DISPUTE SETTLEMENT METHODS UNDER THE WTO AND FREE TRADE AGREEMENTS

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1. Dispute Settlement System under WTO

I. Background

1.1 The World Trade Organisation (WTO) came into being in the year 1995 and is one of the youngest of the international organizations. It is the successor body to the erstwhile General Agreement on Tariffs and Trade (GATT), 1947, which was the parent body facilitating multilateral trade. The WTO's overriding objective is to help trade flow smoothly, freely, fairly and predictably, which it does by:

- Administering trade agreements
- Acting as a forum for trade negotiations
- Settling trade disputes
- Reviewing national trade policies
- Assisting developing countries in trade policy issues, through technical assistance and training programmes
- Cooperating with other international organizations

1.2 The WTO holds no meaning to the member countries if the substantive provisions under the various WTO Agreements can not be upheld and enforced. It is natural that once a body of laws is created, disputes will arise with respect to their applicability and enforcement. It is important therefore for the functioning as well as for the legitimacy of the WTO that it provides a just and equitable system for the redressal of trade disputes that may crop up. The Dispute Settlement Body (DSB) under the aegis of the WTO is the body responsible for providing redressal to such trade disputes.

1.3 The WTO Agreement[1] signed after the Uruguay Rounds of multilateral trade negotiations creates a system for dispute settlement. It is embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding (DSU). The DSU, which constitutes Annex 2 of the WTO Agreement, sets out the procedures and rules that define the dispute settlement system. It should however be noted that, to a large degree, the present dispute settlement system is the result of the evolution of rules, procedures and practices developed over almost half a century under the GATT 1947.

1.4 The General Council of the WTO, comprising of representatives from all the member countries is the parent body responsible for administering the WTO DSS. It

[1] The WTO Agreement comprises of the parent agreement establishing the WTO and the Annexes which contain all the specific multilateral agreements. In other words the WTO Agreement incorporates all the agreements that have been concluded in the Uruguay Rounds of multilateral trade negotiations.

discharges its duties under the DSU through the Dispute Settlement Body (DSB)[2]. Like the General Council, the DSB is composed of representatives from all WTO members and is responsible for administering the DSU. It also has the authority to establish panels, adopt panel and appellate body reports, maintain surveillance of implementation of rulings and recommendations, and authorize the suspension of obligations under the covered agreements.[3] The DSB meets as often as necessary to adhere to the timeframes provided for in the DSU.[4]

1.5 The operation of the WTO dispute settlement system involves the parties and third parties to a case and may also involve the DSB panels, the Appellate Body, the WTO Secretariat, arbitrators, independent experts, and several specialized institutions.

1.6 Pursuant to the rules detailed in the DSU, member states can engage in consultations to resolve trade disputes pertaining to a "covered agreement" under the WTO Agreement or if unsuccessful, have a WTO panel hear the case. The priority however, is to settle disputes by consultations as far as possible.

II. Importance of WTO Dispute Settlement System (DSS):

2.1 The legitimacy and success of any international agreement depends entirely upon the enforcement of the obligations created therein. An effective mechanism to settle disputes thus increases the practical value of the commitments the signatories undertake in an international agreement. The fact that the Members of the WTO established the current dispute settlement system during the Uruguay Round of Multilateral Trade Negotiations underscores the high importance they attach to compliance by all Members with their obligations under the WTO Agreement.

2.2 Settling disputes in a timely and structured manner is important. It helps to prevent the detrimental effects of unresolved international trade conflicts and to mitigate the imbalances between stronger and weaker players by having their disputes settled on the basis of rules rather than having power determine the outcome.

2.3 The WTO dispute settlement system was created by Member governments during the Uruguay Round in the conviction that a stronger, more binding system to settle disputes would help to ensure that the WTO's carefully negotiated trading rules are respected and enforced. The system, sometimes referred to as the "WTO's unique contribution to the stability of the global economy", is based on, but constitutes major improvements over, the previous GATT dispute settlement system. As such, it has greatly enhanced the stability and predictability of the rules of international trade to the benefit of businesses, farmers, workers and consumers around the world.

[2] Article IV:3 of the WTO Agreement
[3] Article 2.1 of the DSU
[4] Article 2.3 of the DSU

1.5 The system encourages countries to settle their differences through consultation. Failing that, they can follow a carefully mapped out, stage-by-stage procedure that includes the possibility of a ruling by a panel of experts, and the chance to appeal the ruling on legal grounds.

III. Functions of the DSS:

The DSS of the WTO is significant in many ways, the key functions and features of the DSS are:

3.1 ***Guarantor of Rights and Obligations:*** by providing the means to countries to settle their trade disputes, the DSS acts as a guarantor for the rights and obligations of countries in the WTO. It characterizes a rule based multilateral trading regime. Countries in the WTO indulge in international trade for mutual benefits and gains based on agreed rules and procedures. For the parties to enjoy their rights, it is important that parties fulfill their obligations. The DSS ensures fulfillment of the obligations of the parties by enforcement of the rules of the WTO and thus maintains the sanctity of rule of law.

3.2 ***Provides Stability and Predictability[5]:*** A central objective of the (WTO) dispute settlement system is to provide security and predictability to the multilateral trading system.[6] Trade between countries is in essence trade between private economic entities from these countries, and business decisions require stability and predictability in the governing laws, rules and regulations applying to their commercial activity, especially when they conduct trade on the basis of long-term transactions. In light of this, the DSU aims to provide a fast, efficient, dependable and rule-oriented system to resolve disputes about the application of the provisions of the WTO Agreement. By reinforcing the rule of law, the dispute settlement system makes the trading system more secure and predictable. Where non-compliance with the WTO Agreement has been alleged by a WTO Member, the dispute settlement system provides for a relatively rapid resolution of the matter through an independent ruling that must be implemented promptly, or the non-implementing Member will face possible trade sanctions.

3.3 ***Protection against Unilateral Action:*** WTO Members have agreed to use the multilateral system for settling their WTO trade disputes rather than resorting to unilateral action.[7]This means abiding by the agreed procedures and respecting the rulings once they are issued and not taking the law into their own hands. This means that no country can act unilaterally against any other country without going through the DSS.

IV. WTO DSB: An Effective Forum for Settlement of Disputes:

The functioning of the DSB is governed by the WTO agreement called, "Understanding on Rules and Procedures Governing the Settlement of Disputes" (DSU).

[5] Introduction to the WTO DSS, Dispute Settlement Training Module, available online: http://www.wto.org/English/tratop_e/dispu_e/disp_settlement_cbt_e/c1s3p1_e.htm
[6] Article 3.2, DSU.
[7] Article 23 of the DSU.

The DSB has emerged as an effective mechanism for the resolution of disputes for a variety of reasons:

4.1 ***Settling Disputes in a stipulated time period:*** the DSB settles the disputes within a given time frame. The DSU lays down very detailed procedures and timetable for each stage of the dispute. This is in marked departure from the dispute settlement system under the General Agreement on Tariffs and Trade (GATT) before the WTO came into being. Under the GATT there was no fixed timeframe for a dispute settlement which led to innumerable delays and slowly countries began to get disillusioned with the efficacy of the system. Settlement of the disputes in a given timeframe makes the whole system more efficient and predictable and lends credibility to the WTO as a whole.

4.2 ***Inability of the losing country to block the ruling***: under the present DSS, the losing country can not block the ruling of the DSB. The DSU allows for automatic adoption of the rulings unless and until there is a consensus amongst all the WTO member countries not to adopt the ruling, which given the nature of political economy is next to impossible.

4.3 ***Retaliatory Mechanism:*** the DSU has also put in place a retaliatory mechanism for cases where countries fail to comply with the rulings of the DSB. In such cases the other country has the right to impose sanctions against the non-complying country.

2. Evolution of DSM in the GATT/WTO Context

I. Background:

1.1 The (WTO) dispute settlement system is often praised as one of the most important innovations of the Uruguay Round. This should not, however, be misunderstood to mean that the WTO dispute settlement system was a total innovation and that the previous multilateral trading system based on GATT 1947 did not have a dispute settlement system.[8]

1.2 On the contrary, there was a dispute settlement system under GATT 1947 that evolved quite remarkably over nearly 50 years on the basis of Articles XXII and XXIII of GATT 1947. Several of the principles and practices that evolved in the GATT dispute settlement system were, over the years, codified in decisions and understandings of the contracting parties to GATT 1947. The current WTO system builds on, and adheres to, the principles for the management of disputes applied under Articles XXII and XXIII of GATT 1947 (Article 3.1 of the DSU). Of course, the Uruguay Round brought important modifications and elaborations to the previous system, which will be discussed later.[9] This chapter provides a brief overview of the historic roots of the current dispute settlement system.

II. Dispute Settlement Mechanism in GATT, 1947:

[8] WTO, Dispute Settlement System Training Module, Chapter 2, available at http://www.wto.org/English/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm
[9] Ibid.

2.1 Two articles of GATT 1947 dealt with dispute settlement. Article XXII - *consultation* - established a right to consultations between individual contracting parties (members) while Article XXIII - *nullification or impairment* - applied this right to situations in which a member considered that it was not receiving benefits to which it was entitled under the GATT because of actions by another member.

2.2 The GATT dispute settlement system was founded upon the application of Articles XXII and XXIII. The operation of the system resulted in the gradual evolution of legal procedures, interpretation and precedent that established an increasingly sophisticated body of law over time.

2.3 The dispute settlement system was founded upon the principle of consensus between GATT contracting parties. In its early days, there was no formal provision for the judicial settlement of trade disputes. Instead, the system emphasised diplomatic negotiation and consensus. This required both parties to a trade dispute to accept the outcome of any finding.

2.4 A key innovation was the introduction of GATT Panels in 1955. This represented a shift away from negotiated dispute resolution to an approach based more upon arbitration and judicial processes. Panel Reports were then presented to the GATT Council for ratification. If a consensus accepted a Panel Report, its findings became binding on the parties involved. Countries defending a complaint however, could veto the ratification procedure and thereby avoid being obliged to bring their trade policy into GATT compliance. It was this right to circumvent the ratification of Panel findings that was deemed to be the most significant defect of the GATT dispute settlement system.

2.5 The procedures and precedents established in the first thirty years of the GATT dispute settlement system were incorporated into a new Understanding on Dispute Settlement, negotiated as part of the Tokyo Round in 1979 (GATT, 1980). This clarified and codified established GATT practice till then, along with the introduction of minor reforms, including decision-making by committee rather than the Council. These reforms also included the de-linking of the resolution of separate disputes and the imposition of time limits on dispute settlement.

2.6 The GATT dispute settlement system evolved as an increasingly rule-oriented judicial system for resolving international trade disputes. Its effectiveness however, was greatly constrained by several weaknesses, in addition to the veto, that led to increasing frustration among GATT member countries with respect to its application. Its principal shortcomings can be summarised as follows:

- The relevant Articles were brief and did not specify clear objectives and procedures, such that settlement relied upon the creation of ad hoc processes.
- Ambiguity concerning the role of consensus, leading to the 'blocking' of adverse decisions.
- Delays and uncertainty in the dispute settlement process, given that there was no right to a panel and no hard time constraints on any aspect of the proceedings.
- Delays in and partial non-compliance with, panel rulings.

2.7 By the 1980s and early 1990s, an increasing number of trade disputes could not be resolved in the face of such ambiguity, uncertainty and delay. This experience, combined with the introduction of wholly new obligations under the GATS (services) and TRIPS (intellectual property) agreements led to a decision to give the WTO a single set of dispute settlement procedures that would apply to all areas of trade relations covered by the new organization, and whose progress could not be blocked by the need for consensus-based decision.

III. The Uruguay Round and the Decision of 1989:

3.1 As the inherent problems in the GATT dispute settlement system led to increasing problems in the 1980s, many contracting parties to GATT 1947, both developing and developed countries, felt that the system needed improving and strengthening. Negotiations on dispute settlement were accordingly included and given high priority on the agenda of the Uruguay Round negotiations.

3.2 The WTO Dispute Settlement Understanding (DSU) superseded the GATT system from 1 January 1995 and is regarded as being one of the central achievements of the Uruguay Round negotiations.

3.3 The negotiated outcome, the WTO DSU, satisfied most of the desired modifications and improvements to the GATT system. Unilateral action is restrained in several ways under the DSU. Article XVI.4 of the Agreement Establishing the WTO requires that Members' national laws comply with their obligations under the WTO. The DSU also requires that Members abide by its rules and procedures, and is further ensured by its inclusion in the covered agreements listed in Appendix 1 of the DSU.

3.4 The DSU incorporates the objective of automaticity as a pivotal element of the dispute settlement process. The negative consensus requirement means that the adoption of Panel Reports can no longer be blocked by losing respondents and thus triggers the right of plaintiffs to retaliate. A strict, and therefore predictable, timetable for the dispute settlement process is provided in Article 20. The limited potential for cross-retaliation between sectors, given non-compliance, is dealt with in Article 22.3.

3.5 Thus the establishment of the DSS, which is widely hailed as a rule oriented dispute resolution system as opposed to the power oriented system under the erstwhile GATT regime, completes the process of putting in place a just and equitable dispute resolution system for resolution of trade disputes at a multilateral level.

3. Various stages in the Resolution of Disputes before the WTO DSS

I. Introduction:

1.1 Disputes between WTO Member countries that cannot be resolved bilaterally are referred to the WTO Dispute Settlement System and the procedure followed during dispute settlement resembles a court or an arbitral tribunal. It should be noted however, that unlike some court proceedings in India, the WTO always prefers that the disputing countries discuss their problems and settle the dispute bilaterally. The first stage of any dispute is therefore consultations between the governments concerned, and even when the case has progressed to other stages, consultation and mediation are still always possible.

1.2 The entire process of dispute settlement in the WTO could take between 1 year and 1 year 3 months depending on whether the aggrieved country decides to appeal the order of the panel. A break-up of the time-taken at various stages and the process involved at each stage is provided below.

II. The Process Involved

2.1 Once a country has decided to refer a dispute to the WTO dispute settlement system there is a specific process which must be followed. The process and the stages involved in settling a dispute are outlined below:

Stage	**Process**	**No. of Days**
1st Stage	Consultations, mediation, etc	60 days
2nd Stage	Panel set up and panelists appointed	45 days
3rd Stage	Final panel report issued to parties	6 months
	Final panel report circulated to WTO members	3 weeks
4th Stage	Dispute Settlement Body adopts report (if no appeal)	60 days
	(without appeal)	**Total = 1 year**
5th Stage	Appeals report	60-90 days
Final Stage	Dispute Settlement Body adopts appeals report	30 days
	(with appeal)	**Total = 1y 3m**

2.2 <u>First stage-Consultation</u>:

2.2.1 Before taking any other actions the parties to the dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the WTO director-general to mediate or try to help in any other way.

2.2.2 A request for consultations must be submitted in writing and must give the reasons for the request. This includes identifying the measures at issue and indicating the legal basis for the complaint. In practice, such requests for consultations are very brief; often they are no more than one or two pages long, yet they must be sufficiently precise. Because requests for consultations are always the first official WTO document emerging in a specific dispute and each dispute has its own unique WTO document number, requests for consultations carry the document symbol WT/DS###/1.

2.2.3 Before initiating consultations, a Member is obliged to exercise its judgement as to whether action under the dispute settlement system would be fruitful, the aim of the dispute settlement mechanism being to secure a positive solution to the dispute (Article 3.7 of the DSU). By its express terms, Article 3.7 of the DSU entrusts the Members of the WTO with the self-regulating responsibility of exercising their own judgment in deciding whether they consider it would be fruitful to bring a case.

2.3 Second stage- Constitution of the panel: If consultations fail, the complaining party can ask for a "panel" to be appointed. A WTO panel is like the court of first instance. The defendant can block the creation of a panel once, but when the Dispute Settlement Body meets for a second time, the appointment can no longer be blocked (unless there is a consensus against appointing the panel).

2.3.1 Working of a Panel:

Panels are like tribunals (such as the CESTAT, the DRT etc.). But unlike in a normal tribunal, the panelists are usually chosen in consultation with both the parties to the dispute. If both the parties cannot agree on the composition of the Panel, then the WTO Director-General appoints the Panelists. Panels consist of three (possibly five) experts from different countries who serve in their individual capacities and examine the evidence and decide who is right and who is wrong. For each dispute, Panelists can be chosen from a permanent list of well-qualified candidates, or from elsewhere but they cannot receive instructions from any government. The panel's final report should normally be given to the parties to the dispute within six months. In cases of urgency, including those concerning perishable goods, the deadline is shortened to three months.

2.3.2 Procedure followed by a Panel while deciding a dispute:

- Before the first hearing**:** each side in the dispute presents its case in writing to the panel.
- First hearing**:** the parties to the dispute, and other countries that have announced they have an interest in the dispute, make their case at the panel's first hearing.

- Rebuttals**:** the countries involved submit written rebuttals and present oral arguments at the panel's second meeting.
- Experts**:** if one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.
- First draft: the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.
- Interim report: The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.
- Review: The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.

2.4 Third Stage-Issuance of the Final report: After going through the process outlined above, the Panel will submit a "Final Report" to the parties, and three weeks later, it is circulated to all 149 WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform with WTO rules. The panel may suggest how this could be done.

2.5 Fourth Stage-The report becomes a ruling: The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it. Both sides can appeal the report (and in some cases both sides do).

2.6 Fifth Stage-Appeal to the WTO Appellate Body: Either of the disputing parties (or both) can prefer an appeal against the panel's ruling to the WTO Appellate Body- which is like a court of appeals. Under WTO law, like in Indian law, appeals have to be based on points of law such as legal interpretation — they cannot reexamine existing evidence or examine new issues. Each appeal is heard by three members of a permanent seven-member Appellate Body. India currently has one "Member" of the WTO Appellate Body-Mr. S. Ganesan, who is a former Commerce Secretary. The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days.

2.7 Final Stage-Adoption of the Appellate Body Report- The Dispute Settlement Body has to accept or reject the appeals report within 30 days — and rejection is only possible by consensus of all 149 WTO Members and has till date not occurred.

III. The eventual outcome of the dispute settlement process:

3.1.1 If a party loses at the Panel stage and the Appeal Stage, then the first step that it must take to avoid trade sanctions is to bring its laws & policy into line with the ruling or recommendations. This would essentially mean that it's Central and State laws which are identified as being WTO-incompatible must be amended in a manner such that it does not violate WTO law. The losing party must specifically commit to the Dispute Settlement Body in a meeting held within 30 days of the report's adoption that it will comply (or not comply) with the Panels or Appellate Body's decision. Once it does so, it may request that changing its laws immediately will be impractical, and the DSB will give India a "reasonable period of time" to make its laws WTO compatible.

3.1.2 If the losing party fails to amend its various State and national laws within this "reasonable" period, then it has to enter into negotiations with the complainant (and other countries which have joined the case) in order to determine mutually-acceptable compensation — for instance, tariff reductions in areas of particular interest to the complaining side.

IV. Retaliatory Measures:

4.1 If, within 20 days after the expiry of the reasonable period of time, the parties have not agreed on satisfactory compensation, the complainant may ask the DSB for permission to impose trade sanctions against the respondent that has failed to implement. Technically, this is called "suspending concessions or other obligations under the covered agreements"

4.2 Concessions are, for example, tariff reduction commitments which (WTO) Members have made in multilateral trade negotiations and are bound under Article II of GATT 1994. Suspending WTO obligations in relation to another Member requires a previous authorization of the DSB. The complainant is thus allowed to impose countermeasures that would otherwise be inconsistent with the WTO Agreement, in response to a violation or to non-violation nullification or impairment. This is informally also called "retaliation" or "sanctions". Such suspension of obligations takes place on a discriminatory basis only against the Member that failed to implement. Retaliation is the final and most serious consequence a non-implementing Member faces in the WTO dispute settlement system. [10].

4. India's experience at the WTO DSB

1.1 India has been involved in 84 cases at the WTO platform till date. It has been complainant in 17 cases and respondent in 19 cases. In 48 cases it has been a third party. However when compared with the number of cases filed by US or EC it seems that India has not made optimum utilization of the WTO dispute resolution system. USA has been a party in 88 cases as complainant and 97 cases as respondent. EC on the other had been a party in 76 cases as complainant and 57 cases as respondent. Currently India is involved in two disputes before the DSS. As a complainant, India is fighting a case against USA against its imposition of anti-dumping duties on frozen and canned warm water shrimp imported from India[11]. In the other dispute before the DSS, also against USA, India is defending its measures imposing additional and extra-additional customs duties on alcoholic liquor and extra-additional customs certain other agricultural and industrial products[12].

1.2 The Indian experience at the WTO DSB has been mixed, in terms of successes at dispute resolution. In some cases India has been able to get the relief sought for, however in some other cases it has also faced non favorable decision from DSB. One of the major problems India faces as a respondent is the dichotomy between the need to generate revenue

[10] Article 3.7 of the DSU
[11] WT/DS345
[12] WT/DS360

and its WTO obligations in so far as trade in goods is concerned. The problem is further complicated by the federal structure of India wherein states are also empowered to impose certain duties. As a complainant India has always strived to protect the interests of its local industries and services. Although the road has always been difficult for India as a complainant still it has been able to get favorable decision from DSB in many cases.

1.3 India's record at the DSB has been reasonably descent. While it has lost some cases (The Patent and the QR Case), it has also been able to use the DSB effectively, to gain market access (EC Bed linen case). It may be concluded that India is quite satisfied with the working of the WTO DSS.

1.4 However the point to be noted here is that many times, WTO DSS as an effective body to resolve disputes is not being used to the desired extent. The high costs of litigation coupled with lack of domestic expertise in the field acts as a big deterrence. Brazil has tried to address the problem through innovative methods like public-private partnerships to enhance its long-term capabilities. In this respect it is also important that developing countries like India take part in a large number of disputes as third party participants, so as to generate greater understanding of the system.

5. Dispute Settlement Mechanism under Regional and Bilateral Free Trade agreement

I Background:

1.1 Trade liberalization is well recognized as the cornerstone of economic growth and development. The global multilateral trading system under the World Trade Organization (WTO) offers the best prospect for the reduction in barriers to trade and thus liberalization of trade. However, of late bilateral initiatives in the form of Regional Trade Agreements (RTAs) or Free Trade Agreements (FTAs) or Preferential Trade Agreements (PTAs) are widely being used to achieve the objective of trade liberalization.

1.2 The surge in these agreements has continued unabated since the early 1990s. By July 2005, a total of 330 had been notified to the WTO (and its predecessor, GATT). Of these: 206 were notified after the WTO was created in January 1995; 180 are currently in force; several others are believed to be operational although not yet notified.

1.3 Countries enter into RTAs, undeniably because they consider international trade to be a key part of their economies. As international business transactions increase, spurred and facilitated by the removal of barriers to trade under the RTAs, possibility of trade disputes increases. Notwithstanding the fact that, there are gains from free trade, countries find it difficult to make a transition from a closed market economy to an open one and they try and preserve their customary turfs. This invariably leads to disputes. Gains from trade can not be achieved unless these disputes are effectively and quickly resolved. And therefore a very important part of international trade agreements, establishing free trade areas and customs unions is Dispute Resolution Mechanism (DRMs).

II. Dispute Resolution Mechanism under RTAs/FTAs:

2.1 By their very nature and constitution, the DRMs under the RTAs, oust the jurisdiction of national courts as far as disputes under the RTAs are concerned. The DRMs are designed to resolve disputes in a time bound, efficient manner and therefore are necessary for the success of RTAs.

2.2 Another reason for the inclusion of DRMs under RTAs is the skepticism over the impartiality of national courts in the resolution of disputes concerning issues such as dumping and subsidies. Parties view the national courts as displaying national favoritisms. For this reason, countries often include DRMs to deal with disputes that may arise under the agreement.

2.3 The Regional Trade Agreements (RTAs) that countries enter into tend to become more detailed and comprehensive over time, covering many of the topics and issues that were part of the Uruguay Round of multilateral trade negotiations, but that were not necessarily concluded or settled to the satisfaction of all countries.[13]

2.4 An ideal dispute resolution system shall display these qualities in order to sustain its legitimacy as an arbiter of trade of disputes.

- A clear procedure which is both accessible and comprehensible to the domestic *and* foreign investor;
- A standard of administration which is effective in its speed, minimal expense, transparency, and lack of complication;
- A system which does not digress (erratically or extremely) from broadly recognized public and private international norms and related procedural (or indeed substantive) standards;
- A standard of judiciary which can be entrusted with the just determination of disputes, irrespective of the identity and origin of the affected party;
- A system which will result in the issuance of a judgment or award which is reasoned, immediately enforceable, of direct effect to all and is consistent with previous decisions;
- A system which permits the development of a uniform jurisprudence; and
- A system which respects the separation of powers.

2.5 The details of these agreements on RTAs /Free Trade Agreements (FTAs) /Preferential Trade Agreements (PTAs) vary vastly, reflecting the varied trading interests of the contracting parties to these agreements. The depth and extent of liberalization under these agreements also reflects the bargaining power of contracting parties vis-à-vis each other.

[13] Drahos Peter, " *Bilateral Web of Trade Dispute Settlement*", Australian National University., available online,www.twnside.org.sg/title2/FTAs/DisputeResolution/TheBilateralWebOfTradeDisputeSettlementPeterDrahos.doc

2.6 The Dispute Settlement Mechanisms established under these RTAs also vary. Depending upon the contracting parties and their respective levels of development, these mechanisms vary from being very rudimentary to extremely detailed, even to the extent of laying down the step by step procedure for the settlement of disputes. However, despite there being considerable and important variations among the dispute settlement mechanisms under different RTAs, they in general terms follow the same structure. Typically the agreements establish a joint committee or commission to oversee the operation of the entire agreement, including the process of dispute resolution. Some agreements as a whole set up working groups or parties to oversee and monitor various parts of the agreement.[14]

2.7 Typically, the parties to a RTA will commit themselves to consultations as the first step in dispute settlement. Where consultations fail they may request a meeting of the body appointed to oversee the agreement and if that fails to produce an agreed solution, the parties may go to a panel. As in the case of the WTO Dispute Settlement Understanding (DSU) most RTAs will prescribe rules for the qualifications of panelists and procedures for panel selection. There are variations amongst the rules for choosing panelists, but the ultimate goal is to select for technical expertise and independence.[15] Detailed rules of procedure are usually not elaborated, except to provide for a minimum of procedural fairness in the form, a right to at least one hearing and the opportunity to provide for initial and rebuttal submissions. The rules of procedure will also usually specify time limits for matters such as submissions, reports by the panel and if necessary the suspension of benefits as well as appeals against such suspension.[16]

2.7 The level of openness in resolving disputes will vary from one agreement to another as will the remedies available to a complaining party. Typically a complaining party may suspend some of the benefits of the agreement that the other party is receiving if the two are unable to resolve their dispute and agree on compensation.[17] Compensation and suspension of benefits are usually considered to be standard remedies that can also be found in the procedure laid out in the DSU.

2.8 More recently, an important provision that is finding its way into RTAs is a "choice-of-forum provision".[18] A "choice of forum" provision essentially gives parties to a dispute to decide the forum in which their dispute will be resolved. The proliferation of bilateral and regional trade agreements coupled with the large membership of the WTO may well result in a situation where a state breaches an obligation it has under more than one agreement. A choice of forum provision will allow the parties to a dispute, to choose whether their dispute should be addressed under the applicable rules of the RTA to which both of them are parties or whether the dispute should be resolved through the WTO. These choice-of-forum

[14] See, for example, the US-Australia FTA that sets up working groups in many areas, including the Medicines Working Group to monitor the Annex on Pharmaceuticals.
[15] Article 10(6), Annex E on Dispute Settlement Procedures of the Indo-Chile PTA states that all arbitrators shall have expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements; be chosen strictly on the basis of objectivity, reliability, and sound judgment; and be independent of, and not to take instructions from, any Party.
[16] Rules of Procedure, Appendix E, Indo-Chile PTA.
[17] Article 16, Annex E on Dispute Settlement Procedures, Indo-Chile PTA.
[18] See, for example, Article 1, Annex E on Dispute Settlement Procedures, Indo-Chile PTA.

provisions may also give rise to some complex litigation scenarios in the future because in cases of "double breach", i.e. breach of obligations under the relevant FTA as well as a breach of WTO obligation, third states which are not party to the FTA, but are parties to the WTO could only proceed in the WTO while the complaining party under the FTA would have a choice. There may also be cases where a party under a FTA introduces a measure that is seen by a third party as being inconsistent with its WTO obligations. The third party may then seek a review of that measure from the WTO.[19]

III. Private Party Rights under RTAs/FTAs: Access to the Dispute Settlement System:

3.1 Free Trade Agreements (FTAs) are bilateral agreements between two or more countries under which they grant each other preferential market access through the removal of trade barriers. FTAs are aimed at achieving deeper levels of economic liberalisation and integration through the mutual exchange of concessions and WTO rules (GATT Article XXIV) permit such FTA arrangements as a specific derogation from the Most Favoured Nation (MFN) principle.

32 FTAs bind contracting nations to certain rules, which must be followed in order to avail of the concessions granted under the FTA. Since FTAs are essentially in the nature of contractual agreements, FTA-rules impose obligations upon the countries that are signatories to the agreements and not upon private parties-who are ultimately affected by the observance of rights and obligations created therein. The rationale being that governments represent the interests of their respective industry and are best equipped to resolve disputes with other governments, either diplomatically or through the use of an inter-governmental dispute settlement mechanism (DSM) as provided for in the FTA.

3.3 Historically, the bilateral concessions offered in FTAs were limited to tariff and non-tariff issues pertaining to the trade in goods. However, recent FTAs are more ambitious in their scope and coverage and address issues such as the trade in services, intellectual property rights, investment, government procurement, competition policy, labour, environment etc. With this widening coverage, FTA's have begun to directly affect the commercial interests and investment decisions of private parties and consequently, some FTAs have begun to provide private parties with recourse to dispute settlement mechanisms to resolve certain types of disputes.

3.4 For example, the ***North American Free Trade Agreement (NAFTA)*** between the US, Canada & Mexico is a comprehensive FTA and includes, amongst other things, certain bilateral investment rules. These rules (Chapter 11) allow private investors recourse to the NAFTA dispute settlement mechanism for the settlement of investment disputes between a private investor and a member government. Similarly, the ***US-Singapore FTA (USS FTA)*** also provides private investors legal recourse to an investor-state dispute settlement mechanism. The ***EFTA-Singapore FTA*** and the ***EFTA-Korea Investment Agreement*** are other examples of bilateral FTAs providing for private investor-state dispute settlement.

[19] For a discussion of the power of WTO Panels to review measures under preferential trading agreements see Petros C. Mavroidis, 'Judicial supremacy, judicial restraint, and the issue of consistency of preferential trade agreements with the WTO: The Apple in the picture' in Daniel L.M. Kennedy and James D. Southwick (eds), The Political Economy of International Trade law, Cambridge University Press, Cambridge, 2002, 583.

3.5 The ***European Union (EU)*** established by the 1957 Treaty of Rome, is one of the most economically and institutionally integrated Free Trade Areas and consequently has the most sophisticated dispute settlement system for addressing private party-state disputes. The EU Treaty provides for a dispute settlement mechanism (DSM), comprising of the Court of Justice, the Court of First Instance and the Civil Service Tribunal.[20] In settling disputes the provisions of the EC Treaty, secondary legislations, directives etc. are enforceable against member states and European Community (EC) institutions not only by other member states but also by business firms and individuals. An individual can approach the Court of First Instance challenging a measure which is directly aimed at it or which is of direct or individual concern to it, for example a measure imposing a fine on a company, or non registration of a trade mark by the Office of Harmonization in the Internal Market (Trade Marks & Designs)[21] or a Community decision holding a merger incompatible with he common market[22]. An individual or a private party under the EC Treaty is entitled to either directly bring an action for annulment of a measure adopted by an EC institution or bring an action for failure to act on part of an EC institution, before the Court of first Instance. In addition private parties have the right to seek enforcement of EC laws before their domestic courts, and EC laws enjoying primacy over domestic laws are compulsorily enforced by the domestic courts.

3.6 Among the FTAs signed by India, the ***Indo-Sri Lanka FTA (ISLFTA)*** and the ***India-Afghanistan Preferential Trade Agreement (IAPTA)*** provide mechanisms for the settlement of disputes that may arise between "commercial entities" of the contracting parties. However the dispute settlement mechanisms (DSM) enshrined under these two agreements are distinct from the investor-state DSMs discussed above, since they provide for dispute settlement *between the commercial entities of the contracting parties*, rather than between a commercial entity and a contracting party (Government) to the agreement.

Table 1: Private Party Rights under FTAs:

FTA	Subject Matter of Dispute	Nature of Private Party Right
North American Free Trade Agreement	Investment	Between Commercial Entities(Investor) and State Parties
US-Singapore FTA	Investment	Between Commercial Entities(Investor) and State Parties
EFTA-Singapore FTA	Investment	Between Commercial Entities(Investor) and State Parties
EFTA-Korea Investment Agreement	Investment	Between Commercial Entities(Investor) and State Parties
EU Treaty	Interpretation & application of Treaty Articles, secondary legislations, directives etc.	Between business firms & individuals and member states & EC Institutions.
Indo-Sri Lanka FTA	Not Specified	Between Commercial Entities
India-Afghanistan Preferential Trade Agreement	Not Specified	Between Commercial Entities

3.7 As the scope and coverage of FTA engagements widen, and the level of integration envisaged in such FTAs is deepened, it will be necessary to evaluate to whether future FTAs or CECAs require more elaborate dispute settlement mechanisms to address disputes between private parties and Governments. The need for a more comprehensive dispute settlement system which

[20] EC Treaty, Article 220.
[21] Henkek KGaA vs. OHIM, 2001.
[22] Airtours plc v. Commission, 2002.

addresses private-party rights is likely to be become increasingly apparent as Indian companies look towards FTA engagements as instruments to facilitate greater market access and opportunities with key trade partners.

IV. RTAs and the WTO Framework :(GATT Article XXIV):

4.1 Article XXIV.4 of the GATT categorically states that RTAs can happily co-exist within the multilateral framework established by the WTO. It reads as follows:

> "*The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories."*

4.2 Hence this provision opens the way for GATT consistent RTAs. The specific conditions for satisfying consistency with the multilateral rules are set out in Articles XXIV.5, XXIV.6, XXIV.7, and XXIV.8 of the GATT.

4.3 Article XXIV GATT distinguishes between two types of RTAs: Customs Union (CU) and Free Trade Areas (FTA). Article XXIV GATT imposes three obligations on WTO members wishing to enter into a RTA, the first of a procedural nature, and the later two of substantive nature:

(a) An obligation to notify the RTA. Since regional integration essentially amounts to an exception from the basic obligation to treat international trade in a non-discriminatory manner, the resulting legal consequence is that WTO member wishing to enter into a RTA, and consequently deviate from the obligation to treat trade from all to state that they have complied with the relevant multilateral rules. The first step towards meeting this obligation comes with the notification of the scheme;

(b) An obligation to liberalize among constituents of the RTA substantially all trade (internal requirement); and

(c) An obligation not to raise the overall level of protection and make access of products of third parties not participating in the RTA more onerous (external requirement).

V. Dispute Settlement Mechanisms in the RTAs and the WTO Dispute Settlement System: Mexico Soft Drinks Case

5.1 There has been a spurt in the signing of RTAs since the early 1990s, and by 2005, 330 RTAs were notified to the WTO. Most of these RTAs contain detailed rules for resolution of disputes arising under the Agreement, and thus establish dispute settlement mechanisms running parallel to the WTO DSS. While the parallel existence of dispute settlement mechanisms in both the WTO and in some RTAs provide countries with two trade conflict resolution options, this advantage could also present its own challenges. The

recent decision of the Appellate Board in the **Mexico Soft Drinks** case highlights some of these challenges.

5.2 In the Mexico Soft Drinks case, the United States challenged certain tax measures imposed by Mexico on imported soft drinks that used sweeteners other than cane sugar, as well as services related to the transfer and importation of these drinks, and certain bookkeeping requirements.

5.3 The United States alleged that these tax measures treated imported soft drinks less favourably than their "like" domestic counterparts. Mexico requested the WTO Panel hearing this case to decline to exercise its jurisdiction, and rather, recommend to the parties that they submit their grievances to an arbitral panel under the NAFTA. According to Mexico, the NAFTA dispute settlement forum could better address the substantive claims in this case which were linked to a broader dispute regarding market access for Mexican cane sugar in the United States under the NAFTA.

5.4 Declining Mexico's request not to exercise its jurisdiction in this case, the panel ruled against Mexico. Mexico appealed the panel's decision on the jurisdiction issue. The Appellate Body upheld the panel's decision noting that it saw no reason "to disagree with the Panel's statement that a WTO Panel would seem not to be in a position to choose freely whether or not to exercise its jurisdiction."

5.5 The Mexico Soft Drinks case brings to the fore some interesting issue arising from dispute settlement provisions under RTAs and the WTO:[23]

- Firstly, what should a country consider when entering into an RTA with dispute settlement provisions?
- Flowing from this question, what is the implication of the choice of dispute settlement forum available to a WTO member who is also a signatory to an RTA that has its own dispute settlement provisions?

5.6 The liberalization of trade through RTAs has been the preferred mode of trade and the process infact continues unabated, notwithstanding the challenges and the frictions that may arise between the institutional framework of the RTAs and the WTO. It's an irreversible process and the challenge before the countries is to devise and put in place such institutional mechanisms under the RTAs which are both WTO compatible and are effective as well.

[23] See, ICTSD Dialogue on the Mexico Soft Drinks Dispute: Implications for Regionalism and for Trade and Sustainable Development, Available online: http:.// ictsd.org