# DISPUTE SETTLEMENT IN RTAs AND WTO: A COMPARATIVE LEGAL ANALYSIS

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## DECLARATION

I declare that the dissertation entitled **"DISPUTE SETTLEMENT IN RTAs AND WTO: A COMPARATIVE LEGAL ANALYSIS"** submitted by me in partial fulfilment of the requirements for the award of the degree of **Master of Philosophy** of Jawaharlal Nehru University is my own work. The dissertation has not been submitted for any other degree of this university or any other university.

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## CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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*In memory of*

*Amma*

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# List of Abbreviations

| | | |
|---|---|---|
| ACB | : | ASEAN Compliance Board |
| ACMB | : | ASEAN Compliance Monitoring Body |
| AFTA | : | ASEAN Free Trade Area |
| APEC | : | Asia Pacific Economic Co-operation |
| ASA | : | Association of Southeast Asia |
| ASEAN | : | Association of South East Asian Nations |
| BENELUX | : | Belgium Netherlands and Luxembourg Customs Union |
| BIMSTEC | : | Bay of Bengal Initiative for Multi Sectoral Technical and Economic Co-operation |
| BISC | : | Basic Instruments and Selected Documents |
| BTA | : | Bilateral Trade Agreements |
| CACM | : | Central American Common Market |
| CAFTA | : | Central American Free Trade Agreement |
| CARICOM | : | Caribbean Common Market |
| CARIFTA | : | Caribbean Free Trade Area |
| CECA | : | Comprehensive Economic Co-operation Agreement |
| CEPT | : | Agreement on Common Effective Preferential Tariff Scheme |
| CMC | : | Common Market Council |
| CMG | : | Common Market Group |
| CRTA | : | Committee on Regional Trade Agreements |
| CU | : | Customs Union |
| CUFTA | : | Canada U S Free Trade Agreement |
| DSB | : | Dispute Settlement Body |
| DSU | : | Dispute Settlement Understanding |
| EC | : | European Community |
| EEC | : | European Economic Community |
| EEZ | : | Exclusive Economic Zone |
| EFTA | : | European Free Trade Area |
| EU | : | European Union |

| | | |
|---|---|---|
| FTA | : | Free Trade Agreement |
| FTC | : | Free Trade Commission |
| GATS | : | General Agreement on Trade in Services |
| GATT | : | General Agreement on Tariff and Trade |
| GCC | : | Gulf Co-operation Council |
| GDP | : | Gross Domestic Product |
| GSP | : | Generalized System of Preferences |
| GSTP | : | Generalized System of Trade Preferences |
| ICJ | : | International Court of Justice |
| ICTSD | : | International Centre for Trade and Sustainable Development |
| ILM | : | International Legal Materials |
| IMF | : | International Monetary Fund |
| IOARC | : | Indian Ocean Association for Regional Cooperation |
| IP | : | Intellectual Property |
| IPR | : | Intellectual Property Rights |
| ISFTA | : | Indo-Sri Lanka Free Trade Agreement |
| ITO | : | International Trade Organization |
| JSG | : | Joint Study Group |
| JWG | : | Joint Working Group |
| LAFTA | : | Latin American Free Trade Association |
| LAES | : | Latin American Economic System |
| LAIA | : | Latin American Integration Association |
| LDC | : | Least Developing Countries |
| MEA | : | Mutual Economic Assistance |
| MERCOSUR | : | Southern Common Market |
| MTC | : | MERCOSUR Trade Commission |
| MFN | : | Most Favourable Nation |
| MoU | : | Memorandum of Understanding |
| NAFTA | : | North American Free Trade Agreement |
| NGO | : | Non Government Organization |
| PB | : | Protocol of Brasilia |

| | | |
|---|---|---|
| PO | : | Protocol of Olivos |
| POP | : | Protocol of Ouro Preto |
| PTA | : | Preferential Trade Agreement |
| PTR | : | Permanent Tribunal of Review |
| QR | : | Quantitative Restriction |
| RTA | : | Regional Trade Agreement |
| SAARC | : | South Asian Association for Regional Co-operation |
| SACU | : | South African Customs Union |
| SAEU | : | South Asian Economic Union |
| SADCC | : | South African Development Co-operation Conference |
| SAFTA | : | SAARC Free Trade Agreement |
| SAPTA | : | South Asian Preferential Trade Agreement |
| SPS | : | Sanitary and Phytosanitary measures |
| TBT | : | Technical Barriers to Trade |
| TCRO | : | Technical Committee on Rules of Origin |
| ToR | : | Terms of Reference |
| TRIMS | : | Trade Related Investment Measures |
| TRIPS | : | Trade Related aspects of Intellectual Property Rights |
| UK | : | United Kingdom |
| UNCTAD | : | United Nations Conference on Trade and Development |
| UNTS | : | United Nations Treaty Series |
| US | : | United States |
| VCLT | : | Vienna Convention on Law of Treaties |
| WTO | : | World Trade Organization |

CHAPTER I

# INTRODUCTION

# Chapter I

# Introduction

## *I.1. Introduction*

The adoption of regional trade agreements (RTAs) has become an important trend in recent times. RTAs[1] are agreements between countries intended to reduce or remove tariff and non tariff barriers to the free flow of goods, services and factors of production. According to Trivedi "the basis for regional cooperation lies in common national interests deriving from propinquity, similarity of socio-political systems, comparable levels of development and complementarity of economies and affinities of language, culture, historical tradition and religion" (Trivedi 2005: 1). Before the Second World War, regional co-operation had more specific objectives and content, and were mainly formed for security reasons. Subsequently a greater number of regional cooperation agreements were adopted for achieving peace, security, development, welfare, trade and other economic purposes thereby increasing its scope and significance.

The *new regionalism*[2] refers to a phenomenon, still in making, that began to emerge in the mid-1980s, starting in Europe and gradually turning into a worldwide phenomenon. It is a heterogeneous, comprehensive, multidimensional phenomenon, which involves state, market and society actors and covers economic, cultural, political, security and environmental aspects (Schulz *et al.* 2001: 3). After the establishment of World Trade Organisation (WTO), regionalism based on economic or market integration gained more attention. It

[1] Scholars use different terminologies. As it is an agreement giving preferential treatment to member nations, it is mainly called Preferential Trade Agreement (PTA). The term RTA is widely used by WTO for PTAs. But the WTO text does not require that the PTA should be regional in nature. The future goal of PTAs is considered as regional integration. So it is sometimes called as Regional Integration Agreements (RIAs) which goes beyond the mere tariff reduction. It sometimes also called as Free Trade Agreements (FTAs).

[2] It is important that old regionalism must be placed within a particular historical context, dominated by the bipolar cold war structure, with nation- state as the uncontested primary actors whereas new regionalism is advocated in a western neo liberal perspective where free trade ends up in a political integration.

rests on regional economic integration theory that has at its foundation the concept of Customs Union (CU). The idea of regional economic integration was advanced by neoclassical economists like Jacob Viner. States allow preferential treatment of lowering tariffs to goods from member countries forming a preferential trade area as a first stage of regional integration. As second stage, States established Free Trade Areas (FTAs) where tariffs and quotas are eliminated from the member countries but each country retains its own tariffs against imports from non members. In the third stage, a CU is formed where members have a common external tariff against non members. The fourth stage is a Common Market where free movement of capital, labour, persons etc is allowed. The fifth stage is the formation of Economic Union where members have a common currency and also there may be harmonization of monetary and fiscal policies and ultimately the theory proposes political integration with a common parliament.

This type of European model of linear integration is highly vulnerable when we consider the realities of third world countries. The bilateral trade agreements are mainly concluded between developed nations and developing nations and some of them are under enabling clause.[3] Developing countries get some protection through the principle of special and differential treatment and less than full reciprocity principle in WTO which may not be guaranteed in RTAs. The equal treatment of unequals may give rise to injustice. The growing tendency of inclusion of WTO plus standards in RTAs such as investments, competition laws, government procurements, higher labour and environmental standards causes problems to the interest to the developing countries. Above all, developing countries have to compromise the development goals which otherwise are framed according to its socio economic conditions.

After the Uruguay Round of Negotiations which established the WTO, the number of RTAs formed has been increased to a considerable extent. At the point

[3] The decision of "Differential and more Favourable Treatment Reciprocity and Fuller Participation of Developing Countries" made by GATT Contracting Parties in 1979 Tokyo Round of Negotiations allows derogations to the MFN treatment in favor of developing countries. In particular, its paragraph 2(c) permits preferential arrangements among developing countries in goods trade (Annexure II).

of its creation itself General Agreement on Tariffs and Trade (GATT) allowed a number of preferential trade systems which were in existence at that time. From 1945 to 1994 the GATT received 124 notifications of RTAs. But from 1995- 2007, 380 RTAs have been notified by WTO. About 400 RTAs are scheduled to be implemented by 2010. At least one reason for this is the deadlock in WTO. The big size of WTO which works under consensus has made developed nations to negotiate regional arrangements which give them an upper hand in trade negotiations.

The fundamental principles governing the WTO are the Most Favoured Nation (MFN) principle and the National Treatment (NT) principle. RTAs are exceptions to these principles if they are compatible with Article XXIV of GATT 1994. Such agreements should be constituted to facilitate trade and not to raise trade barriers. Thus, for example, the duties or other regulations imposed at the establishment of RTAs or FTAs shall not on the whole be higher or more restrictive than those applicable prior to their formation.

Many RTAs are merely tariff reduction agreements. But some of them form a well institutionalized system which creates parallel rights and duties to WTO. For example RTAs like North American Free Trade Agreement (NAFTA), Southern Common Market (MERCOSUR), Association of South East Asian Nations (ASEAN) etc have an institutional arrangement which is equivalent to WTO. Sovereign states have full right to form international agreements. But these types of interlocking trade agreements may causes confusion and deadlocks in the international trade arena. Numerous trade agreements may causes conflicts and overlapping of rules. Bhagwati speaks of this phenomenon as the "spaghetti bowl" phenomenon. Several scholars have mentioned the overlapping of WTO and RTA rules, but very few have made a concrete study on the emerging jurisprudence or possible solutions.

### *I.2. Dispute Settlement in WTO and RTAs*

One of the central pillars of the multilateral trading system is the WTO dispute settlement system (DSS). The WTO DSS underscores the rule of law, and

makes the trading system secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case, automaticity, an appeal provision and an effective enforcement mechanism. It is a unified system, with flexibility with regard to some categories of disputes. Article 23 of the Understanding on Rules and Procedure Governing the Settlement of Disputes (DSU) gives exclusive jurisdiction to the WTO DSS for resolving disputes. WTO DSS is intended to preserve the rights and obligations of members under WTO Agreements.

Though existing RTAs do not have a well institutionalized dispute settlement system like the WTO DSS, there is a growing tendency to establish a parallel dispute settlement mechanism in RTAs. It is said to help resolve disputes in a smaller yet similar forum saving time and money particularly for developing countries. But the existence of parallel dispute settlement systems causes problems like jurisdictional overlapping, choice of forum disputes, conflicts relating to choice of law applied, fragmentation and forum shopping. The present study examines these substantial issues.

WTO Panels and Appellate Body (AB) have not discussed the legal and jurisdictional conflict between RTAs and WTO in great detail, even though such issues have arisen in a number of cases. The problem continues to haunt the WTO jurisprudence.

In disputes such as *Mexico- Soft drinks, Canada- Softwood Lumber, Argentina- Poultry Anti Dumping Duties* some issues came up for resolution in WTO DSS as well as regional forums. For example, in *Argentina- Poultry* case Brazil after losing the case in MERCOSUR (Southern Common Market is a RTA between Brazil, Argentina, Uruguay and Paraguay, founded in 1991) took the anti dumping complaint to WTO DSS on a different legal basis. The WTO Panel held that if MERCOSUR decision was taken into consideration, the Panel would be going beyond its mandate of only interpreting a specific WTO provision. Likewise, in *Softwood Lumber* case, US took the dispute to GATT Panel and then to WTO DSS after it was settled by NAFTA (North American Free Trade Agreement) dispute settlement panel. This tendency of forum shopping leads to multiplicity of disputes and also sometimes different findings causing legal problems. It may also

become a financial burden on developing countries. Legal problems also arise when RTAs and WTO follows different laws and standards regarding the same dispute (*Brazil – Tyres*). Parties always ask as to which law prevails in such cases.

For taking a dispute to WTO DSS, the complaining parties need not prove that all other available remedies have been exhausted. The WTO DSS can only look into the violation of rights and obligation of member states conferred under the WTO Agreement (Article 1 of DSU). It can also clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law (Article 3.2 of DSU). But the WTO dispute settlement system has no authority to look into the existing obligations of member states under RTAs. So dispute settlement mechanism under RTAs and its relationship with WTO becomes a legal problem in many respects.

### *I.3. Objectives and Scope of the Study*

The present study will be confined to studying the potential conflicts at various levels in applicability of laws likely to occur in the working of WTO and RTAs dispute settlement mechanism. In this regard the study will examine relevant cases which have come before various dispute settlement forums. The study will also try to suggest possible solutions. Schematically speaking the proposed study will have the following objectives:

i. To examine various jurisdictional and legal problems arising between WTO and RTAs in dispute settlement.

ii. To test the viability of the idea of mutual recognition and accommodation of RTA forums with WTO as a possible method of resolving conflicts in international trade.

iii. To analyze the manner in which existing and future RTAs should frame their provisions to avoid a potential conflict with WTO Agreement.

iv. To examine how the WTO and NAFTA dispute settlement systems address the conflicting jurisdictional issue.

v. To briefly explore the provisions of RTAs to which India is a party.

### *I.4. Hypothesis*

The problem stated above suggests the following hypothesis

i. The concurrent applicability of the WTO and RTAs jurisdiction could result in the breakdown of the WTO dispute settlement system.
ii. The absence of a single forum for dispute settlement undermines the effective and harmonious functioning of the multilateral trading system.

### *I.5. Research Questions*

Following from the statement of the problem, the objectives of the study and the hypothesis the following research questions have been identified among others:

i. If a dispute arises between two states who are members of both WTO and RTAs regarding the rights and obligation conferred to them by both the agreements, in which forum should the dispute be brought?
ii. Which will be the authority to decide the forum for dispute settlement?
iii. Which law would govern the dispute?
iv. Would the existence of parallel dispute settlement mechanisms give rise to the practice of 'forum shopping'?
v. Will WTO or RTAs take into consideration the forum exclusion clause which is appearing in some RTAs?
vi. If one party has gone to one forum and the other party to the alternative forum, would there be any provision for the stay of proceedings in one forum until the other forum decides the issue conclusively?

vii. Is *the principle of res judicata* applicable in international trade disputes?

viii. Can a retaliation proceeding initiated in one forum cause violation of another agreement?

ix. What are the implications of these issues for developing countries?

### *I.6. Research Methodology*

The study will make use of both primary and secondary sources available on the subject. The primary sources include the relevant legal texts of WTO Agreement and the covered agreements, various regional and free trade agreements, the decisions of the GATT/ WTO Dispute Settlement bodies and NAFTA panel decisions. The secondary sources include books, articles, journals, case reviews and internet sources. The analytical method will be used to study the relevant issues.

### *I.7. Outline of the Study*

The study is divided into four further chapters. Chapter II deals with the legal relation between WTO DSU and RTA dispute settlement mechanisms. It will address the institutional structure, history and background of WTO and RTA dispute settlement mechanisms. It will briefly deal with institutional structure of dispute settlement mechanism in various major RTAs such as NAFTA, MERCOSUR and ASEAN.

Chapter III deals with legal issues and problems that may arise in the working of dispute settlement systems of WTO and RTAs by analyzing various cases and hypothetical situations.

Chapter IV will try to suggest possible solutions to the problems mentioned in the third chapter by analyzing various rules and principles in public international law.

Chapter V will provide a summary of conclusions arrived at on the various issues considered in the present study.

CHAPTER II

# RELATIONSHIP BETWEEN WTO AND RTA DISPUTE SETTLEMENT MECHANISMS: AN OVERVIEW

# Chapter II

# Relationship between WTO and RTA Dispute Settlement Mechanisms: An Overview

## *II.1. Introduction*

After the end of colonial period, the western states began to search for new ways to enter developing country markets. In order to get markets in new sovereign states of Asian, African and Latin American countries developed countries began to conclude agreements with them. The remarkable growth of international trade in the second half of the nineteenth century created a number of international trade agreements. As the trade and trade agreements increased, trade disputes among nations also increased. Effective settlement of dispute becomes necessary for the success of world trade. The sovereignty concept becomes an obstacle in the effective settlement of disputes. Nations usually adopted consultation and mediation for settling their trade disputes. When the intra-regional and international trade increases in volume, the international business community and individual entities will demand a strong and effective legal system that can ensure consistency, certainty and predictability, especially in the area of dispute settlement (Mohamad 1998: 48). With the success of GATT and subsequent WTO, nations began to think about third party dispute settlement with an institutional background. Subsequent RTAs also follow the same path. This chapter will analyze the overall relationship between WTO and RTAs particularly the dispute settlement mechanisms existed in them.

## *II.2. Multilateral Trading Arrangements and its Dispute Settlement Mechanisms*

### *II.2.1. International Trade Organisation (ITO)*

In the course of the Second World War, Western leaders realized that a strong world economy is necessary for preserving international peace and security.

By learning lessons from great depression of 1930s and World War II, the Bretton woods Conference of 1944 suggested for the formation of three institutions, viz; International Monetary Fund (IMF), International Bank for reconstruction and Development (IBRD) and International Trade Organisation (ITO), in order to rebuilt the war torn economy. ITO never came into being as the US Senate did not ratify it because of its reluctance to accept an institutional structure that constrained its sovereignty. Instead a 'Protocol on Provisional Application' was signed in 1946 which formed the basis for the functioning of GATT and came into effect on 1 January 1948. The model of dispute settlement system in GATT 1947 was adopted from the proposed ITO charter.

### *II.2.2. General Agreement on Tariffs and Trade (GATT)*

GATT mainly acts as a forum for negotiation to reduce tariff among member countries and thus facilitate free trade. Its main functions can be summarized as (i) tariff bargaining (ii) bargaining on non tariff barriers (iii) elimination of quantitative restrictions (iv) settlement of disputes (Rao and Manjula Guru 2004: 3). All the rounds of trade negotiations up to the Dillon Round dealt with trade cuts. A procedure for helping dispute settlement to developing country parties was adopted in 5 April 1966 called 'Procedures under Article XXIII'. In the Tokyo Round, the 'Decision on the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance' and its Annex 'Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement' was adopted on 28 November 1979.[1] This codification of customary practices considerably helped in the development of future trade dispute settlement mechanism. The Ministerial Decision on Dispute Settlement Procedure of 29 November 1982[2], the Ministerial Decision of 30 November 1984[3] and the 'Improvements to the GATT Dispute Settlement Rules and Procedures', decision

[1] Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII: 2), BISD 265/215.

[2] BISD 295/13; it add a system of reporting mechanism in case of not implementing the recommendation or ruling of the Panel.

[3] BISD 315/9

of 12 April 1989[4] were the other attempts during the GATT periods to improve the dispute settlement mechanism (Rao and Manjula Guru 2004: 1-3); (Ernst- Ulrich Petersmann 1997: 25-29). In Uruguay Round as a result of extensive multilateral trade negotiations, a permanent structure which replaced the GATT as an international organisation, that is, the WTO, came into being on 1 January 1995 (Rao and Manjula Guru 2004: 2-3).

### *II.2.3. World Trade Organisation*

Article III of WTO agreement designated five functions to WTO; (i) to provide for the administration of the WTO agreements (ii) to serve as a negotiation forum (iii) dispute settlement (iv) trade policy review (v) global economic coherence. From the above the important functions are negotiation forum and dispute settlement (Davey 2006: 344). GATT gets an institutional face through WTO in the Uruguay Round of trade negotiations. WTO is headed by a Ministerial Conference of all members that meets at least once in every two years. In between the meetings of Ministerial Conference its functions are managed by the General Council. The General Council consists of representatives of all the member nations. General Council turns itself into Dispute Settlement Body (DSB) whenever needed to settle disputes between WTO member States. Subsidiary Councils on goods, on services and on TRIPs also function under the general guidance of the General Council. Committees, subcommittees, working groups etc which includes the Committee on RTAs were also set up.

The decision making in WTO mainly follows GATT method of consultation and consensus, but on rare occasions voting is also adopted. Unanimous decision is required for amendment relating to general principles like MFN principle and NT principles. A three quarters majority vote is required for an authoritative interpretation of WTO Agreements.

Non discrimination is the most important principle in WTO. Non discrimination consists of MFN principle and the NT principle. The exception to

[4] BISD 365/61; it is also called Montreal Rules

the general MFN principle of WTO is key aspect in RTAs. RTAs are given this exception for the greater integration and RTAs enhance the free trade[5] and in the long run leads to a global free trade area.

### *II.2.3.1. Non Discrimination*

In earlier times, non discrimination treatment was mainly given to friendly nations. For the first time, the principle was adopted by UK in the nineteenth century when it undertook unilateral trade liberalisation in 1846 (Irwin 1993). The principle of non discrimination began to spread to other countries with the Anglo-French commercial treaty of 1860. This treaty incorporated a provision that "each of the contracting powers engages to extend to the other any favour, any privilege or diminishing of tariff which either of them may grant to a third." This non discrimination clause was then repeated in many other bilateral treaties (Mathilde 1995). MFN clauses have a history of more than seven hundred years in trade agreements (Jackson 1989: 158). The MFN principle requires that a product made in one member country be treated no less favorably than a like good that originates in any other member country.[6] NT principle requires that foreign goods, once they have satisfied whatever border measures are applied, be treated no less favorably, in terms of internal taxation etc than like or directly competitive domestically produced goods.[7] An unconditional MFN clause which can be seen in WTO which does not discriminate any parties cannot be seen in bilateral agreements (Snape 2006: 373-380). A RTA works under the principle of reciprocity between each member. Generally, a concession given to one nation under WTO will automatically extend to other nations which will not happen between various RTAs. Each RTA is considered as an isolated compartment. Each RTA has its own rules and procedure and concessions and tariff rates. So a great fragmentation can be seen in the field of bilateral agreements.

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[5] Ongoing debates in regionalism verses multilateralism mainly deals with whether RTAs enhance free trade or it is a stumbling block to the free trade.

[6] Article 1 of GATT 1994

[7] Article 3 of GATT 1994

### *II.2.3.2. Reciprocity*

Reciprocity is a fundamental element and motivating principle in the trade negotiation process. It reflects both a desire to limit the scope for free riding that may arise because of the MFN rule and a desire to obtain payment for trade liberalisation in the form of better access to foreign markets (Hoekman: 2002: 43). Negotiation should be on a reciprocal and mutually advantageous basis.[8] The logic of the GATT/WTO is that in the negotiations each member is sovereign to determine for itself whether a proposed agreement is to its advantage and an agreement is an outcome that each member considers to be to its best[9] (Finger and Winters:2002: 51). In WTO, special and differential treatment principle to the developing countries forms an exception to reciprocity. Therefore, a developing country gets better treatment. In RTAs, negotiations are done on a pure reciprocal basis and the principle of special and differential treatment is generally marked by its absence.

### *II.2.4. Dispute Settlement under GATT/WTO*

The "negotiation-based settlement" and the "rule-based approach" are the two approaches commonly used in resolving international trade disputes. The "negotiation-based settlement" approach permits parties to conduct deliberations and reach shared solutions, while the "rule-based approach" inherits much from the "arbitration/adjudication method of dispute resolution," which "emphasizes and emulates the modern judicial system of rules of law, precedent, and appeal procedures"(Amala Nath 2006: 338). Rule based approach makes for more stable and secure mechanism.

In the early GATT phase, enforcement was undertaken through negotiation based settlement. It may be recalled that the Members of the ITO had agreed that

[8] Article XXVIII bis, of GATT 1994.

[9] There are certain exceptions to this reciprocal provision when it comes in respect of developing countries. Article XXXVI.8 states "the developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariff and other barriers to the trade of less developed contracting parties." However the commitments under part IV are not legally binding.

they will not have recourse to any procedure other than the procedures envisaged in the Charter for complaints and the settlement of differences arising out of its operation.[10] Without prejudice to any other international agreement, ITO Charter also prohibited unilateral economic measures.[11] The GATT which followed the ITO developed a loose, consensus based members driven dispute settlement mechanism (Maki 2000: 344-347). States preferred a flexible and non legalistic framework for settling trade disputes, in the light of the existing political situation and the need to preserve the sovereignty of the States. In their view, dispute settlement within the GATT framework had to be based on consultations, negotiations and diplomatic compromise (Reich 1997: 794).

In the beginning, disputes were settled in semi-annual meetings of the GATT Contracting Parties. After that "working parties" were constituted, consisting of representatives of the disputing parties, to settle disputes (Jackson 1989: 115-116). The purpose of the GATT dispute settlement rules was to maintain the balance of reciprocal rights and obligations relating to the conditions of market access, namely tariffs and non tariff measures (Marceau 1997: 491). Procedural and institutional clarifications were adopted to GATT 1947 dispute settlement mechanism in 1979.[12] The first phase of the procedure established under the Tokyo Round Understanding was negotiation and consultation. If they remained unsuccessful, the party could request the establishment of a panel. It was the duty of GATT General Council to determine the panel members and terms of reference. The decisions were taken by consensus. The panel report was also adopted by consensus. After 1980s, particularly during the Uruguay Round of Trade negotiations, states gradually began to use GATT dispute settlement mechanism. There were a number of deficiencies in the GATT dispute settlement mechanism.

[10] Article 92(1) of Final Act of the United Nations Conference on Trade and Employment: Havana Charter for an International Trade Organisation.

[11] Article 92(2) of Final Act of the United Nations Conference on Trade and Employment: Havana Charter for an International Trade Organisation.

[12] On Nov. 28, 1979, the GATT Contracting Parties approved the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance," and the "Annex: Agreed Description of Customary Practice of the GATT in the Field of Dispute Settlement" which is found at GATT B.I.S.D. (26th Supp.) at 210 (1980) which was called Tokyo Round Understanding.

The parties could block the decisions of panel because it was adopted by consensus among the parties including the losing party.

The WTO adopted a unified dispute settlement mechanism. WTO provides an effective three stage enforcement mechanism based on the principle of reverse consensus.[13] An appeal provision was also added in the WTO along with a more effective implementation and retaliation procedure and proper monitoring mechanism. Appeal is limited to issues of law covered in the panel report and legal interpretation developed in the panel. The AB may uphold, modify or reverse the legal findings and conclusions of the panel (Sacerdoti 1997: 87). All the major alternative dispute settlement methods under public international law (e.g., bilateral and multilateral consultations, good offices, conciliation, mediation, panel and appellate review procedures, arbitration, and national and international adjudication) are also available in WTO law for the prevention and settlement of international trade disputes (Ernst-Ulrich Petersmann 2006: 302).

Robert Hudec has maintained the view that the GATT dispute settlement system was a quasi judicial in nature, not entirely diplomatic or entirely legalistic. But it is not agreed by all. The enforcement in WTO retains some middle path (Maton and Carolyn Maton 2007: 320-321)[14]. When this system of dispute settlement shifted to a rule oriented system in WTO, it preserved some remains of the old diplomatic/quasi judicial model. The central element of WTO DSS is to provide security and predictability to the multilateral trading system. This provision gives the trading system a rule oriented approach. So DSU is the central element which secures the multilateral trading system. The GATT/WTO mechanism serves not only to resolve the dispute and to redress the balance of the agreement but also to build up a case history of interpretation of the GATT provisions which Jackson terms it as GATT jurisprudence, thus reducing the area for dispute in the future. In most of the parallel dispute settlement systems found in

[13] A decision is deemed to be adopted by the DSB unless its members decide by consensus not to adopt the decision (Articles 6.1, 16.4, 17.14, 22.6 of DSU)

[14] Many scholars like Garrett and Smith still believes that the decision making in DSU will be strategic and often political. DSU often uses a middle path rather than adopting a strict rule based decision. It is because of the peculiar nature of trade and economic law.

FTAs and RTAs, such an extensive use of rules and procedures are absent (Joseph 1993).

In addition to that DSU also recommends a prompt settlement[15] of situations for the effective functioning of the WTO and maintenance of a proper balance between the rights and obligations of members. The DSU recommends a satisfactory settlement[16] of the matter. It opts to secure a positive solution[17] to the dispute. The above provisions allude to a diplomatic or quasi judicial settlement of dispute. Thus on the one hand, the dispute settlement process is designed to preserve the rights and obligations of Members under the covered agreements. On the other hand, Members are encouraged to seek 'mutually acceptable'[18] solutions. Thus DSU continues its dual nature of dispute settlement (Mc Rae 2004: 7).

The first objective of dispute settlement is the withdrawal of the measures concerned if it is found to be inconsistent with the provision of the covered agreement. The provision of compensation can be used as a temporary measure if the immediate withdrawal of concerned measure is not possible. The suspension of concession or other obligation should only be used a last option with the approval of DSB. The DSU request its members to engage in all dispute settlement procedure in good faith to resolve the dispute.

### *II.2.4.1. Panel*

If a WTO member state feels that the measure adopted by another member state(s) is a violation of a covered agreement or nullifies or impairs a benefit, then the aggrieved party can request for consultation.[19] If the consultation fails and the complaining party request in writing to the DSB to establish a panel, the DSB has to constitute a panel at the latest DSB meeting.[20] The complaint party has to identify the specific measures at issue and provide a brief summary of the legal

[15] Article 3(3) of DSU
[16] Article 3(4) of DSU
[17] Article 3(7) of DSU
[18] Article 3(6) of DSU
[19] Article 4 of DSU
[20] Article 6(1) of DSU

basis of the complaint.[21] The panel shall examine, in the light of relevant provisions in the covered agreement, the matter referred to the DSB and shall make such other findings as will assist the DSB to resolve the dispute.[22] The function of the panel is thus to assist the DSB in discharging its responsibility and to make an objective assessment of the matters 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.[23]

### *II.2.4.2. The Appellate Body*

The introduction in the WTO dispute settlement procedures of an appellate review from the report of a panel can be considered as one of the most important innovation of the world trading system (Sacerdoti 1997: 1025-1026). Article 17 of the DSU provide for the provision of a standing Appellate Body (AB).[24] It is for the first time in the history of international trade disputes that such a system of appellate review was being established. The objective was to provide a security blanket or a safety valve to ensure against the occasional bad decisions of panels as a result of the *quid pro quo* for the automatic adoption of panel reports by the DSB[25](Steger: 2002). An appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel.[26] The AB may uphold, modify or reverse the legal findings and conclusions of the panel.[27] An AB report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decided by consensus not to adopt the AB report within 30 days following its circulation to the members.[28] So for non adoption of the report,

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[21] Article 6(2) of DSU
[22] Article 7(1) of DSU
[23] Article 11 of DSU
[24] It is composed of seven persons. It will establish its own working procedure in consultation with the chairman of the DSB and the Director-General.
[25] The DSB consist of representatives of all WTO members. Normally General Council sits as DSB. It has the authority to establish dispute settlement panels, to adopt panel and AB report, to maintain surveillance of the implementation of the report and to authorize the suspension of concessions, if the party makes default in its implementation of panel report.
[26] Article 17(6) of DSU
[27] Article 17(13) of DSU
[28] Article 17(14) of DSU

it is mandatory to get the consensus of all parties including the winning party. These provisions give teeth to WTO dispute settlement system.

In most of the appeals, parties raise certain systematic and procedural issues. AB has developed a growing body of jurisprudence to deal with these issues. The AB has been called upon, by the parties in particular disputes, to rule on numerous systematic and procedural matters such as, *inter alia*, treaty interpretation, burden of proof, standard of review, jurisdiction of competent panels, treatment of *amicus curiae* briefs, and representation by private legal counsel in WTO dispute settlement proceedings(Steger: 2002).

However the basic aim of dispute settlement in WTO is to resolve dispute and the AB does not consider that Article 3.2 of the DSU is meant to encourage to make law by clarifying the existing provisions of the WTO agreement outside the context of resolving a particular dispute (Steger: 2002).

### *II.3. Regional Trading Arrangements and Dispute Settlement*

In the post second World War reconstruction of world trade, Customs Unions (CU) and FTAs are more regarded as an issue of frontiers and customs jurisdiction than a commercial arrangement deviating from the principle of non discrimination (Wolfrum *et al*: 2006: 217-218). There is no consensus regarding the terminology used to describe the RTAs. Scholars use different terminologies like Regional Integration Agreement, Preferential Trade Agreement etc.[29] Bhagwati (1991) called the regional trading agreements in 1960s as the first regionalism and the current period as the second regionalism. Krueger (1999: 7) defines a PTA as any trading arrangement which permits the importation of goods from countries signatories to the PTA partners at lower rates of duty than are imposed on imports from third countries. Nations for a long time with specific trade policies have discriminated in favour of some valued neighbours against others. The German Zollverein, the Customs Union that was formed among

[29] WTO mainly used as regional trade agreements. Well-known economist Jagdish Bhagwati termed it as PTAs because there is no regional or free trade in these arrangements, but only preferential trade which excludes one country from another.

eighteen small states in1834, was regarded as the first of such one. After GATT, beginning with BENELUX 1958[30], the proliferation of RTAs becomes one of the main trends in international trade. Between 1947 and 1995, ninety eight agreements had been notified under Article XXIV of GATT 1947 and eleven agreements under enabling clause (Srinivasan 1998: 331).

RTAs mainly deal with reduction of tariffs. But some of them go beyond that and include a wide range of issues such as investment, government procurement, competition, higher standards of environment, labour policies etc.

The reasons for the proliferation of RTAs are several. RTA may be an easy substitute for a more difficult multilateral arrangement. There are economic, geo political, diplomatic reasons to form RTAs. The hidden protectionist interest of national industries also may play a role in forming such groupings (Glania and Matthes 2005: 13-14). Often nations in close geographical proximity share common interests. There may be common elements in culture, religion, language, history, social and economic system among such nations. Even if nations are not geographically close to each other, they can share some common interests (Matsushita 2004: 498).

It is argued that smaller forums of similar interest can be a substitute for highly complicated multilateral trade agreements. RTAs reduce the number of states actively involved in WTO negotiations and also the policy proposals by increased consensus among the regional groupings. The argument about the actual number of participants in the negotiating process will not always stand. This is because, as can be seen in the WTO negotiations, negotiations are not necessarily between regional trading groups but on the basis of different interests in international trade.

However, RTAs do speed up trade liberalisation. In the present set up WTO is working under the consensus rule and complicated amendment procedures and consists of more than 150 members. So RTAs are regarded as an alternative to

[30] Formed by Belgium, Netherlands and Luxembourg after the BENELUX Treaty 1958

achieve the goal of trade liberalisation. On the other hand, some pessimists argue that RTAs put in place the old fragmented system of trade (Lawrence 1996: 41-42). For instance Bhagwati observes that these RTAs will weaken the multilateral trading system. The regulation of world trade will become more complicated with different rules, standards and procedure that are also highly adverse to the developing countries.

Thus there are three distinct approaches regarding RTAs with regard to trade liberalisation. Some economist like Bhagwati argues that the regionalism is dangerous to multilateral free trade and is a stumbling block to multilateralism. Others like Bergsten, Summers, Hufbauer etc argued that regionalism and multilateralism should go hand in hand and can reinforce another. Some others argue at a more general level that regionalism is a necessary or desirable substitute for multilateralism (Acharya 2005: 152). Being that as it may, the proliferation of RTAs can be seen as a trend from the very inception of WTO. A contradiction can be seen in this trend. The WTO is formed to avoid the fragmentation of international trade and to bring international trade negotiation under one roof so that every nation gets a decent share in international trade. It also aims at the optimal utilization of world resources. At the political level, the US factor was an important reason. In the beginning, US showed some enthusiasm for multilateral trade rules. But developing nations under the leadership of countries like India also began to successfully bargain in the multilateral forum. This was disappointing to the interest of US and other trade giants. The slow progress in multilateral trade negotiations force them to opt for RTAs which can be negotiated according to their convenience.[31] Baldwin (1996) shows that *domino regionalism*[32] can also be a

[31] US corporate interest faced powerful countervailing forces. For instances, the EU a major economic power in its own right, with an economy almost as large as US pushed back US demands on several issues such as commodification of public services. Second, Japan was then viewed as the next emerging economic superpower and played a weighty role, for instance in opposing some US agriculture, procurement and investment demands. Additionally, given the expansive membership of GATT, groups of developing countries such as G 7, also occasionally were able to band together to defy the most extreme elements of the US corporate agenda, resulted in limited WTO investment and procurement agreements (Wallach and Woodall 2004).

[32] When the major trading nations created trade blocs in the name of RTAs, the others also have pressure to form such regional trade groups as the costs of exclusion in international trade seemed to grow.

reason for the proliferation of RTAs. The lobbying of private firms to their government to get favorable markets in other countries to form preferential agreements, so as to avoid competition, may be another reason. Another reason was the limited number, similarity and proximity of members which reduces tensions and thus easy to handle. The most important reason is political. RTAs are often formed due to political reasons such as foreign policy and strategic reasons and the aspiration for political integration in the long run (Hoekman and Kostecki 2001: 349).

### *II.3.1. Customs Union and Free Trade Areas*

GATT and WTO address only the lesser integration model of RTAs such as CU and FTAs. This may be because in the political atmosphere of the 1940s it was difficult to think about closer integration of economies in the fashion of common markets or economic union. Even the European Union took 40 plus years to move from one stage to another. GATT 1994 defines CU and FTAs. According to it "A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that duties and other restrictive regulations of commerce 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 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." [33]

A free trade area "shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories."[34]

### *II.3.2. Rules of Origin*

The basic function of Rules of Origin (ROO) is to determine where a particular product has originated geographically. Usually RTAs contains strict

[33] Article XXIV (8)(a) of GATT 1994
[34] Article XXIV (8) (b) of GATT 1994

rules of origin criteria. It is to ensure that only goods originating in the partner countries are allowed to enter the importing country at preferential rate of tariffs. In the case of FTAs when there is a different tariff among the member countries trade deflection may be caused because of the entering of goods and services to FTAs through lower tariffs member country. Therefore, a strict ROO criterion becomes necessary to differentiate the goods from other countries. The common approach taken in most of the countries regarding the determination of origin of a product is the location where the last substantial transformation took place. Significant or substantial is defined as sufficient to give the product its essential character (Garay and Cornejo: 2002: 114). Normally, it is expensive to create highly complex ROO documents for each RTA particularly for developing countries and thus it may result in loss of trade benefits.

### *II.3.3. Trade Creation and Trade Diversion*

The common sense view is that RTAs promotes trade liberalizing and free trade. Viner and Meade, however, point out the trade creation and the trade diversion effects in RTAs. Trade diversion is more visible in FTAs than CU. Trade creation takes place when a member country's level of domestic production of a good falls and is replaced by lower cost production from a partner country because the importation of good is cheaper than producing at home. Trade diversion takes place when a member country replaces lower cost and quality imports from the rest of the world with imports from a higher cost partner (Krueger 1999: 8-10). Therefore, if the most efficient producer of a product in the world is the part of the RTA, then trade promotion occurs in a greater momentum. But if vice versa it may cause trade diversion.

### *II.4. Compatibility of RTAs with WTO*

Freeing the trade or reducing trade barrier is not the only criteria for establishing a RTA. Article XXIV (4) of GATT 1994 clearly mentions the purpose of forming a regional agreement. It reads as "increasing freedom of trade by development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreement. They also recognize that the





purpose of a customs union or 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." As RTA is an exception to MFN principle, discrimination is inherent. GATT 1994 makes it clear that Article XXIV can be used as a defence to the adoption of certain measure inconsistent with GATT provisions for the establishment of RTAs. For that two conditions have to be satisfied. First, the measures taken should be fully meets the requirements of sub- paragraph 8(a) and 5(a) of Article XXIV. Second, the restrictions or inconsistent provisions can be used only to the extent that the formation of the Customs Union or FTAs would be prevented if the introduction of the measure were not allowed[35].

The Uruguay Round adopted the "Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994" to clarify Article XXIV. RTAs are formed according to Article XXIV of GATT 1994 or by enabling clause of 1979 which give more favorable treatment to developing countries. According to it, RTAs have to be notified to the Council for Trade in Goods in case of RTAs formed under XXIV of GATT 1994, Committee on Trade and Development in case of RTAs under enabling clause, or Council for Trade in Services in case of RTAs covering trade in services. RTAs have to be examined by the working party formed by the Committee on Regional Trade Agreements (CRTA) which is established by WTO General Council in 1996 (Yuqing 2007: 472-473). In addition to Article XXIV of GATT 1995, GATS also imposes three conditions on RTAs if it covers services. First, such agreements must have substantial sectoral coverage in terms of number of sectors, volume of trade and modes of supply. Second, it must provide for the absence or elimination of substantially all measures violating national treatment in sectors where specific commitment were made in the GATS. Third, RTAs may not result in higher trade barriers against third countries (Hoekman and Kostecki 2001: 355).

[35] Turkey- Restrictions on imports of Textiles and Clothing Products WT/DS34/AB/R 22 October 1999 para 58

The compatibility question is not merely a legal issue but also include political and economic issues. The CRTA is a political body which operates by the principle of consensus. Though WTO empowered CRTA for reviewing the compatibility question, the outcome of the review is always controlled by the RTA members itself and thus members can very well block the outcome (Abbott 2000: 173-178). It is because the decisions in CRTA are mainly taken by consensus. Member nations also don't want to closely scrutinize regional commitments. According to Pauwelyn (2007: 2) there may be three possible reasons why WTO members refrain from challenging regional agreements before a panel: (i) nearly all WTO members have concluded regional agreements and no one sees an interest in clarifying or tightening the rules under Article XXIV as this might work against their own regional programs; (ii) WTO members may not trust panels to make binding decisions on the economically complex question of Article XXIV compliance, and (iii) if a regional agreement does not liberalize "substantially all trade" within the region and thereby violates Article XXIV, third parties may not have an incentive to challenge this inconsistency as the most logical result would be more discrimination (i.e. more regional liberalization and preferences) rather than less discrimination. CRTA never scrutinized most of the RTAs. Therefore, it may not liberalize substantially all trade according to Article XXIV. Usually RTAs practices measures which violates the WTO provisions. For example, the trade balancing requirements within MERCOSUR is prohibited by TRIMs[36]. Another example is the voluntary export restraint measures practiced in NAFTA which is prohibited according to the Agreement on Safeguards (Panagariya and Srinivasan 1998: 230).

In any case, Article XXIV of GATT 1995 is very vague. Thus, for example, Article XXIV (7) provides for the 'notification to the contracting parties' and 'shall make available to them such information'. Therefore only notification to the contracting parties is needed. Article XXIV does not say about the need for the approval of WTO member states. There is also no clarity regarding the time for notification and the kind of information given by the RTA members (Wolfrum *et al* 2006: 219-221).

[36] It means an Argentine company operating in Brazil must export as much Brazilian goods to Argentina as it imports from the latter.

### *II.5. Dispute Settlement in RTAs*

The dispute settlement in the RTAs is primarily intended to settle tariff disputes. It is done mainly through mutual consultation and mediation. It is because a majority of RTAs are nothing more than commercial contracts. So a more diplomacy oriented system is adopted rather than a rule oriented system. But these become inadequate to more complex RTAs particularly when the interpretation of text is needed. In such a circumstances member nations usually copy institutional mechanisms such as the WTO DSS. In the existing circumstances WTO DSU has some advantages over various RTAs like better staff and other support system, effective enforcement more legitimacy, less power based and more rule oriented system etc. Hudec (1998) points out that WTO DSU has a minimum quality which gains the confidence of member countries and its impact generally influences the success of WTO. The trust or confidence of member nations on DSU makes dispute settlement in WTO a successful one and the RTA dispute settlement system also should gain such confidence.

#### *II.5.1. Reasons for Dispute Settlement Provisions under RTAs*

Most international treaties or agreements have a dispute settlement provision for the effective implementation of agreement. It is more important in trade agreements as the interpretation and constant vigil is necessary. Usually the chances of frequent disputes are more in trade and economic field (Chang- Fa Lo 2007: 457-459). Recent RTAs are keen to establish a well established dispute settlement mechanism. These are sometimes necessary to deal with such a complex economic activities. Many RTAs are more than a mere tariff reduction agreement. Sometimes the environmental, labour, health and other standards are higher than other trade agreements. In the words of Trachtman (1999: 336), "to understand the role of dispute resolution, one must recognize that the dispute resolution is not simply a mechanism for neutral application of legislative rules but it itself a mechanism of legislation and of governance". Reisman and Wiedman (1995: 5) state that "a well-designed, contextually responsive (dispute resolution mechanism) can minimize frustration and tension between parties by providing procedures

suited to their goals and their internal and external political relationships. An ill-designed (dispute resolution mechanism) can generate friction and actually contribute to vitiation of the trade agreement it was created to preserve"(as cited in Specht 1998: 66). Jackson (2004: 875-878) summarises the reasons for the dispute settlement systems in international trade agreements: (i) Undo harm done by respondent, to redress complainant's injury (ii) Settle the differences amicably to restrict international tensions, avoid conflict, or even war (iii) Settle the differences efficiently and promptly (iv) To establish stability (v) Provide jurisprudence or "precedents" for predictability and stability (vi) Fill gaps and resolve ambiguities in treaty text (vii) Promote compliance with dispute settlement outcome (viii) Redress asymmetries of power; fairness to weaker entities (ix) Re-establish a balance of benefits (x) For giving parties fair procedure (xi) Provide reasoned judgments to enhance broader public acceptance of the application and development of the rules. So interpreting its own text and finding a solution from the agreement for a dispute become more necessary as far as such complex trade agreements like NAFTA for instance is concerned.

Different RTAs have adopted different forms of dispute settlement mechanisms. The 1985 US.-Israel Free Trade Agreement treats third-party decisions as mere recommendations in the form of a conciliation report. Other treaties like ASEAN Free Trade Area Dispute Settlement Protocol 1992 gives legal force to arbitral rulings only after they have been officially adopted, and perhaps substantially revised, by political representatives of the member governments acting through one of the pact's governing institutions. But most of the trade agreements dispute settlement systems have binding effect (Smith 2000: 140).

### *II.6. Dispute Settlement in Major RTAs: An Overview*

Dispute settlements in RTAs have advantages and disadvantages when compared with WTO DSU. Majority of the RTAs have only consultation mechanisms. But there are a number of RTAs which contain a well elaborated dispute settlement mechanism like the one that exists in WTO. Even with a well elaborated system, states are normally reluctant to move a RTA mechanism. This

may be because of their inherent deficiencies. Some of the major RTA dispute settlement mechanisms are briefly discussed below.

### *II.6.1. NAFTA*

The NAFTA dispute settlement mechanism is one of the most elaborate and successful mechanisms among RTAs. It is as elaborate as WTO. NAFTA was built upon the Canada-US FTA (CUFTA). It developed as NAFTA with the inclusion of Mexico and entered into force on January 1994. NAFTA dispute settlement mechanism contains three different systems. One is the general dispute settlement mechanism relating to the application, interpretation and implementation of the provisions of the agreement (chapter 20). There are two other special mechanisms for the settlement of investment disputes (chapter 11) and for the review of final determinations and statutory amendments relating to countervailing duties and anti dumping laws (chapter 19).

NAFTA dispute settlement has exclusive jurisdiction and prevails over GATT/WTO mechanism, including conflicts between NAFTA and bilateral or multilateral environmental agreements listed in Article 104; disputes under the NAFTA Chapters 7 (sanitary and phytosanitary measures); and Chapter 9 (standards-related measures) relating to human, animal, or plant life, or health, or protection of the environment, or raising factual issues concerning the environment, health, safety, or conservation, including directly related scientific matters (Gantz 1999: 1033). There are certain areas covered by NAFTA on which the WTO is silent. These include the regional tariff reduction measures (Chapter 3) and rules of origin (Chapter 4), as well as, NAFTA-specific customs measures (Chapter 5); most investment measures (Chapter 11); competition (Chapter 15); and business travel (Chapter 16). If a matter does not arise under both the NAFTA and the GATT/WTO and it only arises under NAFTA, then it must be submitted to NAFTA dispute settlement procedures (Gantz 1999: 1034).

#### *II.6.1.1. Chapter 20 Mechanism*

Chapter 20 establishes a Free Trade Commission (FTC) and a secretariat. The dispute settlement system under Chapter 20 has three stages: consultations

between the parties; intervention by the Free Trade Commission; and panel proceedings.

FTC is the highest body. Its main functions are to supervise the implementation of the Agreement with the help of Secretariat, committees and working groups. It can take any matter that may affect interpretation, operation and application of the Agreement.[37] The FTC has its own rules and procedures. The decisions in the FTC are taken by consensus.[38] The Commission may establish and delegate responsibilities to, ad hoc or standing committees, working groups or expert groups and also to seek the advice of non-governmental persons or groups and can do such other actions for the exercise of its functions.[39]

The Secretariat[40] assists the FTC and gives administrative support to the dispute settlement panels and supports the work of committees and groups established under NAFTA.[41]

The dispute settlement provisions of Chapter 20 apply to the interpretation or application of NAFTA or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of NAFTA or cause nullification or impairment.[42] Any party can request for consultation in writing.[43] The Commission may call on such technical advisers or create such working groups or expert groups as it deems necessary or have recourse to good offices, conciliation, mediation or such other dispute resolution procedures, or make recommendations, as may assist the consulting Parties to reach a mutually satisfactory resolution of the dispute.[44] Thus the commission brings together the governments of the disputing Parties so as to encourage an atmosphere of negotiation and to avoid costly and lengthy proceedings.

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[37] Article 2001.2 of NAFTA
[38] Article 2001.4 of NAFTA
[39] Article 2001.3 of NAFTA
[40] It consists of two standing tripartite bodies responsible for the supervision and administration of the Agreement.
[41] Article 2002.3 of NAFTA
[42] Article 2004 of NAFTA
[43] Article 2006 of NAFTA
[44] Article 2007.5 of NAFTA

If consultation fails, parties can request the FTC for establishment of a panel.[45] The Panel carries out its proceedings according to the terms of reference agreed by the parties. Term of reference helps the panel not to exceed its functions and also not to leave the questions covered unresolved.

A third party who has a substantial interest in the matter can be joined as a complaining Party.[46] If a third Party does not join as a complaining Party, it normally shall refrain thereafter from initiating or continuing a dispute settlement procedure under NAFTA, or a dispute settlement proceeding in the GATT on grounds that are substantially equivalent to those available to that Party under this Agreement, regarding the same matter in the absence of a significant change in economic or commercial circumstances.[47] A panel of five members is appointed from a roster consisting of thirty members.[48]

The panel submits the final report according to the submissions and arguments of the parties. An initial report should be submitted within ninety days and thereafter a final report within thirty days. After the receipt of the final report, parties shall agree on the resolution of dispute according to the recommendations and determinations.[49] If the parties fail to agree on a mutually satisfactory resolution, the aggrieved party can suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute.[50]

Chapter 20 also encourages alternative dispute settlement between private parties in the free trade area. It directs the FTC to establish an Advisory Committee on Private Commercial Disputes comprising persons with expertise or experience in the resolution of private international commercial disputes.[51] The Committee shall report and provide recommendations to the Commission on general issues

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[45] Article 2008 of NAFTA
[46] Article 2008.3 of NAFTA
[47] Article 2008.4 of NAFTA
[48] Article 2009 of NAFTA
[49] Article 2018 of NAFTA
[50] Article 2019.1 of NAFTA
[51] Article 2022 of NAFTA

referred to it by the Commission respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area.[52]

There are only three disputes that have come under Chapter 20 till date, whereas the three NAFTA States have approached DSU 36 times. Out of the three chapter 20 decisions, only *Broom- corn Brooms from Mexico*[53] offered a choice of recourse of both the WTO and NAFTA forum. But the reason for Mexico to proceed under NAFTA is not known. In the other two cases, US and Mexico had no other choice, because their plea was entirely on NAFTA provisions and therefore could not go before WTO (Mestral 2006: 364).

### *II.6.1.2. Chapter 11*

Chapter 11 of NAFTA describes the principles concerning the protection and treatment of investment and investors of other member countries and a mechanism for the settlement of disputes arising between a Party and an investor (may be an individual or a corporation). Chapter 11 B thus provides the private individual of the member country the locus standi to file its claim before the NAFTA dispute settlement mechanism. The investor of the state party has the right to resort to the dispute settlement mechanism if it has incurred loss or damage as a consequence of the breach of a provision of the Chapter. The action must be brought within three years.[54] It consists of a consultation stage and a panel stage.

### *II.6.1.3. Chapter 19*

Chapter 19 of the Agreement provides procedures for the review of statutory amendments to the domestic legislation on anti-dumping and countervailing duty of the Parties as well as for the review of final determinations of dumping and subsidies. It ensures that the domestic procedure for anti dumping

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[52] Article 2022.4 of NAFTA

[53] In the matter of the U.S. Safeguard Action taken on Broom corn Brooms from Mexico (usa-97-2008-01) 30 January 1998

[54] Article 1116.2 of NAFTA

and countervailing duties do not resort to unfair practices so as to help domestic industries (Hufbauer and Schott 2005: 210-214). NAFTA chapter 19 provides a final determination of antidumping duties which is parallel to WTO proceedings in Agreement on Implementation of Article VI of GATT 1994. The complaining Party has the choice between a review by a binational panel established under Chapter 19 or a judicial review under the domestic legislation of the importing Party or the procedure under WTO.

NAFTA has two side agreements of which one is dealing with environmental cooperation and the other is dealing with the protection of labour standards. NAFTA dispute settlement is based on a hybrid substantive logic, as much an exercise of diplomacy as an exercise of jurisdictional functions, which allows political factors to have significant hold in dispute settlement mechanism. NAFTA dispute settlement seems in many respects to lean towards a negotiated settlement than to settling the dispute in a truly jurisdictional manner. The final report of the arbitral panel is not the ultimate stage of dispute settlement (Loungnarath and Stehly 2000: 40-45). There are some innovations in the NAFTA dispute settlement mechanism like cross selection of panel, flexibility in procedure so that parties can arrive at a mutually agreed solution, extensive use of experts, scientific advisers and working parties, encouragement of private commercial dispute settlement etc. But lot of criticism also exists regarding this system. The main criticism is the more diplomacy oriented dispute settlement mechanism than a pure legal one. The involvement of FTC, roster formation and the selection of Panel have also been the subject of criticism. Finally, the need for resolution of parties for the implementation of Panel report defeats the entire system of dispute settlement in NAFTA.

### *II.6.2. MERCOSUR*

The early stage of the Latin American integration process was the creation of the Latin American Free Trade Association (LAFTA) in 1960[55], and of the Latin American Economic System (LAES) in 1975 (UNCTAD 2003). A second Treaty of Montevideo was signed in 1980 for the institution of Latin American Integration

[55] Treaty of Montevideo 1960

Association (LAIA). In 1990 an economic cooperation agreement was signed which paved the way for the Treaty of Asuncion in 1991 that established the Southern Common Market (MERCOSUR)[56]. A particular feature of MERCOSUR, despite its being an international organization, is that its founding Member States did not transfer any part of their sovereignty to MERCOSUR institutions. Therefore, its institutions have no supranational authority (UNCTAD 2003).

The *Treaty of Asuncion* 1991 suggests a framework for the dispute settlement in MERCOSUR. The detailed procedure for dispute settlement came in the *Protocol of Brasilia* on 22 April 1993. It consists of direct negotiation, conciliation by Common Market Group (CMG) and *ad hoc* arbitration. A private party can file complaint under Protocol of Brasilia.[57] The Protocol of Olivos was signed in February 2002. This protocol established a permanent body called Permanent Tribunal of Review (PTR) to hear appeal from *ad hoc* arbitration tribunal and also instituted compensatory measures. The decision made by MERCOSUR Panel is binding upon the parties. The parties can initially submit its complaint before MERCOSUR Trade Commission (MTC). If no decision is reached by direct negotiation, MTC can request the assistance of MERCOSUR Technical Committee. Even then if no consensus is reached, the MTC may sends the various alternatives proposed, together with the opinion or conclusions of the Technical Committee, to the Common Market Group. If no consensus is reached, the complaining party can request for the initiation of arbitral proceedings.[58] An appeal from the arbitral proceedings can be filed in the PTR within 15 day.

MERCOSUR dispute settlement mechanism left opened the choice of parties to approach other preferential trade forums and also WTO. If a party chooses a particular forum, it will lose the right to resort to another forum.[59]

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[56] The members are Brazil, Argentina, Uruguay and Paraguay and the objective was to create first a free trade area, and subsequently a common market. Chile and Bolivia are become partners of MERCOSUR by separate FTAs. The institutional structure of MERCOSUR was established by The Additional Protocol to the Treaty of Asuncion which entered into force in 1994. It is also known as the Protocol of Ouro Preto (POP). Common Market Council (CMC) is the highest organ of MERCOSUR which ensures the observance of the Treaty of Asuncion, its Protocols and other agreements.

[57] Article 25 of Protocol of Brasilia

[58] Article 7 of Protocol of Brasilia

[59] Article 1.2 of POP

### *II.6.3. ASEAN*

ASEAN was established in August 1967 through the Bangkok Declaration.[60] ASEAN Free Trade Area (AFTA) was created in 1992. The mechanism for the dispute settlement in ASEAN can be found in CEPT- AFTA agreement[61], ASEAN Protocol on Dispute Settlement Mechanism of 1996 (ASEAN Protocol) and the ASEAN Protocol on Enhanced Dispute Settlement Mechanism which entered into force on November 2004. According to the Enhanced Dispute Settlement Mechanism 2004, there are four institutions for the peaceful settlement of disputes between the parties. They are ASEAN Legal Unit[62], ASEAN Consultation to Solve Trade and Investment Issues (ACT)[63], the ASEAN Compliance Monitoring Body (ACMB) or ASEAN Compliance Board (ACB)[64] and Enhanced ASEAN DSM. The Protocol on Enhanced Dispute Settlement Mechanism 2004 provides a consultative stage, a Panel stage and an Appellate review stage. The protocol is intended to resolve dispute regarding the implementation, interpretation and application of the Agreement or any of the covered agreements.[65] The Protocol provided for appeal provision from the decision of Panel. It did not contain any specified choice of forum provisions. It does not prohibit member nations from approaching other forums.

### *II.7. Dispute Settlement in Indian RTAs*

Regional trade agreements of India are in the preliminary or discussion stages. Its trade relations through RTAs are limited. Most of its agreements are concluded for political rather than economic concerns and almost all are with developing nations. Indian trade agreements mainly aim at tariff reduction. Most of

[60] Indonesia, Philippines, Singapore, Malaysia and Thailand are the members
[61] Agreement on Common Effective Preferential Tariff Scheme for AFTA, 28 January 1992.
[62] It provide free legal advice to the member nations in case of dispute
[63] It was constituted to solve the investment related disputes
[64] The parties can go to this body before going to the Panel for the redressal
[65] Article 3.1 of Protocol on Enhanced Dispute Settlement Mechanism 2004

the trade agreements with the partner countries are done like a joint statement or memorandum of understanding rather than an institutionalized RTA.

The dispute settlement mechanisms under Indian RTAs are not more than a mere line of amicable settlement. So usually it does not go beyond a consultative or mediatory mechanism. There is no well established institutional mechanism concluded in Indian RTAs. India's current engagements and its provisions relating to settlement of disputes are provided in ANNEXURE III

India's main multilateral RTA South Asian Free Trade Agreement (SAFTA)[66] has a special chapter (Chapter 20) devoted to dispute settlement. It entrusts a committee of experts to settle disputes regarding the interpretation and application of the provisions of SAFTA, if consultation fails. The Committee of Experts may request a specialist from a Contracting State not party to the dispute selected from a panel of specialists. A Party can also file an appeal in SAFTA Ministerial Council (SMC). There is no provision in SAFTA regarding the forum choice with WTO or other RTAs.

In the recent trade engagements of India like one in Preferential Trade Agreement between MERCOSUR and the Republic of India (India-MERCOSUR PTA)[67], according to Chapter XIV Article 29, there is a provision for separate institutionalized dispute settlement machinery provided in Annex 5[68] of the trade Agreement. It allows parties to approach WTO and can settle their dispute according to DSU or can use Annex 5 of this agreement.[69] If consensus is not arrived in choice of forum after direct negotiation between parties, the complaining party can select the forum.[70] Once a dispute settlement procedure has been initiated under this Annex or under the WTO covered agreements, the forum selected shall exclude the other for the same subject matter of the dispute.[71] It also provides that disputes that arise in connection with anti-dumping and countervailing measures

[66] Available at http://www.saarcsec.org/data/agenda/economic/safta/SAFTA%20AGREEMENT.pdf
[67] Available at http://commerce.nic.in/flac/pta_india&mercosur.pdf
[68] Available at http://commerce.nic.in/flac/Annex-V%20DSP_mercosur_pta.pdf
[69] Article 2.2 of Annex 5 of India-MERCOSUR PTA
[70] Article 2.3 of Annex 5 of India-MERCOSUR PTA
[71] Article 2.4 of Annex 5 of India-MERCOSUR PTA

shall exclusively be submitted to the WTO under the DSU.[72] India-MERCOSUR PTA often shows indebtedness to WTO by allowing WTO provisions to prevail in order to avoid conflicts. It allows parties to take appropriate actions and measures consistent with Article XX and XXI of GATT 1994.[73] The anti-dumping and countervailing measures shall be governed by their respective domestic legislations in accordance with WTO anti-dumping and countervailing provisions.[74] The technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures are also taken according to WTO provisions. But member states can make equivalence agreements and mutual recognition agreements in order to facilitate international trade.[75] There are specific Annexes for the safeguard measures[76] and it also approves the rights and obligations of parties under Agreement on Safeguards under WTO.[77] The India-MERCOSUR PTA is silent about the conflict in safeguard measures that can be aroused.

A direct negotiation shall be conducted at first instance in order to avoid the dispute and to get a mutually satisfied solution.[78] If direct negotiation fails, the complaining party or both the parties by mutual consent constitute a Joint Committee for dealing the case.[79] The Joint Committee can search for the option of mutually agreed solution or can give the case to the Group of Experts.[80] The Group

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[72] Article 2.6 of Annex 5 of India-MERCOSUR PTA

[73] Chapter III Article 9 of Preferential Trade Agreement between MERCOSUR and the Republic of India.

[74] Chapter IX Article 17 of Preferential Trade Agreement between MERCOSUR and the Republic of India.

[75] Chapter X and Chapter XI of Preferential Trade Agreement between MERCOSUR and the Republic of India.

[76] Chapter VIII Article 15 of Preferential Trade Agreement between MERCOSUR and the Republic of India.

[77] Chapter VIII Article 16 of Preferential Trade Agreement between MERCOSUR and the Republic of India.

[78] Chapter II of Annex 5 of Preferential Trade Agreement between MERCOSUR and the Republic of India. The direct negotiations shall be conducted, in the case of MERCOSUR, by the Pro Tempore Presidency or the National Coordinators of the Common Market Group and in the case of the Republic of India, by the Secretary of the Department of Commerce or his representative.

[79] Chapter III Article 7 of Annex 5 of Preferential Trade Agreement between MERCOSUR and the Republic of India.

[80] For the purpose of establishing the Group of Experts, each Signatory Party shall provide the Joint Committee with a list of ten experts, four of them being nationals of countries other than the Signatory Parties.

of Experts shall consist of three members and shall deliver its report to Joint Committee. The parties shall adopt the report failing to which the complaining party can recommend Joint Committee to suspend concession or can ask for compensation in special cases. There is no appeal provision.

Preferential Trade Agreement between the Republic of India and the Republic of Chile (India-Chile PTA)[81] in its objective itself validate the conformity of this agreement with WTO. It specifically authorizes the parties to follow WTO agreement in the case of SPS and TBT Agreement of WTO.[82] Unlike India-MERCOSUR PTA this agreement retains the rights and obligation of the parties to apply safeguard measures consistent with WTO Agreement on Safeguard.[83] Anti dumping and Countervailing measures are also taken according to the WTO Agreement.[84] Article XVIII provided for a dispute settlement mechanism which detailed in Annex E. Annex E[85] recognizes that any dispute arising can be settled either by this agreement or according to WTO DSU.[86] After consultation parties shall agree on a single forum for submission of dispute. If no consensus is reached on the forum, the complaining Party shall select the forum of dispute.[87] Once a dispute settlement procedure has been initiated, the forum selected shall exclude the other for the same subject matter of the dispute.[88] As a first stage there should be consultation and if consultation fails, the parties can approach Joint Administration Committee to constitute an Arbitral panel. It consists of three members. There will be an initial and final report. The final report of an arbitral panel shall be binding on the Parties and shall not be subject to appeal. The non implementation will lead to retaliatory measures such as suspension of benefits and compensation in special cases.

The Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (CECA between India and

[81] Available in http://commerce.nic.in/trade/indiachile/PTA.pdf
[82] Article XII and Article XIII of India-Chile PTA.
[83] Article X of India-Chile PTA.
[84] Article XVI of India-Chile PTA.
[85] Available in http://commerce.nic.in/trade/indiachile/Dispute_Setllemnt.pdf
[86] Article I.2 of Annex E of India-Chile PTA.
[87] Article I.3 of Annex E of India-Chile PTA.
[88] Article I.4 of Annex E of India-Chile PTA.

Singapore)[89] is formed to liberalise and promote trade in goods and services in accordance with Article XXIV and Article V of GATT 1994 respectively.[90] This is one of the detailed trade agreement made by India. Chapter 15 of the agreement provides a detailed dispute settlement procedure based on consultation and arbitration.[91] Though the parties agreed on their objective of this agreement to build upon their commitments at the World Trade Organization, the dispute settlement mechanism does not provide any hint on the relationship with WTO DSU.[92] So there is no choice of forum clause or forum exclusion clause on this agreement.

Thus, recent Indian trade agreements also try to address a detailed dispute settlement system and the overlapping forum problems.

### *II.8. Conclusion*

Dispute settlement mechanism is a main feature of trade agreements. The strength and weakness of a trade agreement depends upon how strong and independent dispute settlement system has been established. Because of the peculiar nature of international trade law, all international trade dispute settlement mechanisms aim at a positive and satisfactory settlement of disputes. This lends flexibility to the international trading system. Recent trade agreements have changed a lot from the old diplomatic method of negotiation and consultation. Legality and institutionalized mechanisms has become the main feature in the modern trade dispute settlement systems. In WTO and major RTAs, an institutional set up for dispute settlement ensure security and predictability to the system. WTO and RTAs are formed for similar and parallel objectives. They should be complimentary to each other for the proper functioning of the world trading system. The conflict avoiding rules where they exist, between WTO and RTAs are meant for the proper functioning of the world trading system. However, unlike some major RTAs, others still follow the old diplomatic method of dispute

[89] Available in http://commerce.nic.in/trade/international_ta_framework_ceca.asp
[90] Chapter I Article 1.2 (b) and Article 1.2 (c) of CECA between India and Singapore.

[91] Available in http://commerce.nic.in/trade/ceca/ch15.pdf
[92] Chapter I Article 1.2 (h) of CECA between India and Singapore.

resolution. Dispute settlements in Indian RTAs are in a preliminary stage of negotiations. Some signs of reforms can be seen in SAFTA, India-MERCOSUR PTA, India-Chile PTA etc. The outcome of all types of dispute settlement mechanisms influence the world trading system. Any problems and confusions arising in dispute settlement make the system weak. The next chapter will analyze some such issues.

CHAPTER III

# RTAs AND WTO DISPUTE SETTLEMENT SYSTEM: EMERGING LEGAL ISSUES

# Chapter III

# RTAs and WTO Dispute Settlement System: Emerging Legal Issues

## *III.1. Introduction*

The idea of RTAs was incorporated in GATT 1945 and later WTO to accelerate free trade analogous to multilateral trade. The idea also reflects the ambitions of developed world to form trade agreements to enhance ties with allied countries. The proliferation in this area after the 1990s, particularly after the Uruguay Round of Trade Negotiations has raised numerous legal problems. Emerging regionalism has become one of the most controversial areas in multilateral trade jurisprudence.

Contemporary RTAs are entering into a new phase covering a range of topics and issues. Many of the RTAs contain WTO plus agenda which include higher environmental and labour protection, agreements related to intellectual property rights, competition, investment etc where the developing countries have serious concerns. It explains the need for a dispute settlement mechanism to clarify and interpret and also to enforce the agreement. Most of the RTAs have political bodies at the head. Unlike WTO, these political bodies have a say in the dispute settlement and enforcement. It allows powerful nations to influence the enforcement and application of RTAs. This situation had existed in the GATT period. The new DSU under WTO was established to overcome these problems and also to relieve the trade dispute settlement from international politics. So a revival of the old diplomatic/power model can be seen in new RTAs.

When we compare with the WTO DSU, RTA dispute settlement mechanisms have some advantages and also some disadvantages. It is arguable that small forums will help to settle dispute easily and efficiently. It of course eases the workload of WTO DSU. RTAs mainly depend on consultation and mediation, methods is more flexible than a pure legalistic framework, and said to be very well suited for the international trade. On the contrary, scholars like Peter Drahos

(2006) argue that RTA dispute settlement is highly harmful to the less powerful developing countries. Problems can be seen in the institutional and supporting mechanisms, the selection and independence of the panel members, the procedures adopted for the enforcement of the decision etc.

Therefore, scholars have their own arguments to support or criticize the dispute settlement mechanisms in existing and emerging RTAs. But from a pure legal point of view, in lieu of the WTO DSU, several overlapping and conflicting dispute settlement mechanisms in the same field raise complex legal problems. Among other things, the concurrent applicability of the WTO and RTA jurisdiction may undermine the WTO dispute settlement mechanism. There are a number of instances in which legal conflicts have occurred. This chapter analyzes some of the emerging legal issues by examining some hypothetical questions and a variety of cases.

### *III.2. Jurisdictional Conflict between WTO DSU and RTAs*

Jurisdiction refers to "the scope of a court or tribunal's power to hear claims and proceedings, examine and determine the facts, interpret and apply the law, make orders and declare judgment".[1] Three relevant elements of jurisdiction can be identified: subject-matter jurisdiction[2]; applicable law[3]; and inherent jurisdiction.[4] WTO DSU does not hold any difference between these three elements. There is no inherent jurisdiction rest in panel and AB other than what specified in the terms of reference and the applicable law and subject matter are also same which are provided in the covered agreements (Mitchell 2007: 821-822). It is legitimate for WTO DSU to use principles in the exercise of inherent jurisdiction in WTO disputes, subject to two conditions. The first condition is that the use of the principle must be necessary to the maintenance and exercise of the tribunal's subject-matter jurisdiction and judicial function. The second condition is that the

[1] Australian Legal Dictionary (Sydney: Butterworths, 1997) 651.
[2] The particular types of claims and proceedings that may be brought before a court or tribunal
[3] The law that a court or tribunal may interpret and apply
[4] The court or tribunal's intrinsic powers, derived from its nature as a judicial body

principle must be used to resolve procedural matters and not as a source of substantive rights or obligations (Mitchell 2007: 832-833).

### *III.2.1. Jurisdiction of WTO DSU*

Article XXIII of GATT permits a Panel and AB to entertain three kinds of complaints. First is a violation complaint where the benefit of any member country accruing directly or indirectly under the covered agreement is being nullified or impaired or impeded as a result of the failure of another contracting party to carry out its obligations. Here the violation of an obligation should actually taken place. The legitimate expectation of the complaining party criteria does not apply to violation complaints. Second, where any measure adopted by a contracting party indirectly nullified or impaired or impeded the benefit accruing from the agreement to another contracting party, the affected party can make a non- violation compliant. And the third one is the situation compliant. It provides a broad scope i.e. the existence of any other situation leading to the nullification and impairment of benefits. Till now no complaint has been made under this category to the DSB.

There is no special provision in WTO which explicitly refers to jurisdiction on the lines of Article 36 of the Statute of International Court of Justice (ICJ). It is specified through a number of provisions (Palmeter and Mavroidis 2004: 17). Article XXIII of GATT 1994 and Article 1 of DSU specifies the coverage and application of the panel and AB.[5] Article 2 establishes the DSB and Article 3 detail the general provisions and scope of DSU. The mandate of panel and AB is to interpret WTO law and to assist the DSB in resolving a dispute.

The panel decides the dispute upon the terms of reference (ToR). The ToR should contain the relevant provisions in the covered agreement cited by the parties to make such findings as will assist the DSB in making its recommendations. The ToR of a panel is important because it will provide sufficient information to the respondent and third party concerning the claims at issue and establishes the

[5] The DSU applies to disputes arising under the covered agreements which are listed in the Appendix I

jurisdiction of the panel by defining the precise claim at issue. The panels are required to consider everything in the ToR (Palmeter and Mavroidis 2004: 18).

The direction vide Article 23(2)(a) of DSU not to make determination of a dispute except through recourse to dispute settlement mechanism in accordance with the rules and procedures to the DSU not only prohibits unilateral actions and behaviors that threaten multilateral system but also confers exclusive jurisdiction on the DSB (Marceau 2002: 759-761). If a member considers that another member's action has led to nullification or impairment of its benefits conferred by the covered agreement, then it can, after consultation fail, seek to establish a panel for redressal.[6] A member has discretion to decide whether it wants to bring a case before DSU or not. The language of Article XXIII (1) of GATT 1994 and Article 3(7) of DSU makes it clear that a member is expected to be largely self regulating in deciding whether any such action would be fruitful[7] (Marceau 2002: 758).

***III.2.2. Applicable Law of WTO DSU***

The applicable law of WTO DSU consists of WTO covered agreements and the international agreements incorporated in the covered agreements. The decisions, procedures and customary practices followed by the GATT Contracting Parties throughout the GATT years are also followed in the WTO[8] (Matsushita *et al* 2006: 25). The customary rules of interpretation of public international law are to be used to clarify the existing provision of the covered agreements.

Some commentators argue that WTO panels should apply only the WTO law and no other rules of international law.[9] Some other commentators have argued that, although WTO panels only have jurisdiction to examine WTO claims, in resolving such claims, they may apply laws other than those set forth in the WTO Agreement, which potentially includes all rules of international law binding on the

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[6] *United States--Measures Affecting Imports of Woven Shirts and Blouses from India*, Appellate Body Report, WT/DS33/AB/R of 23 May 1997,

[7] *European Communities--Regime for the Importation. Sale and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R, of 25 September 1997, para. 135

[8] Article XVI.1 of Agreement Establishing WTO

[9] See, e.g., Joel P. Trachtman, The Domain of WTO Dispute Resolution, 40 Harv. Int'l L.J. 333 (1999); cf. Gabrielle Marceau, Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between the WTO Agreement and MEAs and Other Treaties, 35 J. World Trade 1081 (2001)

disputing parties.[10] According to Ernst- Ulrich Petersmann (2007: 54-58) the question of interpreting the WTO rules with non WTO rules must be distinguished from questions like limited coverage of the DSU[11] and the limited terms of references of WTO panels and AB.[12] The limited scope of jurisdiction also should be distinguished from applicable law. Yet a panel or AB has not given a clear answer to this question.[13] In many instances such questions were avoided. But due to the growing importance and competition in world trade, and the connection of trade with other areas, and the member nations attitude to use all available defences to protect their interest, the Panel or AB may have to squarely address such issues in the near future.

### *III.2.3. Jurisdiction of Dispute Settlement System in RTAs*

Most of the RTAs have only a loose dispute settlement mechanism and call for amicable settlement of disputes by consultation or negotiation. A developed RTA usually has a consultation mechanism by an Ad hoc Panel and a higher political authority consists of representatives of all the member nations for the implementation of panel decision. Most of them work upon the terms of reference provided by the disputing members. Some RTAs specify that the dispute settlement system is established for the interpretation and application of the concerned trade agreement and also to protect the rights and obligation of the parties. So it is assumed that the jurisdiction of RTA dispute settlement rest on the terms of reference and the applicable law is the trade agreement signed by the parties. A few RTAs have appeal provisions (ASEAN).

## *III.3. Overlap and Conflicts in RTAs and WTO*

At present, there are numerous potentially overlapping and interlocking trade agreements having formal dispute settlement mechanisms that could cause an

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[10] See, e.g., Lorand Bartels, Applicable Law in WTO Dispute Settlement Proceedings, 35 J. World Trade 499 (2001); Joost Pauwelyn, The Role of Public International Law in the WTO: How Far Can We Go?, 95 Am. J. Int'l L. 535 (2001).

[11] Article 1 of DSU

[12] Article 7 and 19 of DSU

[13] *United States- Import Prohibition of Certain Shrimps and Shrimp Products from India*, Appellate Body Report, WTO Document WT/DS58/AB/R of 12 October 1998

unpredictable dispute resolution. This problem of competing jurisdiction can be seen in a number of circumstances. Marceau (2002: 792) quote from Karl Wolfram (1984), "Technically speaking, there is a conflict when two or more treaty instruments contain obligations which cannot be complied with simultaneously". In the present scenario, the numbers of international dispute settlement forums with implications for international trade are multiplying. For example, in trade and human rights related issues, the case may be decided in human rights fora, national or regional court etc in addition to being the subject of WTO panel or AB Report. This may give rise to multiplicity of interpretations and divergent conclusions. The different types of overlap may be discussed through different cases and hypothetical situations

### *III.3.1. Procedural Overlap*

A procedural overlap takes place when one country after submitting a case before one forum and after losing or being dissatisfied with the outcome, approach another forum with the same facts. The repetition of case may in some circumstances lead to a different outcome. RTAs like NAFTA have a forum exclusion clause. Therefore, it is not possible to file a case in NAFTA tribunal after losing a case in the WTO. But the reverse is possible like what happened in *Brazil-Poultry and Mexico- Soft Drinks* cases.

#### *III.3.1.1. Mexico- Taxes Measures on Soft Drinks and Other Beverages*

In the case of *Mexico- Soft Drinks*, Mexico argued that the WTO panel should decline to exercise jurisdiction in favour of NAFTA general dispute settlement under chapter 20 and make a ruling in that effect. The reason behind such an argument was that there is a different in interpretation between Mexico and US regarding the conditions specified under NAFTA. In WTO, US alleged discriminatory treatment against its products resulting from internal and external measures imposed by Mexico. Under NAFTA Mexico had a valid defense that the US was violating its market access commitments under the agreement. US argued before the WTO Panel that there was nothing in the NAFTA that provides that the US may not bring the present dispute to the WTO. The panel rejected Mexico's

argument by saying that under DSU the panel had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it. The Panel observed that if a WTO panel was to decide not to exercise its jurisdiction in a particular case, it would diminish the rights of the complaining member under the DSU and other WTO covered agreements (Kennedy 2007: 69-72).

### *III.3.1.2. Argentina- Definitive Anti- Dumping Duties on Poultry from Brazil*

In the case of *Brazil- Poultry*, Brazil filed a complaint before a WTO panel against Argentina (on a different legal basis) in spite of the case already was having been heard by the MERCOSUR Ad Hoc Arbitral Tribunal. Argentina requested the panel to refrain from ruling on the claims raised by Brazil in the light of the prior MERCOSUR proceedings. Argentina contended that the successive proceedings initiated by Brazil were contrary to the principle of good faith and against the principle of estoppel. Argentina want, in pursuant to Article 31.3(c) of the VCLT and Article 3.2 of DSU, the panel should consider the precedents set by the proceedings of the MERCOSUR. Argentina asserted that the parties should accept the obligations deriving from the legislative framework in force including the MERCOSUR Treaty of Asuncion and the Protocol of Brasilia. On contrary, Brazil asserted that the case submitted before WTO is on a different legal basis. The principle of estoppel did not apply in this case because under Protocol of Brasilia, Brazil did not expressively waive its right to bring the case before WTO. Moreover, the Protocol of Olivos which contains the forum exclusion clause did not come into existence at the time of filing of the case.

The panel held that the preconditions for a finding that Brazil failed to act in good faith are not met. For considering that a party failed to act in good faith, it must be satisfied that the member must have violated a substantive provision and there must be "something more than mere violation". Here Argentina had not alleged that Brazil violated any substantive provision of the WTO agreements. WTO panel also rejected the argument of principle of estoppel. According to the panel, Brazil did not make any clear and unambiguous statement that it would not resort to WTO proceedings after a case was brought under MERCOSUR dispute

settlement framework. There is no implicit waiver on the part of Brazil also. This is because the Protocol of Brasilia, under which previous MERCOSUR case had been brought by Brazil, imposes no restrictions on Brazil's right to bring a subsequent case before the WTO dispute settlement system in respect of the same measure. The Protocol of Olivos 2002, which was subsequently signed by the MERCOSUR parties for the settling of disputes, contains a forum exclusion clause which prevents parties from invoking the same case before another tribunal. WTO panel did not consider this provision because that Protocol had not entered into force at that time. Panel also reasoned that the fact that the parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests that they recognised that in the absence of such Protocol a MERCOSUR dispute settlement proceeding could be followed by a WTO settlement proceeding in respect of the same measure. The WTO panel had not clarified what happened when once the Protocol of Olivos came into existence. The Protocol of Olivos came into existence in February 2002. Will any subsequent WTO panel reject a case coming before it after it was once decided by a MERCOSUR Panel by citing the forum exclusion clause contained in the Protocol of Olivos?

On Argentina's argument on the binding effect of MERCOSUR ruling on WTO pursuant to Article 3.2 of DSU and Article 31.3(c) of VCLT, the panel stated that parties can suggest to 'interpret' a WTO provision in a particular way. It cannot direct the panel to 'apply' a relevant provision in a particular way. Panel stated that it is not bound by any earlier WTO panel report or rulings of non- WTO dispute settlement bodies. WTO Panel also asserted that Argentina failed to clarify what 'negative impact' occurred to them by the act of Brazil. Thus, Panel rejected the arguments of Argentina and admitted the case for hearing.

### *III.3.2. Overlap in Anti Dumping Proceedings*

A large number of cases concerning overlapping occur in relation to anti dumping for anti dumping measures can be easily taken in order to protect domestic industries. RTAs like WTO contain anti dumping rules. Chapter 19 of NAFTA provides an extensive provision to check dumping. On the other hand,

there is no existing provision in WTO to avoid successive anti dumping measures by member countries. When the RTAs also give States authority to take anti dumping measures, the same facts may give rise to overlapping cases.

### *III.3.2.1. Softwood Lumber dispute*

*Softwood Lumber* dispute is perhaps the only case in the history of international trade law which was fought in three distinct dispute settlement forums. The case is between Canada and US first came before CUFTA and then NAFTA and then WTO. Through *Softwood Lumber* dispute US has set a poor example with its delay in addressing and resolving trade disputes leading to wastage of large amount of resources. The continuing anti dumping investigations and subsequent measures adopted by US on softwood lumber causes multiplicity in antidumping cases. The dispute originated in 1982/83 and got the name as 'softwood lumber war'. The dispute went through Canada- US Free Trade Agreement (CUFTA), NAFTA, GATT and WTO on several occasions. In 2005 WTO panel accepted the US argument that the Canadian import of softwood lumber causes material injury to US. Earlier in that year, a NAFTA panel confirmed that the Canadian import does not causes material injury to US. Even in its latest report on softwood lumber, AB has not analyzed the relationship with other trade agreements. In such circumstances, it is difficult for a country to initiate retaliation procedure against big country like US as it is costly, time consuming and leads to a never ending cycle of dispute resolution (Petelin 2006: 568). It is often debatable that whether the purpose of retaliation is to induce compliance with rulings or to rebalance reciprocal trade (WTO Handbook 2004). In either case the purpose will undermine by such ever continuing disputes (Petelin 2006: 568).

*Mexico- High Fructose Corn Syrup*[14], *US- Mexican OCTG AD measures*[15], *US- Cement AD Measures*[16], *US- Hard Red Spring Wheat*[17], *US- Pork*[18] are some

[14] Mexico- Anti Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, WT/DS/132/R

[15] United States- Mexican Oil Country Tubular Goods AD Measures WT/DS/282/R

[16] United States- Cement AD Measures, WT/DS 281

[17] United States- Determination of the International Trade Commission in Hard Red Spring Wheat from Canada, WT/DS 310

other anti dumping case that came before both WTO and NAFTA forum in a parallel way.

### *III.3.3. Substantive Overlapping*

A substantive overlapping takes place when a rule or regulation or measures in one agreement is contrary to or prohibited by another agreement. For example, usually RTAs with developed countries have higher health standards or safeguard measures than what there is in WTO. In such circumstances government officials and businesses ask which rule prevails under public international law. Such persons have to first identify by which rule their actions are regulated. If they opt for a higher standard, it may be regarded as disguised trade restriction under WTO or other agreements with lower standards. If they opt for a lower standard, the lower standards in products become a cause of action in RTAs with higher standards. (Pauwelyn 2007: 5). *US- Steel and Brazil- Tyres* cases are examples of substantive overlapping which came under scrutiny of WTO DSS.

### *III.3.4. Overlapping When Rules are Same*

If two RTAs or a RTA and WTO has same rules or regulations, the problem of choice of forum will take place. Parties have confusion regarding the forum to which the dispute may be taken. In *Mexico- Soft Drinks*, the US brought a national treatment claim to the WTO and at the same time US investors in Mexico brought an investment claim under NAFTA Chapter 11 tribunal. This national treatment claim will also stand in NAFTA Chapter 20 tribunal.

### *III.3.5. Overlapping when one Rule is a Defence against another*

A potentially contradictory rule in one agreement in respect of another can cause conflicts. In *Mexico- Soft Drinks*, Mexico had a valid reason under NAFTA for excusing its breach of national treatment in WTO. But WTO Panel did not allow Mexico to raise NAFTA defense in WTO because Panel had no authority to

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[18] United States- Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, DS7/R, 38S/30

look into an agreement other than covered agreements. In *Brazil- Tyres*, Brazil raised a MERCOSUR ruling as defence in WTO against EC (Pauwelyn 2007: 7).

#### *III.3.5.1. Brazil- Measures Affecting Import of Retreaded Tyres*

In *Brazil- Tyres*, EC approached WTO Panel against the import ban on retreaded tyres and exception given to MERCOSUR counties by Brazil. AB justified import ban according to Article XX (b) of GATT 1995. AB however held that, exception given to MERCOSUR countries constitutes unjustifiable discrimination and a disguised restriction on international trade. Panel and AB rejected EC argument that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1 of GATT 1994. They held that since Article XX (b) and its *chapeau,* were violated there was no need to address that claim. Thus AB while holding that the exemption to import ban adopted by Brazil was arbitrary, did not scrutinise the MERCOSUR exemption under Article I and III.

### *III.3.6. Overlap When Parties are not Members to both the Agreements*

If one of the disputing parties is a member of both agreements and other is not, then also conflict can arise like in *EC- Banana* and *Brazil- Tyres.* When overlapping between WTO rules and Lome Convention rules occurred in *EC-Banana*, EC is a party to both Lome Convention and WTO but US was not a party to Lome Convention. In *Brazil- Tyres*, Brazil was party to MERCOSUR and WTO, but EC was not a party to MERCOSUR (Pauwelyn 2007: 7). This kind of overlapping did not cause problems because treaties are only binding on parties (Article 34 of VCLT). So the applicable law will be the treaties where both the parties are members.

### *III.3.7. Overlap When one Agreement Suggests Retaliation Procedure*

This is a hypothetical situation. But there is all chance for such a situation to occur when one RTA panel suggests a retaliatory measure to a party due to non compliance. It can be regarded as a trade restriction measure under another RTA or WTO.

### *III.4. Overlap between WTO and Other Tribunals*

Sometimes overlap of jurisdiction may arise between WTO DSS and other Tribunals like International Court of Justice (ICJ) and International Tribunal for the Law of the Sea (ITLOS).

#### *III.4.1. Nicaragua v Honduras*

In the maritime delimitation dispute between Nicaragua, Colombia, and Honduras, Nicaragua submitted its maritime dispute with Honduras to the ICJ in December 1999. Colombia requested WTO consultations with Nicaragua in January 2000[19] and the establishment of a WTO panel in May 2000[20] to examine whether Nicaragua's trade sanctions in response to the maritime dispute were inconsistent with its GATT/WTO obligations. Honduras requested WTO consultations over the alleged inconsistencies of Nicaragua's countermeasures with GATT and GATS in June 2000 and reserved its third party rights to intervene in the WTO panel proceeding between Nicaragua and Colombia[21] (Ernst-Ulrich Petersmann 2006: 326). This type of parallel proceedings could affect the fairness of dispute settlement systems. Competing and overlapping jurisdictions for the resolution of the same legal dispute pose legal problems if they lead to conflicting judgments. It can lead to legal insecurity, or a waste of scarce legal and other resources in the case of multiple litigation (Ernst-Ulrich Petersmann 2006: 355).

#### *III.4.2. Chile- Swordfish case (EU v Chile)[22]*

In this case Spanish fishermen wanted to use Chilean ports and airfreight their products to EU which was permissible under the WTO agreement. But Chile refused to give permission. Chile argued that it had to protect its Exclusive Economic Zone (EEZ) as the activities of Spain disturbed its EEZ. The EU filed a

[19] Request for Consultations by Colombia, Nicaragua--Measures Affecting Imports from Honduras and Colombia, WT/DS188/1 (Jan. 20, 2000).

[20] Request for the Establishment of a Panel by Colombia, Nicaragua-- Measures Affecting Imports from Honduras and Colombia, WT/DS188/2 (Mar. 28, 2000). This panel was not composed.

[21] Request for Consultations by Honduras, Nicaragua--Measures Affecting Imports from Honduras and Colombia, WT/DS201/1 (June 13, 2000).

[22]Chile- Swordfish, Request for Consultations by the European Communities, WT/DS 193/1

complaint against Chile for violating WTO law and started panel procedure under DSU. Chile argued that the activities of EU are a violation of Article 64 and 116 of United Nations Convention on the Law of the Sea 1982[23] which aim at the conservation of swordfish. Chile initiated a compliant before ITLOS upon the same fact. Later, both parties agreed to have the dispute settled by a Special Chamber of the International Tribunal of the Law of the Sea[24]. However, in March 2001, they reached a provisional arrangement concerning the dispute and suspended both the ITLOS and WTO proceedings.[25]In this case, both the forum lost a chance to have a detail look into the jurisdictional aspects of the case.

### *III.5. Choice of Forum*

The legal systems and institutions developed in the world differ from one another. During the development of laws governing mutual interaction of states, some general principles emerged. Its influence can heavily be seen in international commercial transactions. Though some of the diverse legal and judicial traditions have slowly merged in transnational arbitration and other dispute settlement practices, differences remained. Due to the diversity of national laws, procedures, and judicial systems, the outcome of private transnational litigation and the applicable procedures are often influenced by the choice of venue in which the litigation takes place (Ernst-Ulrich Petersmann 2006: 282). It was not a major problem in private transnational commercial arbitrations. But it became more problematic when the dispute settlement systems of the world become more legalized and certain problems like never ending litigations, forum shopping, waste of resources, burden on weaker parties etc aroused due to this flexible choice of forum provisions.

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[23] 10 December 1982, 1833 UNTS 3, 397, 21 ILM 1261 (1982)

[24] Case 7, Order 2001/1, Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. Eur. Cmty.), (Mar. 15, 2001), at http:// www.itlos.org/start2_ en.html

[25] WTO Dispute Panel Report, Communication from the European Communities, Chile- -Measures Affecting the Transit and Importation of Swordfish--Arrangement Between the European Communities and Chile, WT/DS193/3 (Apr. 6, 2001),

Normally the choice of forum issues arise when there are two parallel forums which having similar jurisdiction to hear the case. The parties and the subject matter of dispute should both be subject to the forums. For that three criteria should be met: Firstly, there should be certain common procedural features which are shared by both the forums. Secondly, the two dispute settlement mechanisms should cover similar areas of substantive law. Thirdly, both the parties should have agreed to the jurisdiction of both the forums. In international commercial transactions, it can be settled easily because of the flexible negotiation type dispute settlement mechanism followed by them.

### *III.6. Forum Shopping*

Forum shopping has been defined as a litigant's attempt "to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict"[26] (Pauwelyn 2004: 246). The complainant may choose a jurisdiction in order to benefit from the procedural advantages of the chosen forum (e.g., low filing fees, possibility of class actions, pretrial discovery, jury trials, large damage awards etc) (Ernst-Ulrich Petersmann 2006: 282).

Pauwelyn (2004: 247) explains the various factors that come into play in forum shopping. They are (1) cost of litigation[27]; (2) the organizational context in which the dispute would be decided[28]; (3) who decides the dispute;[29] (4) any advantages in the applicable law; (5) who can initiate a complaint and against whom; (6) any procedural advantages; (7) any special procedures for least developed countries; (8) the possibility of appeal; (9) what remedies can be obtained; (10) who is bound by the eventual ruling; and (11) what happens in the event of non-compliance.

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[26] Quoting Black's Law Dictionary 590 (5th ed. 1979)

[27] In WTO the expenses of panel and AB are met by the WTO budget itself (Article 8(11) and Article 17(8) of DSU). Even the expenses incurred in providing expert evidences in the case of developing countries are provided from the WTO budget (Article 27(2) of DSU).

[28] In WTO the support of other equally affected nations will get unlike in regional organisations.

[29] Advantage of supporting machinery and the standing independent panel members gives WTO some authority over other regional organisations.

### *III.7. Choice of Forum and Forum Shopping in WTO and RTAs*

In international trade agreements between countries, the choice of forum problem may arise because of covering the same subject area. States are allowed to frame hundreds of agreement with different countries on the same trade issues. Each one may have a dispute settlement mechanism. Some of them have well established and detailed mechanisms. In either case there may be no uniformity in deciding the disputes by each forum. Therefore, parties may choose favourable forums to hear its disputes. The choice of forum problem may arise between RTAs and WTO and also between two RTAs.

There is no provision for choice of forum in WTO. It advocates for the exclusivity of WTO proceedings in the case of any dispute arising from by the nullification and impairment of WTO covered agreements and also to protect the rights and obligations under them. It also prohibits unilateral trade sanctions. Article 23.2 of DSU states that in the case of violation of a covered agreement, "the members shall not make a determination except through recourse to dispute settlement in accordance with the rules and procedures of DSU and shall make any determination consistent with the findings of panel or AB". Thus, the members have no choice to approach another forum, for example RTA, for the violation of any provisions in the covered agreements.

In various RTAs sometimes there is clear choice of forum rules like the one in NAFTA. In some other RTAs, no such provisions can be seen, but there may be a clause to decide the forum between the parties. In some other cases, they may not mention anything.

#### *III.7.1. Choice of Forum rule in NAFTA*

Article 2005 of NAFTA details the choice of forum provision. According to Article 2005(1) the disputes regarding any matter arise under both this agreement and GATT 1947, may be settled in either forum at the discretion of the complaining Party. Once dispute settlement procedures have been initiated under this agreement or dispute settlement proceedings have been initiated under the

GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4.[30] Paragraph 3 and 4 of Article 2005 provided exclusive jurisdiction to NAFTA in actions related to environmental and conservation agreements[31], Sanitary and Phytosanitary Measures[32] and Standards-Related Measures[33], if the third party or defending party request in writings. If a party initiates a case related to the above provisions in GATT and the defending or the third party made a written request within 15 days, then the complaining party has to withdraw the case from GATT forum.[34]

Article 2005 (3) and (4) gives exclusive jurisdiction to NAFTA panel in the matter related to environmental and conservation matters, sanitary and phytosanitary measures and standard related measures which is also a matter coming under WTO. Article 2005 (6) also contains a *forum exclusion clause* if the case is initiated in other forum. But the real fact is that WTO DSS is not bound by the *forum exclusion clause* in NAFTA as WTO does not have a *forum exclusion clause* in its agreement. Even if exclusive jurisdiction is given to NAFTA panel in the certain matters, the WTO DSU is not bound by this clause. If any of the NAFTA parties came before DSU with any case related to the above matters, then DSU has no choice but to hear the case and settle the dispute according to the WTO rules. In the hypothetical case of a NAFTA country's domestic regulation violating Article III of GATT and thus impairing the benefit of other two NAFTA countries, the defending party may have a valid defence under NAFTA, but the complaining party may prefer to have the matter addressed in the WTO. The situation may also be reversed. This may cause serious political and legal problems (Marceau 1997: 493-495).

### *III.7.2. Choice of Forum in MERCOSUR*

Article 1.2 of the Olivos Protocol 2002 provides a choice of forum provision with respect to MERCOSUR and WTO. It states, "Dispute settlement

[30] Article 2005(6) of NAFTA
[31] Article 104 of NAFTA
[32] Chapter Seven B of NAFTA
[33] Chapter Nine of NAFTA
[34] Chapter 2005 (5) of NAFTA

falling within the scope of application of this Protocol that may also referred to the dispute settlement system of the World Trade Organisation or other preferential trade systems that the MERCOSUR state parties may have entered into, may be referred to one forum or the other, as decided by the requesting party. Provided, however, that the parties to the dispute may jointly agree on a forum". It follows, "Once a dispute settlement procedure pursuant to the preceding paragraph has begun, none of the parties may request the use of the mechanisms established in the other fora". Thus the forum will be decided by the complaining party and after the beginning of the case, one forum will exclude the other from deciding on that particular dispute.

If a dispute initiated in the WTO DSU, WTO Panel will not halt the proceedings because of the similar or related procedure are taking place in any other RTAs. It is difficult for the panel to refuse to hear a WTO member complaining about a measure inconsistent with the WTO, because the complaining or defending member may have a more specific or even more appropriate defence or remedy in another forum concerning the same legal facts (Marceau 1997: 493-495).

When it comes to the availability of defenses, much depends on whether a defendant can invoke a RTA defense only before a RTA panel, or whether a defendant also could invoke the RTA defense before a WTO panel as between two RTA members. Most of the scholars and observers of the international trade system view the dispute settlement institutions provided by RTAs as courts adjudicating a contract dispute between two contracting parties (Trachtman and Moremen 2003). But recent agreements have moved away from the traditional ad hoc framework provided by early trade agreements and achieved a more institutional and complex nature. The RTAs routinely provide for the publication of documents, the submission of amicus briefs, and a limited roster of panelists that will be called upon to adjudicate disputes. (Livshiz 2005: 560). WTO Panels or AB has not yet offered a clear answer to the status of RTA Reports. Therefore confusion exists regarding this problem.

### *III.8. Forum Exclusivity*

Some international trade agreement like NAFTA claims forum exclusivity. Article 103(2) of NAFTA affirms that in case of any inconsistency with NAFTA and any other agreement (including WTO), this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in NAFTA. Likewise many trade agreements have a forum exclusive clause when it deals with SPS and TBT standards. This may be because of its high standard settings. But according to the general principles of international law, this forum exclusivity is not permitted.

### *III.9. Fragmentation of International Trade Law*

The fragmentation of international trade law for dispute settlement and the lack of harmonization among them have raised a number of problems that have been examined in this chapter. This problem affect not only in international trade law but also the general international law field. The International Law Commission distinguishes three types of normative conflicts and fragmentation: (1) fragmentation through conflicting interpretations of general international law rules by different international courts; (2) fragmentation and conflicts arising when a particular rule claims to exist as an exception (lex specialis) to general law; and (3) fragmentation and conflicts between different special international treaty regimes[35] (Ernst-Ulrich Petersmann 2006: 280).

In the general international law, the problem can be solved to an extent by drawing specific lines between each field. But in international trade law, particularly between WTO and RTAs and between two RTAs, gains more attention because the line separating each field is very narrow. Mostly, the rights and obligations are overlapping and the dispute arises mainly from the same or similar facts.

[35] International Law Commission, Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, P 10, U.N. Doc. A/CN.4/L.644(July 18, 2003)

### *III.10. Conclusion*

In the field of international law WTO-RTA interface has received more attention than the general discussion of economic benefits of RTAs and its effects on multilateral trade. In particular overlapping issues arising from procedural and substantive law have come to be debated. The substantive and procedure overlapping that arises in the field of dispute settlement in international trade law was there in international commercial law for a long time. Often private international law used to play a role in solving such problems.

The substantive overlapping such as overlapping when rules are same, overlapping when one rule becomes a defence to another, conflict when both the parties are not the members of same RTAs etc challenges the world trading system. The cases and circumstances discussed in this chapter are some instances of conflicts that have arisen in a limited period of ten years after the creation of WTO. The problems will mount with the growing number of RTAs being adopted. These types of situations affect especially the developing and least developed nations because powerful nations have resources to counter such situations and to protect their interest. Therefore, it is high time to address the issues specified especially from the perspective of developing countries. The next chapter will look at some of the solutions that can be suggested from within the existing legal frame work.

CHAPTER IV

# JURISDICTIONAL AND LEGAL CONFLICTS: POSSIBLE SOLUTIONS

# Chapter IV

# Jurisdictional and Legal Conflicts: Possible Solutions

## *IV.1. Introduction*

The emerging issues raised in the last chapter have to be solved for the smooth functioning of the world trading system. The absence of solution to overlapping jurisdiction and applicable laws creates instability and unpredictability in international trade. The forum exclusivity in the case of inconsistency will not work as general principles of international law do not permit such a clause in international treaties. With the development of existing RTAs and the conclusion of more RTAs in the future, the issues assume great urgency. The solution should be found from the evolving WTO jurisprudence in the matrix of public international law. This chapter makes an attempt to suggest some solutions from this perspective.

## *IV.2. Reconciling Trade with General International Law Treaties: An Analysis*

### *IV.2.1. Multilateral Environmental Agreements (MEAs) and GATT/WTO*

The problems of jurisdictional overlapping and conflicts of law in international trade can be seen in the trade environment debate. The visible conflicts occurs in the area of trade environment debate is with the obligations of the nations under MEAs and the GATT/WTO provisions. It becomes complicated when trade measures use as a mechanism for carrying out international environmental policy (Esty 1996: 72-73). At present several MEAs have binding trade restriction provisions which are directly in conflict with WTO agreements. Both MEAs and WTO are ratified by a large number of States and have to abide by the commitments in good faith. One cannot over ride another. In such circumstances conflicts may arise in dispute settlement mechanisms.

Majority of the WTO members observe WTO law as a separate trade regime with limited trade policy competence. But on several occasions, WTO DSS has been confronted with broader international legal regimes like MEAs (Ernst-Ulrich Petersmann 2004: 289). In *US- Shrimp case* AB observed that "the contemporary concern of community of nations needed to be taken into account".[1] In this case, the AB rejected the measures adopted by US not because of its unilateral or trade restraint nature, but because of its arbitrariness and suggested to negotiate with disputing countries and conclude agreements like one formed with North American countries. Thus AB acknowledge that environmental issues can be resolved through the conclusion of multilateral agreements made by consensus and can be incorporated into WTO jurisprudence.

MEAs are enforced mainly through non-compliance regimes. Such non-compliance regimes are not contentious in nature and do not involve adjudication (Boyle 1991: 230-235). Such MEAs are easy to incorporate in WTO regime like the *US- Shrimp case*. Moreover, trade can be separated from environmental issues and with the help of Article XX chapeau the arbitrariness and trade distorting effect of the alleged measures can be avoided. Unlike MEAs, RTAs have a limited scope in being incorporated into WTO. This is because, both are dealing with the same issues parallel to each other. Dispute settlement forums generally have similar jurisdiction and the facts usually are same. The only difference that can be cited is the applicable law which is mentioned in the terms of reference. RTAs specify the text of the trade agreement as the applicable law. The covered agreements are the applicable law in the case of WTO DSU.

### *IV.2.2. Dispute Settlement under UNCLOS 1982: Mutual Comity and Respect*

A forum for international dispute settlement has been created in the field of dispute relating to UNCLOS 1982. It also contributes to the proliferation of international dispute settlement tribunals and adds to the potential fragmentation and conflicts both of the substantial law and of the procedures available for settling international disputes (Boyle 1997: 37). One area of potential conflict may arise is

[1] Appellate Body Report, US- Shrimp, para 129.

in the area of international trade as in the *Chile- Swordfish case*. UNCLOS 1982 lays down compulsory jurisdiction particularly on commitment in freedom of navigation and protection of marine environment.[2] The broadest view of the ITLOS jurisdiction is that it may hear any case brought to it (Boyle 1997: 50). At the time a conflict or overlapping arises between UNCLOS and other international forums, the issue will be usually settled through bilateral negotiations.

The mutual comity and respect between international tribunal is necessary in order to solve problems of overlapping jurisdiction and applicable law. It can be seen from the *Mox Plant case (Ireland v UK)*. In this case Ireland submitted a claim before ITLOS against discharge of nuclear waste into Irish Sea from Mox Plant owned by UK. ITLOS assumed jurisdiction according to Article 288.1 of UNCLOS. UK responded that the case falls within the exclusive jurisdiction of ECJ pursuant to Article 292 of the EC treaty. Therefore ITLOS suspended the proceedings by saying that the question of whether and what aspects of the UNCLOS dispute fall under the exclusive jurisdiction and competence of the EC is a question to be decided within the EC institutions. ITLOS noted that a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between parties (Pauwelyn 2003: 1009). This is a guiding example which can be used in the case of RTA WTO jurisdictional conflicts.

### *IV.3. Rule of lis alibi pendens and the doctrine of res sub judice*

The *lis alibi pendens* rule prohibits initiation of another judicial proceeding during a pending judicial proceeding on the same legal claims among the same parties. This is same as the doctrine of *res sub judice*. The objective being is to avoid arriving at different legal conclusions on the same dispute. The above description of mutual respect and comity as shown by ITLOS in *Mox Plant case* can be incorporated into RTAs and WTO in the case of conflicting and competing

[2] Article 297 and 298 of UNCLOS 1982. Article 288 limits compulsory jurisdiction to cases concerning the interpretation or application of the convention or of any international agreement related to the purpose of the convention. Article 293 (1) allows the tribunal to use rules of general international law also.

jurisdiction. In other words, an application of *lis alibi pendens rule* and the *doctrine of res sub judice* should be incorporated in WTO jurisprudence and the case before a WTO panel should be stayed in order that it is scrutinized by the more appropriate forum. The incorporation of the above mentioned principles in WTO jurisprudence becomes necessary due to the increasing number of RTAs with separate dispute settlement mechanisms so as to avoid recurrence of disputes and competing results.

### *IV.4. Doctrine of Res judicata in WTO*

As in the case of ICJ judgments, WTO Reports are also binding only on the disputing parties and in the disputing case. AB in a number of reports has confirmed that the Panel and AB reports are not 'decisions'[3] and so it cannot have the precedent value. Earlier reports merely have persuasive power. The *India-Autos* panel noted that the DSU does not directly address the issue of *res judicata.* The panel stated that the question to determine is whether a particular issue was ruled on and decided upon, and not merely whether the implementation of a previous ruling may have practical implications for particular measures in the later dispute (Palmeter and Mavroidis 2004: 41). Even the panel will admit successive complaints. Furthermore, the ongoing discussion regarding the *principle of res judicata* is only about successive cases coming before a panel after the matter was conclusively decided by a previous panel. But when coming to a dispute conclusively decided in a RTA forum, even a wider construction will not help to bring the dispute under the purview of *doctrine of res judicata.* This is because normally parties introduce some differences in the facts and terms of reference of the case in order to avoid such problems.

According to Pauwelyn (2003: 1017-1018) the application of *doctrine of res judicata* in WTO DSU can be possible if WTO panel recognizes that *doctrine of res judicata* is a principle of general international law that WTO panels must apply irrespective of whether the earlier ruling in question comes from within or

[3] Japan- Taxes on Alcoholic Beverages WT/DS 8/R; EC- bed linen WT/DS141/AB/RW. 8 April 2003

outside the WTO. Secondly the ruling or report by the other court or tribunal must meet the following three conditions i.e. identity of parties, identity of object or subject matter and the identity of the legal cause of action. Even if all the conditions were satisfied, the applicable law or legal cause of action will be different. In the WTO law it will be covered agreements and in RTAs it will be the respective agreement. According to Pauwelyn (2003: 1018) a wide construction becomes necessary so that the doctrine of "issue estoppel"[4] or "collateral estoppel"[5] applies. Therefore, RTA decisions can be incorporated in WTO according to a wider legal interpretation. But it may add or diminish the rights and obligations provided in the covered agreement. RTA dispute settlements are in an infant stage and also have some inherent problems. This may leads to bring all the negative aspect of RTAs dispute settlement mechanism to a more legalized WTO DSU. It may highly prejudicial to the developing countries, because political intervention is possible in most of the RTA dispute settlement system.

### *IV.5. Vienna Convention on Law of Treaties (VCLT): An Elucidation to Address the Conflict.*

In the pre GATT period trade was mainly dealt with in bilateral agreements. The dispute settlement was primarily done through mutual consultation and negotiations. If consultations or negotiations failed to secure the conduct expected from the other parties, the complaining party had no other remedy except declining to perform some obligations partially or completely or withdraw from the agreement. This situation caused much uncertainty among trading nations. The only factor that brings nations together in trade agreement may be mutual interest in trade. So the trading nations consider the option for a strong third party adjudication that did not undermine the trading agreement as a whole. GATT DSS fulfilled some of these concerns. The new RTAs follow the old consultation mechanism to resolve dispute between parties. RTAs provide mutual

[4] For applying issue estoppel the English law required that (i) the same question has been decided (ii) the judicial decision should be final (iii) the parties to the judicial decision were the same as the parties to the estoppel proceedings.

[5] Collateral estoppel applies to the same issue arising in a different action and even to different parties, if the party got adequate opportunity for hearing.

retaliatory and other measures to give binding effect to the obligations of parties. This may cause instability in trading arrangements.

When VCLT rules are used as a tool for treaty interpretation in WTO, it can be argued that this approach sometimes leads to a rather extreme textualism towards treaty interpretation and that this textualism is not well suited to the large multilateral and complex treaties, particularly given the problem of treaty rigidity (Jackson: 2004: 870-873). This argument becomes more significant when DSU considers a dispute which is connected to a RTA and involves more complex economic questions.

WTO law does not elaborate on norm regulating the potential conflicts and tension of rules within and outside the multilateral system (Pauwelyn 2003). The provision relating to RTAs in WTO also does not elaborate or have any explicit rules to regulate in the event of conflict between obligations of RTAs and WTO. Therefore the general rules of international law have to be applied to resolve the conflicts (Kyung and Marceau 2006: 474-477). The basic rules of resolution of treaty conflicts are contained in Vienna Convention of Law of Treaties 1969. AB in *Japan- Taxes* implicitly clarified that VCLT will apply to non parties also by declaring that the VCLT represents a codification of customary international law and is therefore binding on all states (Cameron and Gray 2001: 254).

In the case of RTAs, Article 41 of the VCLT is more relevant. Article 41 of VCLT regulates the modification[6] of treaty by some parties through subsequent agreement. Article 41 of the VCLT states that:

> 1."Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
>
> (*a*) the possibility of such a modification is provided for by the treaty; or
>
> (*b*) the modification in question is not prohibited by the treaty and:
>
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

[6] Modification is different from amendment. According to Article X the consent of all the parties needed for the amendment of WTO agreement. But it is not needed to modification. Any parties can modify if it is not make discrimination to a third party (Cottier and Foltea 2006: 62-68).

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."

There is a difference of opinion among the scholars regarding the application of the above provision in RTAs. Mathis (2002) is of the view that Article 41.1(a) applies but Pauwelyn (2003) is of the view that Article 41.1(b) applies. Cottier and Foltea (2006) also agreed with the Mathis view as Article XXIV of GATT 1994 and Article V of GATS give explicit consent to the parties to form the agreement. But it is noticeable that the elements of reporting in Article 41.1(b) also incorporates in the WTO as it provide for reporting of RTAs in WTO and also the forming of RTAs should not cause disguised restriction to the third parties. Though RTAs and WTO are legally similar according to Article 30 of VCLT, Article 41 gives primacy to WTO (Cottier and Foltea 2006: 53-58). It is because RTAs are not formed as a separate treaty. They can be regarded as subsidiary agreement under WTO because generally RTAs should inform to CRTA about their adoption and CRTA has the power to check the compatibility of RTAs with WTO. Moreover Article 41.1(b)(i) prohibits any bilateral or regional contracting-out from a multilateral agreement if it affects the enjoyment by the other parties of their rights under the treaty or the performance of their obligations (Pauwelyn 2007: 9). Thus RTAs are prohibited from forming agreements in such a way as to cause disguised trade restriction that is more than what is permitted under Article XXIV of GATT 1994.

### *IV.5.1. Concept of Good Faith and Doctrine of abuse of rights*

An important principle contained in the VCLT is the principle of *pacta sunt servanda* or the principle of good faith. The concept of good faith and doctrine of abuse of rights is in a developing stage. According to it, parties to international treaties have an obligation to follow the rules contained in the treaty in good faith.[7]

[7] Article 26 of VCLT 1969

This obligation essentially excludes the parties from entering into successive agreements incompatible with obligations entered into at an earlier stage; if they do so, the rights and obligations under the earlier treaty remain unimpaired and cannot be derogated. The abuse if rights doctrine is rooted in the principles of good faith and equity. It prohibits actions that deviates from the purpose of the treaty and frustrates legitimate expectation of the other party and should fulfill the obligation in a bona fide and reasonable manner (Cameron and Gray 2001: 294).

Some scholars interpret *pacta sunt servanda* as not favouring earlier treaty but rather making each treaty enforceable (Cottier and Foltea 2006: 53-54). Normally, States form new agreements. If they do so in good faith the later treaty prevails even though it does not contain the same number of parties.[8] In any case States cannot be prohibited from entering into a new treaty. A new treaty will not automatically set aside the old one unless and otherwise specified in the new treaty. However, the provisions of the old treaty will be applicable only to the extent they are compatible with the later treaty.[9] It is easy to form such treaty if all the parties agree to do so. But the new treaty will not apply to a third party.[10]

WTO panel and AB extensively use these principles in interpreting the covered agreements. In *'US--FSC'*, the Appellate Body stated that Article 3.1 of the DSU was an expression of the good faith general principle of law[11]. In *US – Shrimp*, AB stated that:

> 'the principle of good faith is 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. An abusive exercise by a Member of its own treaty right thus results

[8] Article 30(2) of VCLT 1969
[9] Article 30(3) of VCLT 1969
[10] Article 30(4) of VCLT 1969
[11] *United States--Tax Treatment for 'Foreign Sales Corporations,* Appellate Body Report, WTO Document WT/DS108/AB/R of 20 March 2000, para. 106

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.' [12]

In an appropriate case a Panel can determine whether a Member has acted in good faith. According to AB in *Byrd Amendment*[13] case:

'Nothing, however, in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In AB view, it would be necessary to prove more than mere violation to support such a conclusion.'[14]

In RTA-WTO interface, particularly in procedural matters, parties usually raise the lack of good faith and abuse of rights as the main argument. In such circumstances, the panel view is that "such findings should not be made lightly" (*Argentina- Poultry* 2003: 20). Therefore

'two conditions must be satisfied before a Member may be found to have failed to act in good faith. First, the Member must have violated a substantive provision of the WTO agreements. Second, there must be something "more than mere violation."[15]

In most of the cases where alleged procedural overlapping occurs as in *Argentina- Poultry*, parties cannot use lack of good faith or abuse of rights as a defense because there is no violation of substantive provisions of WTO agreement. So a mere violation of procedural formality is not essential for invoking such defense.

### *IV.5.2. Article 31 of VCLT: How is it Address RTA WTO Interface?*

Article 31 of VCLT is the most important provision which codifies the general rule of interpretation. WTO panel and AB used this general rule for

[12] Appellate Body Report, *US – Shrimp*, para. 158. See also, Appellate Body Report, *US – FSC*, para. 166.

[13] *United States- Continued Dumping and Subsidy Offset act of 2000*, Appellate Body Report, WTO Document WT/DS217/AB/R; WT/DS234/AB/R of 16 January 2003.

[14] *United States – Continued Dumping And Subsidy Offset Act Of 2000*, WTO Document WT/DS217/AB/R, WT/DS234/AB/R, 16 January 2003 , para 298

[15] *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, Panel Report, WTO Document WT/DS241/R, of 19 May 2003, para 7.36

interpretation considerably. It can also be used to analyze Article 31 for interpreting conflicts between RTAs and WTO.

Article 31.1 of VCLT states:

> '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.'

So panels are to interpret RTAs in good faith. Textual interpretation should be done to give ordinary meaning to the terms of the treaty. A teleological interpretation may be necessary to find the object and purpose of the treaty. The object and purpose of RTAs is provided clearly in the Article XXIV of GATT 1995. It should be for increasing trade and encouraging closer integration of member nations. In short, the purpose should be to facilitate trade between member countries and not to raise barriers to the trade of other WTO member states. The dispute settlement mechanisms in RTAs should also not be used in a manner as to circumvent the free trade between member nations. Therefore, the jurisdictional overlapping of dispute settlement machinery should not be used to pursue forum shopping. That is the reason why the panel insisted for a "more than mere violation of any substantive provision of WTO covered agreement", in order to invoke 'lack of good faith defense' in forum shopping cases.

Article 31.3(c) of VCLT states there shall be taken into account when determining the context for treaty interpretation,

> (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (*c*) any relevant rules of international law applicable in the relations between the parties.

In *India- Patents*, AB states that "the duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended." The relevant rules of international law applicable in the relations between parties can take into consideration to clarify the context of a disputed treaty with ambiguous provision.

### *IV.6. Principles of International Law Governing RTA/WTO Relationship*

Legal systems are not equipped with answers to every issue that may arise in the future. There may be silences or ambiguous provisions. It is the duty of the judicial body to fill the vacant places according to the available legal principles. Like every other legal system the drafters of the WTO agreement also did not or could not foresee the possible problems that may arise in the dispute settlement mechanism. The parallel dispute settlement mechanisms in RTAs can be regarded as one such problem. That is the reason to give power to DSB through Article 3.2 of DSU, in case of ambiguity, to clarify the existing provisions of covered agreements in accordance with customary rules of interpretation of public international law. The resolution of disputes through such principles of interpretation is necessary to avoid some potential conflicts. The fact that WTO drafters had used the term customary international law indicates mainly that they assume that the Vienna Convention of Law of Treaties is part of customary international law. AB in a handful of decisions has clarified that Articles 31 and 32 of Vienna Convention of Law of Treaties have attained the status of a rule of customary or general international law.[16] One of the criticisms leveled against this approach is the extreme textualism of treaty interpretation. It is argued that the approach that would more likely to fulfill the long term objectives including evolutionary interpretation and teleological interpretation is suitable for DSU

[16] US- Gasoline; Japan- Alcoholic Beverages

(Jackson 2004: 870-873). If we adopt the above mentioned view of scholars, it is easy to incorporate RTAs in WTO or vice versa.

When analyzing some general principles of international law, it is possible to understand the contradictions in the RTA-WTO interface. WTO panel and AB generally accept jurisdiction when there is an infringement of a covered agreement. One of the main features of almost all international dispute settlement mechanisms is the presence of the clause specifying the exhaustion of local or other remedies (more appropriate remedy available in another forum). But WTO DSU does not insist on such a rule. The panel in the *Argentina Textiles* case and *US Salmon* case rejected the argument of exhaustion of local remedies or alternative remedies (Davey 2005). Thus whenever a party argues that the opposite party has a more appropriate remedy available under RTAs, WTO panel has no obligation to take such a plea. RTAs also have no such provisions. So RTAs or WTO do not have to wait for exhaustion of one dispute settlement mechanism procedure.

All treaties are of equal value[17]. There is no hierarchy in international law. WTO or RTAs cannot claim supremacy over other. But specific treaty provision prevails over a more general treaty provision which is called *lex specialis* principle. Here WTO cannot be regarded as a general treaty. There is no special provision in RTAs that clarify WTO covered agreements. Rather both the agreements have similar provisions and are simultaneous in operation. RTAs may regulate the more specific trade relations between two member countries (Pauwelyn 2007: 11). But a specific trade relation doesn't mean that RTA is a special treaty and WTO is a general treaty.

In the event of conflict between an earlier treaty and a later treaty, the later treaty prevails. The earlier treaty applies to both the parties, to the extent that its provisions are compatible with those of the later treaty. If later treaty explicitly states that it remains subject to earlier treaty then earlier treaty prevails. RTAs are formed by assuming consent from WTO parties through Article XXIV of GATT. They give prior notice and also submit details of proposed RTA to CRTA for

[17] The only exception to this principle is *jus cogens*.

compatibility checking. So an implied consent of RTAs can be assumed and RTAs remain, in that sense, subject to the WTO.

### *IV.7. Non liquet*

A *non liquet* occurs when a judicial body decides not to rule on a case because the law is not clear, or the non availability of relevant law or there is a gap in the law. In the jurisprudence of ICJ the use of general principles of international law as a source of law prevents the use of *non liquet* to some extent (Davey 2005). There is a strong presumption that a declaration of *non liquet* is prohibited under the normal principles of international law (Bartels 2004: 873). In WTO also *non liquet* rarely occurs (Coconut case). Article 3.2, 23, 7.2[18] and 17.12[19] of DSU appears to prohibit panels and AB from using the principle of *non liquet* (Bartels 2004: 874-877). Bartels (2004: 874) argues that DSU is an expression of the 'will' of WTO members and so it imposes a duty on panels and AB necessarily to decide all disputes arising before them and over which they have jurisdiction.

### *IV.8. Judicial Law Making in DSU: How far it can go?*

A WTO Panel has to adopt wide interpretations in order to incorporate international law principles to clarify the RTA-WTO interface. The panel members of DSU are provided with the power to interpret the WTO agreement if there is an ambiguity. WTO agreement is a complex agreement. So it can be argued that the drafters of the agreement did not foresee the problems that may arise in a later circumstance. So it is the duty of DSU to fill any gap in the agreement. But how far can that power be utilized by the panel? What is the limit? Will it be a case of judicial activism? WTO DSB have no mandate to apply non WTO rules of international law if such direct application could result in adding or diminishing from the rights and obligations provided in the covered agreements (Ernst- Ulrich Petersmann 2007: 42-48). But Pauwelyn (2003) and others argue for a different approach. But WTO DSB still has not addressed the controversial questions.

[18] Article 7.2 of DSU authorize panel and AB to address' the relevant provisions in any covered agreement or agreements cited by the parties to the dispute'.

[19] Article 17.12 of DSU requires the AB to 'address each of the issues' raised on appeal

Therefore DSB can't change the substantive law and can't go beyond what parties agreed. If Panel/AB concludes that it can only look into the rights and obligations of parties accepted under WTO covered agreements, then there is no scope for any further construction. If it takes a wider view and adopt a broad construction for clarifying ambiguous provisions, then RTA obligations also can scrutinized in order to avoid legal dead locks.

### *IV.9. Other Solutions*

The nature of matters dealt with in WTO appears to attract jurisdiction in other related fields such as environment, labour, human rights etc (Marceau 2001: 1082). When the matters related to RTAs have become a matter of concern there are of particular interest. This is because, unlike other areas RTAs often share the same subject matter with WTO. Though they are supposed to be complementary to each other, sometimes they conflict with each other as shown in Chapter III. It is possible to deduce some solutions to this problem from the existing WTO text itself.

There are, as has been seen, some grey areas in WTO jurisprudence with regard to RTAs. When interpreting the existing text of WTO it is possible to advance some arguments and conclusions to fill the grey areas. Construction is possible for dispute settlement machinery, particularly in WTO, if there are some ambiguous provisions. It is called for where the intent of the parties and objectives of the legislation is determinable (Trachtman 2005). If there is a *a lacuna* or *non liquet*, then also WTO DSB can avail assistance from customary international law as far as their construction or interpretation do not add or diminish the rights and obligations provided in the covered agreements.

When we look at Article XXIV of GATT 1994 to decide the intent of parties, it is very clear that the WTO members favour RTAs and its dispute settlement systems. Article XXIV (4) recognizes the increasing freedom of trade by development through voluntary agreements to facilitate trade between constituent territories as long as it is not intended to raise barriers to the trade of other contracting parties with such territories. So if a member country uses this

lacuna and uses RTA dispute settlement system to undermine the international trade without good faith, then WTO DSB can very well intervene in that matter.

The texts of the WTO agreements do not exhaust the sources of potentially relevant law (Palmeter and Mavroidid 1998: 341-345). Palmeter and Mavroidid (1998) argue that Article 3 (2) and Article 7 of the DSU can be used as a basis for the use of non WTO international law. According to Article 3 (2)

> '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.'

and the Article 7 states that in determining the terms of reference

> 'to make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).'

However, these provisions refer only to the interpretation of relevant provisions of WTO agreements in accordance with customary rules of interpretation of international law. They cannot be taken as making the WTO dispute settlement system a court of general international law jurisdiction (Trachtman 1998: 355-360).

Article 11 of DSU when describing the functions of the Panels states that "a panel should make an objective assessment of the matter before it including an objective assessment of 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".

Schoenbaum (1998) argues that Article 11 of DSU provides a kind of implied power allowing the Panels and AB to decide all international legal issues involved in a dispute properly before them. According to him the general language 'such other findings' used in the above Article gives DSB to overcome the specific limitations of covered agreements and such findings can be used to assist the rulings which is made according to the covered agreements .

So if we take the existing provisions of WTO regarding RTAs is a case of *non liquet* or are ambiguous, according to the above provisions a Panel or AB can resolve the WTO RTA interface.

Moreover general provisions mentioned in the DSU entrust the panel and AB to provide for a positive and satisfactory solution to the dispute. Therefore, the contracting parties really set forth a chance for the mutually agreed solution consistent with the covered agreements. So a variation from the pure legal method of resolution of dispute is possible if it is necessary for the smooth functioning of international trade. In sum, WTO panel and AB can look into the RTA provisions even though it is not a part of covered agreements.

### *IV.10. Objective Assessment of the Facts*

Article 11 of DSU entrusts Panels to make objective assessment of the matters including objective assessment of facts and also such other findings necessary to assist the DSB in making the recommendations for a prompt, satisfactory and positive settlement of disputes. So the panel has a wide range of powers to scrutinise the facts. It is easy for the panel to find out the real intention of the parties bringing a dispute which have a chance of potential conflict or overlap with a RTA. If the real intention of the party is to make disguised restriction of trade, then panel should give proper recommendation including rejection of jurisdiction. Panel held in *Brazil- Tyres* that Article 11 was required to address only those issues that are necessary for the resolution of the matter between the parties. Therefore, for the satisfactory resolution of dispute, panel has to take responsibility under Article 11 of DSU and can give a report accordingly.

### *IV.11. Conclusion*

There are general principles in international law which satisfactorily address the conflict of treaties. The general principles discussed in this chapter are also applicable to the interpretation of RTA-WTO interface. But the application of these interpretative principles becomes more complicated in WTO-RTA interface as specified in the chapter. It is because, as international trade is one of the key areas in international relations, nations use the loop holes to circumvent their obligations. So, legal principles need to be adopted to avoid this unwanted

behaviour. Public international law does not offer only one set of principles. It is the duty of decision making forum to adopt principles and interpretations which give a just and satisfactory result. The doctrine of good faith coupled with objective assessment of facts can be the best option that can be used by panel and AB to deal with overlapping problems. As a treaty cannot create rights or obligations without the consent of parties, negotiation is the other alternative. The general principles in public international law have to develop more to address such problems.

CHAPTER V

# CONCLUSION

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One of the main objectives of WTO is to develop an integrated, viable and durable multilateral trading system for the overall development of member nations through the mechanism of free trade. The formulation of RTAs, despite their temporary departure from the MFN principle, is regarded as one of the means to achieve this objective. The WTO-RTA interface however raises a number of complex legal issues that call for urgent attention.

At present scholars are mostly discussing the economic effect of RTAs, that is, whether RTAs are a building bloc or a stumbling bloc to the multilateralism. There is a scant discussion about the legal problems that arise from WTO-RTA interface, in particular, because of the coexistence of different dispute settlement mechanisms. Chapter II describes the salient features of dispute settlement mechanisms in WTO and various RTAs and the reason for the need of a legalized dispute settlement mechanism that brings stability and predictability to the whole system. An effective dispute settlement system is crucial for the functioning of a trade agreement. So any problems that disturb the smooth functioning of dispute settlement system should be addressed immediately.

Chapter III identified a number of problems and instances indicating that the concurrent applicability of WTO and RTA dispute settlement mechanisms could result in the breakdown of the WTO dispute settlement system. Article XXIV of GATT 1994 which deals with RTAs does not address the overlapping or competing nature of dispute settlement mechanisms in RTAs. While the applicable law may be different, both practically act in a similar field and aim at the settlement of international trade disputes between member states. The common membership and the similarity in rights and obligations of member states in WTO and RTAs can lead to legal deadlock in international settlement of trade disputes. Unlike other overlapping fields in international law, international trade law gets

more significance because of its binding nature and its core importance in nation's international and internal affairs.

Dispute settlement in international trade law was principally managed by diplomatic resolution. Later GATT practices paved the way for dispute settlement of a legalized nature. The adoption of DSU in WTO cemented the legalized concept in trade dispute settlement. Though legality does not mean an error less framework, it offers *prima facie* evidence that things will be done in a proper way. Member nations show a kind of trust in the legalized mechanism irrespective of the political and economic power with them. It gives predictability and stability to the system. The trust can be seen from the large number of cases that have been taken to the WTO DSS in a short period of time.

The dispute settlement systems created by recent RTAs have not paid much attention to establishing a legalized arrangement. Rather they have opted for diplomatic means of dispute settlement which existed in the early GATT period. This is perhaps because strong nations wish to control the outcome of dispute settlement which is difficult in a rule oriented WTO DSS. In international law both RTAs and WTO DSS have the same legal value. The signatory nations are bound by the provisions of both RTAs and WTO. The breach of an international agreement will lead to state responsibility.

Jurisdictional overlapping on procedural and substantive matters are the main problems identified in this study. Procedural overlapping like multiplicity of disputes (*Brazil- Poultry and Mexico- Soft Drinks* cases), overlap in anti dumping procedures (*softwood lumber case*), and substantive overlapping like same rules and regulations in different forums (*Mexico- Soft Drinks*), overlapping when one rule is a defence against another (*Brazil- Tyres*), and when parties are not members to both the agreements (*Brazil- Tyres).* It is also possible that one agreement suggests retaliation procedure which can be regarded as a trade restraint measure by another agreement etc causes legal dead locks. This overlapping leads to problems like forum shopping, confusion in selecting forum and applicable law, never ending disputes and wastage of money and resources which defeat the real

objective of the international trading system. The absence of a single forum of dispute settlement to manage international trading system undermines in the final analysis its effective and harmonious functioning. Chapter IV identified the legal problems in public international law which we are likely to come across when attempting to harmonize the RTA and WTO DSS. Legal solutions will eventually come through negotiations. RTAs are concluded under Article XXIV of GATT 1995 and Article V of GATS and enabling clause. Therefore perhaps a consensus can be reached in this regard in the WTO.

International trade law has a developing jurisprudence. The main contribution to is being made by WTO Panels and AB. An ideal place for starting the reform therefore is WTO. WTO can be regarded as a parental body which includes almost all trading nations. Hence a consensus in WTO regarding the problems that arise in RTA-WTO interface can be good alternative for resolving matters relating to issues such as overlapping jurisdiction and applicable laws.

There is no hierarchy in international law. Therefore WTO cannot claim supremacy over RTAs. So only a harmonization of trade rules is possible when dealing with the different RTAs. For that two options are there. RTA rules can be accommodated into WTO or in the alternative WTO rules can be accommodated into RTAs. But it should be kept in mind that both are distinct legal regimes and one cannot substitute the other. The accommodation should be limited to avoiding the legal problems that arise from their coexistence and interface.

Generally parties bring cases first to RTAs and if the decision is not satisfactory, then to WTO DSS. This is because most of the developed RTAs have choice of forum and forum exclusion clauses. WTO does not have such a choice of forum or forum exclusion clause. DSU stipulates panel and AB as exclusive forums in the case of disputes relating to covered agreements. Including a forum exclusion clause, as in NAFTA, is necessary in WTO DSU to deal with repetition of cases. At present, from the attitude of panels and AB, and also the provisions of the existing WTO legal text, the WTO DSS is not bound by the forum exclusion clause in a RTA and also the other way around. So consensus among the WTO

parties in this regard is the foremost thing. It is easy to identify a similar fact which gives rise to a cause of action.

A sound discussion becomes necessary in the case of applicable law because the applicable law will always be different. Most of the applicable laws in RTAs and WTO have a similar content. It should therefore satisfy the complaining party that it got adequate opportunity to deal with the case in one forum. The dispute settlement forum should get the assurance that the parties bringing the case in repetition are not doing so for circumventing their obligations. The rule of *lex posterior* and *lex specialis* which often helps in the interpretation of contradicting and conflicting treaties will not be applicable in the case of WTO-RTA interface. Though the inclusion of *lis alibi pendens, the principle of res judicata* and the rule of *res sub judice* may not also be possible in WTO due to a variety of reasons discussed in Chapter IV, WTO Panel or AB can make a judicious use of the principle of good faith and abuse of rights doctrine along with objective assessment of facts under Article 11 of DSU to avoid the malicious use of WTO DSS.

If a dispute coming before WTO creates the problem of procedural overlapping, the DSB can (i) refuse to establish a Panel, (ii) reject the complaint, (iii) suspend the proceedings in order to avoid conflict till the proceedings in the other forum gets completed. In the present circumstances, it is not possible for a panel to reject a complaint, because the terms of reference are binding on it. It is therefore good to incorporate provisions for refusal, rejection or suspension of complaints in WTO DSU in order to avoid procedural overlapping.

The substantive problems like overlapping and conflict in applicable law for the same kind of fact situation that arise in the RTA-WTO interface have also to be resolved through negotiation within WTO. It is accepted that WTO has a superior and well equipped system of dispute settlement system due to a good secretariat, appellate procedure, tested enforcement system and the acceptance of almost all trading nations. Therefore the parties can agree to submit disputes in

WTO DSS, unless a significant difference exists in the applicable law of the dispute.

Mutual accommodation and respect between different dispute settlement bodies is necessary to resolve the procedural problems. Since world trade is developing at a rapid pace, nations will choose all means of defence in order to protect their interests. But a fragmented international trade law will prejudice the rights and interests of nations. WTO can accommodate or at least take into consideration RTA rules as long as it does not affect the rights and obligation of the parties. WTO Panel should permit RTA defenses if both the disputing parties are members of that RTA and the rules in RTA do not affect other WTO parties. This mutual accommodation is also necessary in the case of retaliation proceedings adopted by RTAs. Otherwise a retaliation proceeding adopted by a RTA can be regarded as trade restraint measure under another RTA or WTO. If it so happens, it will become difficult to enforce the rules.

There is no single answer to the legal issues that emerge from WTO-RTA interface. The suggestions and conclusions offered from within the existing framework of international trade agreements do not offer answers to the entire range of problems. Future RTAs should explicitly address issues arising from WTO-RTA interface. The recognition of the existence of RTAs by WTO DSS is an important step to solve WTO-RTA interface. A more legalized RTA dispute settlement mechanism which addresses the legal conflicts with other international trade agreements including WTO has become the need of the hour. A new round of negotiation having a positive approach should begin in the WTO for addressing these legal issues.

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# ANNEXURES

# ANNEXURE I

## Article XXIV of GATT 1994

*Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas*

1. 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. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided*, that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more 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 by a single contracting party.

2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.

3. The provisions of this Agreement shall not be construed to prevent:

   (*a*) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;

   (*b*) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. 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.

5. Accordingly, 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 of a free-trade area; *Provided* that:

(*a*) with respect to a 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 a 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 if 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; and

(*c*) any interim agreement referred to in sub-paragraphs (*a*) and (*b*) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of sub-paragraph 5 (*a*), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already

afforded by the reduction brought about in the corresponding duty of the other constituents of the union.

7. (*a*) 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.

(*b*) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (*a*), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(*c*) Any substantial change in the plan or schedule referred to in paragraph 5 (*c*) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:

(*a*) A customs union shall be understood to mean 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;

(*b*) A free-trade area shall be understood to mean 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, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.* This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (*a*)(i) and paragraph 8 (*b*).

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.

11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognizing the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

# ANNUXURE II

## Differential and More Favourable Treatment Reciprocity and Fuller Participation Of Developing Countries

*Decision of 28 November 1979*
*(L/4903)*

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries[1], without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following:[2]

*(a)* Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,[3]

*(b)* Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

*(c)* Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-

[1] The words "developing countries" as used in this text are to be understood to refer also to developing territories.
[2] It would remain open for the CONTRACTING PARTIES to consider on an ad hoc basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.
[3] As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

tariff measures, on products imported from one another;

*(d)* Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

3. Any differential and more favourable treatment provided under this clause:

*(a)* shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

*(b)* shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

*(c)* shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:[4]

*(a)* notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

*(b)* afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade

[4] Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

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.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. 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 the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

# ANNEXURE III

## Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994

*Members,*

*Having regard* to the provisions of Article XXIV of GATT 1994;

*Recognizing* that customs unions and free trade areas have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade;

*Recognizing* the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

*Recognizing* also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;

*Reaffirming* that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;

*Convinced* also of the need to reinforce the effectiveness of the role of the Council for Trade in Goods in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements;

*Recognizing* the need for a common understanding of the obligations of Members under paragraph 12 of Article XXIV;

Hereby *agree* as follows:

1. Customs unions, free-trade areas, and interim agreements leading to the formation of a customs union or free-trade area, to be consistent with Article XXIV, must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article.

*Article XXIV:5*

2. The evaluation under paragraph 5(a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.

3. The "reasonable length of time" referred to in paragraph 5(c) of Article XXIV should exceed 10 years only in exceptional cases. In cases where Members parties to an interim agreement believe that 10 years would be insufficient they shall provide a full explanation to the Council for Trade in Goods of the need for a longer period.

4. Paragraph 6 of Article XXIV establishes the procedure to be followed when a Member forming a customs union proposes to increase a bound rate of duty. In this regard Members reaffirm that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted on 10 November 1980 (BISD 27S/26-28) and in the Understanding on the Interpretation of Article XXVIII of GATT 1994, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union.

5. These negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by paragraph 6 of Article XXIV, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the Members having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII as elaborated by the Understanding on the Interpretation of Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

6. GATT 1994 imposes no obligation on Members benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its constituents.

7. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate.

8. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed time-frame and on measures required to complete the formation of the customs union or free-trade area. It may if necessary provide for further review of the agreement.

9. Members parties to an interim agreement shall notify substantial changes in the plan and schedule included in that agreement to the Council for Trade in Goods and, if so requested, the Council shall examine the changes.

10. Should an interim agreement notified under paragraph 7(a) of Article XXIV not include a plan and schedule, contrary to paragraph 5(c) of Article XXIV, the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.

11. Customs unions and constituents of free-trade areas shall report periodically to the Council for Trade in Goods, as envisaged by the CONTRACTING PARTIES to GATT 1947 in their instruction to the GATT 1947 Council concerning reports on regional agreements (BISD 18S/38), on the

operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur.

*Dispute Settlement*

12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union or free-trade area.

*Article XXIV:12*

13. Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

14. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

15. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of GATT 1994 taken within the territory of the former.

# ANNEXURE IV

## Indian Trade Agreements and their Dispute Settlement Mechanisms

| | TRADE AGREEMENTS | CURRENT STAGE | DISPUTE SETTLEMENT PROVISIONS |
|---|---|---|---|
| 1 | Framework Agreement on Comprehensive Economic Co-operation between the Association of South East Asian Nations (ASEAN) and India. | Signed in 8 October 2003 | Under Negotiating Stage |
| 2 | India-Singapore Comprehensive Economic Cooperation Agreement | Signed in 29 June 2005 | Detailed provisions under Chapter 15. But no choice of forum or forum exclusion rule |
| 3 | Framework Agreement for establishing Free Trade between India and Thailand | Signed in 9 October 2003 | Amicable settlement through consulation |
| 4 | Negotiations towards India –Malaysia Comprehensive Economic Cooperation Agreement (CECA) | Signed in 11 August 2007 | Under Negotiation Stage |
| 5 | Agreement between India and Indonesia | MOU signed in 23 November 2005 | Under Negotiation Stage |
| 6 | Preferential Trade Agreement (PTA) between India and SACU | Finalized in 7 September 2004 | Under Negotiation Stage |
| 7 | Preferential Trade Agreement (PTA) between India and Chile | Signed in 20 January 2005 | Annex E, complaining party can decide the choice of forum if negotiation fails; and a forum exclusion rule provided |
| 8 | PTA with Bhutan | Signed in 29 July 2006 | No specific dispute settlement forum |
| 9 | Trade Agreement with Bangladesh | Signed in 21 March 2006 | No specific dispute settlement forum |

| | | | |
|---|---|---|---|
| 10 | India- MERCOSUR PTA | 19 March 2005 | Annex V, complaining party can select the forum and there is forum exclusion clause |
| 11 | India- Sri Lanka FTA | Signed in 28 December 1999 | Amicable settlement by arbitration |
| 12 | India-Afghanistan PTA | March 6, 2006 | Chapter XIII entrust arbitration and for joint committee for interpretation |
| 13 | India-Mongolia Trade Agreement | September 16, 1996 | No specific dispute settlement mechanism |
| 14 | India-Japan Trade Agreement | February 4, 1958 | Through consultation |
| 15 | India-China Trade Agreement | August 15, 1984 | Through arbitration |
| 16 | India-Maldives Trade Agreement | March 31, 1981 | No specific dispute settlement mechanism |
| 17 | India-Bhutan Trade Agreement | February 28, 1995 | Through consultations |
| 18 | India-Bangladesh Trade Agreement | March 21, 2006 | No specific dispute settlement mechanism |
| 19 | India-Nepal Trade Treaty | December 6, 1991 | No specific dispute settlement system |
| 20 | India- Maldives | 31 March 1981 | No specific dispute settlement procedure |
| 21 | India EU Trade and Investment Agreement | Under negotiation | Under negotiation |
| 22 | India-US Trade Policy Forum Joint Statement | March 23, 2005 | Under negotiation |
| 23 | Framework Agreement with GCC States | August 24, 2005 | Under negotiation |
| 24 | Asia Pacific Trade Agreement (APTA) | 2 November 2005 | Can be brought to Standing Committee |
| 25 | SAFTA | 6 January 2004 | Article 20- parties can approach committee of experts and can appeal to SMC |
| Source: www.commerce.nic.in Indian Ministry of Commerce | | | |

# ANNEXURE V

## REGIONAL TRADE AGREEMENTS NOTIFIED TO GATT/ WTO (by date of entry into force)

## (As of 20 May, 2008)

| Agreement | Date of entry into force | Date of notification | Related provisions | Type of agreement | Document series |
|---|---|---|---|---|---|
| EC (Treaty of Rome) | 1-Jan-58 | 10-Nov-95 | GATS Art. V | Economic integration agreement | WT/REG39 S/C/N/6 |
| EC (Treaty of Rome) | 1-Jan-58 | 24-Apr-57 | GATT Art. XXIV | Customs union | L/626 |
| EFTA (Stockholm Convention) | 3-May-60 | 14-Nov-59 | GATT Art. XXIV | Free trade agreement | WT/REG85 |
| CACM | 12-Oct-61 | 24-Feb-61 | GATT Art. XXIV | Customs union | WT/REG93 |
| TRIPARTITE | 1-Apr-68 | 23-Feb-68 | Enabling Clause | Preferential arrangement | L/2980 L/2980/Add.1 |
| EFTA accession of Iceland | 1-Mar-70 | 30-Jan-70 | GATT Art. XXIV | Accession to free trade agreement | L/3328 L/3328/Add.1 |
| EC — OCTs | 1-Jan-71 | 14-Dec-70 | GATT Art. XXIV | Free trade agreement | WT/REG106 |
| EC — Switzerland and Liechtenstein | 1-Jan-73 | 27-Oct-72 | GATT Art. XXIV | Free trade agreement | WT/REG94 |
| EC accession of Denmark, Ireland and United Kingdom | 1-Jan-73 | 7-Mar-72 | GATT Art. XXIV | Accession to customs union | L/3677 |
| PTN | 11-Feb-73 | 9-Nov-71 | Enabling Clause | Preferential arrangement | L/3598 18S/11 |
| EC — Iceland | 1-Apr-73 | 24-Nov-72 | GATT Art. XXIV | Free trade agreement | WT/REG95 |
| EC — Norway | 1-Jul-73 | 13-Jul-73 | GATT Art. XXIV | Free trade agreement | WT/REG137 |
| CARICOM | 1-Aug-73 | 14-Oct-74 | GATT Art. XXIV | Customs union | WT/REG92 |
| Bangkok Agreement | 17-Jun-76 | 2-Nov-76 | Enabling Clause | Preferential arrangement | L/4418 L/4418/Corr.1 |
| EC — Algeria | 1-Jul-76 | 28-Jul-76 | GATT Art. XXIV | Free trade agreement | WT/REG105 |
| PATCRA | 1-Feb-77 | 20-Dec-76 | GATT Art. XXIV | Free trade agreement | L/4451 L/4451/Add.1 |
| EC — Syria | 1-Jul-77 | 15-Jul-77 | GATT Art. XXIV | Free trade agreement | WT/REG104 |

| Agreement | Date of entry into force | Date of notification | Related provisions | Type of agreement | Document series |
|---|---|---|---|---|---|
| SPARTECA | 1-Jan-81 | 20-Feb-81 | Enabling Clause | Preferential arrangement | L/5100 |
| EC accession of Greece | 1-Jan-81 | 24-Oct-79 | GATT Art. XXIV | Accession to customs union | L4845 |
| LAIA | 18-Mar-81 | 1-Jul-82 | Enabling Clause | Preferential arrangement | L/5342 |
| CER | 1-Jan-83 | 14-Apr-83 | GATT Art. XXIV | Free trade agreement | WT/REG1 11 |
| United States — Israel | 19-Aug-85 | 13-Sep-85 | GATT Art. XXIV | Free trade agreement | L/5862 L/5862/Add.1 |
| EC accession of Portugal and Spain | 1-Jan-86 | 11-Dec-85 | GATT Art. XXIV | Accession to customs union | L/5936 |
| CAN | 25-May-88 | 12-Oct-90 | Enabling Clause | Preferential arrangement | L/6737 |
| CER | 1-Jan-89 | 22-Nov-95 | GATS Art. V | Economic integration agreement | WT/REG40 S/C/N/7 |
| GSTP | 19-Apr-89 | 25-Sep-89 | Enabling Clause | Preferential arrangement | L/6564/Add.1 |
| Laos — Thailand | 20-Jun-91 | 29-Nov-91 | Enabling Clause | Preferential arrangement | L/6947 |
| EC — Andorra | 1-Jul-91 | 9-Mar-98 | GATT Art. XXIV | Customs union | WT/REG53 |
| MERCOSUR | 29-Nov-91 | 5-Mar-92 | Enabling Clause | Customs union | WT/COMTD/ 1 |
| AFTA | 28-Jan-92 | 30-Oct-92 | Enabling Clause | Preferential arrangement | L/4581 |
| EFTA — Turkey | 1-Apr-92 | 6-Mar-92 | GATT Art. XXIV | Free trade agreement | WT/REG86 |
| EFTA — Israel | 1-Jan-93 | 1-Dec-92 | GATT Art. XXIV | Free trade agreement | WT/REG14 |
| Armenia - Russian Federation | 25-Mar-93 | 27-Jul-04 | GATT Art. XXIV | Free trade agreement | WT/REG174 |
| Kyrgyz Republic — Russian Federation | 24-Apr-93 | 15-Jun-99 | GATT Art. XXIV | Free trade agreement | WT/REG73 |
| EC — Romania | 1-May-93 | 23-Dec-94 | GATT Art. XXIV | Free trade agreement | WT/REG2 |
| EFTA — Romania | 1-May-93 | 24-May-93 | GATT Art. XXIV | Free trade agreement | WT/REG16 |
| Faroe Islands — Norway | 1-Jul-93 | 13-Mar-96 | GATT Art. XXIV | Free trade agreement | WT/REG25 |
| Faroe Islands — Iceland | 1-Jul-93 | 23-Jan-96 | GATT Art. XXIV | Free trade agreement | WT/REG23 |
| EFTA — Bulgaria | 1-Jul-93 | 7-Jul-93 | GATT Art. XXIV | Free trade agreement | WT/REG12 |
| MSG | 22-Jul-93 | 7-Oct-99 | Enabling Clause | Preferential arrangement | WT/COMTD/ N/9 WT/COMTD/ 21 |

| Agreement | Date of entry into force | Date of notification | Related provisions | Type of agreement | Document series |
|---|---|---|---|---|---|
| EC — Bulgaria | 31-Dec-93 | 23-Dec-94 | GATT Art. XXIV | Free trade agreement | WT/REG1 |
| EEA | 1-Jan-94 | 10-Oct-96 | GATS Art. V | Economic integration agreement | WT/REG138 S/C/N/28 |
| NAFTA | 1-Jan-94 | 1-Feb-93 | GATT Art. XXIV | Free trade agreement | WT/REG4 |
| NAFTA | 1-Apr-94 | 1-Mar-95 | GATS Art. V | Economic integration agreement | WT/REG4 S/C/N/4 |
| Georgia — Russian Federation | 10-May-94 | 21-Feb-01 | GATT Art. XXIV | Free trade agreement | WT/REG118 |
| COMESA | 8-Dec-94 | 29-Jun-95 | Enabling Clause | Preferential arrangement | WT/COMTD/ N/3 |
| CIS | 30-Dec-94 | 1-Oct-99 | GATT Art. XXIV | Free trade agreement | WT/REG82 |
| Romania — Moldova | 1-Jan-95 | 24-Sep-97 | GATT Art. XXIV | Free trade agreement | WT/REG44 |
| EC accession of Austria, Finland and Sweden | 1-Jan-95 | 20-Jan-95 | GATT Art. XXIV | Accession to customs union | WT/REG3 L/7614/Add.1 |
| EC accession of Austria, Finland and Sweden | 1-Jan-95 | 20-Jan-95 | GATS Art. V | Accession to Economic integration agreement | WT/REG3 S/C/N/6 |
| EC — Bulgaria | 1-Feb-95 | 25-Apr-97 | GATS Art. V | Economic integration agreement | WT/REG1 S/C/N/55 |
| EC — Romania | 1-Feb-95 | 9-Oct-96 | GATS Art. V | Economic integration agreement | WT/REG2 S/C/N/27 |
| Faroe Islands — Switzerland | 1-Mar-95 | 8-Mar-96 | GATT Art. XXIV | Free trade agreement | WT/REG24 |
| Kyrgyz Republic — Armenia | 27-Oct-95 | 4-Jan-01 | GATT Art. XXIV | Free trade agreement | WT/REG114 |
| Kyrgyz Republic — Kazakhstan | 11-Nov-95 | 29-Sep-99 | GATT Art. XXIV | Free trade agreement | WT/REG81 |
| SAPTA | 7-Dec-95 | 25-Apr-97 | Enabling Clause | Preferential arrangement | WT/COMTD/ 10 |
| Armenia - Moldova | 21-Dec-95 | 27-Jul-04 | GATT Art. XXIV | Free trade agreement | WT/REG173 |
| EC — Turkey | 1-Jan-96 | 22-Dec-95 | GATT Art. XXIV | Customs union | WT/REG22 |
| Georgia — Ukraine | 4-Jun-96 | 21-Feb-01 | GATT Art. XXIV | Free trade agreement | WT/REG121 |
| Armenia - Turkmenistan | 7-Jul-96 | 27-Jul-04 | GATT Art. XXIV | Free trade agreement | WT/REG175 |
| Georgia — Azerbaijan | 10-Jul-96 | 21-Feb-01 | GATT Art. XXIV | Free trade agreement | WT/REG120 |
| Kyrgyz Republic — Moldova | 21-Nov-96 | 15-Jun-99 | GATT Art. XXIV | Free trade agreement | WT/REG76 |
| Armenia - Ukraine | 18-Dec-96 | 27-Jul-04 | GATT Art. | Free trade | WT/REG171 |

| Agreement | Date of entry into force | Date of notification | Related provisions | Type of agreement | Document series |
|---|---|---|---|---|---|
| | | | XXIV | agreement | |
| EC — Faroe Islands | 1-Jan-97 | 19-Feb-97 | GATT Art. XXIV | Free trade agreement | WT/REG21 |
| Canada — Israel | 1-Jan-97 | 23-Jan-97 | GATT Art. XXIV | Free trade agreement | WT/REG31 |
| Turkey - Israel | 1-May-97 | 18-May-98 | GATT Art. XXIV | Free trade agreement | WT/REG60 |
| CARICOM | 1-Jul-97 | 19-Feb-03 | GATS Art. V | Economic integration agreement | WT/REG155 S/C/N/229 |
| CEFTA accession of Romania | 1-Jul-97 | 8-Jan-98 | GATT Art. XXIV | Accession to free trade agreement | WT/REG11 |
| EC — Palestinian Authority | 1-Jul-97 | 30-Jun-97 | GATT Art. XXIV | Free trade agreement | WT/REG43 |
| Canada — Chile | 5-Jul-97 | 13-Nov-97 | GATS Art. V | Economic integration agreement | WT/REG38 S/C/N/65 |
| Canada — Chile | 5-Jul-97 | 26-Aug-97 | GATT Art. XXIV | Free trade agreement | WT/REG38 |
| EAEC | 8-Oct-97 | 21-Apr-99 | GATT Art. XXIV | Customs union | WT/REG71 |
| Croatia - FYROM | 30-Oct-97 | 1-Apr-05 | GATT Art. XXIV | Free trade agreement | WT/REG197 |
| Kyrgyz Republic — Ukraine | 19-Jan-98 | 15-Jun-99 | GATT Art. XXIV | Free trade agreement | WT/REG74 |
| Romania — Turkey | 1-Feb-98 | 18-May-98 | GATT Art. XXIV | Free trade agreement | WT/REG59 |
| EC — Tunisia | 1-Mar-98 | 23-Mar-99 | GATT Art. XXIV | Free trade agreement | WT/REG69 |
| Kyrgyz Republic — Uzbekistan | 20-Mar-98 | 15-Jun-99 | GATT Art. XXIV | Free trade agreement | WT/REG75 |
| Mexico - Nicaragua | 1-Jul-98 | 2-Nov-05 | GATS Art. V | Economic integration agreement | WT/REG206 S/C/N/359 |
| Mexico - Nicaragua | 1-Jul-98 | 2-Nov-05 | GATT Art. XXIV | Free trade agreement | WT/REG206 |
| Georgia — Armenia | 11-Nov-98 | 21-Feb-01 | GATT Art. XXIV | Free trade agreement | WT/REG119 |
| Bulgaria — Turkey | 1-Jan-99 | 4-May-99 | GATT Art. XXIV | Free trade agreement | WT/REG72 |
| CEFTA accession of Bulgaria | 1-Jan-99 | 24-Mar-99 | GATT Art. XXIV | Accession to free trade agreement | WT/REG11 |
| CEMAC | 24-Jun-99 | 29-Sep-00 | Enabling Clause | Preferential arrangement | WT/COMTD/ N/13 WT/COMTD/ 24 |
| EFTA — Palestinian Authority | 1-Jul-99 | 21-Sep-99 | GATT Art. XXIV | Free trade agreement | WT/REG79 |
| Georgia — Kazakhstan | 16-Jul-99 | 21-Feb-01 | GATT Art. XXIV | Free trade agreement | WT/REG123 |

| Agreement | Date of entry into force | Date of notification | Related provisions | Type of agreement | Document series |
|---|---|---|---|---|---|
| Chile — Mexico | 1-Aug-99 | 14-Mar-01 | GATS Art. V | Economic integration agreement | WT/REG125 S/C/N/142 |
| Chile — Mexico | 1-Aug-99 | 8-Mar-01 | GATT Art. XXIV | Free trade agreement | WT/REG125 |
| EFTA — Morocco | 1-Dec-99 | 18-Feb-00 | GATT Art. XXIV | Free trade agreement | WT/REG91 |
| Georgia — Turkmenistan | 1-Jan-00 | 21-Feb-01 | GATT Art. XXIV | Free trade agreement | WT/REG122 |
| EC — South Africa | 1-Jan-00 | 21-Nov-00 | GATT Art. XXIV | Free trade agreement | WT/REG113 |
| WAEMU/UEMOA | 1-Jan-00 | 3-Feb-00 | Enabling Clause | Preferential arrangement | WT/COMTD/ N/11 WT/COMTD/ 23 |
| Bulgaria — Former Yugoslav Republic of Macedonia | 1-Jan-00 | 18-Feb-00 | GATT Art. XXIV | Free trade agreement | WT/REG90 |
| EC — Morocco | 1-Mar-00 | 8-Nov-00 | GATT Art. XXIV | Free trade agreement | WT/REG112 |
| EC — Israel | 1-Jun-00 | 7-Nov-00 | GATT Art. XXIV | Free trade agreement | WT/REG110 |
| Israel - Mexico | 1-Jul-00 | 8-Mar-01 | GATT Art. XXIV | Free trade agreement | WT/REG124 |
| EC — Mexico | 1-Jul-00 | 1-Aug-00 | GATT Art. XXIV | Free trade agreement | WT/REG109 |
| EAC | 7-Jul-00 | 11-Oct-00 | Enabling Clause | Preferential arrangement | WT/COMTD/ N/14 WT/COMTD/ 25 |
| SADC | 1-Sep-00 | 9-Aug-04 | GATT Art. XXIV | Free trade agreement | WT/REG176 |
| Turkey — Former Yugoslav Republic of Macedonia | 1-Sep-00 | 22-Jan-01 | GATT Art. XXIV | Free trade agreement | WT/REG115 |
| Croatia - Bosnia and Herzegovina | 1-Jan-01 | 6-Oct-03 | GATT Art. XXIV | Free trade agreement | WT/REG159 |
| New Zealand - Singapore | 1-Jan-01 | 19-Sep-01 | GATT Art. XXIV | Free trade agreement | WT/REG127 |
| New Zealand - Singapore | 1-Jan-01 | 19-Sep-01 | GATS Art. V | Economic integration agreement | WT/REG127 S/C/N/169 |
| EFTA — Former Yugoslav Republic of Macedonia | 1-Jan-01 | 31-Jan-01 | GATT Art. XXIV | Free trade agreement | WT/REG117 |
| EC — Mexico | 1-Mar-01 | 21-Jun-02 | GATS Art. V | Economic integration agreement | WT/REG109 S/C/N/192 |
| El Salvador - Mexico | 15-Mar-01 | 30-May-06 | GATS Art. V | Economic integration agreement | WT/REG212 S/C/N/367 |
| El Salvador - Mexico | 15-Mar-01 | 30-May-06 | GATT Art. XXIV | Free trade agreement | WT/REG212 |
| EC — FYROM | 1-Jun-01 | 21-Nov-01 | GATT Art. XXIV | Free trade agreement | WT/REG129 |
| Romania - Israel | 1-Jul-01 | 25-Apr-05 | GATT Art. XXIV | Free trade agreement | WT/REG199 |
| EFTA - Mexico | 1-Jul-01 | 22-Aug-01 | GATT Art. XXIV | Free trade agreement | WT/REG126 |

| Agreement | Date of entry into force | Date of notification | Related provisions | Type of agreement | Document series |
|---|---|---|---|---|---|
| EFTA - Mexico | 1-Jul-01 | 22-Aug-01 | GATS Art. V | Economic integration agreement | WT/REG126 S/C/N/166 |
| India — Sri Lanka | 15-Dec-01 | 27-Jun-02 | Enabling Clause | Free trade agreement | WT/COMTD/ N/16 |
| United States Jordan | 17-Dec-01 | 18-Oct-02 | GATS Art. V | Economic integration agreement | WT/REG134 S/C/N/193 |
| United States Jordan | 17-Dec-01 | 5-Mar-02 | GATT Art. XXIV | Free trade agreement | WT/REG134 |
| Armenia - Kazakhstan | 25-Dec-01 | 27-Jul-04 | GATT Art. XXIV | Free trade agreement | WT/REG172 |
| Bangkok Agreement - Accession of China | 1-Jan-02 | 29-Jul-04 | Enabling Clause | Accession to Preferential arrangement | WT/COMTD/ N/19 |
| Bulgaria - Israel | 1-Jan-02 | 14-Apr-03 | GATT Art. XXIV | Free trade agreement | WT/REG150 |
| EFTA — Jordan | 1-Jan-02 | 22-Jan-02 | GATT Art. XXIV | Free trade agreement | WT/REG133 |
| EFTA — Croatia | 1-Jan-02 | 22-Jan-02 | GATT Art. XXIV | Free trade agreement | WT/REG132 |
| Chile — Costa Rica | 15-Feb-02 | 24-May-02 | GATS Art. V | Economic integration agreement | WT/REG136 S/C/N/191 |
| Chile — Costa Rica | 15-Feb-02 | 14-May-02 | GATT Art. XXIV | Free trade agreement | WT/REG136 |
| EC — Croatia | 1-Mar-02 | 20-Dec-02 | GATT Art. XXIV | Free trade agreement | WT/REG142 |
| EC — Jordan | 1-May-02 | 20-Dec-02 | GATT Art. XXIV | Free trade agreement | WT/REG141 |
| Chile - El Salvador | 1-Jun-02 | 16-Feb-04 | GATT Art. XXIV | Free trade agreement | WT/REG165 |
| Chile - El Salvador | 1-Jun-02 | 17-Mar-04 | GATS Art. V | Economic integration agreement | WT/REG165 S/C/N/299 |
| EFTA | 1-Jun-02 | 3-Dec-02 | GATS Art. V | Economic integration agreement | WT/REG154 S/C/N/207 |
| Albania - FYROM | 1-Jul-02 | 14-Dec-04 | GATT Art. XXIV | Free trade agreement | WT/REG182 |
| FYROM - Bosnia and Herzegovina | 15-Jul-02 | 11-May-05 | GATT Art. XXIV | Free trade agreement | WT/REG200 |
| Canada — Costa Rica | 1-Nov-02 | 17-Jan-03 | GATT Art. XXIV | Free trade agreement | WT/REG147 |
| Japan - Singapore | 30-Nov-02 | 14-Nov-02 | GATS Art. V | Economic integration agreement | WT/REG140 S/C/N/206 |
| Japan - Singapore | 30-Nov-02 | 14-Nov-02 | GATT Art. XXIV | Free trade agreement | WT/REG140 |
| EFTA - Singapore | 1-Jan-03 | 24-Jan-03 | GATS Art. V | Economic integration agreement | WT/REG148 S/C/N/226 |
| EFTA - Singapore | 1-Jan-03 | 24-Jan-03 | GATT Art. XXIV | Free trade agreement | WT/REG148 |
| EC - Chile | 1-Feb-03 | 18-Feb-04 | GATT Art. XXIV | Free trade agreement | WT/REG164 |
| CEFTA accession | 1-Mar-03 | 3-Mar-04 | GATT Art. XXIV | Accession to free trade | WT/REG11 |

| Agreement | Date of entry into force | Date of notification | Related provisions | Type of agreement | Document series |
|---|---|---|---|---|---|
| of Croatia | | | | agreement | |
| EC - Lebanon | 1-Mar-03 | 4-Jun-03 | GATT Art. XXIV | Free trade agreement | WT/REG153 |
| Panama - El Salvador | 11-Apr-03 | 5-Apr-05 | GATS Art. V | Economic integration agreement | WT/REG196 S/C/N/325 |
| Panama - El Salvador | 11-Apr-03 | 18-Mar-05 | GATT Art. XXIV | Free trade agreement | WT/REG196 |
| Croatia - Albania | 1-Jun-03 | 31-Mar-04 | GATT Art. XXIV | Free trade agreement | WT/REG166 |
| ASEAN - China | 1-Jul-03 | 21-Dec-04 | Enabling Clause | Preferential arrangement | WT/COMTD/ N/20 WT/COMTD/ 51 |
| Turkey - Bosnia and Herzegovina | 1-Jul-03 | 8-Sep-03 | GATT Art. XXIV | Free trade agreement | WT/REG157 |
| Turkey - Croatia | 1-Jul-03 | 8-Sep-03 | GATT Art. XXIV | Free trade agreement | WT/REG156 |
| Singapore - Australia | 28-Jul-03 | 1-Oct-03 | GATS Art. V | Economic integration agreement | WT/REG158 S/C/N/233 |
| Singapore - Australia | 28-Jul-03 | 1-Oct-03 | GATT Art. XXIV | Free trade agreement | WT/REG158 |
| Albania - Bulgaria | 1-Sep-03 | 31-Mar-04 | GATT Art. XXIV | Free trade agreement | WT/REG167 |
| Albania - UNMIK (Kosovo) | 1-Oct-03 | 8-Apr-04 | GATT Art. XXIV | Free trade agreement | WT/REG168 |
| Romania - Bosnia and Herzegovina | 24-Oct-03 | 14-Feb-05 | GATT Art. XXIV | Free trade agreement | WT/REG191 |
| Romania - FYROM | 1-Jan-04 | 14-Feb-05 | GATT Art. XXIV | Free trade agreement | WT/REG193 |
| Albania - Romania | 1-Jan-04 | 14-Dec-04 | GATT Art. XXIV | Free trade agreement | WT/REG180 |
| China - Macao, China | 1-Jan-04 | 12-Jan-04 | GATT Art. XXIV | Free trade agreement | WT/REG163 |
| China - Macao, China | 1-Jan-04 | 12-Jan-04 | GATS Art. V | Economic integration agreement | WT/REG163 S/C/N/265 |
| China - Hong Kong, China | 1-Jan-04 | 12-Jan-04 | GATT Art. XXIV | Free trade agreement | WT/REG162 |
| China - Hong Kong, China | 1-Jan-04 | 12-Jan-04 | GATS Art. V | Economic integration agreement | WT/REG162 S/C/N/264 |
| United States - Singapore | 1-Jan-04 | 19-Dec-03 | GATT Art. XXIV | Free trade agreement | WT/REG161 |
| United States - Singapore | 1-Jan-04 | 19-Dec-03 | GATS Art. V | Economic integration agreement | WT/REG161 S/C/N/263 |
| United States — Chile | 1-Jan-04 | 19-Dec-03 | GATT Art. XXIV | Free trade agreement | WT/REG160 |
| United States — Chile | 1-Jan-04 | 19-Dec-03 | GATS Art. V | Economic integration agreement | WT/REG160 S/C/N/262 |
| Republic of Korea - Chile | 1-Apr-04 | 19-Apr-04 | GATT Art. XXIV | Free trade agreement | WT/REG169 |
| Republic of Korea - Chile | 1-Apr-04 | 19-Apr-04 | GATS Art. V | Economic integration agreement | WT/REG169 S/C/N/302 |

| Agreement | Date of entry into force | Date of notification | Related provisions | Type of agreement | Document series |
|---|---|---|---|---|---|
| Moldova - Bosnia and Herzegovina | 1-May-04 | 28-Jan-05 | GATT Art. XXIV | Free trade agreement | WT/REG187 |
| EU Enlargement | 1-May-04 | 30-Apr-04 | GATT Art. XXIV | Accession to customs union | WT/REG170 |
| EU Enlargement | 1-May-04 | 28-Apr-04 | GATS Art. V | Accession to Economic integration agreement | WT/REG170 S/C/N/303 |
| Bulgaria - Serbia and Montenegro | 1-Jun-04 | 11-Mar-05 | GATT Art. XXIV | Free trade agreement | WT/REG195 |
| EC - Egypt | 1-Jun-04 | 4-Oct-04 | GATT Art. XXIV | Free trade agreement | WT/REG177 |
| Croatia - Serbia and Montenegro | 1-Jul-04 | 22-Sep-05 | GATT Art. XXIV | Free trade agreement | WT/REG205 |
| Romania - Serbia and Montenegro | 1-Jul-04 | 14-Feb-05 | GATT Art. XXIV | Free trade agreement | WT/REG192 |
| Moldova - Serbia and Montenegro | 1-Sep-04 | 28-Jan-05 | GATT Art. XXIV | Free trade agreement | WT/REG190 |
| Albania - Serbia Montenegro | 1-Sep-04 | 19-Oct-04 | GATT Art. XXIV | Free trade agreement | WT/REG178 |
| Moldova - Croatia | 1-Oct-04 | 31-Jan-05 | GATT Art. XXIV | Free trade agreement | WT/REG189 |
| Albania - Moldova | 1-Nov-04 | 20-Dec-04 | GATT Art. XXIV | Free trade agreement | WT/REG183 |
| Bulgaria - Bosnia and Herzegovina | 1-Dec-04 | 11-Mar-05 | GATT Art. XXIV | Free trade agreement | WT/REG194 |
| Moldova - FYROM | 1-Dec-04 | 31-Jan-05 | GATT Art. XXIV | Free trade agreement | WT/REG188 |
| Moldova - Bulgaria | 1-Dec-04 | 28-Jan-05 | GATT Art. XXIV | Free trade agreement | WT/REG186 |
| Albania - Bosnia and Herzegovina | 1-Dec-04 | 14-Dec-04 | GATT Art. XXIV | Free trade agreement | WT/REG181 |
| EFTA - Chile | 1-Dec-04 | 10-Dec-04 | GATT Art. XXIV | Free trade agreement | WT/REG179 |
| EFTA - Chile | 1-Dec-04 | 10-Dec-04 | GATS Art. V | Economic integration agreement | WT/REG179 S/C/N/309 |
| Thailand - Australia | 1-Jan-05 | 5-Jan-05 | GATT Art. XXIV | Free trade agreement | WT/REG185 |
| Thailand - Australia | 1-Jan-05 | 5-Jan-05 | GATS Art. V | Economic integration agreement | WT/REG185 S/C/N/311 |
| United States - Australia | 1-Jan-05 | 23-Dec-04 | GATT Art. XXIV | Free trade agreement | WT/REG184 |
| United States - Australia | 1-Jan-05 | 23-Dec-04 | GATS Art. V | Economic integration agreement | WT/REG184 S/C/N/310 |
| EC-Chile | 1-Mar-05 | 1-Nov-05 | GATS Art. V | Economic integration agreement | WT/REG164 S/C/N/360 |
| Japan - Mexico | 1-Apr-05 | 22-Apr-05 | GATT Art. XXIV | Free trade agreement | WT/REG198 |
| Japan - Mexico | 1-Apr-05 | 22-Apr-05 | GATS Art. V | Economic integration agreement | WT/REG198 S/C/N/328 |
| Turkey - Palestinian Authority | 1-Jun-05 | 15-Sep-05 | GATT Art. XXIV | Free trade agreement | WT/REG204 |
| EFTA - Tunisia | 1-Jun-05 | 7-Jun-05 | GATT Art. XXIV | Free trade agreement | WT/REG201 |

| Agreement | Date of entry into force | Date of notification | Related provisions | Type of agreement | Document series |
|---|---|---|---|---|---|
| Thailand - New Zealand | 1-Jul-05 | 2-Dec-05 | GATS Art. V | Economic integration agreement | WT/REG207 S/C/N/361 |
| Thailand - New Zealand | 1-Jul-05 | 2-Dec-05 | GATT Art. XXIV | Free trade agreement | WT/REG207 |
| Turkey - Tunisia | 1-Jul-05 | 15-Sep-05 | GATT Art. XXIV | Free trade agreement | WT/REG203 |
| Turkey - Morocco | 1-Jan-06 | 21-Feb-06 | GATT Art. XXIV | Free trade agreement | WT/REG209 |
| United States - Morocco | 1-Jan-06 | 16-Jan-06 | GATS Art. V | Economic integration agreement | WT/REG208 S/C/N/362 |
| United States - Morocco | 1-Jan-06 | 16-Jan-06 | GATT Art. XXIV | Free trade agreement | WT/REG208 |
| Dominican Republic-Central America-United States (CAFTA-DR) | 1-Mar-06 | 28-Mar-06 | GATS Art. V | Economic integration agreement | WT/REG211 S/C/N/365-6 |
| Dominican Republic-Central America-United States (CAFTA-DR) | 1-Mar-06 | 28-Mar-06 | GATT Art. XXIV | Free trade agreement | WT/REG211 |
| Republic of Korea - Singapore | 2-Mar-06 | 24-Feb-06 | GATS Art. V | Economic integration agreement | WT/REG210 S/C/N/363 |
| Republic of Korea - Singapore | 2-Mar-06 | 24-Feb-06 | GATT Art. XXIV | Free trade agreement | WT/REG210 |
| ECO | not available | 22-Jul-92 | Enabling Clause | Preferential arrangement | L/7047 |
| GCC | not available | 11-Oct-84 | Enabling Clause | Preferential arrangement | L/5676 |
| Trans-Pacific SEP | 28-May-06 | 18-May-07 | GATS Art. V | Economic integration agreement | WT/REG229 S/C/N/394 |
| Trans-Pacific SEP | 28-May-06 | 18-May-07 | GATT Art. XXIV | Free trade agreement | WT/REG229 |
| Japan-Malaysia | 13-Jul-06 | 12-Jul-06 | GATS Art. V | Economic integration agreement | WT/REG216 S/C/N/371 |
| Japan-Malaysia | 13-Jul-06 | 12-Jul-06 | GATT Art. XXIV | Free trade agreement | WT/REG216 |
| Panama-Singapore | 24-Jul-06 | 4-Apr-07 | GATS Art. V | Economic integration agreement | WT/REG227 S/C/N/392 |
| Panama-Singapore | 24-Jul-06 | 4-Apr-07 | GATT Art. XXIV | Free trade agreement | WT/REG227 |
| United States-Bahrain | 1-Aug-06 | 8-Sep-06 | GATS Art. V | Economic integration agreement | WT/REG219 S/C/N/375 |
| United States - Bahrain | 1-Aug-06 | 8-Sep-06 | GATT Art. XXIV | Free trade agreement | WT/REG219 |
| EFTA-Korea | 1-Sep-06 | 1-Sep-06 | GATS Art. V | Economic integration agreement | WT/REG217 S/C/N/373 |
| EFTA-Korea | 1-Sep-06 | 23-Aug-06 | GATT Art. XXIV | Free trade agreement | WT/REG217 |

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| Chile-China | 1-Oct-06 | 20-Jun-07 | GATT Art. XXIV | Free trade agreement | WT/REG230 |
| EC-Albania | 1-Dec-06 | 7-Mar-07 | GATT Art. XXIV | Free trade agreement | WT/REG226 |
| EC 27 | 1-Jan-07 | 26-Jun-07 | GATS Art. V | EIA Accession | WT/REG220 S/C/N/397 |
| Turkey-Syria | 1-Jan-07 | 15-Feb-07 | GATT Art. XXIV | Free trade agreement | WT/REG225 |
| EFTA-Lebanon | 1-Jan-07 | 22-Dec-06 | GATT Art. XXIV | Free trade agreement | WT/REG224 |
| EC 27 | 1-Jan-07 | 27-Sep-06 | GATT Art. XXIV | CU Accession | WT/REG220 |
| Egypt-Turkey | 1-Mar-07 | 5-Oct-07 | Enabling Clause | Free trade agreement | WT/COMTD/ N/23 |
| CEFTA Enlargement | 1-May-07 | 26-Jul-07 | GATT Art. XXIV | Free trade agreement | WT/REG233 |
| Pakistan - China | 1-Jul-07 | 18-Jan-08 | GATT Art. XXIV | Free trade agreement | WT/REG237 |
| EFTA-Egypt | 1-Aug-07 | 17-Jul-07 | GATT Art. XXIV | Free trade agreement | WT/REG232 |
| Chile-Japan | 3-Sep-07 | 24-Aug-07 | GATT Art. XXIV | Free trade agreement | WT/REG234 |
| Chile-Japan | 3-Sep-07 | 24-Aug-07 | GATS Art. V | Economic integration agreement | WT/REG234 S/C/N/398 |
| Japan-Thailand | 1-Nov-07 | 25-Oct-07 | GATT Art. XXIV | Free trade agreement | WT/REG235 |
| Japan-Thailand | 1-Nov-07 | 25-Oct-07 | GATS Art. V | Economic integration agreement | WT/REG235 S/C/N/419 |
| Pakistan - Malaysia | 1-Jan-08 | 19-Feb-08 | GATS Art. V | Economic integration agreement | S/C/N/440 |
| Pakistan - Malaysia | 1-Jan-08 | 19-Feb-08 | Enabling Clause | Free trade agreement | WT/COMTD/ N/24 |
| EC - Montenegro | 1-Jan-08 | 16-Jan-08 | GATT Art. XXIV | Free trade agreement | WT/REG236 |
| Chile - Panama | 7-Mar-08 | 17-Apr-08 | GATS Art. V | Economic integration agreement | S/C/N/443 |
| Chile - Panama | 7-Mar-08 | 17-Apr-08 | GATT Art. XXIV | Free trade agreement | WT/REG239 |
| Turkey - Albania | 1-May-08 | 9-May-08 | GATT Art. XXIV | Free trade agreement | WT/REG240 |
| ECOWAS | 1993 | 26-Sep-05 | Enabling Clause | Preferential arrangement | WT/COMTD/ N/21 WT/COMTD/ 54 |

Source: WTO, available at www.wto.org.