: (a) complied with the procedural rules of the ATC; (b) properly established the facts; (c) made an objective and impartial evaluation of the facts in light of the rules of the ATC; (d) properly exercised its discretion in the interpretation of the rules; and (e) complied with the rules in general, while also having complied with the other four requirements mentioned above.<sup>218</sup>

The Panel adopted neither of these arguments. In the view of the Panel, a policy of total deference to the findings of the national authorities could not ensure an “objective assessment” as foreseen by Article 11 of the DSU. A review by the Panel is not a substitute for the proceedings conducted by national authorities. Rather, the Panel’s function should be to assess objectively the review conducted by the national authorities. The Panel drew particular attention to the fact that a series of prior panel reports in the antidumping and subsidies/countervailing duties context had made it clear that it was not the role of panels to engage in a *de novo* review.<sup>219</sup> The Panel considered that the same was true for panels operating in the context of the ATC, since they would be called upon, as in the context of cases dealing with antidumping and/or subsidies/countervailing duties, to review the consistency of a determination by the national investigating authorities imposing a restriction under the relevant provisions of the relevant WTO legal instruments, in this case the ATC. Under these circumstances, the Panel stated that its task was “to examine the consistency of the US action with the international obligations of the United States, and not the consistency of the US action with the US domestic statute implementing the international obligations of the United States.”<sup>220</sup>

In light of the fact that an appeal shall be limited to the “issues of law covered in the panel report and legal interpretations developed by the panel” (Article 17[6] of the DSU), the standard of review during the panel process is essential to deliberating a qualified panel report. The *Dispute Settlement Understanding* is flawed in this respect. Considering the comprehensive governance of the DSU and the complicated amendment

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<sup>217</sup> : See *Report on the Withdrawal by the United States of a Tariff Concession Under Article XIX of the General Agreement on Tariffs and Trade*, GATT Document CP/206, adopted on 22 October 1951 (CP.6/SR.19), version published by the Secretariat in November 1951, preface made by the Director-General E Wyndham White.

<sup>218</sup> : See supra note 202, para.7.7.

<sup>219</sup> : See the panel reports on *Korea—Antidumping Duties on Imports of Polyacetal Resins from the United States*, adopted on 27 April 1993, GATT BISD, 40th Supplement(1994), p.205; *United States—Imposition of Antidumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted on 27 April 1994, GATT BISD, 41st Supplement(1994); *United States—Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada*, adopted on 3 June 1987, GATT BISD, 34th Supplement(1988), p.194.

<sup>220</sup> : See supra note 202, para.7.12.

procedures,<sup>221</sup> we might reasonably predict that there is no feasibility to amend the DSU in near future. One option, at the moment, to compensate the insufficient stipulations in the DSU is to make a particular statement in a specific multilateral agreement like Article 17(6) of the *Antidumping Agreement*. The significance of doing so lies not only in the release of the burden of panel work, but in the rule-orientation of deliberations in a panel report.

#### **5.4.4. The need for a due process to draft a panel report**

J. C. Thomas and David Palmeter have started a very good discussion of the need for “due process” in the WTO dispute settlement proceedings. They raised in their discussions some essential questions concerning the issues such as: does a complaining party have an opportunity to make its case fully in a WTO dispute settlement proceeding? Does a respondent have a full opportunity to meet the case which has been brought against it? Do both parties to a dispute have the opportunity to put the necessary evidence before the panel? When evidence is adduced by one party, does the other party have the opportunity to adequately test it?<sup>222</sup> All these questions are fundamental to building a rule-orientation for the WTO dispute settlement mechanism.

However, it is a pity that they missed, at least, one important issue, which is the due process to draft a panel report.

Article 15 of the *Dispute Settlement Understanding*, which is obviously the legacy of the 1979 *Understanding*, has set up an interim review process for a panel to draft its report. This set-up, however, seems contradictory to the rule-orientation spirit of the WTO dispute settlement mechanism. According to Article 15(1), a WTO panel, after considering the submissions of complaints and rebuttals, shall first issue the descriptive(factual and argument) sections of its draft report to both parties to the dispute for their comments. Following the expiration of the set period of time for receipt of their comments, 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 the circulation of the final report to other WTO Members. At the request of any party, the panel shall hold a further meeting with the parties on the issues identified in the written comments(Article 15[2] of the DSU).

The stipulations of the WTO interim review process are similar to those contained in the North American Free Trade Agreement. When a dispute is submitted to the NAFTA Free Trade Commission, a panel, after the failure of consultation, good offices, mediation and conciliation, will proceed in a judicial way. The panel will first render an Initial

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<sup>221</sup> : Under the WTO amendment mechanism, a decision to amend the provisions, except Articles I and II of GATT 1994, of the Multilateral Agreements in Annex 1A shall be taken by consensus among WTO Members. If consensus is not reached, the Ministerial Conference shall decide by a two-third majority of all Members whether to submit the proposed amendment to the Members for acceptance. Such a proposed amendment shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. While the decision to approve amendments to the *Dispute Settlement Understanding* shall be made only by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. See Article X of the *WTO Agreement*. See supra note 1.

<sup>222</sup> : J. C. Thomas and David Palmeter: *The Need for Due Process in the WTO Proceedings*, Journal of World Trade, Vol.31, 1997, No.1, pp.45-57.

Report setting out its findings of fact, its determination as to whether the measure at issue is inconsistent with the NAFTA Treaty or nullifies or impairs benefits which the complaining Party or Parties could reasonably have expected to accrue under the Treaty, and the panel's recommendations for the resolution of the dispute. It then receives the comments of the Parties, in the lights of which it may hold further hearings and reconsider its report. It then presents its Final Report to the Free Trade Commission.<sup>223</sup>

The NAFTA is a regional trade agreement. Its dispute settlement system is established on the negotiations and compromise among three neighbouring countries, Canada, the United States and Mexico. While the WTO is a global organisation which consists of more than 140 Members. The large membership makes it very difficult to coordinate the different interests in its legal system. Although the interim review report and the final resolution are only limited to the disputing parties in the particular case, the consequential impact is beyond that. Therefore, the only practicable way in such a "universal" organisation is to have the dispute settled on a uniform, rule-based process.

The WTO interim review process reflects the diplomatic-negotiation-based panel practice of the GATT. Before the new dispute settlement mechanism was set up, it was a common practice to get the consent of the parties to the dispute before the panel report was adopted. In order to avoid blocking by the losing party, the GATT panels used to conciliate the approaches of the disputing parties as close as possible. The situation in the WTO, in this regard, has changed dramatically from that as it was in the GATT. The WTO has designed an appellate review to continue the dispute settlement process if either of the parties to the dispute considers that the panel report is incomplete, partial, or even prejudiced. There are no legal obstacles, except some procedural requirements, for a WTO Member to appeal the panel report. Article 16(4) of the DSU states: "Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting 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." (Original footnote omitted).<sup>224</sup> Thus, the right for the parties to the dispute to appeal could be lost only if they exercise their right after the 60-day period.<sup>225</sup>

According to David Palmeter, the term "due process" means fundamental fairness--- particularly procedural fairness,<sup>226</sup> and he is probably right. A "due process" in drafting a panel report, in the view of the author of this thesis and in a narrow sense, is an "independent process" for a panel to draft its report. A panel may exercise its right to seek information from any relevant sources when it scrutinises the evidence before it. The parties to the dispute may provide some additional information during the drafting process, but the decision of whether or not to accept this information shall be in the hands of the panelists. Neither is a panel obliged to, nor should it discuss with the parties to the dispute about the deliberations of its report. Any different views to the panel report may be contained in the arguments of the appeal, including those from both the appellant and the appellee. In light of these aforesaid discussions, Article 15 of the DSU is redundant in building a due panel report drafting process.

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<sup>223</sup> : See 1992 NAFTA Treaty, Articles 2016, 2017 and Annex 2004.

<sup>224</sup> : See supra note 1.

<sup>225</sup> : In the view of the author of this thesis, this is another flaw of the *Dispute Settlement Understanding* because there is no such permit as to extend this period under some exceptional circumstances.

<sup>226</sup> : J. C. Thomas and David Palmeter, see supra note 222, p.51.

The first few years' practice of the WTO dispute settlement mechanism has demonstrated that the interim review process cannot prevent the parties to the dispute from appealing the panel decisions. The statistical figures made by Professor Norio Komuro in his article *Kodak--Fuji Film Dispute and the WTO Panel Ruling* are in support of this conclusion.<sup>227</sup> Of the first 16 Panel Reports circulated by the end of March 1998 under the WTO dispute settlement mechanism, all but the Panel Report of the case *Japan---Measures Affecting Consumer Photographic Film and Paper*(which was adopted by the DSB on 22 April 1998) were appealed. In other words, all the first 15 disputes did not end at the panel stage. While we hail the success of the WTO dispute settlement mechanism, we are aware that there are still many aspects of it, like the panel report drafting process, which need to be improved.

Cambridge University's James Crawford has noted that the development of law in complex societies has seen a constantly increasing refinement, and that international law has shared in this increasing refinement.<sup>228</sup> Certainly this is true of the WTO law which is still in a developing process with the input of our expertise and intelligence. At the moment, it will be very interesting to watch the developments in the next round of multilateral trade negotiations. With luck these developments will include the issue of a due process for a panel to draft its report.

The WTO panels have already worked efficiently and judicially compared with those of the GATT. The automatic establishment of a panel, the clearly-cut time frames and more independent work of the panelists reflect such a fact that the WTO dispute settlement mechanism has laid a fundamental foundation in the rule-orientation. However, what distinguishes the WTO Dispute Settlement Body from other international tribunals is its appellate review which is unique not only in its function, but also in its jurisdiction.

## **Section Five Legal Significance of the WTO Appellate Review**

### **5.5.1. The right of a WTO Member to bring a claim under the new dispute settlement mechanism**

International judicial settlement involves the reference of a dispute between States to a permanent tribunal for a legally binding decision. It developed from arbitration, which accounts for the close similarity between the two and, through the past century, has been available in a number of courts of general or specialised jurisdiction.<sup>229</sup> Example of the court of general jurisdiction is the International Court of Justice(ICJ), while the European Court of Human Rights is a particular type of court of specialised jurisdiction. Different tribunals may define different procedures to start a dispute settlement process. In the case of the ICJ, Article 34(1) of the *Statute of the International Court of Justice* states: "Only States may be parties in cases before the Court". Then, Article 35(1), (2) further state respectively: "The Court shall be open to the States Parties to the present Statute." "When a State which is not a Member of the United Nations is a party to a case, the Court shall

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<sup>227</sup> : Norio Komuro: *Kodak--Fuji Film Dispute and the WTO Panel Ruling*, Journal of World Trade, Vol.32, 1998, No.5, pp.162-163.

<sup>228</sup> : James Crawford: *Democracy in International Law*, Cambridge University Press, 1994.

<sup>229</sup> : See J. G. Merrills: *International Dispute Settlement*, Cambridge: Grotius Publications Limited(1991), p.109.



fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such State is bearing a share of the expenses of the Court.”<sup>230</sup> Article 33 and Article 34 of the *European Convention on Human Rights* (amended by Protocol 11), on the other hand, provide respectively: “Any High Contracting Party may refer to the Court an alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party”. “The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocol thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”<sup>231</sup>

In contrast, there are no specific provisions in either the *Dispute Settlement Understanding* or other WTO agreements, which deal with the question of standing for a Member to bring a claim under the WTO jurisdiction. The only provision touching this issue is Article 3(7) of the DSU, which partly states: “Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful.”<sup>232</sup> Nevertheless, the meaning of the word “fruitful” is not well-defined. The author of this thesis has pointed out in the previous section that, in the WTO dispute settlement mechanism, a claim cannot be refused by the panel simply under the excuse that the evidence is insufficiently presented by the parties to the dispute.<sup>233</sup> But who has the standing to bring a case under the WTO jurisdiction is another issue, which merits clarifying here.

In the appellate review of the *Bananas* case, the European Communities argued that the Panel infringed Article 3(2) of the DSU<sup>234</sup> by finding that the United States had a right to advance claims under GATT 1994. The European Communities asserted that, as a general principle in any system of law, including international law, a claimant must normally have a “legal right or interest” in the claim it was pursuing. According to the European Communities, treaty law is a “method of contracting out of general international law”. Therefore, the *WTO Agreement* must contain a rejection of the requirement of a legal interest or an acceptance of the notion of *actio popularis* in order to conclude that the WTO dispute settlement system sets aside the requirement of a legal interest. The absence of such an express rule in the DSU or in the other covered agreements indicates that general international law must be applied. The European Communities maintained that the reasoning advanced by the Panel that all parties to a treaty had an interest in its observance was a general observation which was true for all treaties.<sup>235</sup>

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<sup>230</sup> : See supra note 2.

<sup>231</sup> : cf. [http://www.ppu.org.uk/learn/texts/doc\\_european%20convention](http://www.ppu.org.uk/learn/texts/doc_european%20convention).

<sup>232</sup> : See supra note 1.

<sup>233</sup> : See the second paragraph of Part Two, Section Four of this Chapter.

<sup>234</sup> : Which states: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with 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.”(Note added). See supra note 1.

<sup>235</sup> : See supra note 151, paras.15-16.

The European Communities also argued that the provisions of Article 10(2) of the DSU, allowing a WTO Member that “has a substantial interest in the matter before a panel” to participate as a third party, suggested a *fortiori* that a party to a dispute must show a “legal interest”. The European Communities asserted that the United States had no actual or potential trade interest justifying its claim, since its banana production was minimal. According to the European Communities, the United States has never exported bananas, and this situation is unlikely to change due to climatic and economic conditions in the United States.<sup>236</sup>

The Appellate Body did not accept the argument of the European Communities, that the need for a “legal interest” is implied in the DSU or in any other provisions of the *WTO Agreement*. The Appellate Body agreed with the Panel that “neither Article 3(3) nor 3(7) of the DSU nor any other provisions of the DSU contains any explicit requirement that a Member must have a ‘legal interest’ as a prerequisite for requesting a panel”.<sup>237</sup> The Appellate Body noted that under Article 4(11) of the DSU, a Member wishing to join in multiple consultations must have “a substantial trade interest”, and that under Article 10(2) of the DSU, a third party must have “a substantial interest” in the matter before a panel. But neither of these provisions in the DSU nor anything else in the *WTO Agreement*, in the view of the Appellate Body, provides a basis for asserting that parties to the dispute have to meet any similar standing.<sup>238</sup>

The Appellate Body also invoked the chapeau of Article XXIII:1 of GATT 1994,<sup>239</sup> together with Article 3(7) of the DSU, to support its conclusions that a WTO Member had broad discretion in deciding whether to bring a case against another Member under the DSU, and the language of Article XXIII:1 of GATT 1994 and Article 3(7) of the DSU suggested, furthermore, that a Member was expected to be largely self-regulating in deciding whether any such action would be “fruitful”. Therefore, the United States, in the view of the Appellate Body, was justified in bringing its claims under GATT 1994 to this case, since it was a producer of bananas, the potential export interest of the United States could not be excluded. The internal market of the United States of bananas could be affected by the EC bananas regime, particularly, by the effects of that regime on world suppliers and world prices of bananas.<sup>240</sup>

The Appellate Body, in the view of the author of this thesis, is right in its deliberation, but should have invoked more legal reasoning from the WTO agreements to support its decision. At the moment, there are at least two factors which could have been used to rebut the argument of the European Communities. According to Article XXII:1 of

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<sup>236</sup> : Id, para.17.

<sup>237</sup> : *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Report of the Panel, WT//DS27/R/USA, para.7.49.

<sup>238</sup> : The Appellate Body did not go too further on this point and emphasised in the same paragraph that it did not believe that its statement was dispositive of whether, in this case, the United States had “standing” to bring claims under the GATT 1994. This reflects the prudence of the Appellate Body on this issue.

<sup>239</sup> : Which partly states: “If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded...” See supra note 1. In the view of the Appellate Body, of special importance for determining the issue of standing are the words “If any Member should consider...” See supra note 151, para.134.

<sup>240</sup> : See supra note 151, paras.135-136.

GATT 1994 and Article 4(2) of the DSU,<sup>241</sup> the only obligation incumbent upon the WTO Member before it starts the litigation is to have a consultation with a relevant Member country. If the consultation fails to reach an agreement, the complaining party will have the right to request the DSB to establish a panel. This request can only be blocked by a consensus of WTO Members, including the requesting party. Furthermore, any breach of its obligations by one WTO Member will upset the overall balance of global trade which was struck during the Uruguay Round negotiations and, in a general way, nullify and impair the interests of all WTO Members. Thus, the United States, after a satisfactory agreement had not been reached with the European Communities, should have its legal right to bring the case to the WTO dispute settlement procedures.

The *Bananas* case is the first one which involved the issue of standing for a Member to bring a case under the WTO jurisdiction. The Appellate Body has emphasised in its report that its conclusion “does not mean, though, that one or more factors we have noted in this case would necessarily be dispositive in another case.”<sup>242</sup> This reflects the prudence of the Appellate Body in interpreting the WTO law. Thus, it is predictable that similar arguments like that in the *Bananas* case may happen again in future. In order to avoid further confusion, it is necessary to add a provision in the DSU to define clearly that, under what circumstances, the general right of a Member to bring a case can be denied. This addition, of course, shall concern the redefining of the objectives and legal characteristics of the WTO dispute settlement mechanism, including the appellate review.

### 5.5.2. The objectives and legal characteristics of the Appellate Body

In the modern international relation sphere, appellate review, in the context of dispute settlement, is a unique characteristic which distinguishes the WTO dispute settlement mechanism from the practice of many other international tribunals. The disputes in most international tribunals are tried only once and the decisions made by the tribunals become final and binding on the parties to the dispute thereafter. For example, Article 60 of the ICJ Statute states: “The judgement is final and without appeal. In the event of dispute as to the meaning or scope of the judgement, the Court shall construe it upon the request of any party”.<sup>243</sup> Article 296(1) of the *Convention on the Law of the Sea* contains the similar wording, which states: “Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute”.<sup>244</sup> In contrast, a decision made for the dispute under the WTO jurisdiction, even after it has gone through the panel examination and appellate review, is still not final until the report of the panel or the Appellate Body is adopted by the DSB. These legal characteristics need to be appreciated together with the objectives of the WTO dispute settlement mechanism, particularly those of the appellate review process.

Article 3(2) of the DSU partly states that “The dispute settlement system of the WTO is a central element in providing *security* and *predictability* to the multilateral trading

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<sup>241</sup> : Article XXII:1 of GATT 1994 states: “Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement”. Article 4(2) of the DSU contains the similar wording. See supra note 1.

<sup>242</sup> : See supra note 151, para.138.

<sup>243</sup> : See supra note 2.

<sup>244</sup> : Id.

system...”(Emphasis added).<sup>245</sup> Thus, to provide “security” and “predictability” are the main objectives of the new dispute settlement mechanism and the appellate review as well.

Security and credibility are the watchwords of a judicial international dispute settlement mechanism. They are the first cornerstone of the whole WTO dispute settlement mechanism including a well functioning Appellate Body. Although the WTO Appellate Body, like any other international court or arbitration tribunal, is one that does not---in reality, as it cannot---rely on “incarceration, injunctive relief, damages for harm inflicted or police enforcement...jailhouse... bail-bondsmen...blue helmets...truncheon or tear gas for the advancement of its objectives”,<sup>246</sup> a strict interpretation of the DSU will provide that “an adopted dispute settlement report establishes an international law obligation upon the Member in question to change its practice to make it consistent with the rules of the *WTO Agreement* and its annexes”.<sup>247</sup> Thus, “moral and political force of international legal obligation” and a precarious threat of retaliation will maintain order in international trading relations.<sup>248</sup> Without such a moral basis and enforcement mechanism, international order, including the trade order blueprinted by the WTO, will be easily evaded and disregarded.

The second objective is predictability, which is implied in not only the rules of the WTO agreements but the results of the dispute settlement under the WTO jurisdiction. In submitting the *Working Procedure of the Appellate Body* to the Chairman of the Dispute Settlement Body, the Chairman of the Appellate Body observed that “it is also important to ensure consistency and coherence in our decision-making, which is to the advantage of every WTO Member and the overall multilateral trading system we all share”.<sup>249</sup> This inclination can be clearly traced in the stipulations of the *Working Procedures of the Appellate Body*, which partly states: “To ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure”([4]{1} of Part I). “In accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with the other Members before the division finalises the appellate report for circulation to the WTO Members...”([4]{3} of Part I).<sup>250</sup> Collegiality, thus, becomes a major responsibility which the Appellate Body members need to adhere to when they exercise their appellate review power. Predictability, coherence and consistency, are the inherent values of a well-functioning legal system. They also form the second cornerstone of the WTO dispute settlement mechanism. They underline one of the most important elements of the shift from the GATT to the WTO, that although the GATT was marked by accommodation and adaptability, the legal structure of the WTO now demands consistency and

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<sup>245</sup> : See supra note 1.

<sup>246</sup> : Hippler Bello, Judith: *The WTO Dispute Settlement Understanding: Less is More*, The American Journal of International Law, Vol.90, 1996, pp.416-417.

<sup>247</sup> : John H. Jackson: *The WTO Dispute Settlement Understanding---Misunderstandings on the Nature of Legal Obligation*, The American Journal of International Law, Vol.91, 1997, p.61.

<sup>248</sup> : See Robert E. Hudec: *Dispute Settlement*(in *Completing the Uruguay Round* edited by Jeffrey J. Schott), Washington, D. C.: Institute for International Economics, 1990, p.180.

<sup>249</sup> : Letter of Julio Lacarte-Muro, Chairman of the Appellate Body, to Celso Lafer, Chairman of the Dispute Settlement Body, 7 February 1996.

<sup>250</sup> : cf. [http://www.wto.org/english/tratop\\_e/dispu\\_e/ab3\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab3_e.htm)

predictability.<sup>251</sup> A standing appellate review is one of the principal means for attaining this objective.

With those foregoing objectives, the Appellate Body has functioned well since the new dispute settlement mechanism was set up. Compared with other international tribunals, the WTO Appellate Body contains many unique features, which may be summarised as the following.

Firstly, the new dispute settlement mechanism appears to be the only international dispute settlement regime<sup>252</sup> where appellate review is introduced at a later stage so as to reduce the risks of erroneous first-level decisions and enable the automatic adoption, without “political filtering” and possibility of “blocking”(such as those under the GATT consensus practice) of first and second level dispute settlement findings. Article 17(14) of the DSU stipulates that 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”. In rare situations will a winning party join this consensus. This automaticity helps the WTO dispute settlement mechanism move in a more rule-oriented and predictable way.

Secondly, according to Article 17(3) of the DSU, the Appellate Body “shall comprise persons of recognised authority, with demonstrated experience in law, international trade and the subject matter of the covered agreements generally”. The Appellate Body membership “shall be broadly representative of membership in the WTO”. This bodes well for the developing country Members since they are, at the moment, the “majorities” in the WTO only in terms of membership, not in terms of trade volume. In contrast, the wording of Article 9 of the ICJ Statute is not so clear, which states: “At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilisation and of the principal legal systems of the world should be assumed.” Among the first appointed seven Appellate Body members, three of them are

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<sup>251</sup> : See Weiss Friedl: *WTO Dispute Settlement and the Economic Order of WTO Member States*(in *Challenges to the New World Trade Organisation* edited by Pitouvan Dijck and Gerrit Faber), The Hague: Kluwer Law International(1996), p.83.

<sup>252</sup> : According to James Cameron and Karen Campbell, there are general four among the various types of appellate review concerning international disputes, which may be summarised as the followings. Firstly, recourse to the original international tribunal. This is provided for in some international court procedures(such as Articles 60 and 61 of the ICJ Statute, and Articles 40 and 41 of the Statute of the European Court of Justice[ECJ]) for the interpretation of the first decision, or for its revision based upon the discovery of some previously unknown facts of decisive importance. GATT practice also provided for original dispute settlement panels to be reconvened to examine whether the panel findings had been properly implemented. Secondly, recourse to another international tribunal for reviewing. This option is often included in the original dispute settlement agreement, for instance, the Statutes of the United Nations and International Labour Organisation Administrative Tribunals provide for recourse to the ICJ for a “binding” advisory opinion. Thirdly, recourse from a quasi-judicial decision of an international organisation to an international court. This is reflected in Article 96 of the stillborn 1948 Havana Charter for the International Trade Organisation(ITO) and in the International Air Services Transit Agreement of 1994. Fourthly, recourse from national courts on questions of international law. The 1907 Hague Convention, No. XII, concerning the creation of an international prize court, which never entered into force, seems to be the only precedent for the use of an international court as a means of appeal from domestic courts, at the request of individuals, on points of international law. James Cameron and Karen Campbell: *Dispute Resolution in the World Trade Organisation*, Cameron May Ltd(1998), pp.86-88.

from developing country Members,<sup>253</sup> Although it will take some time to see what the developing country Members can benefit from this composition, we can reasonably expect that the Appellate Body is well placed to hear the complaints from the developing country Members and, to review those special and preferential provisions designated for the developing country Members.

Thirdly, similar to Article 168A of the *European Community Treaty*, which provides for a right of appeal to the European Court of Justice(ECJ) “on points of law only” and subject to the further limitation(set out in Article 113, Statute of the ECJ) that “the subject matter of the proceedings before the Court of First Instance may not be changed in the appeal”, Article 17(6) of the DSU limits the scope of appeal to “issues of law covered in the panel report and legal interpretations developed by the panel”. The right of appeal, under the WTO jurisdiction, is limited to parties to the dispute and does not extend, as in the ECJ, even to the third parties of the panel examination process and other Members and institutions which did not intervene in the first dispute settlement proceedings.<sup>254</sup> In the WTO, only panel reports may be appealed.(Article 17[4] of the DSU). While in the ECJ, appeals may be lodged not only against final decisions of the Court of First Instance but also against its decisions on interlocutory matters(e.g., disposing of substantive issues in part or disposing of a procedural issue). The Appellate Body may “uphold, modify or reverse the legal findings and conclusions of the panel” without explicit power for remanding the case back to the panel(Article 17[13] of the DSU). The ECJ, by contrast, “may itself give final judgement in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgement”(Article 54, Statute of the ECJ).

Finally, unlike the International Court of Justice(ICJ) and the European Court of Justice(ECJ), the Appellate Body has no competence to give advisory opinions. The *Dispute Settlement Understanding* explicitly affirms that “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”(Article 3[9] of the DSU). Appellate review relates to the exercise of quasi-judicial powers of WTO panels and the Dispute Settlement Body. Yet, the Appellate Body differs from a court in the true sense. An Appellate Body report can become legally binding only upon the adoption by the DSB, which is also the core of the debate about the Appellate Body’s impartiality and independence.

The objectives determine the regulating dimension of an international institution and, the legal characteristics of this international institution reflect the advantages and disadvantages to some of its participants in terms of its function and jurisdiction. The WTO is a new institution and, so is the Appellate Body. While the Appellate Body is helping the WTO dispute settlement mechanism to move in a rule-oriented direction, the tribunal itself needs reforming in a more judicial way.<sup>255</sup>

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<sup>253</sup> : The first seven Appellate Body members are James Bacchus(United States), Christopher Beeby(New Zealand), Claus-Dieter Ehlermann(Germany), Said El-Naggar(Egypt), Florentino P. Feliciano(Philippines), Julio Lacarte-Muro(Uruguay), Mitsuo Matsushita(Japan). See *WTO Focus*, 1995, No.6, p.8.

<sup>254</sup> : See the *Statute of the European Court of Justice*, Article 49. The *Dispute Settlement Understanding*, Article 17(4). See supra note 1.

<sup>255</sup> : As for the suggestions of how to reform the WTO dispute settlement mechanism in a more judicial way, see Part Two of Section Two, Chapter Six.

### 5.5.3. The function of and jurisdiction by the Appellate Body

Set as a “buffer” and a “filter”, the appellate review provides one more chance for the parties to the dispute, particularly the one which deems the panel report as unfavourable to it, to lodge their arguments. The *Dispute Settlement Understanding* does not establish any preconditions for the exercise of jurisdiction by the Appellate Body. It simply provides that appeals are “limited to issues of law covered in the panel report and legal interpretations developed by the panel”(Article 17[6] of the DSU). In other words, the concept of an “appeal” is meant to speak for itself. This bears some analogy to the stipulations of the domestic law. We know intuitively what an appellate body should do. Although the right of appeal may be statutory, there is no need to have some statutory explanation of when an appeal court can overturn a decision of a lower court---it does so when the lower court is wrong in law. In this respect, an appeal proper is distinguished from judicial review. Just as a classic English administrative law textbook puts it: “On an appeal, the question is ‘right or wrong’? On a judicial review, the question is ‘lawful or unlawful’?”<sup>256</sup>

But is the domestic analogy appropriate for international tribunals, particularly in the context of the WTO dispute settlement mechanism? Is the application of the *WTO Agreement* and its covered agreements a matter on which panels ought to be granted leeway, or is it a matter on which there is a single correct interpretation, adherence to which must be insisted upon by the Appellate Body? One approach might be that the function of the Appellate Body is to ensure the proper interpretation of the *WTO Agreement* and other multilateral agreements. Otherwise, judicial decisions might be governed by political rather than legal considerations and, the results of the Uruguay Round negotiations will be reduced to disuse. In accordance with this view, there is no room for flexibility in the application of the terms of those agreements by panels and, should be no scope for the Appellate Body to develop any concept of standard of review.

An alternative view is that, in the interpretation of the *WTO Agreement* and other multilateral agreements, there must be a recognition of the need for the WTO Members to have some flexibility in the implementation of their obligations. Since such obligations may have a wide range of potential applications, the Appellate Body should be allowed some leeway in its deliberations before concluding that a panel has not correctly applied the relevant provisions of the *WTO Agreement* and its covered agreements. This is not an argument that the panels are mediatory or compromissory in nature. It is a recognition that interpretation involves choices and that, in the context of a developing system of law like that of the WTO, there has to be some flexibility in the exercise of the appellate function. Obviously, the important question is, how much?

The issue of the nature of the appellate function is particularly acute in relation to appeals arising under the *Antidumping Agreement* where there is a specific standard of review. Article 17(6)(ii) of the *Antidumping Agreement* states: “...Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.” The question here is whether this is a rule for both panels and the Appellate Body. In other words, does Article 17(6)(ii) turn the function of the Appellate Body in the area of antidumping into a process

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<sup>256</sup> : H. W. Wade and C. F. Forsyth: *Administrative Law*(seventh edition), Oxford: Clarendon Press(1994), p.38.

of judicial review? If so, the concept of “issues of law covered in the panel report and legal interpretations developed by the panel”, which is the description of the Appellate Body’s jurisdiction provided in Article 17(6) of the DSU, has to be read in the light of Article 17(6)(ii) of the *Antidumping Agreement*, if a dispute arises under that agreement. Following this vein, there is an important preliminary issue for the Appellate Body to determine about its jurisdiction when a matter comes before it under the *Antidumping Agreement*.

How has the Appellate Body perceived its role so far? At the outset, it is clear that the Appellate Body considers that it, rather than parties to the dispute, controls the procedures of the dispute settlement, and the Appellate Body has been prepared to insist that WTO Members should comply with those rules. During the appellate review proceedings of the first appealed case, *United States---Standards for Reformulated and Conventional Gasoline*, the Appellate Body rejected the attempt by Venezuela and Brazil to make arguments on a matter that had not been appealed.<sup>257</sup>

In the initial stage of its practice, the Appellate Body appeared to treat the requirement of Article 17(12) of the DSU<sup>258</sup> as a stipulation that it must set out in its decision a formal legal conclusion on every issue raised.<sup>259</sup> Thus, the Appellate Body, in those earlier cases, was prepared to question a panel’s interpretation, no matter whether or not that interpretation has any effect on the actual outcome of the case. However, in a later case, the Appellate Body changed its former approach and took the view that nothing in Article 11 of the DSU or “in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party. Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues. Thus, if a panel found that a measure was inconsistent with a particular provision of GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that, a complaining party may have argued, were violated.<sup>260</sup> In recent WTO practice, panels likewise have refrained from examining

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<sup>257</sup> : The issues raised by Venezuela and Brazil in their respective Appellees’ Submissions are whether clear air is an exhaustible natural resource within the meaning of Article XX(g) of GATT 1994 and whether the baseline establishment rules are consistent with the *Agreement on Technical Barriers to Trade*. *United States---Standards for Reformulated and Conventional Gasoline*, see supra note 136, pp.10-12.

<sup>258</sup> : Which states: “The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.” See supra note 1.

<sup>259</sup> : After the *Gasoline* case, the *Beverages* case can be deemed another such example. See *Japan-Taxes on Alcoholic Beverages*(hereinafter as *Beverages*), Report of the Appellate Body(distributed on 4 October 1996), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

<sup>260</sup> : See, for example, *EEC---Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, GATT BISD, 30th Supplement(1984), p.129, para.33; *Canada---Administration of the Foreign Investment Review Act*, adopted on 7 February 1984, GATT BISD, 30th Supplement(1984), p.140, para.5.16; *United States---Imports of Sugar from Nicaragua*, adopted on 13 March 1984, GATT BISD, 31st Supplement(1985), p.67, paras.4.5-4.6; *United States---Manufacturing Clause*, adopted on 15/16 May 1984, GATT BISD, 31st Supplement(1985), p.74, para.40; *Japan---Measures on Imports of Leather*, adopted on 15/16 May 1984, GATT BISD, 31st Supplement(1985), p.94, para.57; *Japan---Trade in Semi-Conductors*, adopted on 4 May 1988, GATT BISD, 35th Supplement(1989), p.116, para.122; *Japan---Restrictions on Imports of Certain Agricultural Products*, adopted on 22 March 1988, GATT BISD, 35th Supplement(1989), p.163, para.5.4.2; *EEC---Regulations on Imports of Parts and Components*, adopted on 16 May 1990, GATT BISD, 37th Supplement(1991), p.132, paras.5.10, 5.22, and 5.27; *Canada---Import, Distribution and Sale of Certain Alcoholic Drinks by*



each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter.”<sup>261</sup> Although a few GATT and WTO panels did make broader rulings, by considering and deciding issues that were not absolutely necessary to dispose of the particular dispute, there is nothing anywhere in the DSU that requires panels to do so.<sup>262</sup> In view of the complexity and time pressure of the WTO disputes, we can predict that the Appellate Body will continue to apply the same measure of “judicial economy” to itself in future cases.

In its early years following the inception of the new dispute settlement mechanism, the Appellate Body suggested that one of its important functions was to provide guidance to panels. How well did the Appellate Body measure up in this regard? Here, we can refer to the old adage that one must look at what a court does and not just what it says. The statement made by the Appellate Body in the *Gasoline* case that “WTO Members have a large measure of autonomy to determine their own policies on the environment(including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement”<sup>263</sup> is no doubt meant to be reassuring to those Members concerned with environmental protection. But this does not mean that future panelists and Appellate Body members have to follow the interpretations of the Appellate Body in the *Gasoline* case. WTO law does not recognise the rule of precedent, neither are there any changes on the existing WTO rules concerning environment issues. Therefore, the dispute settlement bodies still need to take into account the particulars of each case in future.

Over time the Appellate Body has to develop a clear view of its role---what it is capable of doing and what it should not do. In the view of the author of this thesis, this will entail articulating some concept of a “standard of review”, perhaps something akin to the European Court of Human Rights concept of a “margin of appreciation”.<sup>264</sup> There are

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*Provincial Marketing Agencies*, adopted on 22 March 1988, GATT BISD, 35th Supplement(1989), p.37, para.5.6; and *United States---Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted on 19 June 1992, GATT BISD, 39th Supplement(1993), p.128, para.6.18.(Footnote original).

<sup>261</sup> : See, for example, Panel Report, *Brazil---Measures Affecting Desiccated Coconut*, adopted on 20 March 1997, WT/DS22/R, para.293; and Panel Report, *United States---Standards for Reformulated and Conventional Gasoline*, as modified by the Appellate Body and adopted on 20 May 1996, WT/DS2/9, para.6.43.(Footnote original) See *United States---Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Report of the Appellate Body(distributed on 25 April 1997), WT/DS33/AB/R, p.18.(Emphasis original).

<sup>262</sup> : See, for example, *EEC---Restrictions on Imports of Desert Apples*, Complaint by Chile, adopted on 22 June 1989, GATT BISD, 36th Supplement(1990), p.91, para.12.20, where the panel explicitly stated that given its finding that the EEC measures were in violation of Article XI:1 of GATT 1947 and were not justified by Article XI:2(c)(i) or (ii) of GATT 1947, no further examination of the administration of the measures would normally be required. In that case, the panel nonetheless considered it “appropriate” to examine the administration of the EEC measures in respect of Article XIII of GATT 1947 in view of the questions of great practical interest raised by both parties.

<sup>263</sup> : *United States---Standards for Reformulated and Conventional Gasoline*, see supra note 136, p.29.

<sup>264</sup> : This concept was first described as a technique “used to grant to governments a certain benefit of thought in especially difficult situations”. See C. Morrisson: *The Developing European Law of Human Rights*, A. W. Sijthoff(1967), p.150. It has come to be seen as “a doctrine of deference in the exercise of judicial review”. See T. A. O’Donnell: *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 Hum. Rts. 6.474(1982), p.495.

two important reasons for this consideration. Firstly, panels and the Appellate Body will be consistently called upon to interpret provisions of the *WTO Agreement* and its covered agreements that are not surrounded with past practice or necessarily fit squarely within traditionally GATT obligations of “most-favoured-nation” and “national” treatment. Those new provisions, drafted in language that may be general rather specific, cannot be given a textual, fixed-in-time meaning the first time when they are raised in a dispute settlement. They need honing and refining over time. Secondly, the interpretative process, particularly in the context of those provisions concerning developing countries, is not an exact science. There must be some leeway for the Appellate Body to give their interpretations so that it may function well not only in maintaining the international trade order, but also in bringing more developing countries to participate in the global trading under this order. Thus, the WTO Appellate Body which commenced in an area where there is no history of appellate jurisdiction must be able to operate with more flexibility than domestic appellate bodies that are able to draw on years, and even centuries, of practice in the development of interpretative process.

#### **5.5.4. The role of the Appellate Body in bringing developing countries into the WTO dispute settlement mechanism**

As stated in the preamble of the *WTO Agreement*, one of the objectives of the World Trade Organisation is to “ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development”. Under this general guidance, many of the multilateral agreements contain relevant provisions with special and preferential treatment for developing and the least-developed country Members.<sup>265</sup> Correspondingly, the *Dispute Settlement Understanding*, from the procedural aspect, also contains some articles to ensure that these provisions are to be implemented properly.<sup>266</sup> This is a clear difference between the GATT and the WTO in the context of taking into account the matters concerning development. However, to make these provisions is only one side of the issue, the other side is how to incorporate these general provisions into the WTO jurisprudence, which has not been envisioned by the draftsmen of the WTO agreements. As the author of this thesis has pointed out in the previous chapter, WTO system, like any other fair legal systems, must contain both the legitimacy and distributive justice.<sup>267</sup> To fulfil this two-tier task, the dispute settlement mechanism should be designed in such a way: on the one hand, it needs to resolve the trade disputes according to the rules negotiated in the Uruguay Round; on the other hand, it should also be capable of keeping the delicate balance which was struck in the Uruguay Round negotiations between developing and developed countries in the context of fulfilling their WTO obligations.

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<sup>265</sup> : For example, Articles 15 and 16 of the *Agreement on Agriculture*; Article 10 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*; Article 12 of the *Agreement on Technical Barriers to Trade*; Article 4 of the *Agreement on Trade-Related Investment Measures*; Article 15 of the *Agreement on Implementation of Article VI of GATT 1994 (Antidumping Agreement)*; Article 20 of the *Agreement on Implementation of Article VII of GATT 1994*; Article 27 of the *Agreement on Subsidies and Countervailing Measures*; Article 9 of the *Agreement on Safeguards*; Article IV of the *General Agreement on Trade in Services*; Article 66 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*. See supra note 1.

<sup>266</sup> : See supra note 51.

<sup>267</sup> : See section Four of Chapter Four.

The Appellate Body has already made some impressive decisions on this issue in a few recent trade disputes. In the case *United States—Restrictions on Imports of Cotton and Man-made Fibre Underwear*, the appellant, Costa Rica, appealed that the Panel erred in finding that the United States' restraint measure<sup>268</sup> could have legal effect between the date of publication of the notice of consultations (i.e. 21 April 1995) and the date of the application of that measure (i.e. 23 June 1995).<sup>269</sup> The restriction measure was "introduced" by the United States on 23 June 1995 for a period of 12 months starting on 27 March 1995, i.e., starting on the day when the United States requested the concerned Members for consultations under Article 6(7) of the *Agreement on Textiles and Clothing* (ATC). By invoking Article 2(4) of the ATC, Costa Rica argued that new restrictions might be imposed in the textiles sector only under either (a) the ATC, or (b) the "relevant" provisions of GATT 1994. More specifically, a transitional safeguard measure could be imposed only if it met the requirements of (a) Articles XI (*General Elimination of Quantitative Restrictions*)<sup>270</sup> and XIII (*Non-discriminatory Administration of Quantitative Restrictions*) of GATT 1994, or of (b) Article 6 of the ATC.<sup>271</sup> Since, Costa Rica argued, Article XIII:3(b)<sup>272</sup> of GATT 1994 generally prohibited the backdating of import quotas, a backdated transitional safeguard measure restricting imports would be permissible only if it is expressly authorised by Article 6 of the ATC.<sup>273</sup>

The question here is whether the silence of Article 6 of the ATC on the issue of backdating allows the United States setting the restraint period starting on March 27 which was the date when the United States requested concerned Members for consultations, or as the Panel concluded, setting the restraint period starting on 21 April which was the date of the publication of the information about the request for

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<sup>268</sup> : Before the establishment of the World Trade Organisation, the international trade of textiles and clothing was regulated by the *Arrangement Regarding International Trade in Textiles* (the *Multifibre Arrangement* or MFA), which permitted the importing countries invoking restraint measures on the importation of textiles and clothing under certain circumstances. The *Agreement on Textiles and Clothing* sets out a transition period of ten years, demanding the importing countries to integrate the textiles and clothing sector into the WTO regime in three stages. See supra note 5. See also *Establishment of an Import Limit for Certain Cotton and Man-made Fibre Textile Products Produced or Manufactured in Costa Rica*, 60 Federal Register 32653, 23 June 1995.

<sup>269</sup> : One of the Panel conclusions is that "the United States violated its obligations under Article 3(2) of the *General Agreement on Tariffs and Trade* 1994 (the '*General Agreement*') and Article 6(10) of the ATC by setting the start of the restraint period on the date of the request for consultations, rather than the subsequent date of publication of information about the restraint." See supra note 202, para. 7.69.

<sup>270</sup> : Costa Rica, however, did not submit any arguments in respect of Article XI of GATT 1994.

<sup>271</sup> : *United States—Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Report of the Appellate Body (distributed on 10 February 1997), WT/DS24/AB/R, p.6.

<sup>272</sup> : Which states: "In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. Any supplies of the product in question which were *en route* at the time at which public notice was given shall not be excluded from entry; *Provided* that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and *Provided* further that if any contracting party customarily exempts from such restrictions products entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the day of such public notice, such practice shall be considered full compliance with this subparagraph." (Noted added). See supra note 1.

<sup>273</sup> : See supra note 271, p.6.

consultation. The Appellate Body believed that the answer to this question was only to be found within Article 6(10) itself---its text and context---considered in the light of the objective and purpose of Article 6 and the ATC in general.

Under the express terms of Article 6(10) of the ATC, "If, however, after the expiration of the period of 60 days from the date on which the request for consultations was received, there has been no agreement between the Members, the Member which proposed to take safeguard action may apply the restraint by date of import or date of export, in accordance with the provisions of this Article, within 30 days following the 60-day period for consultation, and at the same time refer the matter to the TMB..."<sup>274</sup> the Appellate Body believed that, in line with the spirit of these terms, the restraint measure could be "applied" only "after the expiration of the period of 60 days" for consultations, without success, and only within the "window" of 30 days immediately following the 60-day period.<sup>275</sup> Accordingly, the Appellate Body believed that, in the absence of an express authorisation in Article 6(10) of the ATC to backdate the effectiveness of a safeguard restraint measure, a presumption arose from the very text of Article 6(10) that such a measure could be applied only prospectively.<sup>276</sup>

After the Appellate Body provided the deliberations to the text of Article 6(10) of the ATC, it turned to its context, which included the whole of Article 6. Article 6(1) offers some reflected light on the question of backdating a restraint, which reads in pertinent part: "Members recognise that during the transition period *it may be necessary to apply a specific transitional safeguard mechanism*(referred to in this Agreement as 'transitional safeguard'). The transitional safeguard may be applied by any Member to products covered by the Annex, except those integrated into GATT 1994 under the provisions of Article 2...The transitional safeguard *should be applied as sparingly as possible, consistently with the provisions of this Article and the effective implementation of the integration process under this Agreement.*"<sup>277</sup> It appears to the Appellate Body that to inject into Article 6(10) an authorisation for backdating the effectiveness of a restraint measure will "loosen up the carefully negotiated language of Article 6(10), which reflects an equally carefully drawn balance of rights and obligations of Members, by allowing the importing Member an enhanced ability to restrict the entry into its territory of goods in the exportation of which no unfair trade practice such as dumping or fraud or deception as to origin, is alleged or proved". In the view of the Appellate Body, "retroactive application of a restraint measure effectively enables the importing Member to exclude more goods by enforcing the quota earlier rather later".<sup>278</sup> Based on this reasoning, the Appellate Body concluded that "the Panel erred in concluding 'if the importing country publishes the proposed restraint period and restraint level after the request for

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<sup>274</sup> : See supra note 1.

<sup>275</sup> : Under Article 6(5) of the ATC, the maximum period of validity of a determination of "serious damage or actual threat thereof", for purpose of application of an ATC-consistent restraint measure, is 90 days after the date of initial notification of such damage. After the 90-day period, a new determination of "serious damage or actual threat thereof" will have to be made if a new restraint measure is imposed. See supra note 1.

<sup>276</sup> : See supra note 271, p.14.

<sup>277</sup> : See supra note 1(Emphasis added).

<sup>278</sup> : See supra note 271, p.15.

consultations, it can later set the initial date of the restraint period as the date of the publication of the proposed restraint”<sup>279</sup>.

Developing countries, in general, were not particularly interested in the GATT dispute settlement mechanism. Only a few developing countries participated in the GATT trade system, few special and preferential provisions in the GATT legal documents were made for those “less-developed contracting parties”, and no strict procedures were provided for the dispute settlement. All these account for the disinterest of many developing countries to the GATT legal system. Therefore, the institutional reforms within the WTO should presumably go a long way to address their concerns. However, the institutional weakness of the GATT is only one (if the most visible) of the problems of the old system. Such substantive anomalies as the *Arrangement Regarding International Trade in Textiles* (the *Multifibre Arrangement* or MFA) had long been regarded as a mockery of free trade, its abolition was a key demand of developing countries throughout the Uruguay Round negotiations and the *Agreement on Textiles and Clothing* (ATC) is the resultant compromise. The question now is the extent to which in operation the compromise can keep both sides happy. That is, on the one hand, the WTO needs to establish the confidence among developing country Members to those new international trade rules and encourage them to behave under the WTO legal framework; on the other hand, it is also necessary to push the developed country Members to give up their restrictive measures substantially and, to integrate those trade sectors like textiles and clothing, which are of great importance to the developing countries, completely into the regime of the WTO in near future. The Appellate Body in the case *United States---Restrictions on Imports of Cotton and Man-made Fibre Underwear* has made a good start on this endeavour. While interpreting the provisions of the ATC narrowly, the Appellate Body put an end to the practice of backdating of the effectiveness of a restrictive measure to the date of the importing Member’s call for consultations.<sup>280</sup> This, as some scholars have observed,<sup>281</sup> means a small step for Costa Rica, but a giant step for developing countries which had been fighting against the MFA for decades.

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<sup>279</sup> : Id, p.21.

<sup>280</sup> : Article 3(5)(i) of the MFA provided in part: “If, however, after a period of sixty days from the date on which the request has been received by the participating exporting country or countries, there has been no agreement either on the request for export restraint or on any alternative solution, the requesting participating country may decline to accept imports for retention from the participating country or countries referred to in paragraph 3 above of the textiles and textile products causing market disruption (as defined in Annex A) at a level for the twelve-month period beginning on the day when the request was received by the participating exporting country or countries not less than the level provided for in Annex B...” (Emphasis added). Simply as a matter of comparative texts, it may be noted that, like Article 6(10) of the ATC, Article XIX of GATT 1994 and the *Agreement on Safeguards* do not contain any language expressly permitting backdating of the effectiveness of a safeguard measure taken thereunder with respect to categories of goods already integrated into GATT 1994. In contrast, it may also be noted that both Article 10(2) of the *Antidumping Agreement* and Article 20(2) of the *SCM Agreement* expressly authorise, under certain circumstances, the retroactive levying of antidumping and countervailing duties for the period when provisional measures were in force.

<sup>281</sup> : See Rambod Behboodi: *Legal Reasoning and International Law of Trade—The First Steps of the Appellate Body of the WTO*, Journal of World Trade, Vol.32, 1998, No.4, p.80.

## Section Six Developing Countries and the WTO Dispute Settlement Mechanism

### 5.6.1. Statistical analysis: participation of developing country Members in the WTO dispute settlement proceedings

During the Uruguay Round of multilateral trade negotiations, developing countries had mixed feelings about the proposed new dispute settlement mechanism.<sup>282</sup> A rule-oriented multilateral dispute settlement mechanism represented an attractive and transparent alternative to the previous unilateral measures and, the new legal system would be assumed to effectively protect the contracting rights of developing country Members. However, the WTO-sanctioned retaliation mechanism, as permitted in the original proposal of the *Dispute Settlement Understanding* when a ruling is ignored, was not credible for the developing country Members. After many revisions of the proposal, a substantially strengthened dispute settlement mechanism was finally agreed in the middle of the negotiations and, some observers have expressed satisfaction with its role in resolving trade disputes between the WTO Members.<sup>283</sup>

One of the remarkable consequences of the establishment of this new dispute settlement mechanism is the active participation of the developing country Members. The following Table 2 will provide a statistical comparison of participation of developing countries in the GATT and WTO dispute settlement mechanism as of the end of 2001. From this table, it is evident that, out of the total 236 GATT disputes, developing countries had initiated only 38 of them as complainants against developed countries and other developing countries, i.e. about 16.10 percent of the totality. But the corresponding percentage occurring in the WTO is already as high as 25.64 percent. In other words, there is an increase of 9.54 percent. The other dramatic increase is the complaints raised by developed country Members against developing country Members, which is 21.37 percent of the total 234 WTO disputes. This is an increase of 11.20 percent, compared with the same scenario in the GATT.<sup>284</sup> From the table it is also clear that there is a 11.55 percent increase in the disputes between developing country Members themselves. Furthermore, one point which merits our notice is that the figure of the total WTO disputes involving developing country Members within only seven years is already higher than that with a forty-seven years' length of GATT history.

Table 2: Level of participation of developing countries in the GATT and WTO dispute settlement mechanism

Title	GATT		WTO	
	Number	%	Number	%
Total complaints	236		234	

<sup>282</sup> : See J. Croome: *Reshaping the World Trading System*, Geneva: World Trade Organisation(1995).

<sup>283</sup> : See John H. Jackson: *Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects*(in *The WTO As An International Organisation* edited by A. O. Krueger), The University of Chicago Press(1998), pp.161-180; A. W. Shoyer: *The First Three Years of WTO Dispute Settlement: Observations and Suggestions*, Journal of International Economic Law, 1998, Vol.1, pp.277-302.

<sup>284</sup> : One factor accounting for the low participation level of developing countries in the GATT dispute settlement mechanism is that most of the developing contracting parties were not the signatories of the codes made during the Kennedy Round(1962-67) and Tokyo Round(1973-79) negotiations. Thus, most of the GATT rules were not binding on developing contracting parties. In contrast, the WTO rules, under the "single package" policy, are binding on all Members.

Developing countries v. developed countries	35	14.83	30	12.82
Developing countries v. developing countries	3	1.27	30	12.82
Total complaints by developing countries	38	16.10	60	25.64
Developed countries v. developing countries	24	10.17	50	21.37

Note: Figures as of the end of 2001.

Since a general picture of the participation of developing countries in the GATT and WTO dispute settlement mechanism has been provided, the following tables are designated to analyse the nature and trend of the current WTO disputes involving the developing country Members. Table 3 is the summary of the complaints raised by the developing country Members against the developed country Members, while Table 4 is the summary of the complaints raised by some developing country Members against other developing country Members. After the analysis of these disputes in which developing country Members participated as complainants, Table 5 provides us another picture of the complaints which were raised by the developed country Members against the developing country Members.<sup>285</sup> In order to show the different stage in which each of the cases is currently involved, in the following three tables, the author of this thesis chooses to use different handwritings to describe the cause of dispute. The cause of dispute in **bold** indicates those cases where the panel or appellate review process has been completed, while the cause of dispute in *italics* indicates those cases where settlement has been notified or is apparent. Active panels are underlined. All others are in pending consultations.

Table 3: Complaints raised by developing country Members against developed country Members

Complaint	Respondent	Year	Cause of the Dispute
Venezuela, Brazil	United States	1995	<b>Standards for reformulated and conventional gasoline</b>
India	Poland	1995	<i>Import Regime for automobiles</i>
Costa Rica	United States	1995	<b>Restrictions on imports of cotton and man-made fibre underwear</b>
India	United States	1996	<i>Measures affecting imports of women and girls' wool coats</i>
India	United States	1996	<b>Measures affecting imports of woven wool shirts and blouses</b>
Mexico	United States	1996	<i>Anti-dumping investigation (fresh or chilled tomatoes)</i>
India, Malaysia,			<b>Import prohibition of certain</b>

<sup>285</sup> : All the sources in tables 2, 3, 4, 5 are from the documents circulated by the WTO Secretariat. See *Overview of the State-of-Play of WTO Disputes*. cf. [http://www.wto.org/english/tratop\\_e/dispu1\\_.htm](http://www.wto.org/english/tratop_e/dispu1_.htm)

Pakistan, Thailand	United States	1996	<b>shrimp and shrimp products</b>
Brazil	European Communities	1997	<b>Measures affecting imports of certain poultry products</b>
Brazil	Canada	1997	<b>Measures affecting the export of civilian aircraft</b>
Colombia	United States	1997	Safeguard measures against imports of broom and corn brooms
Korea	United States	1997	<i>Anti-dumping duties(CTVs)</i>
Chile	United States	1997	Countervailing measures(salmon)
Korea	United States	1997	<i>Anti-dumping duties(DRAMS)</i>
Panama	European Communities	1997	Regime for the importation, sale and distribution of bananas
Argentina	United States	1997	Tariff rate quota(groundnuts)
India	European Communities	1998	Import duties(rice)
India	European Communities	1998	Anti-dumping investigation (unbleached cotton fabrics)
India	European Communities	1998	<b>Anti-dumping duties(bed-linen)</b>
Brazil	European Communities	1998	Special and differential treatment(coffee)
India	South Africa	1999	Anti-dumping duties (pharmaceuticals)
Korea	United States	1999	<b>Anti-dumping measures(steel)</b>
Pakistan	United States	2000	Transitional safeguard measures on combed cotton yarn
Korea	United States	2000	<u>Safeguard Measures(line pipe)</u>
India	United States	2000	Anti-dumping and countervailing measures on steel plate
Brazil	European Communities	2000	Measures affecting soluble coffee
Brazil	United States	2000	Countervailing duties(carbon steel products)
Brazil	European Communities	2000	Anti-dumping duties(pipe fittings)
Brazil	Canada	2000	<u>Export credits and loan guarantees for regional aircraft</u>
Brazil	United States	2001	US Patents Code



Note : Figures as of the end of 2001.

Out of these thirty complaints raised by the developing country Members, nine are caused by the anti-dumping regime of some developed country Members, particularly those of the United States and the European Communities. Together with the other two countervailing disputes, they make up more than one third of the total disputes in this group. This is a worrying tendency as the United States and the European Communities are the two largest markets of exports for many developing countries. Before the establishment of the World Trade Organisation, developed countries used to limit the imports from developing countries with some non-tariff means like import licenses, tariff quotas and voluntary export restraints. One typical example is the *Multi-Fibre Arrangement*(MFA) which was made between some developing countries with bulks of textile exports and those major developed countries. The MFA restricted the exports of textile and clothing products from developing countries to those major developed countries by the allocation of quotas. The other example is the *Lome Convention* between the European Communities and those African, Caribbean and Pacific(ACP) countries(most of which are the former colonies of the European metropolitan countries), which provided more preferential treatment to these ACP countries than other developing countries. With the elimination of these prejudicial non-tariff measures under the WTO rules, some developed country Members are concerned about the surging of cheap commodities from developing country Members into their domestic markets. They begin to choose the means within the ambit of the WTO rules to limit the imports from developing country Members. The anti-dumping measure becomes one of the efficient ways which many countries are glad to have recourse to.<sup>286</sup> However, the investigation in an anti-dumping dispute involves a very complicated process.<sup>287</sup> To evaluate the impact of the allegedly dumped imports in the domestic market, in most cases, is subjective rather than objective. More often than not, the fact that the cost of production, including labour force and raw materials, in most developing countries is much cheaper than that in developed countries is overlooked by those countries raising the complaints. Consequently, it is not easy to persuade the panel or the Appellate Body of the fact that the dumping does not exist.

After we summarised these anti-dumping and countervailing disputes, we still have got such an impression that all other disputes listed in Table 3 are more or less connected with other restrictive measures implemented by the developed country Members on the

<sup>286</sup> : Article 17(6)(i) of the *Antidumping Agreement* states: "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned". See supra note 1. In the view of the author of this thesis, this flexible standard of review in the examination of an anti-dumping dispute accounts for, in some extent, the frequent use of anti-dumping measure by some countries.

<sup>287</sup> : For example, Article 3(4) of the *Antidumping Agreement* states: "The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment. The list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance". See supra note 1.

imports from the developing country Members. For example, the *Gasoline* and *Shrimp* disputes, both cases concern the different technical and product standards existing in developing and developed countries. If we apply the WTO rules without taking into full account the difference of the economic development existing between the developing and developed country Members, then most developing country Members will surely be placed in a disadvantageous position in the dispute settlement proceedings.

One of the disputes in the this group, which merits special attention, is *European Communities---Measures Affecting Different and Favourable Treatment of Coffee*.<sup>288</sup> This dispute arose from the complaint by Brazil in respect of the special and preferential treatment under the EC's Generalised System of Preferences(GSP). Brazil stated that it was aware that there was a proposed EC Council Regulation(COM[1998] 521 final) which would unify all EC laws and regulations concerning the operation of the GSP scheme for both agricultural and industrial products. Brazil contended that this special treatment adversely affected the importation into the EC of soluble coffee originating in Brazil. In this context, Brazil alleged that this special treatment was inconsistent with the Enabling Clause, as well as with Article I of GATT 1994. To the author's memory, this is the first case raised by a developing country Member under the terms of the special and preferential treatment in the WTO dispute settlement history. In the dispute settlement proceedings, four other developing country Members, Costa Rica, Bolivia, Peru and Columbia, expressed their wishes to join the consultations. Although this dispute is resolved peacefully in the end, it raised another question as whether the WTO panel or the Appellate Body should take the special and preferential treatment clause as one of the standards of review when they are dealing with the disputes concerning developing country Members, no matter under what excuses these complaints are raised.

Table 4: Complaints raised by developing country Members against other developing country Members

Complaint	Respondent	Year	Cause of the Dispute
Singapore	Malaysia	1995	<i>Prohibition of imports of Polyethylene and Polypropylene</i>
Philippines	Brazil	1995	<b>Measures affecting desiccated coconut</b>
Mexico	Venezuela	1995	<i>Anti-dumping investigation(OCTG)</i>
India	Turkey	1996	<b>Restrictions on imports of textiles and clothing products</b>
Sri Lanka	Brazil	1996	Countervailing duties on imports of desiccated coconut and coconut milk powder
Mexico	Guatemala	1997	<b>Anti-dumping investigation(port-land cement)</b>
Brazil	Peru	1997	Countervailing duty investigation(buses)
Indonesia	Argentina	1998	Safeguard measures on imports of footwear
Mexico	Guatemala	1999	<b>Anti-dumping measure(port-land cement)</b>
Thailand	Colombia	1999	Safeguard measure(plain polyester filaments)

<sup>288</sup> : See WT/DS154/1, dated on 7 December 1998. Brazil previously brought a similar case against the US system of GSP during the GATT period. See *United States---Denial of Most-Favoured-Nation Treatment as to Non-rubber footwear from Brazil*(1992).

Mexico	Ecuador	1999	Provisional antidumping measure(cement)
Costa Rica	Trinidad and Tobago	1999	Measures affecting imports of pasta
Costa Rica	Trinidad and Tobago	2000	Provisional anti-dumping measure on macaroni and spaghetti
Colombia	Nicaragua	2000	Measures affecting imports from Honduras and Colombia
Brazil	Argentina	2000	<i>Transitional safeguard measures(cotton fabrics)</i>
Mexico	Ecuador	2000	Anti-dumping measures(cement)
Honduras	Nicaragua	2000	Measures affecting imports from Honduras and Colombia
Thailand	Egypt	2000	Import prohibition on canned tuna with soybean oil
Argentina	Chile	2000	<u>Price band system and safeguard measures relating to certain agricultural products</u>
Brazil	Turkey	2000	Antidumping duty on steel and iron pipe fittings
Turkey	Egypt	2000	<u>Anti-dumping measures on steel rebar</u>
Korea	Philippines	2000	Anti-dumping measures(polypropylene resins)
Brazil	Mexico	2000	Provisional anti-dumping measure(electric transformer)
Guatemala	Chile	2001	Price band system and safeguard measures relating to certain agricultural products
Argentina	Chile	2001	Provisional safeguard measure on mixed edible oil
Chile	Peru	2001	<u>Taxes on cigarettes</u>
India	Brazil	2001	Anti-dumping duties on jute bags
Colombia	Chile	2001	Safeguard measures and modification of schedules regarding sugar
Chile	Mexico	2001	Measures affecting the import of matches
India	Argentina	2001	Measures affecting the import of pharmaceutical products

Note: Figures as of the end of 2001.

Table 4 demonstrates a picture of diversified disputes between the developing country Members. Anti-dumping and countervailing disputes are still the biggest portion of the total thirty disputes. But after that, there are five disputes concerning safeguard measures, six concerning measures affecting imports, three concerning import restriction measures, two concerning different price systems, and one concerning different tax systems. One fact accounting for this diversity is that these disputes are normally produced either because of the indirect effects brought by the readjustment of domestic industrial policies or because of the direct protection for those domestic infant industries. Since many developing country Members are required to readjust their import and export regime, making them operating in conformity with the WTO rules, there might emerge some conflicts of interests in the course of these readjustments. These conflicts may lead to trade disputes not only between developing and developed country Members, but

between developing country Members themselves. More importantly, many developing countries have come to realise that their industries, no matter how small and weak they are, need to compete with those of other countries under the same rules. Although they may benefit some years of delay in the implementation of these rules, they still lack enough resources to strengthen their economies within these extended periods. Under these circumstances, some countries have to resort to those emergency measures, like anti-dumping or safeguard measures, to protect their domestic industries.<sup>289</sup> While, in general, we take a positive approach to the participation of developing country Members in the WTO dispute settlement proceedings, we shall not overlook those protective elements inherent in these disputes, which cannot be forgiven at the excuse that these complaints are brought by developing country Members.

Compared with others in this group, the first two disputes attracted more attention. *Malaysia---Prohibition of Imports of Polyethylene and Polypropylene*<sup>290</sup> is the first dispute which arose between two developing country Members, Singapore and Malaysia, and was brought to the WTO dispute settlement procedures. On 10 January 1995, Singapore requested Malaysia to enter into consultation pursuant to Article XXIII:1 of GATT 1994 and Article 4(3) of the DSU regarding the prohibition of imports of polyethylene and polypropylene instituted and maintained by Malaysia under its Customs(Prohibition of Imports) Order 1994. The consultations failed to settle the dispute within 60 days after the date of the receipt of the request for consultation. Thereafter, Singapore requested the establishment of a Panel pursuant to Article XXIII:2 of GATT 1994 and Article 4(7), Article 6 of the DSU upon the standard terms of reference provided in Article 7(1) of the DSU. This is also the first dispute which invoked the formal WTO dispute settlement mechanism. This dispute was settled eventually upon an agreement of both sides and with Singapore's withdrawal of the panel request.

The second dispute is *Brazil---Measures Affecting Desiccated Coconut*(hereinafter as the *Coconut* case), which went through the whole dispute settlement procedures.<sup>291</sup> The

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<sup>289</sup> : For many developing countries, they prefer to use safeguard measures as the relevant WTO rules are more flexible on this point than others. Article XIX:1(a) of GATT 1994 states: "If, as a result of unforeseen development and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession". Article 2(1) of the *Safeguard Agreement* states: "A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products". See supra note 1. Thus, compared with the anti-dumping dispute, it is much easier for a respondent to support its actions in a safeguard measure dispute.

<sup>290</sup> : See *Malaysia---Prohibition of Imports of Polyethylene and Polypropylene*, WT/DS1, distributed on 19 July 1995.

<sup>291</sup> : The application for initiation of the countervailing duty investigation was filed with the Brazilian authorities on 17 January 1994. The investigation was initiated on 21 June 1994, provisional countervailing duties were imposed on 23 March 1995, and definitive countervailing duties were imposed on 18 August 1995. The *Marrakesh Agreement Establishing the World Trade Organisation*(the *WTO Agreement*) entered into force for both parties to this dispute, Brazil and the Philippines, on 1 January 1995, that is, after the application for, and the initiation of, the investigation and prior to the imposition of the provisional and

Philippines claimed that the countervailing duty imposed by Brazil on the Philippine's exports of desiccated coconut was inconsistent with the WTO rules. The fundamental question in this case is one of the temporal application of one set of international legal norms, or the successor set of norms, to a particular measure taken during the period of co-existence of GATT 1947 and the *Tokyo Round Subsidies and Countervailing Measures Code* with the *WTO Agreement*. Article 28 of the *Vienna Convention on the Law of Treaties* contains a general principle of international law concerning the non-retroactivity of treaties. It provides as follows: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".<sup>292</sup> In the *Coconut* case, Article 32(3) of the *Agreement on Subsidies and Countervailing Measures* is the relevant provision, which states: "...the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement".<sup>293</sup> Absent a contrary intention, the *WTO Agreement on Subsidies and Countervailing Measures* is not applicable to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force. Based on this reasoning, the Panel concluded that the provisions of the agreements relied on by the claimant were inapplicable to the dispute. This dispute was finally settled after the appellate review (appealed by both the Philippines and Brazil) and the Appellate Body upheld the findings and legal interpretations of the Panel.

Table 5: Complaints raised by developed country Members against developing country Members

Complaint	Respondent	Year	Cause of the Dispute
United States	Korea	1995	Measures concerning the testing and inspection of agricultural products
United States	Korea	1995	<i>Measures concerning the shelf-life of products</i>
Canada	Korea	1995	<i>Measures concerning bottled water</i>
United States	Pakistan	1996	<i>Patent Protection for pharmaceutical and agricultural chemical products</i>
European Communities	Korea	1996	<i>Laws, regulations and practices in the telecommunications sector</i>
United States	Turkey	1996	<i>Taxation of foreign film revenues</i>
Canada	Brazil	1996	<u>Export financing programme for aircraft</u>
United States	India	1996	<b>Patent protection for pharmaceutical and agricultural chemical products</b>
United States,			

definitive countervailing duties. See *Brazil--Measures Affecting Desiccated Coconut*, Report of the Appellate Body, WT/DS22/AB/R, Report of the Appellate Body (distributed on 21 February 1997), p.1.

<sup>292</sup> : See supra note 2.

<sup>293</sup> : See supra note 1.

Japan, European Communities	Brazil	1996	Certain measures affecting trade and investment in the automotive sector
European Communities	Mexico	1996	Customs valuation of imports
United States, Japan, European Communities	Indonesia	1996	<b>Certain measures affecting the automotive industry</b>
United States	Argentina	1996	<u>Certain measures affecting imports of footwear, textiles, apparel and other items</u>
United States	Philippines	1997	Measures affecting pork and poultry
United States, European Communities	Korea	1997	<b>Taxes on alcoholic beverages</b>
European Communities	Argentina	1997	Measures affecting textiles and clothing
European Communities	India	1997	<b>Patent protection for pharmaceutical and agricultural chemical products</b>
European Communities	Chile	1997	<b>Taxes on alcoholic beverages</b>
United States	India	1997	<b>Quantitative restrictions (agricultural, textile and industrial products)</b>
Australia, Switzerland, Canada, New Zealand, European Communities	India	1997	<i>Quantitative restrictions on imports of agricultural, textile and industrial products</i>
European Communities	Korea	1997	<b>Safeguard measure (diary products)</b>
United States	Mexico	1997	<b>Anti-dumping investigation (corn syrup)</b>
European Communities	Pakistan	1997	Exports measures affecting hides and skins
United States, European Communities	Chile	1997	<b>Taxes on alcoholic beverages</b>
European Communities	Brazil	1998	Measures affecting payment terms for imports
European Communities	India	1998	Measures affecting export of certain commodities
European Communities	Argentina	1998	<b>Safeguard measures (footwear)</b>
Poland	Thailand	1998	<b>Anti-dumping duties (metal products)</b>
United States	Mexico	1998	<b>Anti-dumping investigation (corn syrup)</b>
European			

Communities	Argentina	1998	Countervailing duties(wheat gluten)
European Communities	India	1998	<u>Measures affecting the automotive sector</u>
European Communities	India	1998	Import restrictions
European Communities	India	1998	Measures affecting custom duties
European Communities	Argentina	1998	<b>Measures on the export of bovine hides and the import of finished leather</b>
European Communities	Argentina	1998	Anti-dumping measures(drill bits)
Czech Republic	Hungary	1999	Safeguard measure(steel product)
United States, Australia	Korea	1999	<b>Measures affecting imports of beef</b>
United States	Korea	1999	<b>Measures affecting government procurement</b>
United States	Argentina	1999	Measures affecting imports of footwear
United States	Argentina	1999	Patent protection for pharmaceuticals and test data protection for agricultural chemicals
United States	India	1999	<u>Measures relating to trade and investment in the motor vehicle sector</u>
European Communities	Brazil	1999	Measures on import licensing and minimum import prices
European Communities	Argentina	2000	<u>Anti-dumping measures(ceramic floor tiles)</u>
European Communities	Chile	2000	<u>Measures affecting the transit and importation of swordfish</u>
United States	Philippines	2000	<u>Measures affecting trade and investment in the motor vehicle sector</u>
United States	Argentina	2000	Certain measures on the protection of patents and test data
United States	Brazil	2000	Measures on minimum import prices
United States	Romania	2000	Measures on minimum import prices
United States	Brazil	2000	<i>Measures affecting patent protection</i>
United States	Mexico	2000	Measures affecting trade in live swine
United States	Mexico	2000	Measures affecting telecommunication service

Note: Figures as of the end of 2001.

The fact that developing country Members are complained against by developed country Members is a dramatic change in the context of the WTO dispute settlement mechanism. In the GATT history, there is only a small portion of 24 complaints raised by

developed contracting parties against developing contracting parties.<sup>294</sup> This is mainly due to the fact that many developing countries were not the signatories of the codes made in the Kennedy Round and Tokyo Round of multilateral trade negotiations. Therefore, most of the GATT multilateral agreements were not relevant to them. In contrast, the developing country Members in the WTO community could no longer keep themselves away from those multilateral trade rules. Thus, those export/import-oriented developing country Members, like Korea, India, Brazil and Mexico, tend to confront the challenges on their foreign trade regime from the developed country Members. A more significant feature is that, within such a short period of WTO history, the complaints raised by developed country Members against developing country Members are even more than those raised by developing country Members against developed country Members (50 vs. 30). This may be beyond the expectations of the Uruguay Round negotiators. Some disputes, like *India---Patent Protection for Pharmaceutical and Agricultural Chemical Products*, are quite influential as the recommendations and rulings of the panel and the Appellate Body adopted by the Dispute Settlement Body will bring much impact upon the domestic policy-making of some developing country Members.<sup>295</sup> Out of the fifty disputes listed in Table 5, about two thirds of them concern the measures affecting the flow of imports or exports. This reflects a similar picture as described in the above paragraphs in which the developing country Members act as the complainants.

In addition to the disputes listed in the foregoing tables, developing country Members are also involved in some mixed disputes, i.e. they are acting as complainants together with other developed country Member.<sup>296</sup>

While we applaud the active participation of developing country Members in the WTO dispute settlement mechanism, we should not overlook one important fact that the number of developing country Members which have used the WTO dispute settlement mechanism is still small in light of the fact that the majority of WTO Members are developing countries. In this respect, the "active participation" is merely referred to a small portion of countries. Only twenty-eight developing country Members have invoked the WTO dispute settlement mechanism either as complainants or as respondents and, the major users are still limited to those newly industrialised countries. While these countries may have gained much experience and trained domestic personnel in the process of

<sup>294</sup> : See Pretty Elizabeth Kuruvila: *Developing Countries and the GATT/WTO Dispute Settlement Mechanism*, Journal of World Trade, Vol. 31, 1997, No.6, p.179.

<sup>295</sup> : In the dispute *India---Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the United States and the European Communities claimed respectively that the absence in India of (a) either patent protection for pharmaceutical and agricultural chemical products or a system to permit the filing of applications for patents on these products and (b) a system to grant exclusive marketing rights in such products, violated the *TRIPS Agreement* Articles 27, 65, and 70. In 1999, India reached agreements with the United States and the European Communities upon its enactment of relevant legislation to implement the recommendations and rulings issued by the DSB. See *Overview of the State-of Play of WTO Disputes*.

cf. [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu1_e.htm)

<sup>296</sup> : Id, for example, *European Communities---Trade Description of Scallops* (Canada, Peru, and Chile as the complainants); *European Communities---Duties on Imports of Grains* (Canada, United States, Thailand, and Uruguay as the complainants); *European Communities---Regime for the Importation, Sale and Distribution of Bananas* (Ecuador, Guatemala, Honduras, Mexico and the United States as the complainants); *Hungary-- Export Subsidies in Respect of Agricultural Products* (Argentina, Australia, Canada, New Zealand, Thailand and the United States as the complainants); *United States---Continued Dumping and Subsidy Offset Act of 2000* (Canada and Mexico as the complainants).



dispute settlement, the majority of others seem still to isolate themselves from the new dispute settlement mechanism. This may develop into a vicious cycle, i.e. the less these countries use the new dispute settlement mechanism, the more they would probably ignore it. This will lead to two consequent issues as whether the dispute settlement under the WTO jurisdiction is compulsory or voluntary and, how the WTO could attract more developing country Members to solve their disputes under its jurisdiction. Following this vein, we may refer to the following two relevant questions: Whether does there exist any legal obligations for Member governments to submit their disputes to the WTO dispute settlement procedures? What is the impact of the dispute settlement within the WTO to the domestic policy making?

### **5.6.2. Obligations of the Member governments to submit their disputes for adjudication and the impact of the disputes settled within the WTO to the domestic policy- making**

As a general rule, it can be said that there is no specific legal obligations for any party in a dispute to submit their dispute for adjudication. Although international economic relations are generally based on agreements, the parties are still free to agree from the very beginning on the methods of settlement which are applicable in case there should arise a dispute between them.<sup>297</sup> It is indeed a very typical feature of international economic relations that the parties very often enter into an agreement beforehand, setting up or referring to a certain dispute settlement mechanism in a way which obliges all parties to make use of it. However, adherence to such agreements can only be secured to the extent that legal enforcement is possible. More importantly, this is only the case when private participants are subject to the jurisdiction of States.

In the context of the obligation of Member governments to submit their disputes for adjudication, one point which needs to be clarified is that, even in the course of the WTO dispute settlement proceedings, Member governments still have much freedom to choose the ways to settle their disputes. For example, Article XXII of GATT 1994 and Article 4 of the *Dispute Settlement Understanding* contain the provisions encouraging the disputing parties to hold consultations between themselves before they request for the establishment of a panel. The Director-General, at the request of any party to the dispute, may offer good offices, conciliation or mediation with the view to assisting them to settle the dispute.<sup>298</sup> Even after the dispute has been referred to a panel, the disputing parties are still permitted to choose the way they deem appropriate to settle their dispute.<sup>299</sup>

Freedom to choose the way for dispute settlement, however, does not mean the freedom to evade the WTO rules. Article 4(1) of the *Dispute Settlement Understanding* states: "Members affirm their adherence to the principles for the management of disputes

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<sup>297</sup> : See Peter Behrens: *Alternative Methods of Dispute Settlement in International Economic Relations* (included in *Adjudication of International Trade Disputes in International and National Economic Law* edited by E.U. Petersmann and G. Jaenicke), University Press Fribourg Switzerland(1992), pp.12-13.

<sup>298</sup> : Article 5(3) of the *Dispute Settlement Understanding* states: "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". See supra note 1.

<sup>299</sup> : Id. Article 12(7) of the *Dispute Settlement Understanding* states: "...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".

heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein".<sup>300</sup> In the light of the general principle contained in Article XVI:4 of the *WTO Agreement*, which states: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements",<sup>301</sup> the WTO rules and the new dispute settlement mechanism should become the first choice for the legal reasoning in a dispute settlement and, still exert much impact upon the policy-making of Member governments. A brief account of the following two cases may vindicate the foregoing point.

The dispute *European Communities—Regime for the Importation, Sale and Distribution of Bananas* is the first such example to be analysed here. A panel was established on 8 May 1996 to consider a complaint raised by Ecuador, Guatemala, Honduras, Mexico and the United States against the European Communities, concerning the regime for the importation, sale and distribution of bananas established by an EC Council Regulation (EEC No.404/93 of 13 February 1993) on the common organisation of the market in bananas, and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the *Framework Agreement on Bananas* (the BFA), which implemented, supplemented and amended that regime. Since the circulation of the Appellate Body Report,<sup>302</sup> there have been a lot of literature published on the merits of the adjudication, but few articles or documents are available on the appraisal of the impact of the recommendations and rulings on the national governments concerned after the adjudication.

The problems existing in those African, Caribbean, and Pacific (ACP) countries, which are brought by the WTO adjudication on the EC bananas regime, are representative of a wider scenario for many developing countries. Just as over 30 years of co-operation under various regimes have failed to improve the position of ACP exporters of bananas, co-operation under the *Lome Convention* has not yielded the results which the ACP countries wished for.<sup>303</sup> The ACP countries, under the previous preferential treatment of the *Lome Convention*, lacked the impetus to adjust their domestic economic structures and promote the competitiveness of their exports. Only when the European Communities began to reduce the preferential treatment, did these ACP countries realise that their dependence on the bananas was so heavy that it was not easy for them to diversify their exports. The WTO adjudication on the EC banana regime has indicated that there will be more important limits on the ability of the EC to promote the trade of the ACP countries, a point which has been recognised by the European Commission, in both the Green Paper and its subsequent communication, in arguing that any new convention must be more WTO-consistent than previous conventions.<sup>304</sup>

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<sup>300</sup> : See supra note 1.

<sup>301</sup> : Id.

<sup>302</sup> : See supra note 151.

<sup>303</sup> : For example, whereas in 1975, the first *Lome Convention*, the ACP countries accounted for 7.6 percent of total EC imports. By 1996, they accounted for only 3.8 percent of total EC imports. See P. Gakuna: *ACP-EU trade: past, present and future*, The Courier, No.167 (January-February 1998), pp.16-17; and C. Cosgrove: *Has the Lome Convention failed ACP trade?* Journal of International Affairs, No.48, 1994, p.223.

<sup>304</sup> : See, for example, the GATT discussions of previous *Lome Conventions*, GATT BISD, the 23rd Supplement (1977), p.46; the 29th Supplement (1983), p.119; and the 35th Supplement (1989), p.321.

On 1 March 2001, the European Communities reported to the DSB that on 29 January 2001, the Council of the European Union adopted Regulation(EC) No.216/2001 amending Regulation(EEC) No.404/93 on the common organisation of the market of bananas. The modifications made in Council Regulation 216/2001 provide for three tariff quotas open to all imports irrespective of their origin.<sup>305</sup> According to the European Communities, the tariff quotas are a transitional measure, leading ultimately to a tariff-only regime no later than 1 January 2006.<sup>306</sup> In the interim period, starting on 1 July 2001, the EC will implement an import regime based on tariff rate quotas, to be allocated on the basis of historical licensing. On 22 June 2001, the EC notified an *Understanding on Bananas between the EC and the US*, and an *Understanding on Bananas between the EC and Ecuador*. Pursuant to these Understandings with the US and Ecuador, the EC has made the following changes on its import regime: (a)effective from 1 January 2001, the EC has implemented an import regime on the basis of historical licensing as set out in annex to each of the Understandings; (b)effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of a GATT Article XIII(with the title *Non-discriminatory Administration of Quantitative Restrictions*) waiver, the EC will implement an import regime on the basis of historical licensing as set out in annex to each of the Understandings. In the view of the EC, the European Commission will seek to obtain the implementation of such an import regime as soon as possible.

Although the settlement of the *Bananas* dispute did not meet the complete satisfaction of the complainants,<sup>307</sup> it did make the Council of the European Union amend the EC bananas import regime. Since the European Union carries out a uniform commercial policy within its member countries, we can expect the recommendations and rulings of the *Bananas* case will bring much impact upon the EU policy-making.

The dispute *India---Patent Protection for Pharmaceutical and Agricultural Chemical Products* is another example which reflects the impact of WTO adjudication upon the domestic policy-making of Member governments. The *Agreement on Trade-Related Aspects of Intellectual Property Rights*(TRIPS) is one of the new agreements negotiated and concluded at the Uruguay Round of multilateral trade negotiations. The *TRIPS Agreement* brings intellectual property within the world trading system for the first time

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<sup>305</sup> : To be specific, the three tariff quotas include: (1)a first tariff quota of 2,200,000 tonnes at a rate of 75/tonnes, bound under the WTO; (2)a second autonomous quota of 353,000 tonnes at a rate of 75/tonnes; (3)a third autonomous quota of 850,000 at a rate of 300/tonnes. Imports from ACP countries will enter duty-free. In view of contractual obligations towards these countries and the need to guarantee proper conditions of competition, they will benefit from a tariff preference limited to a maximum of 300/tonnes. See *Overview of the State-of-Play of WTO Disputes*.

cf. [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu1_e.htm)

<sup>306</sup> : Id. According to the EC, substantial progress has been achieved with respect to the implementing measures necessary to manage the three tariff rate quotas on the basis of the First-come, First-served method. On 3 May 2001, the EC reported to the DSB that intensive discussions with the U.S. and Ecuador, as well as the other banana supplying countries, including the other complaints, have led to the common identification of the means by which the long-standing dispute over the EC's banana import regime will be resolved.

<sup>307</sup> : Id. At the same DSB meeting on 3 May 2001, both the United States and Ecuador reported that the Understandings did not constitute mutually satisfactory solutions within the meaning of Article 3(6) of the *Dispute Settlement Understanding*, and that, at the moment, it would be premature for them to take the item to the DSB agenda.

by imposing certain obligations on WTO Members in the area of trade-related intellectual property rights. First the United State in 1996,<sup>308</sup> then the European Communities in 1997,<sup>309</sup> complained respectively to the WTO Dispute Settlement Body that: (a)India did not comply with its obligations under Article 70(8) of the *TRIPS Agreement* to establish “a means” that adequately preserved novelty and priority in respect of applications for product patent in respect of pharmaceutical and agricultural chemical inventions during the transitional period provided for in Article 65 of the *TRIPS Agreement*; (b)India did not comply with its obligations under Article 70(9) of the *TRIPS Agreement*; (c)India thereby nullified and impaired benefits accruing directly or indirectly to the United States and the European Communities under the *TRIPS Agreement*.

Article 70(8) of the *TRIPS Agreement* provides that “Where a Member does not make available as of the date of entry into force of the *WTO Agreement* patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27,<sup>310</sup> that Member shall: (a)notwithstanding the provisions of Part VI,<sup>311</sup> provide as from the date of entry into force of the *WTO Agreement* a means by which applications for patents for such inventions can be filed; (b)apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and (c)provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement,<sup>312</sup> for those of these applications that meet the criteria for protection referred to in subparagraph(b)”.<sup>313</sup> Under the general requirement of the foregoing provisions, the United States and the European Communities contended that India did not provide such means for them to apply patents for their pharmaceutical and agricultural chemical products during the transitional period of implementing the WTO rules. As Article 65 of the *TRIPS Agreement* provides for transitional periods for developing country Members: in general five years from the entry into force of the *WTO Agreement*, i.e. till 1 January 2000, and an additional five years to provide for product patent protection in areas of technology to which such protection

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<sup>308</sup> : See *India---Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Appellate Body(distributed on 19 December 1997), WT/DS50/AB/R.

<sup>309</sup> : See *India---Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Panel, WT/DS79/R.

<sup>310</sup> : Article 27(1) of the *TRIPS Agreement* states: “Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced”.(Note added)(Original note omitted). See supra note 1.

<sup>311</sup> : Id. Under the title *Acquisition and Maintenance of Intellectual Property Rights and Related Inter Partes Procedures*, Part IV of the *TRIPS Agreement* contains only Article 62, which provides the general principles governing the procedures of acquisition and maintenance of intellectual property rights within the WTO legal system.(Note added). See supra note 1.

<sup>312</sup> : Id. Article 33 states: “The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date(It is understood that those Members which do not have a system of original grant may provide that the term of protection shall be computed from the filing date in the system of original grant)”.(Note added).

<sup>313</sup> : See supra note 1.

would otherwise have to be extended in its territory on 1 January 2000 under the general transition rule. Hence, in the areas of technology, developing country Members which meet these conditions are not required to provide patent protection until 1 January 2005. However, these transitional provisions are not applicable to Article 70(8), which ensures that, if product patent protection commensurate with Article 27 is not already available for pharmaceutical and agricultural chemical product inventions, a means must be in place as of 1 January 1995 which allows for the entitlement to file patent applications for such inventions and the allocation of filing and priority dates to them so that the novelty of the inventions in question and the priority of the applications claiming their protection can be preserved for the purposes of determining their eligibility for protection by a patent at the time that product patent protection will be available for these inventions, i.e. at the latest after the expiration of the transitional period. Thus, in order to prevent the loss of the novelty of an invention in this sense, filing and priority dates need to have a sound legal basis if the provisions of Article 70(8) are to fulfil these purposes. Moreover, a filing must entitle the applicant to claim priority, if available, on the basis of an earlier filing in respect of the claimed invention over applications with subsequent filing or priority dates. Without legally sound filing and priority dates, the mechanism to be established on the basis of Article 70(8) will be rendered inoperable.

The recommendations and rulings adopted by the DSB in these two disputes have brought significant impact on the Indian government's policy-making.<sup>314</sup> After the first dispute was settled, both parties agreed that the period of implementation for the Indian government was 15 months from the date of the adoption of the Appellate Body Report, i.e. it expired on 16 April 1999. As for the second dispute with the European Communities, India indicated at the DSB meeting of 21 October 1998, that it needed a reasonable period of time to comply with the DSB recommendations and that it intended to have bilateral consultations with the EC to agree on a mutually acceptable period of time. At the DSB meeting on 25 November 1998, India read out a joint statement done with the EC, in which it was agreed that the implementation period in this dispute would correspond to the implementation period in the former dispute between India and the United States. At the DSB meeting on 28 April 1999, India presented its final status report on the implementation of the DSB recommendations and rulings in its dispute with the United States, which report also applied to the implementation in its dispute with the European Communities. This report disclosed the enactment of the relevant domestic legislation to implement the recommendations and rulings of the DSB.

The settlement of the dispute *India--Patent Protection for Pharmaceutical and Agricultural Chemical Products* has indicated that forcing developing countries to pay the full cost of intellectual property rights would make certain products prohibitively expensive in the developing world. The developing world, in turn, has far less ability to invest large sums in the development of innovative industries of its own. Furthermore, Many developing countries like India had no regime, or only limited regime, for the protection of intellectual property rights before the *TRIPS Agreement* was enacted. This

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<sup>314</sup> : The Appellate Body in the first complaint raised by the United States recommended that the Dispute Settlement Body request India to bring its legal regime for patent protection of pharmaceutical and agricultural chemical products into conformity with India's obligations under Articles 70(8) and 70(9) of the *TRIPS Agreement*. These recommendations had much impact on the conclusions made by the Panel in the second complaint raised by the European Communities. See supra note 308, p.34, and supra note 309, p.69.

is the rationale behind the transition period designed for the developing country Members in the *TRIPS Agreement*. When the transition period expires, the developing country Members will be required to establish the same regime as that of the developed country Members, concerning the protection of the trade-related intellectual property rights. It is certainly no easy job for them to do so. Meanwhile, developing country Members may have to pay more for some imports in the context of the protection of intellectual property rights, and this will become, for many developing country Members, another insurmountable barrier in the future international trade.

A principal theme in the study of WTO law is the greatly increased cost of participation for some Members in the new multilateral trading system. Whereas prior to 1995, a GATT requirement that involved too high a domestic political cost could in effect be resisted, that is no longer the case in the WTO.<sup>315</sup> At least with regard to patents, the *TRIPS Agreement* involves obligations that could well cost some citizens in the WTO Members their lives. Even in the name of the future development of efficient research-based industries, that is a political cost of the highest order.<sup>316</sup> It is to be expected that non-compliance will continue to be a prominent feature of the *TRIPS Agreement* in particular.<sup>317</sup> Indeed, how to deal with this continued tendency to resist the full rigours of the WTO rules like the provisions in the *TRIPS Agreement* has been a major source of contention in the WTO dispute settlement. In this regard, the only practicable solution is to establish a fair dispute settlement mechanism.

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<sup>315</sup> : See Sara Dillon: *Fuji-Kodak, the WTO, and the Death of Domestic Political Constituencies*, Minnesota Journal of Global Trade, No.8:2, 1999, p.197.

<sup>316</sup> : See Sara Dillon: *International Trade and Economic Law and the European Union*, Hart Publishing(2002), p.79.

<sup>317</sup> : See John E. Giust: *Noncompliance with TRIPS by Developed and Developing Countries: Is TRIPS Working?* Indiana International and Comparative Law Review, No.8, 1997, p.69; Keshia B. Haskins: *Special 301 in China and Mexico: A Policy Which Fails to Consider How Politics, Economics, and Culture Affect Legal Change Under Civil Law System of Developing Countries*, Fordham Intellectual Property, Media and Environment Law Journal, No.9, 1999, p.1125.

## Chapter Six Towards a Complete Dispute Settlement Mechanism

### Section One Relevant Issues to Be Clarified for a Complete Dispute Settlement Mechanism

#### 6.1.1. Representation of parties in the WTO dispute settlement proceedings

The issue of representation of parties did not catch wide attention until the incident occurred during a recent panel procedure, where two WTO Members (the United States and Mexico) successfully opposed the participation of some private attorneys who had been appointed as its delegates by another WTO Member (St. Lucia).<sup>1</sup> The rights and wrongs on this Panel decision have been debated significantly by many scholars since then.<sup>2</sup> The present writings will mainly focus the research on the stipulations of the *Dispute Settlement Understanding* on this particular issue, the impact of the Panel decision on the developing country Members and, the recommendations on the possible amendments to the DSU.

To start with this analysis, it is necessary to read the relevant provisions of the *Dispute Settlement Understanding* on this issue. Unfortunately, the DSU is silent on which persons are to be recognised as being entitled to represent a WTO Member in the dispute settlement proceedings. This silence, however, shall not prevent us from drawing the jurisprudence for this issue from other relevant provisions, or even other international agreements. Besides, the practice and documents of the GATT, the predecessor of the WTO, are also a valuable source for us to understand the legality of the WTO dispute settlement mechanism.<sup>3</sup>

While we refer to those relevant international agreements and customary practice, Article 3(2) of the DSU is an illuminating provision, which states: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law..."<sup>4</sup> Guided by this provision, we first invoke the general principles regarding the representation of States in their relations with international organisations, which are set out in the *1975 Vienna Convention on the Representation of States in their Relations with International Organisations of a*

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<sup>1</sup> : This incident happened during a Panel meeting on 10 September 1996 on the dispute *European Community--Regime for the Importation, Sale and Distribution of Bananas*. See WTO Press Notice dated 19 September 1996. See also B. Bahree: *Rules of the Game---WTO Slips on Denying Parties Outside Legal Help*, Wall Street Journal Europe, 17 September 1996.

<sup>2</sup> : See U. Bourke: *International Dispute Settlement: The WTO Route or Alternatives?* paper delivered at the conference on Dispute Resolution in the World Trade Organisation held in Brussels on 14 June 1996. See also Rutsel Silvestre J. Martha: *Representation of Parties in World Trade Disputes*, Journal of World Trade, Vol. 31, 1997, No.2, pp.83-96.

<sup>3</sup> : Article XVI:1 of the *WTO Agreement* states: "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947." See The Legal Texts: *The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press(1999).

<sup>4</sup> : Id.

*Universal Character.*<sup>5</sup> Although this Convention has not yet entered into force, its Part III (*Delegations to Organs and to Conferences*) particularly represents a reflection of customary international law in this area. Article 43 (*Appointment of the members of the delegation*) states: "Subject to the provisions of Articles 46 and 73, the sending State may freely appoint the members of the delegation."<sup>6</sup> In terms of the composition of the delegation, Article 45 states: "In addition to the head of delegation, the delegation may include other delegates, diplomatic staff, administrative and technical staff, and service staff."<sup>7</sup> Therefore, it is the consideration and freedom of choice of the sending State upon who will represent it in an international organisation. The only exceptions are the limit on the size of the delegation and the conditional appointment of delegates from the persons who have the nationality of the host State. In the case of the WTO, this means that only Switzerland would be entitled to oppose the appointment of its nationals in delegations to a panel hearing in Geneva.

The rules contained in the *1975 Vienna Convention* are in line with the stipulations of the *Rules of Procedures for Sessions of the GATT Contracting Parties*.<sup>8</sup> Rules 5 and 6 provide that each contracting party shall be represented by an accredited representative, and each representative may be accompanied by such alternate representatives and advisers as he may require. No mention is made of any requirement that either the alternates or the advisers must be full-time government employees. Furthermore, under Rule 7, the credentials of the members of the delegation shall take the form of a communication from or on behalf of the Minister of Foreign Affairs. One is therefore compelled to conclude that neither the principles enshrined in the *1975 Vienna Convention*, nor the specific rules adopted under the GATT, contain any stipulation that would warrant the decision of a panel that excludes duly accredited private practitioners from its proceedings.

The Panel decision to expel private attorneys in the *Banana* case also contradicts the objective of the WTO to bring developing country Members fully into its dispute settlement mechanism. Article 27(2) of the *Dispute Settlement Understanding* provides that "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

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<sup>5</sup> : See *The American Journal of International Law*, Vol. 69, 1975, pp.730-759.

<sup>6</sup> : *Id.* Article 46 (*Size of the delegation*) states: "The size of the delegation shall not exceed what is reasonable and normal, having regard, as the case may be, to the functions of the organ or the object of the conference, as well as the needs of the particular delegation and the circumstances and conditions in the host State". Article 73 (*Nationality of the members of the mission, the delegation or the observer delegation*) states: "(1)The head of mission and members of the diplomatic staff of the mission, the head of delegation, other delegates and members of the diplomatic staff of the delegation, the head of the observer delegation, other observer delegates and members of the diplomatic staff of the observer delegation should in principle be of the nationality of the sending State. (2)The head of the mission and members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the host State except with the consent of that State, which may be withdrawn at any time. (3)Where the head of the delegation, any other delegate or any member of the diplomatic staff of the delegation or the head of the observer delegation, any other observer delegate or any member of the diplomatic staff of the observer delegation is appointed from among persons having the nationality of the host State, the consent of that State shall be assumed if it has been notified of such appointment of a national of the host State and has made no objection."

<sup>7</sup> : See *supra* note 5.

<sup>8</sup> : See *GATT BISD*, 12th Supplement(1964), pp.10-16.



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.”<sup>9</sup> Without any opposite stipulations, we then deduce from the above ambiguous wording that the legal assistance to a developing country Member may continue, if necessary, in the whole course of the dispute settlement proceedings, including the panel examination and appellate review. However, the fact in real situations is that there is neither such possibility that the legal expert from the WTO technical cooperation services is the government official of the requesting country, nor such requirement in the DSU that the legal expert should be a national of the requesting country. If we follow the Panel decision of the *Banana* case in future situations, the legal assistance provided by the WTO to the developing country Members will seem either impossible or impracticable.

According to Ambassador Edwin Laurent of St. Lucia, the Panel decision to expel private attorneys at the September 1996 meeting entrenches the disadvantage of small countries in the WTO, which, unlike the larger and more powerful countries, cannot afford to employ full-time specialised legal counsel on a permanent basis.<sup>10</sup> Indeed, it should not be difficult to conceive that the effective exercise of the right to be heard in a legal proceeding is largely dependent upon the availability of international legal expertise and advocacy skills which may not be available in the government staff of some developing countries. If those developing country Members are deprived of the right to seek legal assistance from outside their countries, or even outside their governments, then the consequence will be like, as David Palmeter argues, that when the panels’ doors are closed, laymen from developing and smaller countries will be left to debate points of law with U.S. and European Community legal specialists.<sup>11</sup> Being aware of this reality, the WTO, besides the provision of legal assistance, also conducts 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. However, these efforts can only make limited achievement in narrowing the huge gap in terms of legal expertise between the developed and developing country Members, at least, for the time being.

Under the *Statute of the International Court of Justice*, no attempt is made to regulate the manner by which the parties to a dispute shall be represented before the Court. Article 42 of the ICJ Statute states: “(1)The parties shall be represented by agents. (2)They may have the assistance of counsel or advocates before the Court. (3)The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.”<sup>12</sup> Presumably, the parties to a dispute have the liberty to recruit both government officials and private practitioners in their delegations by which they are represented before the Court. Even in cases where the instrument referring the matters in dispute to an international adjudicatory procedure contains provisions concerning the representation of parties, no limitations are imposed as regards the representation of sovereign States and organs of international

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<sup>9</sup> : See supra note 3.

<sup>10</sup> : See Rutsel Silvestre J. Martha, supra note 2, p.94.

<sup>11</sup> : David Palmeter: *The Need for Due Process in WTO Proceedings*, Journal of World Trade, Vol.31, 1997, No.1, p.53.

<sup>12</sup> : See *Basic Documents in International Law*, fourth edition, edited by Ian Brownlie, Oxford University Press(1995).

organisations. For example, pursuant to the *EC Treaty*, parties to a dispute before the European Court of Justice who are not member States or the institutions of the European Communities must be represented by a member of the bar of any of the member States. However, member States themselves and the institutions can be represented by anyone, whether a private practitioner or not, who has been appointed as an agent.<sup>13</sup> On the other hand, the various instruments concerning international commercial arbitration adopt an even more liberal approach. Under the UNCITRAL Arbitration Rules, the ICC Rules of Conciliation and Arbitration, the London Court of International Arbitration Rules, and the recent World Intellectual Property Organisation(WIPO) Arbitration Rules, parties may be represented by persons of their choice and, in addition, these persons may be assisted by advisers.<sup>14</sup>

However, professor Rutsel Silvestre J. Martha, in his article *Representation of Parties in World Trade Disputes*, has cogently distinguished the representation of States in political organs from the representation before international adjudicatory bodies. In the former situation, the States participate in the decision-making, whether they are present or not may affect the legal validity of the decision adopted by these organs.<sup>15</sup> But in the case of adjudication, as a rule, States do not participate as co-decision-makers. Thus, the function of a State's participation in the legal proceedings of an international adjudicatory body is of a different nature to that of their participation in the non-adjudicatory organ: they do not participate in the adjudicatory body itself but rather appear before it.<sup>16</sup> Therefore, in a third-party dispute settlement, the parties to a dispute tend to be concerned over the impact of the judgement rather than the legality of the rules. Under this circumstance, the legal expertise will play a vital role in the proceedings of a dispute settlement.

Although the *Banana* case was conditionally resolved at the Doha Ministerial Conference,<sup>17</sup> there is no assurance that similar incidents like the Panel decision of the *Banana* case will not reoccur, in light of the ambiguities of the DSU provisions in this respect. Therefore, in order to avoid confusions in future disputes and clarify the relevant

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<sup>13</sup> : See *EEC Statute*, Article 17. See also *Rules of Procedure of the Court of Justice*, Article 38(8).

<sup>14</sup> : See *UNCITRAL Arbitration Rules*: Article 4; *ICC Rules of Conciliation and Arbitration*: Article 15.5; *London Court of International Arbitration Rules*: Article 9; *WIPO Arbitration Rules*: Article 13.

<sup>15</sup> : The WTO deviates from the traditional way by setting up two separate decision-making mechanisms. Where the rules and procedures of the *Dispute Settlement Understanding* provide for the DSB to take a decision, it shall do so by consensus(the body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision). On the other hand, according to Article IX and Article X of the *WTO Agreement*, only in the cases of amendment to Articles IX, X:2 of the *WTO Agreement*, Articles I and II of GATT 1994, Article II:1 of the GATS, Article 4 of the Agreement on TRIPS, is the acceptance of all WTO Members necessary. In most other cases, if the consensus is not reached, the decisions and amendments will be made by voting of either three-fourths or two-thirds majority, and take effect upon all WTO Members. See supra note 3.

<sup>16</sup> : See Rutsel Silvestre J. Martha, supra note 2, p.88.

<sup>17</sup> : At the fourth WTO Ministerial Conference, the ministers of WTO Members agreed to permit a waiver requested by the European Communities from its obligations under Article I:1 of GATT 1994 until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in African, Caribbean and Pacific(ACP) countries as required by Article 36.3, Annex V and its Protocols of the *ACP-EC Partnership Agreement*, without being required to extend the same preferential treatment to like products of any other Member.

cf. [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_acp\\_ec\\_agre\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.htm)

provisions, the WTO needs to amend the present *Dispute Settlement Understanding*. Two proposed amendments are put forward here. The first amendment goes to Article 3(10). A sentence should be inserted between the first and second sentences of the original paragraph, which reads as “In the course of the dispute settlement procedures, the parties to a dispute are free to seek assistance from their government officials, and legal experts who are not necessarily limited to the nationals of the seeking country.” The second amendment applies to Article 27(2). The last sentence of the original paragraph should be modified as “The expert may assist the developing country Member in the whole course of the dispute settlement proceedings, including the panel examination and appellate review.”

After we have clarified the issue of representation of parties in the WTO dispute settlement proceedings, a relevant issue comes to us, which equally merits our attention for the sake of the efficiency of enhancement in the WTO dispute settlement mechanism. This issue concerns the relationship of the admissibility of a claim under the WTO jurisdiction and the exhaustion of local remedies.

### **6.1.2. The exception to the customary rule of exhaustion of local remedies**

It is acknowledged generally that local remedies are relevant to the settlement of certain international disputes concerning States and privates. As one scholar has pointed out, the fact that the celebrated rule of “exhaustion of local remedies”(which means that an international tribunal will not entertain a claim put forward on behalf of an alien on account of alleged denial of justice unless the person in question has exhausted the legal remedies available to him in the State concerned) is accepted as a customary rule of international law needs no proof today, as its basic existence and validity have not been questioned.<sup>18</sup> Not only has this rule been affirmed in recent diplomatic practice, particularly by developed countries against whom or in regard to whose nationals the rule is most likely to be invoked in regard to the protection,<sup>19</sup> and been assumed to exist as a principle of customary or general international law in such conventions as the *International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of all Forms of Racial Discrimination*, and the *European Convention on Human Rights*,<sup>20</sup> but, in recent history, has it been frequently invoked in international litigation both before the ICJ and other arbitration tribunals in circumstances in which such international courts have conceded either explicitly or implicitly that the rule exists.<sup>21</sup>

The exhaustion of local remedies rule did not catch much attention in the GATT dispute settlement history until the days when the results of the Uruguay Round of

<sup>18</sup> : C. F. Amerasinghe: *Local Remedies in International Law*, Grotius Publications Limited(Cambridge), 1990, p.1.

<sup>19</sup> : Id.

<sup>20</sup> : See Article 41(c) of the *International Covenant on Civil and Political Rights*; Article 11(3) of the *International Convention on the Elimination of all Forms of Racial Discrimination*; and Article 26 of the *European Convention on Human Rights*. See supra note 12.

<sup>21</sup> : For example, the rule was invoked by the respondent State before the ICJ in the *Interhandel* case, where the Court stated categorically that “the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law”. See ICJ *Reports*(1959), p. 27. The rule was also accepted by the tribunals as a relevant rule of customary international law in both the *Finnish Ships Arbitration* and the *Ambatielos Claims*. See *United Nations Reports of International Arbitration Awards*(UNRIAA)(1934), p.1479; and UNRIAA(1956), p.83.

Multilateral Trade Negotiations began to be implemented. The GATT legal system was set up to regulate the international trade in the respect of goods. Disputes might arise when a GATT contracting party did not keep up its scheduled concessions, imposed measures which were inconsistent with GATT 1947, or applied the measures which, notwithstanding, were consistent with GATT 1947, but still impaired or nullified the benefits of other contracting parties, or impeded the attainment of benefits of other contracting parties.<sup>22</sup> The focus of debate in the GATT dispute settlement proceedings was the treatment to goods, not to persons. Therefore, it is understandable that the Panel in the case *United States---Antidumping Duties on Gray Portland Cement and Cement Clinker from Mexico*(the *Gray Portland Cement* case) rejected the request to apply the exhaustion of local remedies rule in the GATT dispute settlement procedures under Article XXIII of GATT 1947. The Panel concerned also ruled that the exhaustion of local remedies rule did not apply to the dispute settlement procedures governed by the *1979 Agreement of Implementation of Article VI of the General Agreement on Tariff and Trade*(the *Anti-Dumping Code*) and seemed to vindicate the thesis that the exhaustion of local remedies rule did not apply in the law of the GATT.<sup>23</sup>

This situation, however, has been changed dramatically since the World Trade Organisation expanded its regulated dimension to such new areas like trade in services and the protection of trade-related intellectual property rights. Article I:2(c) and (d) of the *General Agreement on Trade in Services*(GATS) define the trade in services as the supply of a service “by a service supplier of one Member, through commercial presence in the territory of any other Member”; and “by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member”.<sup>24</sup> Article II:1 and Article XVII:1 of the GATS require that the host State(or separate customary territory) should offer national treatment and most-favoured-nation treatment in relation to its own service suppliers and among all the foreign service suppliers. Again, the first sentence of Article 1(3) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*(TRIPS) states: “Members shall accord the treatment provided for in this Agreement to the nationals of other Members”.<sup>25</sup> Similar words can also be found in Article 3 and Article 4 of the *TRIPS Agreement* where national treatment and most-favoured-nation treatment are required. Hence, the WTO legal system, different from that of the GATT, regulates not only the treatment to goods, but also the treatment to private persons and companies.

If we read rigidly Article 3(2) of the *Dispute Settlement Understanding*, which states: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of

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<sup>22</sup> : See GATT Article XXIII:1. See supra note 3.

<sup>23</sup> : See GATT Document, ADP/82, p.72, para.5.9.

<sup>24</sup> : See supra note 3.

<sup>25</sup> : Id. As for the definition of “nationals”, the second sentence of Article 1(3) of the *TRIPS* states: “In respect of the relevant intellectual property rights, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the *Paris Convention*(1967), the *Berne Convention*(1971), the *Rome Convention* and the *Treaty on Intellectual Property in Respect of Intellectual Circuits*, were all Members of the WTO members of those Conventions”.

interpretation of public international law...”(Emphasis added)<sup>26</sup> we may tend to conclude that the customary rule of exhaustion of local remedies is also applicable in the WTO dispute settlement procedures, albeit there are no such relevant provisions in the WTO agreements. As a matter of fact, there has been at least one scholar who argued for the application of this rule in the WTO legal system.<sup>27</sup> His arguments are nothing inappropriate if we do not take into account the unique institutional characteristics of the World Trade Organisation. But, after having acquired a full knowledge of the objectives and composition of this organisation, we may tend to draw a different conclusion.

The argument for the exception of the WTO dispute settlement mechanism to the customary rule of exhaustion of local remedies is based on the analyses concerning both the procedural and substantial aspects of the WTO legal system.

The initial considerations in respect of the procedural aspect derive from Article 3(3) of the DSU, which states: “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”.<sup>28</sup> In other words, in a judicial or quasi-judicial procedure concerning the settlement of a commercial dispute, the promptness of the dispute settlement has the same value as the impartiality of the legal procedure itself. Under the present WTO dispute settlement mechanism, a dispute may go through the stages of consultation, panel examination and appellate review before it is finally resolved. These stages will normally last up to 60 days,<sup>29</sup> six months<sup>30</sup> and 60 days<sup>31</sup> respectively, which do not include the time necessary for the Dispute Settlement Body to decide the establishment of a panel and to adopt the panel or Appellate Body report. Even after the panel or Appellate Body report is adopted by the Dispute Settlement Body and has the effect of enforcement upon the complained Member to redress its inconsistent measures, there still may be some “sequence” problems as to who and how to decide whether the implementations of the complained Member have fully complied with the recommendations and rulings of the panel or Appellate Body report, and when the provision of compensation may be resorted to by the complaining Member if the immediate withdrawal of the complained measures is not available. These sequence problems which arose after the Appellate Body report of the *Banana* case was adopted almost paralysed the WTO dispute settlement mechanism.<sup>32</sup> If the exhaustion of local remedies is required before a Member wishes to resort to the WTO dispute settlement procedures, there will be two situations arising out of it. In the first situation, there may be no breach of obligations at all under the WTO law until all local legal remedies

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<sup>26</sup> : See supra note 3.

<sup>27</sup> : For example, see Rutsel Silvestre J. Martha: *World Trade Dispute Settlement and the Exhaustion of Local Remedies Rule*, Journal of World Trade, Vol. 30, 1996, No. 4, pp.107-130.

<sup>28</sup> : See supra note 3.

<sup>29</sup> : In cases of urgency, including those which concern perishable goods, this period will be no more than 20 days.

<sup>30</sup> : In cases of urgency, including those relating to perishable goods, this period will be no more than three months. In other exceptional cases, this period may be extended to nine months to the maximum.

<sup>31</sup> : In some cases, this period may be extended to 90 days to the maximum.

<sup>32</sup> : For the details of the sequence problems of the *Banana* case, see Cherise M. Valles and Brendan P. McGivern: *The Right to Retaliate under the WTO Agreement---The “Sequence” Problems*, Journal of World Trade, Vol. 34, 2000, No.2, pp.63-84.

available in the complained Member have been exhausted by the aliens who claim to have been injured by the measures of the complained Member---the breach consisting in the very failure to afford a remedy, provided it be an improper failure. In that case, no question of any breach can arise until all such remedies have been exhausted. In the second situation, the breach can be established(or at any rate alleged) independently of the action of the local tribunals; but in that event, a bar to the admissibility of any international claim in respect of the breach continues so long as any remedies afforded by the local law in respect of it have not been exhausted.<sup>33</sup> If we stick to such a viewpoint that the exhaustion of local remedies rule is inherently contained in the WTO law and an injured alien needs to exhaust all the local remedies of the host State(or separate customs territory) available to him before he petitions his government to bring his claim to the WTO, it will be highly unpredictable and inconceivable that the dispute could be resolved promptly in accordance with the spirit of Article 3(3) of the DSU, taking into account the varieties and complexities of the local legal system in the present 144 WTO Members. Furthermore, it is likely to occur that some recalcitrant Members may use this rule as a gimmick to circumvent the WTO dispute settlement procedures, by changing a little each time on the treatment to foreign privates and companies after the decision of their local tribunal is made, thus making the exhaustion of local remedies fall into an endless loop of litigation. Such a prolonged process will undoubtedly make the WTO dispute settlement mechanism more costly and unattractive. Meanwhile, it is important for us to note the extreme difficulties encountered by many developing country Members if they are required to invoke the local remedies of some developed country Members in terms of the complicated legal system and high cost.

Compared with those procedural issues, the considerations derived from the substantial aspects of the WTO law are even more significant. The development and application of the exhaustion of local remedies rule have naturally been influenced by the jurisprudential considerations which underlie them. These considerations concern the practice of diplomatic protection in the customary international law, as well as this rule in a narrower context. Therefore, it may be useful to first review the bases of the law relating to diplomatic protection, before we embark on the analysis of the jurisprudential underpinnings of this customary rule, in order to appreciate the special kind of emphasis which has been inherent in the case of the exhaustion of local remedies rule.

According to professor C. F. Amerasinghe, the protection of aliens by their national States in one form or another predates considerably the eighteenth century. Early in the seventeenth century, Grotius, in his *De Jure Belli ac Pacis*(1625), had written what

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<sup>33</sup> : Gerald Fitzmaurice in the book *The Law and Procedure of the International Court of Justice* raises several other questions which merit our consideration in the application of the exhaustion of local remedies rule: (1)Does the local remedies rule apply in every case in which a breach of international law or treaty is alleged, and the local law of the defendant State in principle affords remedies(if its courts recognise the existence of the breach) or could do so if invoked; or are there cases, or classes of cases, to which the rule has no application, even if the local law could afford a remedy if resorted to? (2)In what cases does the rule operate as a bar to admissibility and in what as a plea to the merits? (3)What constitutes a “remedy” for the purposes of the application of the rule; must every actual or apparent remedy be invoked and, in general, what is the kind of remedy non-resort to which will bring the objection into play? (4)Where does the burden of proof lie of establishing, as the case may be (a)that local remedies existed, but have either (i)not been resorted to at all, or (ii)have been resorted to, but have not been fully exhausted; (b)that although such remedies existed, they were not of the kind to which the rule relates, or otherwise that non-resort to them is no bar to the claim? Cambridge University Press(1993), p.687.

appears to have foreshadowed the formulation of this practice. But it was not until the time of Vattel that a clear attempt was made to explain the concept of diplomatic protection in any terms. In 1758, Vattel, in his book *Le droit des gens*, not only asserted the right of a State to protect its nationals, but seems to have implied that there was an obligation resting upon the alien's national State to protect him. It is clear that Vattel conceived the right of protection as inhering in the national State of the alien and did not envisage the injury done to the alien as creating any right vesting in the alien at international law to remedy against the host State. A consequence of this view was that the injury done to the alien was regarded as being a violation of an obligation owed by the host State to his national State. Formally, this explanation was the result of the theory that the individual had no rights at international law.<sup>34</sup> Although it is not clear what Vattel meant by the duty to protect a national abroad which rested upon the national State of the alien, the principle that the right infringed in cases where an alien suffers illegal injury at the hands of a State is the right of the alien's national State and not the right of the alien himself, apparently deriving as it does from the theory that States alone are subjects of international law, has been recognised in several international judicial decisions.<sup>35</sup>

While the rationale for the exhaustion of local remedies rule should basically be the same as for that of diplomatic protection in general, it would seem that there are some jurisprudential considerations which enter into the implementation and application of the exhaustion of local remedies rule, which result in certain crucial variations in the importance attached to some of the underlying premises of diplomatic protection. In the view of professor Amerasinghe, the development of the exhaustion of local remedies rule is based on, apart from the recognition of the respondent State's sovereignty in what is basically an international dispute, the objective contemplated in the relief of international tribunals from being excessively burdened with litigation. On the other hand, the national State of the injured alien may also have an interest in the relief from being unduly burdened with international claims, but this is clearly secondary to that of having the dispute in which its national is involved appropriately settled, if necessary, by resorting to international litigation.<sup>36</sup>

After having reviewed the legal basis of the formulation and development of the exhaustion of local remedies rule, we may find that the most substantial element inhering in this customary rule is the recognition of the sovereignty of the host State. This, however, is contradictory to the legal foundation and composition of the World Trade Organisation. Article XII:1 of the *WTO Agreement* defines the WTO membership as

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<sup>34</sup> : See supra note 18, pp.53-54 and footnote 2.

<sup>35</sup> : For example, in the *Mavrommatis Palestine Concessions Case*, the Permanent Court of International Justice (PCIJ) stated that "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and resorting to a diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights---its right to ensure, in the person of its subjects, respect for the rules of international law". Jurisdiction (1924), PCIJ Series A, No.2, p.12. The International Court of Justice (ICJ) has also affirmed this principle in several cases, either explicitly or implicitly. For example, in the *Reparations* case, it said that the rule of diplomatic protection rests upon two bases: "The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach". ICJ Reports (1949), p.181.

<sup>36</sup> : See supra note 18, p.69.

consisting of both “States” and “separate customary territories”.<sup>37</sup> This division leads to such an assumption that the sovereignty is not necessarily the inherent quality of a separate customary territory. The WTO only requires the separate customary territory to possess full autonomy in the conduct of its external commercial relations and of the other matters provided for in the *WTO Agreement* and the multilateral trade agreements on terms agreed between it and the WTO. If we insist that the WTO dispute settlement mechanism should be no exception to the customary rules of international law in respect of local remedies, then, the logical explanation to the fact that there is, so far, no such practice in the WTO dispute settlement history is that WTO Members either have impliedly waived the requirement that local remedies must be exhausted, or are estopped from raising this requirement.<sup>38</sup> Nevertheless, this waiver does not mean that all the possibilities for an injured alien to get remedies from the host State(or separate customary territory) have been excluded. He may still be able to choose to solve the dispute by means of the local tribunals under the national law of the host State(or separate customary territory).<sup>39</sup> The point, however, is that this choice is optional, not compulsory.

The fact that the rule of exhaustion of local remedies has not been invoked in the WTO dispute settlement procedures reflects a tendency that WTO Members wish to solve their trade disputes in a practicable and efficient way. Hence, when we review the WTO dispute settlement mechanism from a developing country perspective, it is only natural for us to raise such a question: are the remedies contained in this mechanism sufficient to relieve the loss of the suffered Member? then a further question is: do they really benefit the developing country Members?

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<sup>37</sup> : See supra note 3.

<sup>38</sup> : Mr. John Dugard, special rapporteur of the *Third Report on Diplomatic Protection*(2002), provides the exceptions to the general principle that local remedies must be exhausted, which includes: (a)the local remedies: are obviously futile(option 1); offer no reasonable prospect of success(option 2); provide no reasonable possibility of an effective remedy(option 3); (b)the respondent State has expressly or impliedly waived the requirement that local remedies be exhausted or is estopped from raising this requirement; (c)there is no voluntary link between the injured individual and the respondent State; (d)the internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State; (e)the respondent State is responsible for undue delay in providing a local remedy; (f)the respondent State prevents the injured individual from gaining access to its institutions which provide local remedies. See International Law Commission, *Third Report on Diplomatic Protection*, pp.5-6, A/CN.4/523. In fact, there is at least one international treaty in which local remedies may be excluded in some circumstances. Chapter 11 of the *North American Free Trade Agreement* provides for investors of one State Party themselves to initiate proceedings in respect of disputes concerning the treatment of their investments by another State Party under the Treaty. Any dispute not resolved by negotiation may be submitted to arbitration(Articles 1116-19). The investor may choose between arbitration under ICSID or the ICSID Additional Facility or UNCITRAL Rules(Article 1120). The States Parties have in NAFTA Article 1122 given their consent to each of these alternative forms of arbitration: investors may give their consent to the arbitration when they initiate proceedings(Article 1121). If the investor does opt for arbitration under the NAFTA treaty, it may not resort to other dispute settlement procedures: in other words, recourse to local remedies is precluded. See John Collier and Vaughan Lowe: *The Settlement of Disputes in International Law*, Oxford University Press(1999), pp.113-114.

<sup>39</sup> : Although the WTO law has no direct effect in the domestic legal system of its Members, Article XVI:4 of the *WTO Agreement* requires each Member to “ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements”. See supra note 3.



## Section Two Towards a Fair and Open Dispute Settlement Mechanism

### 6.2.1. Does the WTO remedy system benefit developing country Members?

When the WTO dispute settlement mechanism was set up, it received a wide acclamation from both academics and politicians for its well-formulated procedures and rule-oriented character. As professor John Jackson pointed out, the Uruguay Round of Multilateral Trade Negotiations, for the first time, established an overall unified dispute settlement system for all portions of the negotiated agreements, and a legal text (rather than just customary practice) to carry out those procedures for dispute settlement. These new dispute settlement procedures include measures to avoid the “blocking” of a decision which once frequently occurred under the GATT positive consensus decision-making rules,<sup>40</sup> and provide for the first time a new appellate review which will substitute for some of the procedures that were vulnerable to blocking.<sup>41</sup> The former WTO Director-General Renato Ruggiero even regarded the WTO dispute settlement mechanism as “the central pillar of the multilateral trading system” and “the WTO’s most individual contribution to the stability of the global economy”.<sup>42</sup>

There is not a bit of exaggeration in these acclamatory remarks if we compare the present WTO dispute settlement mechanism with the previous one under the GATT system. Clearly-cut time limits for each stage of the dispute settlement proceedings, an appellate review of the appealed panel report, the negative consensus adopted in making decisions upon the establishment of the panel and the adoption of the panel or Appellate Body report,<sup>43</sup> all these reforms have guided the WTO dispute settlement mechanism developing towards a more judicial objective. However, these developments have only reflected one side of the issue. If we take a careful look at its other side, the remedy system of the WTO dispute settlement mechanism, particularly from the developing country Members’ perspective, we might have got a different view as to this widely-acclaimed legal system.

Through the analysis of Article 22 of the *Dispute Settlement Understanding*,<sup>44</sup> we may draw three expounding points. Firstly, the remedy methodology in the WTO is in a sequential order, i.e. the impracticability of one way is the precondition to invoke the next way in offering remedies. If the first sort of remedy can be used to cover the loss of the complaining party, it is neither necessary nor reasonable to invoke the rest ones. Secondly, by means of this remedy system, the complaining party can always find one way or another to get its damages remedied after the measures of the complained party

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<sup>40</sup> : The positive consensus requires the agreement of all the parties present at the meeting in adopting a decision. Thus, more often than less, a defeated party will object to the passage of a decision which is unfavourable to it.

<sup>41</sup> : See John H. Jackson: *The Uruguay Round and the Launch of the WTO: Significance & Challenges* (contained in the book *The World Trade Organisation---The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, edited by Terence P. Stewart), American Bar Association (1996), p.10.

<sup>42</sup> : See the speech delivered by Renato Ruggiero on 17 April 1997.

cf. [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm)

<sup>43</sup> : The negative consensus requires the agreement of all parties present at the meeting in negating a decision. It seems unlikely that a prevailing party will join the consensus to negate the decision which is favourable to it.

<sup>44</sup> : As for the detailed analysis of the remedy system in the WTO dispute settlement mechanism, see Part Four of Section Three, Chapter Five.

have been found to be inconsistent with the requirements of the WTO agreements and have impaired or nullified the benefits of the complaining party, or the measures have been found to be consistent with the requirements of the WTO agreements, but the nullification or impairment still exists.<sup>45</sup> Thirdly, there are no clear definitions as to such wording “not practicable or effective” and “serious enough”. The considerations of these circumstances merely depend on the presentations(oral and written) of the disputing parties and the discretion of the panel or the Appellate Body. Together with the negative consensus mechanism practised in adopting the panel or the Appellate Body report, the WTO remedy system is really effective to scare those potential breachers of the negotiated concessions and obligations.

Before the complaining party starts the retaliation process, the complained party may choose to compensate the loss of the complaining party. A mutual agreement on the solution of a dispute is clearly preferred. Article 22(2) of the DSU states: “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...”<sup>46</sup> As compensation in the WTO is voluntary, it may include to entail the complained party reducing tariffs on a product of export interest to the complaining party, or offering concessions in either trade in services or the protection of intellectual property rights in an equal value to the decided level of nullification or impairment of benefits, or whatever forms both parties may mutually agree.

Then the first question may arise as to what extent the developing country Members can benefit from the WTO compensation mechanism. Under both common law and civil law, compensation in terms of monetary damages always benefits the party who has suffered a sustained injury or loss as a result of the actions of the defendant.<sup>47</sup> Under the WTO system, however, it is not possible for one WTO Member to offer “monetary compensation” to another, following a settlement of the dispute. In some instances, the offered compensation may not benefit the industry which has suffered damages as a result of the implementation of WTO-inconsistent measures, or even WTO-consistent measures, by the complained party. For example, when country A, which is presumably a developed country Member, has a trade dispute with country B, which is incidentally a developing country Member, over the protective measures of country A to its domestic market for agricultural products. The rulings and recommendations of the Appellate Body report require that country A should remove these WTO-inconsistent measures within a reasonable period of time. However, because of the strong lobbies and being afraid of losing the votes from farmers, the government of country A refuses to reduce the tariffs on the imports of agricultural products from country B, but agrees to compensate country B in one way or another. Provided the overall benefits accruing from the previous reduction of tariffs are ensured, country A may choose either to reduce the tariffs in other

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<sup>45</sup> : Id. Article XXIII:1(b) of GATT 1994 is designated for those non-violation disputes.

<sup>46</sup> : See supra note 3.

<sup>47</sup> : See the definition of “compensation” in *Oxford Dictionary of Law*, Oxford University Press(1997), pp.90-91.

sectors of the same agreement, or to reduce the tariffs in the sectors of other agreements. In regard to the first choice, country B may use the compensation to alleviate the loss of the farmers concerned temporarily. But many developing countries have few choices of agricultural products available for the replacement of tariff reduction. The temporary compensation is not possible to help them to change the monotonous economic pattern. Furthermore, the WTO compensation mechanism does not punish a recalcitrant for its past wrongs, even if it could be established that the complained party flagrantly ignored its obligations under the WTO agreements by implementing those inconsistent measures. This is because compliance under WTO law is prospective in nature as opposed to being retroactive.

As to the second choice, the reduction of tariffs in the sectors of other agreements is irrelevant to the farmers of country B, and what is more significant is that there are practically not many sectors as important as agriculture in this country. Nevertheless, in view of the comprehensive interests of the mutual relationships, the government of country B may have to accept this bitter offer from country A. Here, one more point which merits our attention is that the reduction of tariffs in the sectors of other agreements by country A does not benefit country B alone. In accordance with the principle of most-favoured-nation treatment, a tariff reduction or an improvement in the market access conditions in those sectors will have to be extended to all other WTO Members. Thus, if country B should accept compensation in this way, it does not necessarily mean that this would increase its market share in country A. It would depend on, *inter alia*, its market position and the strength of its competitors.

The second question is connected with the methodology and effect of suspension of concessions and obligations. As Article 22(3) of the DSU demonstrates, the suspension methodology in the WTO remedy system is a "cross-retaliation". Therefore, the WTO Members can always expect to seek some retaliation for their losses if compensation is not available to them. But the question as how much the developing country Members can really benefit from this mechanism remains to be debated. The consequent situations which occurred after the decision of arbitrators was delivered in the *Banana* case have vindicated our worrying on this issue to a certain extent. One of the complaining parties,<sup>48</sup> Ecuador, was authorised by the Dispute Settlement Body to impose retaliatory measures in the form of punitive tariffs on certain products exported into its domestic market by the complained party, the European Communities, after the failure by it to comply with the recommendations of the DSB. While the authorisation was meant to restore the balance of concessions struck between the parties during the Uruguay Round negotiations by allowing the prevailing parties to suspend concessions equivalent to the level of nullification and impairment of benefits, a critical question may arise: do these authorisations benefit a small developing country Member like Ecuador? This is because retaliation may not always be the preferred remedy of a complaining party, as its effect is to raise barriers not only to the trade of the complained party but also to its own. Furthermore, one may ask whether this objective may ever be achieved in a situation where a great imbalance in terms of trade volume and economic power exists between the

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<sup>48</sup> : Apart from Ecuador, the complaining parties in the *Banana* case include Guatemala, Honduras, Mexico and the United States. See *European Communities---Regime for the Importation, Sale and Distribution of Bananas-Recourse to Article 21.5 by Ecuador*. WT/DS27/RW/ECU, Report of the Panel(distributed on 12 April 1999).

complaining party which is seeking suspension of concessions and the complained party which has failed to bring the WTO-inconsistent measures into compliance with the requirements of the WTO agreements. In such a case, and in situations where the complaining party is highly dependent on the imports from the complained party, the consequence of retaliation is likely to fall into such a dilemma that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension than for the other party. As one scholar once pointed out, for a significant number of developing countries which rely on the imports from developed countries, it might be counter-productive for them to impose retaliatory measures, as they would increase the prices of capital goods and other relevant products and services that they need for their own economic development.<sup>49</sup>

According to the data reflected in the arbitration award of the *Banana* case, Ecuador's share of world merchandise trade is below 0.1 percent, whereas the EC's world merchandise trade share is 20 percent. In terms of world trade in services, the EC's share is 25 percent, while no data are available for Ecuador because its share would be so small. The GDP at market prices in 1998 was US\$ 20 billion for Ecuador and US\$ 7,996 billion for the 15 EC member States. In 1998, the EC's GDP per capita was US\$ 22,500, whereas per capita income is US\$ 1,600 in the case of Ecuador.<sup>50</sup> While Ecuador may be authorised by the DSB, as it previously suggested in its request for arbitration, to retaliate against the European Communities by suspending certain obligations under the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, which include the protection of performers, producers of phonograms (sound recording) and broadcasting organisations, geographical indications and industrial designs, it is doubtful whether the retaliation would benefit Ecuador in the medium to long terms. Should Ecuador proceed to retaliate in this way, it would probably scare off foreign investors and damage that country's reputation, making the economic development of this country become even more difficult. It is in that context that the arbitrators encouraged the parties to seek a mutually satisfactory result as retaliation would not be to each party's benefit.<sup>51</sup> Ecuador appears to accept this reasoning and has indicated its willingness to delay the imposition of retaliatory measures, albeit it has received the authorisation from the DSB, and arranges to explore with the European Communities the possibility of reaching a mutually satisfactory result.

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<sup>49</sup> : See Edwini Kessie: *Enhancing Security and Predictability for Private Business Operators under the Dispute Settlement System of the WTO*, *Journal of World Trade*, Vol. 34, 2000, No.6, p.8.

<sup>50</sup> : See *European Communities---Regime for the Importation, Sale and Distribution of Bananas-Recourse to Arbitration by the European Communities under Article 22(6) of the DSU*, WT/DS27/ARB/ECU (distributed on 24 March 2000), para.125.

<sup>51</sup> : Id. The arbitrators state: "Given the difficulties and the specific circumstances of this case which involves a developing country Member, it could be that Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension authorised by the DSB for the full amount of the level of nullification and impairment estimated by us in all of the sectors and/or under all agreements mentioned above combined. The present text of the DSU does not offer a solution for such an eventuality. Article 22.8 of the DSU merely provides that the suspension of concessions or other obligations is temporary and shall only be applied until the WTO-inconsistent measure in question 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. We trust that in this eventuality the parties to this dispute will find a mutually satisfactory solution".

After observing these dysfunctioning aspects of the WTO remedy system, a few scholars begin to rethink the trade sanctions and their consequences.<sup>52</sup> These intelligent researches will help us to review the present WTO dispute settlement mechanism in a more thorough way. Steve Charnovitz in his recent article *Rethink WTO Trade Sanctions* also put forward some alternatives to reform the WTO remedy system, which include: (a)giving WTO law direct effect in Members' domestic legal systems; (b)imposing monetary fines on scofflaw governments(those governments treating WTO law with contempt); (c)invoking membership sanctions within the WTO; (d)adopting the practice of other international organisations like the ILO to catalyse a community response to the heinous behaviour of a recalcitrant Member; (e)improving the interaction between the WTO and domestic political processes.<sup>53</sup> All these alternatives are relevant in reforming the present WTO remedy system, but no individual one can be a perfect substitute. The first alternative, if practicable, could be an efficient way to implement WTO agreements and the panel or the Appellate Body decisions. But the author of this thesis does not think that it could be achieved in a feasible future in light of the complexities of domestic legal systems among the present 144 Members. To render WTO law direct effect within the territories of Members will likely meet resistance on the pretext of sovereignty. As Charnovitz himself pointed out: "courts have suggested that a country manifesting direct effect would be at a disadvantage if its trading partners did not do so".<sup>54</sup> Thus, WTO Member governments will certainly not move towards direct effect unless this is a unanimous choice. The last three alternatives may be practicable, but the question is: to what extent? As it is previously emphasised, the World Trade Organisation is based on agreements. All its functions and mandate derive from the authorisation of its Members. Sometimes, the negotiators purposely choose the ambiguous words in order to avoid the political confrontation. If they could have their intentions expressed clearly and meet no opposition, they would have done so in their agreements. The vagueness of the remedy system in the WTO dispute settlement mechanism reflects, to a certain extent, the difficulties and compromise of the negotiators. Comparatively speaking, the second alternative could be a practicable way to improve the present WTO remedy system. But the disadvantage of this choice is, as in the situation of compensation, that the suffered industry may not get the necessary remedies, particularly in terms of their market access conditions in the complained party. A fine is a penalty for violating a law. It cannot be used to achieve the long-term objectives.

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<sup>52</sup> : See Edward Alden: *Gloom Descends over Former Supporters of the WTO's Procedure for Disputes*, Financial Times(London), 6 December 2000, at p.8(discussing unhappiness with WTO trade sanctions); Jagdish Bhagwati: *After Seattle: Free Trade and the WTO*, International Legal Affairs, Vol.77, 2001, pp.15-28(explaining that large-scale retaliation through the WTO "makes ever more people hostile to the WTO, which is seen as authorising bullying tactics"); Edwini Kessie, see supra note 49, pp.1-16(suggesting that it might be advisable to abolish the remedy of retaliation); Brink Lindsey, Daniel T. Griswold, Mark A. Groombridge, & Aaron Lukas: *Seattle and Beyond: A WTO Agenda for the New Millennium*, 4 November 1999, pp.29-31(stating that the most serious problem with the WTO procedures is their reliance on trade sanctions as the ultimate remedy), cf. <http://www.cato.org> Bruce Stokes: *Something Is Missing Here*, 19 May 2001,p.1514(urging Member governments to rethink the present WTO system of sanctions), cf. <http://www.tabd.org>

<sup>53</sup> : Steve Charnovitz: *Rethink WTO Trade Sanctions*, The American Journal of International Law, Vol.95, 2001, p.824.

<sup>54</sup> : Id, p.825.

While the WTO remedy system is regarded by some developed country Members as an effective way to restore the balance of concessions and obligations struck during the Uruguay Round negotiations in the case that a certain Member fails to bring its WTO-inconsistent measures into full conformity with the recommendations and rulings of a panel or the Appellate Body, it may not seem the same story as to many developing country Members. This is because an efficient trade system requires the conformity of the conducts of the participants with the requirements of their negotiated agreements. This reasoning is also in accordance with the spirit of Article 22(1) of the DSU, which partly states: “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”.<sup>55</sup> However, considering the large membership and the huge magnitude of trade rules, we can expect that disputes among WTO Members will still be unavoidable. In this regard, an efficient dispute settlement institution seems not only practicable, but indispensable, to guide the Member governments to conduct in conformity with the WTO rules.

### **6.2.2. From quasi-judicial to judicial, the future of the WTO dispute settlement institutions**

The success of the WTO dispute settlement mechanism has surpassed the expectations of the Uruguay Round negotiators. Despite their quasi-judicial nature, the WTO dispute settlement institutions have functioned very much like a court of international trade. There is a compulsory jurisdiction; disputes are settled largely by applying the rules of law; adopted panel or Appellate Body decisions are binding upon the disputing parties; and sanctions may be imposed if the decisions are not observed by the complained party. These jurisdictional features have vindicated that the increasing number and importance of the disputes will necessitate expanding and upgrading the current WTO's dispute settlement institutions. Panels and the Appellate Body should be given their permanent status. The dispute settlement proceedings should be under the public scrutiny and, the decisions of the panels and the Appellate Body should be implemented in a more expeditious way. All these procedural reforms will eventually expedite the creation of a new judicial body, the international court of trade.

The idea to set up an international court of trade is not new. According to the *Havana Charter* which was part of the fruits achieved at the Bretton Woods Conference after the Second World War, the proposed International Trade Organisation(ITO) should have included a judicial body similar to the International Court of Justice, which was designated to deal with the trade disputes among its members.<sup>56</sup> With the failure of the ITO, the dream to set up an international court of trade did not come true.

Then, the creation of the WTO, particularly the initial success of its dispute settlement mechanism, has again brought the concerns to the fore about the judiciary of this new institution. These concerns, so far, have not resulted in a unanimous viewpoint upon the necessity to create a rule-based trade court within the World Trade Organisation. For example, Thomas J. Schoenbaum in his article *WTO Dispute Settlement: Praise and Suggestions for Reform* stated: “Forcing disputes to a rule-based

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<sup>55</sup> : See supra note 3.

<sup>56</sup> : See John H. Jackson: *The World Trade Organisation: Constitution and Jurisprudence*, The Royal Institute of International Affairs(1998), Chapter Two.

conclusion through adjudication may put undue strain upon the WTO system and lead to unwise results. Even certain rule-based disputes are better settled through the negotiation process".<sup>57</sup> Schoenbaum used the dispute *United States---Imposition of Import Duties on Autos from Japan under Sections 301 and 304*(hereinafter as the *Auto* case)<sup>58</sup> to support his argument. In the view of Schoenbaum, although the US measure to impose 100 per cent tariffs on six models of cars imported from Japan was a blatant violation of GATT rules, and a WTO panel certainly would have found in Japan's favour, such a result would have caused a political furore in the United States.<sup>59</sup> Schoenbaum's remarks recalled our memory of the GATT negotiation-based dispute settlement practice, by which the contracting parties chose to settle their disputes outside the purview of the GATT rules, making the GATT dispute settlement mechanism almost being discarded. In the view of the author of this thesis, should the WTO panel in the *Auto* case have found in Japan's favour, the result would not have caused a political furore in the United States. The WTO is founded on the multilateral agreements which bind each Member and, the dispute settlement mechanism is based on the trust and confidence of the Members including the United States. If the deliberations of the panel or the Appellate Body still depend on the political will of a few Members, then the decisions made by the panel or the Appellate Body cannot be expected to be fair and impartial. As a matter of fact, in another dispute *United States---Restrictions on Imports of Cotton and Man-made Fibre Underwear*, the Appellate Body found in favour of Costa Rica, a small developing country, and the United States accepted the Appellate Body's decisions.<sup>60</sup> Therefore, Schoenbaum's worries about the creation of a rule-based judiciary are groundless and unnecessary.<sup>61</sup>

For a complete judiciary, the WTO dispute settlement institutions need to be improved in the following three aspects: independence, publicity and enforcement.

Independence is referred to the final effect of the panel or Appellate Body decisions. According to the practice under the current WTO dispute settlement mechanism, the decisions made by a panel or the Appellate Body are not final until they are adopted by the Dispute Settlement Body. Article 16(4) of the *Dispute Settlement Understanding* states: "Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting 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..."<sup>62</sup> Different from the practice of most courts of first instance in which the decision of the court will have the binding effect if the disputing parties do not appeal before the expiration date. In the case of the WTO, the panel report, if the disputing parties do not appeal it, will have its binding effect only after it is adopted by the DSB.

<sup>57</sup> : International and Comparative Law Quarterly, Vol. 47, July, 1998, p.650.

<sup>58</sup> : Since this dispute was settled mutually, it was not the subject of a WTO panel decision. For complete analysis of this dispute, see Eleanor Robert Lewis and David J. Weiler: *Will the Rubber Grip the Road? An Analysis of the US-Japan Automotive Agreement*, Law & Policy in International Business(1996), p.631.

<sup>59</sup> : See supra note 57.

<sup>60</sup> : See *United States---Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R(distributed on 10 February 1997).

<sup>61</sup> : In the same article, Schoenbaum referred to another settled dispute *European Communities---Regime for the Importation, Sale, and Distribution of Bananas*, arguing that it would have been better to have negotiated a compromise solution. See supra note 57, p.651. In the view of the author of this thesis, this argument could also be rebutted with the same reasoning.

<sup>62</sup> : See supra note 3(Original note omitted).

Then, Article 17(14) of the DSU has the similar provisions, which states: "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".<sup>63</sup> Here, the crucial point is that the Dispute Settlement Body is not a judicial body in its full sense. The DSB is, *de facto*, the General Council of the WTO in its another capacity, which is composed of representatives of all the Members(Article IV[2] and [3] of the *WTO Agreement*). Although, under the negative consensus, the panel or Appellate Body report is due to be adopted automatically, this procedural requirement reduces the independence of the deliberations made by the panelists and the Appellate Body members. At the moment, as a first step of the reform, the overload problem could be fixed by creating a permanent roster of panel members, enlarging the Appellate Body, and giving the Appellate Body members full-time status as judges of court, and expanding the DSB secretariat. The creation of a permanent roster of panel members derives from the considerations of collegiality of a judicial body. While the full-time status as judges of court for the Appellate Body members may extricate them from affairs which might affect the impartiality of their decisions. Although the DSU does not have the provisions like Article 17(2) of the ICJ Statute, which stipulates that a judge cannot participate in deciding a case if he has acted as agent, counsel or advocate, or as a member of a national or international court, or of a commission of inquiry, in the case,<sup>64</sup> the qualifications of an Appellate Body member should be as high as that. When time becomes ripe, the panel report(after the expiration date without being appealed) and the Appellate Body report may become binding on the disputing parties without the necessity of being adopted by the DSB. Meanwhile, the standing problem could be partly solved by incorporating into the DSU the criteria under public international law, which must be fulfilled by a Member to espouse a claim on behalf of one of its nationals.<sup>65</sup>

The second aspect concerning the procedural reform is the publicity of the WTO dispute settlement proceedings. Although the WTO is a "universal" international organisation,<sup>66</sup> its dispute settlement mechanism is available only to its Members. The non-Members and other governmental or non-governmental organisations have no direct access to it. This is different from the practice of the ICJ.<sup>67</sup> Article 5 of the *WTO*

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<sup>63</sup> : Id(Original note omitted).

<sup>64</sup> : See supra note 12. According to professor John Collier and professor Vaughan Lowe, Article 17 of the Statute contains the obvious rule that no member of the Court may act as agent, counsel, or advocate in any case. See John Collier and Vaughan Lowe, supra note 38, p.129, note 21.

<sup>65</sup> : From the developing country Members' perspective, the right to bring a claim to the WTO dispute settlement mechanism should be limited to the Member governments which may evaluate the overall balance before they take the complaints of their nationals to the WTO. Take the example of the GATS, if the private parties(service suppliers) are allowed to bring their claims to the WTO, then the host Members, most of which are developing country Members, will be involved in an endless loop of litigation. This will scare away many developing country Members from participating in the GATS.

<sup>66</sup> : As for the institutional characteristics of the WTO, see the first part of Section One, Chapter Three.

<sup>67</sup> : Article 93(2) of the ICJ Statute states: "A State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council." Article 35(3) of the ICJ Statute further states: "When a State which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such State is bearing a share of the expenses of the Court." See supra note 12.



*Agreement* requires the WTO to arrange “consultation” or “cooperation” with other governmental or non-governmental organisations, but this does not provide the legal foundations for the direct participation of these organisations in the WTO dispute settlement proceedings. Although some of the multilateral agreements like the *Sanitary and Phytosanitary Agreement*,<sup>68</sup> contain specific provisions for the cooperation with other non-governmental organisations, whether or not these mentioned organisations have the direct access to the WTO dispute settlement proceedings remains debatable. The deliberations of the Appellate Body in the dispute *United States---Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter as the *Shrimp* case) indicate that the answer is negative.<sup>69</sup> With the increasing of those technical disputes, the WTO panels and the Appellate Body will face more and more disputes which want special knowledge for judgement. Hence, it is necessary to design a mechanism which will enable those relevant governmental and non-governmental organisations to have the access to the WTO dispute settlement proceedings. As for the participation of those non-Member governments, the author of this thesis prefers that the future international court of trade should exclude such possibility. This is because the WTO is a “technical” organisation. Its dispute settlement mechanism is only one of the means available between the Member and non-Member governments to solve their trade disputes. The latter may either choose a “universal” and open international organisation or act on a mutual agreement for the dispute settlement.

One other issue concerning publicity is whether the WTO dispute settlement process should be under the public scrutiny. Article 14(1) of the *Dispute Settlement Understanding* states: “Panel deliberations shall be confidential.” Similar provisions can also be found in Article 17, which is to regulate the appellate review proceedings.<sup>70</sup> These arrangements are obviously the legacy of the GATT negotiation-based dispute settlement practice. In contrast, Article 46 of the ICJ Statute states: “The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.”<sup>71</sup> This is also the common practice of most tribunals, both domestic and international.<sup>72</sup> At least, there are two contributory points accounting for

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<sup>68</sup> : Article 12(2) of the *Sanitary and Phytosanitary Agreement* states: “The Committee (on Sanitary and Phytosanitary Measures) shall maintain close contact with the relevant international organisations in the field of sanitary and phytosanitary protection, especially with the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention, with the objective of securing the best available scientific and technical advice for the administration of this Agreement and in order to ensure that unnecessary duplication of effort is avoided”. See supra note 3.

<sup>69</sup> : The Appellate Body states: “It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organisations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members ‘having a substantial interest in a matter before a panel’ may become third parties in the proceedings before that panel”. (Original note omitted). *United States---Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (distributed on 12 October 1998), p.35.

<sup>70</sup> : Article 17(10) of the DSU partly states: “The proceedings of the Appellate Body shall be confidential...” See supra note 3.

<sup>71</sup> : See supra note 12.

<sup>72</sup> : For example, Article 40(1), (2) of the *European Convention of Human Rights* provides respectively: “Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.” “Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides

this arrangement. Firstly, public hearing will help the dispute settlement proceedings progress on an impartial way. This is also one of the basic elements for a judicial body. Secondly, through the dispute settlement, not only the disputing parties, but other Members, will have a better understanding to the WTO rules. This will eventually reduce the trade disputes among Members. The WTO dispute settlement procedures, in this context, need to be more transparent when the dispute settlement institutions evolve on the way from quasi-judicial to the judicial.

Then, the third aspect for consideration is the enforcement of the adopted panel or Appellate Body decisions. In general, the WTO dispute settlement mechanism is efficient, compared with that of the GATT or even some other international tribunals. For example, the dispute settlement process under the International Court of Justice, if we do not take into account the nature of the cases, takes a much longer time. The “automaticity” provisions of the DSU have eliminated the ability of some recalcitrant defending parties to block the dispute settlement system at critical stages, such as panel establishment or the adoption of panel or Appellate Body reports. The “cross-retaliation” system ensures the winning party to find one way or another to get compensation if the losing party fails to bring its measures in conformity with the WTO rules. Nevertheless, as it was pointed out previously, the “sequence” problem still looks like Achilles’ heel of the whole enforcement system.<sup>73</sup> Although early experience has told us that most WTO Members are ready to accept the decisions made by the present dispute settlement institutions, there is no such guarantee that this loophole will not be exploited. In this respect, the future reform should focus on the strict construction of Article 21(5) and Article 22 of the *Dispute Settlement Understanding*.<sup>74</sup> As the author of this thesis suggested in the previous chapter, the right for the complaining party to suspend(or

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otherwise.” cf. [http://www.ppu.org.uk/learn/texts/doc\\_enropean%20convention.htm](http://www.ppu.org.uk/learn/texts/doc_enropean%20convention.htm) Article 291(1) of the *Convention on the Law of the Sea* states: “All the dispute settlement procedures specified in this Part shall be open to States Parties.” In some circumstances, the dispute settlement procedures shall be open to entities other than States Parties.(Article 291[2]). See supra note 12.

<sup>73</sup> : See supra note 32.

<sup>74</sup> : Cherise M. Valles and Brendan P. McGivern put forward three models for the construction of Article 21(5) and Article 22 of the DSU: (a)The *Bananas* model: the arbitrators first determined the WTO-consistency of the implementing measures(the role of an Article 21[5] panel) before assessing the level of the suspension of concessions(the function of an Article 22 arbitration). The two principal difficulties with this model are that it blurs the line between Article 21(5) and Article 22, which were intended by the DSU to perform separate functions, and it compresses two major adjudicative functions into a single, limited timeframe. (b)The *Salmon* model: the parties provided for “sequencing” on *ad hoc* basis. The complaining party, Canada, made concurrent requests for the suspension of concessions under Article 22 and for the establishment of a panel under Article 21(5). Canada and Australia then asked the Article 22 arbitrators to suspend their deliberations on the level of suspension until after the Article 21(5) panel had ruled on the WTO-consistency of Australia’s implementing measures. This may well prove to be a model for future cases, as it establishes a procedure to ensure that any request to suspend concessions is based on a prior multilateral determination of inconsistency. It also preserves the right of the complaining party to receive subsequent authorisation to suspend concessions by negative consensus. (c)The *SCM* model: in three implementation disputes involving prohibited subsidies, the parties used a provision in the *SCM Agreement* to extend any Article 22 retaliation deadlines that would otherwise apply. In each case, the complaining party requested the establishment of an Article 21(5) panel on the basis of a bilateral agreement to extend the Article 22 deadlines until after completion of the Article 21(5) process. This model is likely to serve as a precedent for SCM implementation disputes in the future. See supra note 32. Each of the foregoing models provides a practical solution in a specific case, but not applicable to all sorts of disputes, particularly when the disputing parties cannot agree on the applicable procedure.

retaliate) should start 20 days after the expiration of the reasonable period if no satisfactory compensation has been agreed. If the dispute is referred to the panel according to Article 21(5) of the DSU, this right should start after the Panel report is adopted without the possibility of being appealed. In other words, this sort of review is only limited to the panel (if possible the original panel) and can be invoked only once.<sup>75</sup> This is because an efficient implementation system not only represents the rule-orientation of the WTO dispute settlement mechanism, but helps to strengthen the Members' confidence in the future dispute settlement institutions.

In the context of a new international court of trade, some Members may express their concern with the workload and procedural delays as the case of the ICJ, a concern not although unjustified. We need only consider the *South West Africa* cases,<sup>76</sup> or the *Barcelona Traction* case,<sup>77</sup> in which, in 1966 and 1970, the International Court of Justice rejected the applications as inadmissible after six or eight years of proceedings.<sup>78</sup> Recently, procedural delays in the ICJ have been reduced and this may have played a role in the renewed confidence placed in the Court. But progress can still be made. One other concern which merits our notice is the cost of the proceedings in the new trade court. Long proceedings cost more money. This might be a problem for some developing country Members. In this respect, the future international court of trade may follow the practice of the ICJ, to set up a fund financed by voluntary contributions from WTO Members, with a view to providing financial assistance to poorer Members to participate in the dispute settlement proceedings.

Gilbert Guillaume cogently pointed out in his article *The Future of International Judicial Institutions* that "The role of international justice in our world must be neither exaggerated nor underestimated. When the Permanent Court of Justice was set up, after the First World War, the paramount idea was that the use of force would cease if governments were compelled to go to courts instead of going to war. This notion is still alive among the general public and with people especially 'concerned' about keeping the peace... The problem of peace cannot be reduced to the settlement of disputes and even to the settlement of certain kinds of disputes. Certainly the judiciary may make a very valuable contribution to the maintenance of peace. But resort to the Court is not the 'miraculous' remedy which will wipe violence from the face of the Earth".<sup>79</sup> The creation of a new international court of trade does not mean the provision of a panacea to all trade disputes. It is only the initial effort to strengthen the WTO rules and, to attract more WTO Members to solve their disputes through legal means. This effort should be buttressed by a solid political will of all WTO Members for a fair international trade system.

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<sup>75</sup> : See Part Four, Section Three of Chapter Five.

<sup>76</sup> : I. C. J. Reports, No.319, 1962 and, I. C. J. Reports, No.6, 1966.

<sup>77</sup> : I. C. J. Reports, No.3, 1970.

<sup>78</sup> : Responding to the criticism, the ICJ revised its rules of procedure in 1972 and 1978, and the situation has now changed. The most recent advisory opinions have taken from three to six months. It is true, however, that when the Court is seized as a result of a special agreement between States, it generally delivers its judgement within two or three years. On the other hand, when unilateral requests are submitted to the Court, procedures may be more lengthy, due to objections relating to jurisdiction or admissibility raised by the respondent State. See Gilbert Guillaume: *The Future of International Judicial Institutions*, *International and Comparative Law Quarterly*, Vol. 44, October 1995, p.851.

<sup>79</sup> : *Id.*, p.860.

## Conclusions

From the GATT to the World Trade Organisation, international regulation of trade has progressed from a voluntary basis to an institutional basis. The post-war trade and financial order was mainly designed to enable States to manage their domestic economies, in a manner consistent with political and social stability and justice, without the risk of setting off a protectionist race to the bottom. States obligated themselves not to impose quotas or related import restrictions, the sort of means strongly associated with the inter-war years. Meanwhile, they were not required to eliminate or reduce their import tariffs. The legal structure of the GATT was created to facilitate such concessions and make them binding. The two pillars which supported the GATT legal structure are the most-favoured-nation treatment clause and the national treatment clause, which are embedded in Articles I and III of GATT 1947.

The World Trade Organisation has inherited these basic principles from the GATT in regulating international trade. However, because of its birth defects, the GATT had some significant limitations. The contractual character meant that the GATT could not effectively make its participants keep their domestic policies consistent with the GATT trade rules. The positive consensus process left panel decisions at risk of being blocked by the losing party. The relative lack of discipline made GATT dispute settlement proceedings less predictable and, in some cases, extraordinarily prolonged. In contrast, the World Trade Organisation has its own legal personality, parallel to those international institutions like the World Bank and the International Monetary Fund. The coexistence of sovereign States and separate customs territories in the WTO indicates a broader type of membership in this international institution. Compared with the GATT, the WTO has not only strengthened the regulation of international trade, but established a new dispute settlement mechanism to ensure that these principles are followed. Furthermore, the WTO has expanded its regulation beyond trade in goods, to include services and trade-related intellectual property rights. Therefore, the differences between the GATT and the WTO are reflected in both their institutional structures and their regulatory remit.

The expansion of the institutional dimension and the increase of membership have occurred concurrently with the evolution of dispute settlement from a negotiation-based means to a rule-based means. Compared with the GATT dispute settlement mechanism and many other international tribunals, the WTO dispute settlement mechanism is unique in many aspects. Although there is no formal judicial body like the International Court of Justice, trade disputes can be settled swiftly, and the recommendations and rulings made by panels or the Appellate Body (after they are adopted by the Dispute Settlement Body) are binding on both parties to the dispute. More significantly, developing countries have changed their attitude from reluctance and scepticism to acceptance and cooperation. They have begun to participate in the WTO dispute settlement proceedings despite the fact that the participants are still limited to a small portion of them. This is a positive trend for any international institution.

At this point in time, appraisals of the early experience of the WTO dispute settlement mechanism are almost uniformly optimistic and approving. The new mechanism has established a unified dispute settlement system for all parts of the GATT/WTO rules, including those which regulate the new subjects of services and intellectual property

rights. It has clarified that all parts of the Uruguay Round legal texts, which are relevant to the matter in issue, can be considered in a particular dispute case. It has reaffirmed and clarified the right of a complaining Member to have a panel process initiated, preventing blocking at that stage. It has established a unique appellate review procedure which has substituted some of the former procedures of Council approval of a panel report. The negative consensus has made it possible to avoid blocking the establishment of a panel and the adoption of the panel or Appellate Body report. All these features have helped us to understand why this new dispute settlement mechanism is playing a more and more important role in the resolution of international trade disputes.

Positive as it is, the new dispute settlement mechanism is still not ideal in its impact on many developing country Members. Specifically, there are several issues to be clarified, which concern the relationships of developing country Members and the WTO dispute settlement mechanism. The issue of the economic development in developing countries and the establishment of the rule-orientation in international trade order was intensely debated during the Uruguay Round negotiations, and is still controversial among WTO Members. The general principle contained in Article II:2 of the *WTO Agreement* requires that all WTO agreements(except those plurilateral agreements) should bind all WTO Members. In view of the current situations in many developing countries, the WTO permits these countries some time to delay the implementation of WTO agreements. By now, most of these extended periods have expired, which means that developing country Members including these least developed countries shall be bound by the WTO rules. But the economic situation in many of these countries has not changed fundamentally.

As dispute settlement is vital to maintaining integrity of WTO treaty system and to protecting interests of weaker developing country Members, the dispute settlement mechanism plays an important role to provide authoritative interpretation and application of the WTO rules, to maintain a balance between rules of multilateral trade system and sovereignty of States, and to ensure the integrated application of WTO law and the rest of international law. All these features have led to the combination of a pragmatic approach and rule-orientation in the WTO dispute settlement mechanism.

WTO dispute settlement mechanism has manifested its pragmatism in many different ways. In a broad sense, it can operate generally to influence WTO Members in their approach to trade policies and the latest developments in international trade relations, especially in the absence of universally accepted norms. More specifically, pragmatism can find a basis in, and be derived from, those legal provisions of the WTO agreements. The purpose of this pragmatic approach is to give added flexibility and to mitigate any undue rigidity in the application of WTO law, so as to make the implementation of WTO agreements more feasible and practicable in terms of trade policies. But the WTO consists of 144 Members and the membership is still on the increase. Too much flexibility will destroy the balance of concessions struck in the Uruguay Round negotiations, and too much rigidity will also make the new institution and its legal system become irrelevant. Therefore, the task for the WTO dispute settlement bodies, including the panels and the Appellate Body, is to find an optimal balance between a strictly juridical pursuit of the basic GATT/WTO principles and a pragmatic recognition of the political and economic realities in many developing country Members.

In the context of the dispute settlement procedures, this thesis provides a critical analysis of the impact of some specific issues upon the developing country Members. The non-violation dispute settlement process is a unique feature in the WTO litigation system. From the developing countries' perspective, this process may operate like a double-edged sword. On the one hand, developing country Members can raise their complaints, under the non-violation clause, of these WTO-consistent measures implemented by some developed country Members, particularly under the provisions of GATT Article XX(*General Exceptions*) and Article XXI(*Security Exceptions*), which, nevertheless, have already affected the exports of some developing country Members. On the other hand, the ambiguity in concept of those non-violation provisions will engage developing countries in many unexpected disputes. This is a disadvantage to many developing countries, both in economic and legal terms. If the complained measure is found to be permitted under the WTO rules, albeit the harmful effect on the exports of a developing country Member, the consequential result will fall back to the negotiations between the disputing parties for the possible compensation, which will put many developing countries in a disadvantageous position as the limited varieties of and heavy dependence on their exports usually make them almost have no "bargaining chips" to negotiate. In this respect, it is reminiscent of the significance of a rule-oriented trade system to many developing countries.

With the WTO disputes becoming rather "technical" and complicated, evidence presented by both parties to the dispute is becoming more and more important in the deliberations of a panel report. Considering the lack of relevant expertise in most developing country Members, the draftsmen of the *Dispute Settlement Understanding* made a particular provision which provides: "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 co-operation service 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"(Article 27[2] of the DSU). The ambiguous wording in the above provision may lead to the difficulties to define the nature of the legal assistance. As one scholar has pointed out, Article 27(2) offers only a limited sort of technical cooperation to WTO developing and least developed country Members, once a complaint has been filed, which means that no advice may be given on strategies or procedures that such a Member may follow in bringing a dispute.<sup>1</sup> Thus, in terms of WTO legal assistance in this respect, there is still a lot of work to do.

Connected with evidence-presenting is the standard of review. The *Dispute Settlement Understanding* contains no explicit provisions upon this issue. Article 11 simply exhorts panels to "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". The sparse language may lead to disagreement when a

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<sup>1</sup> : The author of this thesis takes this view from one of the examiners, Mary E. Footer. In the first review of the *Dispute Settlement Understanding* which was held in the Seattle Ministerial Conference in 1999, many developing country Members expressed their concern about the shortage of resources to participate in the dispute settlement system. cf. [http://www.wto.org/english/thewto\\_e/minst/\\_min99\\_e/english](http://www.wto.org/english/thewto_e/minst/_min99_e/english)

panel is examining the domestic law of a Member as interpreted by domestic authorities and tribunals to determine whether the law, or the actions of those authorities and tribunals(including fact-finding), or both are in compliance with the provisions of the covered agreements. Within the current WTO legal frame, only the *Antidumping Agreement* addresses explicitly the issue of standard of review. A certain degree of deference to the findings of fact made by domestic authorities in antidumping matters is provided in Article 17(6)(i) of that Agreement, which states: “in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and the evaluation was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned”. But in what circumstances the evaluation can be deemed as “unbiased” and “objective”? this Agreement does not say about that. It is at the discretion of the panel. Since the victims in those antidumping complaints are usually developing countries, whether the domestic authorities could have a correct evaluation of those basic elements concerning the price of the exported product is crucial to their objective judgement. The standard-of-review issue, in the view of Steven Croley and John Jackson, has become something of a touchstone regarding the relationship of “sovereignty” concepts to the GATT/WTO rule system.<sup>2</sup> In many ways this relationship reflects a central problem for the future of the international trading system--how to reconcile competing views about the allocation of power between national governments and international institutions on matters of vital concern to governments, as well as the domestic constituencies of some of those governments.

Arbitration, as an alternative means contained in the WTO dispute settlement mechanism, can be used to facilitate the solution of certain disputes which concern issues “that are clearly defined by both parties”(Article 25[1] of the DSU). An arbitration under the WTO jurisdiction is usually raised upon those issues concerning the fact finding and the standard of review. Several advantages of arbitration can be easily discerned. Promptness and flexibility are the most obvious ones among them. Simple process means time-saving, money-saving, or even face-saving. In the context of the WTO dispute settlement proceedings, arbitration, however, is not a suitable means for all sorts of disputes and all kinds of Members. The apparent disadvantage is the lack of rules to regulate the arbitration process. Article 25 of the DSU is the relevant provision, but is insufficient. Since there are no clear provisions in the DSU to refer to the arbitration rules outside the WTO legal system, the author of this thesis holds that WTO Members, particularly the developing and least developed country Members, should be careful in choosing whether they will put their disputes to the panelists or arbitrators. In contrast, the detailed provisions governing the panel examination and appellate review in the DSU indicate that these procedures seem more attractive and manageable.

Finally, there are two basic themes which need to be further clarified in future. The first theme is how to incorporate developing country Members fully into the global trading community through the dispute settlement process. The World Trade Organisation is a new institution. The myriad of trade rules made during the Uruguay Round

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<sup>2</sup> : See Steven P. Croley and John H. Jackson: *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, The American Journal of International Law, Vol.90, 1996, p.194.

negotiations is beyond the knowledge of any single intellect. Most developing country Members still have not acquired a full understanding of the impact of these rules. In view of the backward economic structures and the huge task to eliminate poverty in some developing country Members, it is understandable to us that the implementation of WTO rules in these countries have met some uncooperation, or even resistance. Some developing countries fear that the current globalisation will marginalise their economy and, eventually, widen the gap between them and developed countries. In this respect, the WTO dispute settlement institutions, including the panels and the Appellate Body, may reduce these fears to a certain extent by the peaceful resolution of trade disputes, particularly those between developing and developed country Members. At this point, it merits our review of the resolutions of two disputes *United States---Restrictions on Imports of Cotton and Man-made Fibre Underwear* (hereinafter as *US Underwear Imports*) and *European Communities---Regime for the Importation, Sale and Distribution of Bananas* (hereinafter as *Bananas*). In the former case, the Panel agreed that the United States failed to prove both the underlying causality of its domestic industries and the attribution of the damage to an individual Member's exports. In the appellate review proceedings, Costa Rica succeeded in obtaining a ruling from the Appellate Body on a few narrow points upon which it did not prevail with the Panel, i.e. the United States could not impose a restraint between the time of publication of the notice of consultations and the date of formal application of the measure.<sup>3</sup> The resolution of the dispute *US Underwear Imports* has strengthened the confidence of many developing country Members that even a small country like Costa Rica can challenge the sole superpower, the United States, in the WTO dispute settlement proceedings. In the latter case, the Appellate Body decided on one of the disputing points that WTO Members should be allowed to have private counsel present during the Appellate Body hearings.<sup>4</sup> The *Bananas* case has helped developing country Members to become aware that the dispute settlement in the WTO is not rigid in clarifying the WTO rules. The domestic situations of some developing country Members should also be under the deliberations of the dispute settlement institutions.

The second theme is how to define a "developing country Member". As noted in the thesis, more than two-thirds of the WTO Members select themselves as "developing country Members". Under this circumstance, it is not difficult to conceive that such an ambiguous definition will bring about much confusion in applying those special and preferential provisions contained in the *WTO Agreement* and its covered agreements for developing country Members. Furthermore, the large number of applicable Members will make it even more difficult for the WTO to distribute the limited legal assistance fund to those which are really in need of help. Hence, it is necessary to redefine a developing country Member in the WTO. Two practicable ways are available at the moment. One is to regroup the developing country Members, applying different treatment to different

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<sup>3</sup> : *United States---Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R (distributed on 10 February 1997), Report of the Appellate Body, pp.11-17.

<sup>4</sup> : The Appellate Body states: "representation by counsel of a government's own choice may well be a matter of particular significance, especially for developing country Members, to enable them to participate fully in dispute settlement proceedings." *European Communities---Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (distributed on 9 September 1997), Report of the Appellate Body, paras.4-12.



groups. The author in this thesis referred to the practice of the World Bank, i.e., to use the Gross National Income(GNI) per capita as the criterion to classify the WTO Members. This is a persuasive and practicable method. The other method, following the way in which some developed countries offer their GSP treatment to the exports of developing countries, is to set a criterion for providing special and preferential treatment to a certain group of developing country Members. Any Member which has reached this criterion will “graduate” from this group.

To provide legal and financial assistance to developing country Members is not the final objective of the World Trade Organisation and its dispute settlement mechanism. The final objective is, as the *WTO Agreement* has declared, to raise standards of living, ensure full employment and a large and steadily growing volume of real income and effective demand, and expand the production of and trade in goods and services under the general guideline of optimal use and preserving of natural resources. The problem of development is not domestic, but international in its nature. Whether the World Trade Organisation and its dispute settlement mechanism have enhanced the international trade can only be appraised against a broader perspective of whether the developing country Members, particularly those least-developed country Members, have benefited from this new institution and its legal system. The contribution of this thesis is not to make conclusions on these important issues, but make a start on the thought of them.

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