

Dispute Resolution: A Case Study of World Trade Organization

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ABSTRACT The aim of this paper is to study the dispute settlement procedure in GATT and WTO and the transition from GATT to WTO in historical perspective. The paper is based on secondary data and literature review. The paper consists of four units – first unit deals with introduction to conflict, second unit discusses free trade issues (development of GATT and WTO), third unit describes dispute resolution under WTO followed by the last unit – conclusion.

INTRODUCTION

The original GATT (General Agreement on Tariffs and Trade) was negotiated in 1947 and entered into force on January 1, 1948. GATT functioned both as a multilateral treaty that laid down a common code of conduct in international trade and trade relations and as a forum for negotiation and consultation to overcome trade problems and reduce trade barriers.

GATT held periodic meetings called “Rounds”, named after a person (such as Kennedy Round), or a nation (such as the Uruguay Round), that has a particular relationship and connection with meeting.

Some of the important meetings of GATT are - November 1979, the seventh Round, Known as Tokyo Round, which, concluded its negotiations with agreements covering an improved legal framework for conduct of world trade. Another important one is the one held on September 20, 1986, where an agreement was reached to launch the Uruguay Round of multilateral trade negotiations, which culminated in the 1994 WTO Agreement.

The World Trade Organization was established pursuant to the Final Act signed by 124 countries at a meeting in Morocco on April 15, 1994. The WTO replaced GATT on January 1, 1995.

One of the objectives of revamping GATT to form WTO was not only to refurbish its legal framework, but also to overhaul the dispute

I DISPUTE/CONFLICT

The Concise Oxford Dictionary defines ‘Dispute’ - as controversy, quarrel, disagreement between management and employees - leading to industrial strike - strife. Strife is synonym with conflict. Hence in this paper the terms Dispute, Conflict are used interchangeably. Conflict can also be defined as a struggle over values, status, power and resources in which the aims of the opponents are to neutralize, injure or eliminate rivals (Coser, 1972,8).

However, authors like Folberg and Taylor (1988) do find a distinction between conflict and dispute - according to them, the term conflict - is often intra-personal and is known to individuals only. Dispute, on the other hand, is interpersonal and is communicated or manifested.

Conflict results from competition - competition between different desires within a human being or between at least two parties. A party may be a person, a family, a lineage, or a whole community; or it may be a class of ideas, a political organization, a tribe or a religion. Conflict is occasioned by incompatible desires or aims and by its duration may be distinguished from strife or angry disputes arising from momentary aggravation. Depending upon the context, conflict may be valuable, useful or destructive. Conflict can be changed to benefit individuals, communities and/or societies.

The same idea can be expressed in other words: Conflicts take place within an individual, between individuals, between individuals and organizations or groups, between an organization and one or more of its components, or between component parts of a single organization or group. A conflict arises within a human being whenever the person has to choose between two different goals or desires. The conflict

also emerges whenever two or more persons (or groups) seek to possess the same object, occupy the same space or the same exclusive position, play incompatible roles, maintain incompatible goals, or undertake mutually incompatible means for achieving their purpose.

FUNCTION OF CONFLICT

The reason of most of the conflicts appears to be the control of territory. In other cases, maintenance of well-organized dominance hierarchies serves to reduce the amount of fighting in a group – but disrespect for hierarchy leads to conflict. For example, in monkeys, there is a set hierarchy and any challenge to the authority leads to conflicts. One kind of behavior that appears to be limited to primates is the use of objects in agonistic display. This use of objects has not been observed in other animal orders.

Realistic conflict arises when men clash in the pursuit of claims and expectation of gain. It was observed in a study, that this conflict is a means toward the achievement of specific goal. On the other hand, nonrealistic conflict, arises from aggressive impulses that seek expression no matter what the object, allows no functional alternative of means, since it is not aimed at the attainment of concrete result but at the expression of aggressive impulses. This is also known as the irrational view of conflict and is based on biological explanation of behavior – both human and animal. This perspective can best be explained by defining conflict as aggression (Lorenz, 1966).

Group Conflict as a cause of social change may result in conflict, competition or co-operation. Group conflict has often been viewed as a base mechanism of social change especially of those of radical and sudden social transformations identified as revolutions. Marxists in particular tend to deflect social life in capitalist society as a struggle between ruling class, which wishes to maintain the system, and dominated class striving the radical change; social change then is the result of struggle. These ideas are basic to what Dahrendorf has called a conflict model of a society.

The notion of conflict becomes relevant for the explanation of the social change if it is broadened to include competition between rival groups as well. Nations, firms, universities,

sports associations, and artistic schools are some of the groups between which rivalry occurs. Competition stimulates the introduction and diffusion of innovations, especially when they are potentially power enhancing. Thus, the leaders of non-Western states feel the necessity of adopting Western science and technology, even though their ideology may be anti-Western, because it is only by these means that they can maintain or enhance national autonomy and power.

Additionally, competition may lead to the growing size and complexity of the entities involved. The classic example of this process, analyzed by Marx, is the tendency in capitalism for monopolies to form, as small firms are driven out of competition by large ones. Marx's analysis has been applied to another area by Norbert Elias, who explained the formation of Nation states in Western Europe as the result of competitive struggles between feudal lords.

Competition is also put forward in individualistic theories, which conceive social change the results of the actions of individuals pursuing their self-interest. With the help of game theory and other mathematical devices it has been shown that individuals acting on the basis of self-interest will co-operate, given certain conditions, in widening social networks.

ASPECTS OF CONFLICT

It is clear from the foregoing discussion that the conflict may occur at different levels like psychological, societal and political level. It will become evident from our further discussions that even though, different levels are described for the sake of this discussion – in fact all these levels overlap each other.

Psychological

Conflict refers to a situation in which a person is motivated to engage in two or more mutually exclusive activities. If the person wants to be in two different places at the same time or to perform two mutually exclusive functions at the same time, it leads to an internal conflict. Under such circumstances, individual has to cope with the conflict oneself (herself or himself). Psychoanalytical school of thought deals with these types of conflicts. Psychoanalytic theory has provided a workable preliminary framework

for much personality research involving motivation and development.

The first important use of concept of the psychological conflict was by Joseph Breuer and Sigmund Freud in their work on hysterical neuroses. Freud placed a great deal of emphasis on a conflict between sexual and self-preservative instincts. Later he phrased this conflict between libidinal wishes and ego anxiety. Freud suggested that opposite instincts exist side by side in the unconscious, with no disharmony. Conflict occurs only when the overt, verbal, symbolic, or emotional responses required to fulfill one motive are incompatible with those required fulfilling another.

Freud's psychoanalytical concepts have had a profound influence on personality theory in the 20th century. He turned scientific attention from mere descriptions of personality types to an interest in how people become what they are. But there were other contemporaries of Freud like Adler and Jung who had different perspective. Much of the controversy in psychoanalytic theory has centered on the motives that enter into neurotic conflict. Alfred Adler disagreed with Freud that sexual conflicts in early childhood cause mental illness and leads to conflict. According to Adler man's opinion of self and the world influences all his psychological process. Because all important life problems are social, an individual must be considered in social context. His socialization is achieved through the development of innate social instinct. Thus mental health is characterized by reason, social interest, and self-transcendence; mental disorder by feelings of inferiority and self-centered concerns over one's safety. The type of conflict – if it is personal or with organization or with society - will depend on the social position and acceptance in society.

The third famous psychoanalyst Carl Jung emphasized unconscious motives as the main trait for personality and reasons for conflict. He separated himself from Freud's emphasis on sexuality, however, and formulated a typical theory that distinguished people according to whether they were extrovert or introvert. Jung also posited a storehouse of inherited racial memories called the 'collective unconsciousness'. According to Jung conflicts resulted because of different personality traits inherited through 'collective unconsciousness', while for Freud it is sexual related and Adler it is the social

setting, which causes conflicts.

Many contemporary psychoanalysts emphasize conflict involving achievement, affiliation, and dependency motives. Culturally oriented psychoanalytical theorists, such as Karen Horney, Erich Fromm, and Henry Stack Sullivan, have seriously challenged the Freudian concept of conflict between biological instincts and socially derived inhibitions.

Kurt Lewin made a comprehensive analysis of personality in terms of field theory. The behavior of the individual was seen as determined by field of psychological forces. These forces were dependent, in part on the positive and negative valences attached to various goals in the situation. Lewin distinguished between three types of conflict:

1. Where a Person is Between Two Goals of Positive Valence - Approach - Approach

A person may have desire to be an excellent sales-person, but is shy and cannot speak to prospective clients. The person cannot really sell without convincing his prospect about the advantages of buying the goods being offered. Although he wants to sell, he has a motive to avoid selling - he is distressed. He is in a dilemma, whether he talks to sell - approach a stranger and experience distress or keep quite. Psychologically, a conflict exists when the reduction of one motivating stimulus involves an increase in another, so that a new adjustment is demanded

2. Where a person faces a goal with both positive and negative valence - approach - avoidance

Repression involves inhibition of thoughts, feelings, and behavior and may be viewed as the result of an approach-avoidance conflict. Besides this approach-avoidance conflicts are not equally severe – not as severe as the next type – avoidance, avoidance type.

3. Where a person is between two goals of negative connotation - avoidance - avoidance.

A conflict between two dangers or threats (avoidance-avoidance conflict) is usually more disturbing than the other types – as explained

below. A man may dislike his job intensely but fears unemployment if he quits. A conflict between a need, a fear may also be intense. For example, a child is dependent on mother but fears her, because she is rejecting and punitive. The conflicts that involve intense threat or fear are not solved readily but make the person feel helpless and anxious. Subsequent adjustments may then be directed more to the relief of anxiety than to the solutions of real problems.

Conflicts are often unconscious, in the sense that the person cannot clearly identify the sources of his distress. Many strong impulses - such as fear and hostility - are much disapproved by the culture that a child soon learns not to acknowledge them, even to himself. When such impulses are involved in a conflict, the person is anxious but does not know why. S/he is then not able to bring rational thinking to bear on the problem.

In the individual human being the distinction between the inner conflict and outer, or social, conflict seems relatively clear: the former involves a confrontation by the individual of a difficult choice between incompatible values, whereas the latter is concerned with an incompatibility between that individual and another individual or group.

Social

Personality development may be viewed as a series of conflict resolutions. The most adaptive method of conflict resolution is sublimation, by which the libidinal urge is discharged in socially useful activities, such as science, art, and work.

The individual in society is subject to pressures of the many groups to which s/he belongs and the demands of the many roles s/he must play, and often experiences personal conflict. The entire process of the socialization of the child has been viewed as a conflict between the individual and society.

The type of conflict discussed above - essentially social conflict - should be distinguished from the inner conflict or quandary that emerges when incompatible or mutually exclusive values present them in the form of an actual or potential choice or decision. Thus an individual finds himself unable to make a decision because he is being pushed or pulled in opposite directions.

Social conflict may be defined as a struggle

over values or claims to status power, and scarce resources, in which the aims of the conflicting parties are not only to gain the desired values but also to neutralize, injure, or eliminate rivals.

Conflict is an important element of social interaction. Far from being always a "negative" factor that "tears apart", social conflict may contribute to many ways to the maintenance of groups and collectivities as well as to the cementing of interpersonal relations.

Whenever two or more individuals or groups come into contact with each other, they may choose to make their relationship primarily conflictual or primarily integrative (i.e. cooperative, supportive, agreed upon). If, on the other hand, the initial relationship is primarily integrative, it is certain that conflict will develop - if for no other reason than through the demands of the association itself as they compete with preferences of individuals and component groups.

Sumner's dictum that the distinction between the in-group (ourselves) and the out-group (everybody else) is established in, and through, conflict has found general acceptance.

In homogenous societies, in which individuals participate in only small numbers of social circles, this distinction is likely to be so encompassing that it allows only minimal relations between the members of all but a few social circles. This may or may not lead to direct conflict, but creates mistrust, because of lack of communications. This may eventually lead to some sort of confrontation or conflict.

However, in heterogeneous societies, that is, in societies in which individuals are likely to participate in a great number of social circles in which there will be high degree of overlapping memberships in a variety of associations and groupings, this sense of exclusiveness will be successfully minimized.

In modern industrial society, where services abound, where government and business intersect in countless ways, the nature of conflicting interests is most complex.

Political

In circumstances where both actors are unconditionally sovereign and do not want to solve the conflict through destructive means (war), or where it does not pay the dominant party to extinguish the weaker one - then they

try to resolve conflict through other means - the best alternative is to secure conditional viability - also known as “protracted conflict”. Here the problem is how to control the conflict, i.e., how to maintain limits, rather than to resolve it.

The question is, how do they handle their conflicts - by unconfined violence and destruction and without institutional restraint, or by some regulated means within an agreed-upon framework?

State A and State B, each seeking possession of an island, may be in a conflict. To resolve the issue one state may withdraw its claim; or the two states may divide the island by mutual agreement; or they both may decide to fight it out. If state A withdraws without consultation or communication with state B, the conflict has been eliminated, but there is no integration - no agreement between the two parties.

If both sides agree to fight, the two states are still in conflict over the means of resolution. Thus the conflict continues, but an element of integration has emerged to the extent that the parties have agreed upon the method of deciding the issue. If both sides tire of combat, they agree upon an equal-sided armistice for achieving resolution by nonviolent means.

The distinction between conflicts that exceed the limits imposed by societal consensus and those taking place within basic consensus has informed political thought ever since Aristotle. Conflicts that do not attack the basic consensus and are in effect waged upon the very ground of consensus are likely to lead to adjustments between the various parties and hence to contribute to a closer integration of the society.

Essentially, the cold war was such a conflict - it vacillated between a plateau of minimal day-to-day conflict and occasional peaks where the hostile interchange stopped short of large-scale violence.

CONFLICT RESOLUTION

If a conflict cannot be avoided an alternative dispute resolution method can be used - i.e. a third party can be used to achieve settlement either by compromise, mediation, arbitration, or adjudication. Certain institutionalized forms of resolution, such as councils, courts, go-betweens, or “crossers” perform these functions.

Alternate Dispute Resolution

Social-psychological research indicates that direct interaction between conflicting parties leads to changes in attitudes and perceptions that facilitate change and empathy. In this view, psychological factors interact with political ones and the two should be integrated into any comprehensive theory of conflict and its resolution. Consequently, Deutsch (1990) argues that a constructive process of conflict resolution must incorporate elements of a co-operative process. These elements may include good communication, trust, perception of similar beliefs and values, and acceptance of each other's legitimacy (Deutsch, 1978; Pruitt and Rubin, 1986).

According to Ury (1989), Burton (1990), and others, a popular subset of dispute resolution methods (DRMs) includes negotiation, mediation and to some extent arbitration. Collectively known as *alternative dispute resolution* (ADR) techniques, they incorporate co-operative processes to resolve conflict situations. For example, trust and good communication are strongly associated with negotiation and mediation but become less important with arbitration (Ury, 1989). In other words, where co-operation is a significant element in dispute resolution, as it is with negotiation and mediation, trust and good communication will be important. However, co-operation, and thus trust and good communication, is comparatively less important where people have little input in a settlement and outcomes are decided by a neutral third party (e.g., litigation, binding arbitration). Alternative dispute resolution (ADR) provides a way of resolving disputes in a consensual manner as an alternative to the traditional court system (litigation). Unlike litigation ADR includes a number of individual techniques that have both different and shared characteristics. Collectively ADR techniques are viewed as problem solving approaches that can encourage face-to-face interaction between interested parties, allow parties to seek consensus. It is a voluntary process and may improve prospects for long-term relationships (Ury, 1989). Where ADR techniques differ is in the scale of intervention that neutral third parties bring to the problem solving process. For example, mediation involves third parties to facilitate communication but mediators do not actively

participate in the substantive aspects of the dispute. At the other extreme, binding arbitration utilizes the third party as a judge to decide on the outcome. Binding arbitration is seen by many ADR practitioners as belonging more to litigation than to ADR since the parties have almost no control over the outcome (Acland, 1995). The following discussion lists different methods, which are used for dispute resolution with the associated strengths and weaknesses (de Loe and Kreutzwlser, 1998):

Negotiation: Processes whereby two or more parties attempt to settle what each shall give and take, or perform and receive in a transaction between them.

Pros

- Promotes co-operation
- Cost efficient
- Promotes open process

Cons

- Some parties may lack negotiating skills
- Power balance is not assured

Mediation: An impartial third party attempts to keep communication lines open, point out areas of agreement, encourage and assist disputants to resolve their differences using compromise and negotiation.

Pros

- Encourages participation
- High degree of participant control
- Helps create alternative options

Cons

- Process can be expensive
- Participants may lack skills

Arbitration: A process similar to litigation but the decision of the impartial third party may or may not be binding depending on the prior wishes of the disputants.

Pros

- Results in conclusive decisions
- Supported by established law and legislation

Cons

- Win/lose outcome possible
- Adversarial
- Can be lengthy process

Litigation: Involves courts and a neutral third party who decides the outcome based on law.

Pros

- Conclusive decisions
- Supported by law

Cons

- Costly
- Win/lose outcomes common

ADR techniques and their application have been characterized as leading to quality decisions. In that they help the parties arrive at decisions, which are favorable, efficient, durable, take community interests into account, and do not significantly damage relationships between disputing parties (Fisher and Ury, 1981).

ADR is not a replacement for other dispute resolution mechanisms, such as the courts or struggle, but rather is seen as a supplement to these processes. For example, Ury (1989) argued that interests, rights and power are three fundamental elements in any dispute and that disputes are resolved by reconciling interests of all parties, by determining who is right and by determining who is more powerful. Problem solving processes, such as negotiation and mediation, are examples of interests-based approaches; going to court is an example of a rights-based approach and strike or struggle are examples of power approaches. However, interest approaches are considered more rewarding than rights approaches, which in turn are more rewarding to disputants than power approaches. Ury (1989) advocate the use of interest-based approaches whenever possible, along with low cost rights procedures, such as non-binding arbitration, but also low cost power-centered processes, such as voting. ADR techniques may not be appropriate where power disparities between parties are large, or where rights-based approaches such as the courts are more appropriate (Ury, 1989).

Arbitration

Essentially, there are a lot of variations of a basic model of arbitration where parties submit their competing claims to an Independent, non-governmental tribunal and agree by contract to be bound to the tribunal's decision. Many former judges, some retired and having left the judiciary, fill positions in these various bodies. There are differences from model to model but they share many common elements.

The origins of the phenomenon of third-party intervention in order to end disputes and prevent wars between other states lie far in ancient history. The ancient Near East provides an example of arbitration from Bronze Age, the delineation of the border between Umma and Lagash by Mesalim, king of Kish. Perhaps the roots of Greek international arbitration should be traced back to its oriental predecessors, but by classical period the Greeks had made arbitration an integral part of their own diplomatic life, in part because the Greek political system was more amenable to the use of arbitration than was the "superpower" system of the Near East. By the fifth century B.C. the Greek poleis were already attaching arbitration clauses to their treaties, clauses that tried to provide for the pacific settlement of future disputes. Instead of using the time-honored method of warfare, some Greeks were apparently trying to settle their differences through diplomacy and negotiations.

Since the terminology of dispute resolution and related processes have substantially changed in meaning over the years, it is essential to identify these developments and current usage. Arbitration is of the ancient origin – in this the contending parties agree voluntarily to submit a dispute to a neutral party for decision and agree to comply with the decision. Forms of arbitration arose in early trading civilizations and found their way from nomenclature of Roman period of commerce to England. This strand of development led to maritime and commercial arbitration.

Arbitration can be seen as strictly defined legal process: both disputants are to submit legal arguments and then accept the natural binding judgement of a disinterested third party. Adhered to rigidly, arbitration leaves no room for mediation and compromise. But it is clear,

particularly in international relations, that the best interests of all concerned are frequently better served by mediation rather than by strict legal procedure of arbitration. The Greeks recognized that it was much better to achieve settlement through agreement, if at all possible, than through litigation. The modern bodies like the International Court of Justice, whose mandate includes the equitable settlement of disputes, recognize mediation - even though such a settlement may not be in conformity with the legal rights and duties of the parties.

Arbitration then, cannot always be separated from the related phenomenon of mediation and voluntary compromise.

Although everyone talks about conflict avoidance, yet conflict is inherent in the trading set: each party is likely to seek a maximum advantage of the other party. A satisfactory trade can be achieved only if both parties tacitly or otherwise, agree to accept something less than an absolute win and to observe certain rules and limitations.

Using the foregoing analysis as a guide, the purpose of this paper is to make a critical examination of the WTO Dispute Settlement Understanding as a mechanism for conflict avoidance. The policy of 'free trade' underpins the organization and to put examination of the WTO into perspective, the next section of this chapter will discuss the concept of free trade in a historical context. Key areas where conflict arose and the way in which it was resolved up until World War II are identified. The structures, which were set up after WWII to provide a framework for conduct of international trade, monetary policy and development are pinpointed. This is followed by a brief examination of the negotiations of conflict avoidance measures in the ITO followed by a critical analysis of the GATT substantive dispute settlement provisions (taken from the ITO Charter) by reference to cases, and the GATT procedures. This is followed by a similar examination of the WTO dispute avoidance mechanism. Finally, attention is drawn to the potential conflict between sovereign states and multinationals, which has been most recently highlighted by the rejection of the draft Multilateral Investment Agreement MIA negotiated in the OECD.

II FREE TRADE IN HISTORICAL PERSPECTIVE

Trade is the bloodline of any nation - greater the flow of trade, greater is the prosperity of its citizens. The same is true for International trade also - greater flow of international trade may result in prosperity of all the nations. Prosperity is attributable to the notion that interregional trade effectively expands the size of market, permits a more refined division of labor, and yields material economic benefits (Irwin, 1996: 14). If we consider this doctrine along with the earlier Greek and Roman doctrines, the economic gains arising from trade clearly appear to be appreciated at an early stage in Greco-Roman civilization (Winham, 1992: 17). As a matter of fact, trading was not only the source of revenue, but also power for many cities/countries like Athens, Ptolemaic Egypt, the Italian city-states of Venice, Florence, Genoa and the German Hanseatic cities like Hamburg, Bremen, Luebeck and others (Winham, 1992: 6). Trade played an important non-economic role in the life of the ancient Greeks - established value and custom in inter-group relations relative to other countries. Trade also led to concentration of population in cities especially the port cities (Winham, 1992: 8).

In addition to the above mentioned city-states which were interested in trade, there were a few great powers like Persia, Rome, France which were relatively indifferent to trade, because of their strong agriculture base (Winham, 1992: 5). Trade did not play an important role during the Old Avestan period, because the economy was based primarily on the herding of livestock and the people were mainly pastoralists (Daniel, 2001: 29) - maybe replica of our primitive rural of certain modern African countries.

However, some nations whose nationals do not profit from such free flow tend to create protection¹ and hinder the free flow of trade. At times the free flow is hindered to benefit certain sections of the society² who wield greater influence or clout (Irwin, 1996, 17). For example, imports of large quantities of cotton calicoes - exported by East India Company in mid-1690s - adversely affected domestic production in U.K. of cotton goods. This activity of the East India Company led to debate and furor whether there should be "free trade" by allowing imports of

these manufactured goods to continue unimpeded (Irwin, 1996: 53). No one in U.K. liked it, because such trade affected his or her livelihood. This argument is as valid today, as it was a few centuries ago and will be demonstrated with a few examples in further discussions. Essence of anti-import position is and was that cheap imports reduce domestic output and thus reduced domestic employment. So under pressing circumstances a tariff could raise the price of competing imports and allow domestic firms to sell more in home market, thereby preventing a decline in employment in that manufacturing industry (Irwin, 1996: 78). One of arguments against free trade is that the new industries cannot compete successfully against established foreign rivals and that government assistance is required to help them overcome certain start-up obstacles and grow to maturity. The appealing and intuitive metaphor of an "infant" lured most eighteenth century economic writers into accepting the case for infant industry protection without much serious questioning (Irwin, 1996: 117).

About two hundred years ago, largely as a result of Adam Smith's *Wealth of Nations*, free trade achieved an intellectual status unrivaled by any other doctrine in the field of economics (Irwin, 1996: 117). Despite being subjected to intense scrutiny over the two centuries since that time, free trade occupied such a commanding position in economics during the past couple of centuries and has maintained its intellectual strength as a doctrine despite the numerous arguments that have arisen against it (Irwin, 1996: 3). Looking over the history of past 200 years or so - in 1846, the repeal of the Corn Laws³, led to spread of free trade to the Continent mainly because of Cobden-Chevalier Treaty⁴ of 1860. This in turn resulted in a series of trade-liberalizing agreements between various European nations and all the European countries benefited from increased trade. However, free trade did not last more than a decade when the comparative advantage shifted to New World, one country after another raised their tariff - starting with Austria-Hungary in 1876, followed by Italy and Germany (Winham, 1992: 25).

Depression and war had turned Germany and France resolutely protectionist by 1870 and these countries continued such policy into the next century (Winham, 1992: 18) resulting in economic despair. Worldwide economic

downturn deepened as an aftermath of the First World War and consequent drop in agricultural production in the late 1920s compounded not only suffering, but also misery (Winham, 1992: 19).

Tariffs⁵ all over the world were at high level. However, the position worsened with the passage of Smoot-Hawley Tariff Act⁶ in 1930. This was matched by a general increase in protection by the majority of its trade partners. It may be added that the United Kingdom⁷ also abandoned free trade in 1930 and introduced into its trade policy that of "imperial preferences" which its colonies had independently already adopted. Thus policy was recorded in bilateral agreements between members of the British Commonwealth⁸. However, global tariff increases hurt everyone else in the system also and resulted in trade wars (Conybeare, 1987: 234).

Trade wars (viz., economic means used for economic ends) are not completely apolitical - most trade wars are political in a much broader sense of the term, insofar as they may involve attempts to exert influence over the behavior of others (Conybeare, 1987: 3). International interactions (i.e. domestic introduction of a protective tariff) between states are the immediate or proximate mechanism of trade wars, and so cannot be ignored (Conybeare, 1987: 11).

Repercussions of these trade wars led to a change in policy by the U.S., in the form of the Reciprocal Trade Agreement Act (RTAA)⁹ in March 1934 - authorizing the president to negotiate tariff reductions on an MFN (Most-Favored-Nations¹⁰) basis with foreign states (Conybeare, 1987: 250). Cordell Hull - Secretary of State - pursued the goal of international trade negotiations in the belief that it would speed both U.S. and world recovery, and would also be conducive to world peace (Conybeare, 1987: 251).

RTAA included an escape clause, which allowed the United States to withdraw concessions in the event of serious injury to U.S. producers/manufactures, large exchange rate movements or shifts in the pattern of trade in such a fashion that third countries might obtain "free" and un-reciprocated tariff concessions in the United States (Conybeare, 1987: 252). The results of this tactic show through clearly in the aggregate effects of the RTAA negotiations. The concessions received by the US between 1934 and 1947 were heavily skewed toward U.S.

producers/ manufactures¹¹ - the advantage which British manufacturers sought by repealing the Corn Law (as stated above).

This makes one wonder about the benefits of RTAA to any other nation than United States. RTAA (supposed to be the brain child of Hull) became the core methodology of American foreign economic policy. The year after World War II, RTAA demonstrated that the U.S. regarded the defense of its liberal trade system as central to its conduct of foreign policy and the stem of that policy's ideology. Yet the implementation of the RTAA, at least until after World War II, was much more consistent with the hegemonic predator thesis (Conybeare, 1987: 251)¹².

That raises the next logical question about the discrepancy in the intentions of the policy maker and the de facto implementation of the policy - a hallmark of the U.S. policy¹³. There is no doubt about the intentions of Secretary Cordell Hull- if one goes by, 'War and Peace Aims of the United Nations: September 1, 1939 - December 31, 1942' edited by Louise W. Holborn and Hajo Holborn. The book is full of quotes from speeches of Hull as well as Roosevelt expressing their desire to propagate world peace through free trade. In one of his speeches, Hull (Hull, 1937. 8) states:

"I was deeply moved when I was informed that the Directors of the Woodrow Wilson Foundation had decided to confer upon me the Foundation's medal and to cite my efforts to bring about a lowering of international economic barriers as the reason for awardIt evokes in me many memories of the long years during which the problem of improvement in the economic relations among the nations has been the absorbing interest to me.

Among these memories, none is more vivid than that of the eighth day of January, 1918, on which the ideal of economic peace among the nations received the formal championship of one of the greatest statesmen our country has ever produced. It was on that day that Woodrow Wilson laid before the world his historic program, Point 3 of which called for "removal, so far as possible, all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance."

Such a view was held not only in States, but

was also held by the officials in the leading capitals. Postwar commercial policy had to address and, if possible, eradicate the twin scourge of depression and war. Many of the officials, in the leading capitals of the world and responsible for developing postwar commercial policy, were old enough to have vivid memories of the 1914 - 1918 war, and all of them lived through the dislocation and anxieties of depression. They had analyzed the policy responses to these defining events and concluded that beggar-thy-neighbor policies adopted almost universally had deepened the depression and paved the road to another world war. They were determined to be better prepared to deal with peace once the war was over and avoid like pest the twin scourge of war and depression in future (Hart, 1998: 9). Probably, this is a reflection on our discussion in chapter 1, that conflict avoidance should get the priority in new policies to avoid wars between nations. Pettigrew, the Canadian Minister of Foreign Trade, expresses similar sentiment. He writes, 'these international economic, financial, and trade organizations have been the engine of the internationalization that the winners of the war desired. They were convinced that countries that were more interdependent would be better able to avoid war, which had done so much harm in Europe over the previous century. The European Economic Community was soon born out of the same inspiration, the same desire. The primary objective of economic interdependence was thus political: to prevent wars among nations. Canada was, from the start, among the creators of these new institutions, for it saw them as a way to promote both its national interests and its political values in favor of peace.' (Pettigrew, 1999: 108)

INSTITUTIONS/REGIMES

In discussions so far the importance of different institutions have been highlighted. The following paragraphs detail the development of various institutions in historical perspective.

Bretton Woods

During the war advisers in the United States and the United Kingdom had worked to achieve the objectives of avoiding future depression and wars. To achieve these goals an international

conference at Bretton Woods in 1944 focused on monetary policy to take the form of an international monetary fund and, of lesser interest to participants at that time, on creating an international bank. The conference of 44 governments had been preceded by lengthy discussions between bankers, traders, economists and government officials. The final proposal for an international monetary fund was based upon one put forward by the United States but drew on ideas of French, Canadian, British and other experts. Cunliffe explains very well the underlying national interest perceptions of the negotiators and other interests, which could have flared into conflict and thus prevented international monetary collaboration. The problem was to permit as free multilateral trade as possible without stripping the West European countries and others whose balance of payments were strained, of safeguards against cyclical pressure on those balances. He makes the point that the controversy was often couched in theoretical terms, which in fact thinly covered whatever the advocate conceived to be national interest. On his analysis it was "counsels of compromise" in the international long-term interest on both sides of the Atlantic, which prevailed over more vocal extreme opinions. This produced an agreement for a monetary fund in which key concerns of both sides were recognized. As in the case of many negotiated solutions where the participants set widely different goals, the outcome was not completely satisfactory to any government. What was agreed was that exchange controls, which protected scarce foreign reserves, could be maintained but each country would move toward their abolition. This was accompanied by a set of principles for future monetary cooperation buttressed by a mechanism to facilitate this.¹⁴ The International Bank for Reconstructions and Development¹⁵

The World Bank is also known as the International Bank for Reconstruction and Development (IBRD) was created in 1946. The International Finance Corporation (IFC) was added to the World Bank Group in 1956 followed by the International Development Association (IDA) in 1962. The IDA promoted the internationalization of finance by providing funds to qualifying nations at comparatively lenient loan requirements for poor countries at no more than 0.75 percent with a grace period of ten years and

are normally due

in fifty years. (www.ifc.org) Whereas, the above-mentioned institutions lend money to governments, the mission of IFC is to promote sustainable private sector investment in developing countries, which will reduce poverty and improve people's lives.

As established in 1945 was perhaps less ambitious, mainly due to the inability of most countries to commit to an international bank which involved them in large capital exports. The bulk of the capital remained uncalled as a guarantee fund. Here too compromise and conflict between the participating governments is to be found; compromise is reflected by the changes to the United States draft to reflect the reluctance of Western European States to commit large amounts of capital and conflict over the nationality and type of expertise of the administration. This last battle was won by the United States with key positions being filled from American banking circles. At that point the Bank began to function.

It must be appreciated that as established the Bank was not an agency to provide aid. It could entertain applications only after it was satisfied that the borrower was not able to obtain funding through the private banking system. It was a cautious pragmatic body keeping in close touch with banking and investment channels. Its first loan to France in 1947 reflected this stance. The loan was granted for specific projects and only after Bank officials and consulting engineers had investigated both the projects and the economic situation in France. The loan granted was half that sought. For the purposes of this paper it is worth noting that some emphasis was made of the need to negotiate on an informal basis (by conversations rather than official requests), in order that any loan might be worked out cooperatively.¹⁶

Separately from the efforts by policy makers to establish these international institutions, private aid agencies and the United States, sponsored the United Nations Relief and Rehabilitation Administration (UNRA), which provided transitional relief in response to appeals for food and medicine by the stricken people in war zones in Western Europe. This was effectively replaced in 1948 by a program of European recovery financed essentially by the United States and administered by the Organization for European Co-operation and the

Economic Cooperation Administration (an Agency of the United States Government). This is often referred to as The Marshall Plan.¹⁷

International Trade Organization (ITO)

In 1946 the United States government, which had provided assistance to its allies under the Lend Lease program made further loans to the United Kingdom and France. Throughout this period the Western European nations were managing extremely tight monetary reserves and maintained the protective tariff regimes, which had been in place before WWII. This was counter to the United States objective of restoring competitive world markets, which involved abandonment of exchange controls, and all forms of discriminatory trade regulation.

By 1946, the United States had drawn up a proposed Charter for International Trade, which was presented to the UN in September of that year, known as the *Suggested Charter for an International Trade Organization of the United Nations* (Havana Charter) or, in abbreviated form, *Suggested Charter*. It contained an embryonic version of Article XXIV of the GATT, dealing with customs unions and free trade areas (Tovias, 1997: 19).

The original intention was to create a third institution handling international economic cooperation, to join the "Bretton Woods" institutions now known as the World Bank and the International Monetary Fund. The complete plan, as envisaged by over 50 countries, was to create an International Trade Organization (ITO) as a specialized agency of the United Nations. The draft ITO Charter was ambitious. It extended beyond world trade disciplines, to include rules on employment, commodity agreements, restrictive business practices, international investment, and services. Appendix 'A' gives the purpose of ITO.

Although the ITO Charter was finally agreed at a UN Conference on Trade and Employment in Havana, yet in some countries ratification proved impossible. The most serious opposition was in the US Congress, even though the US government had been one of the driving forces behind it. In 1950, the United States government announced that it would not seek Congressional ratification of the Havana Charter, and the ITO was effectively dead (Brown, 1950).

Trade issues are rarely discussed in isolation

from other policy issues. The conference that led to the adoption of the Havana Charter for an International Trade Organization was the United Nations Conference on Trade and Employment. The Charter assigned to the stillborn Organization the task of resolving the most pressing problems of the late 1940s. It was to work towards full employment and the removal of balance of payments disequilibria of its members, take action against inflationary or deflationary pressures, and promote fair labor standards. Its members would have committed to cooperating in the fields of economic development and reconstruction. And the Organization was to be forum for negotiating agreements on technology transfer, foreign investment, double taxation, and restrictive business practices, as well as commodity agreements (Roesler, 2000: 107).

An insight into what “went wrong” is gained by examining the negotiating mechanism adopted by the United Nations. In February 1946 the United Nations established a preparatory committee to arrange a conference and draft a charter based on the United States’ draft. This 18 persons Committee (the USSR declined to participate) met in London in late 1946, in New York early in 1947 and, in Geneva from April to August 1947. From the outset the United States had had to resist efforts by the developing country representatives to obtain concessions regarding their special needs.

Given the composition of the Preparatory Committee the United States had enough support to resist these proposals and by the end of the Geneva meeting the draft was in a form acceptable to the American delegation. However, when the draft Charter came before the full membership of the United Nations at Havana in November 21 1947 to March 24 1948 the developing countries were successful in forcing a compromise aimed at protecting their infant industries. The United States might well have lived with that concession but other changes to both the substantive provisions and the provisions for the administrative machinery meant that the draft which had been settled by the Preparatory Committee unraveled. It was not difficult for the opposition in the United States Congress to reject it.

It is tempting to regard the episode as an example of winning the battle and losing the war in terms of conflict resolution. The developing

countries (and the Soviet bloc) had been successful in achieving their objectives but the result was rejection of the negotiated outcome by the disappointed party. The United States could not be legally forced to accept the Charter in its final form. There was no political pressure available to force it to do so. Worse, its dominant economic strength meant that not only was there was no effective way in which the developing countries could retaliate against it, but without it, the objects of the Charter could not be achieved. An important factor in this result was undoubtedly the United States’ success in securing the conclusion of a multilateral trade agreement during the 1947 Geneva meeting between the 23 members of the Preparatory Committee. This fulfilled a major United States policy objective. How this occurred is discussed below.¹⁸

General Agreement on Trade and Tariff

The 23 members of the Preparatory Committee negotiated The General Agreement on Tariffs and Trade (GATT, 1948) during their 1947 discussions of the Draft ITO Charter. Initially intended as a temporary arrangement pending the entry into force of the ITO, the GATT became the only multilateral framework of principles and rules for the conduct of international trade (Tovias, 1997: 1).

As opposed to ITO, GATT was never envisaged to be an organization - it was supposed to be an agreement. There was never a blueprint for an organization. However an organization developed over a period of time and can be described as follows:

A working party on the continuing administration of General Agreement recommended in 1950 the establishment of a standing committee with intersessional power over matters going well beyond balance-of-payments restrictions. But it was not until the sixth session in 1951 that a committee for agenda and intersessional business was formed. And even then the life of the committee was limited to one intersessional period (Dam, 1970: 337).

The Intersessional Committee originally had two functions: first to meet four to six weeks before each session to fix the agenda and second to consider urgent and unforeseen matters. With the growth of the secretariat and the establishment by the major contracting permanent parties

of permanent representation to the GATT, the function fixing agenda transferred to “informal contact” between executive secretary and the permanent representatives (Dam, 1970: 337).

The scope of intersessional work expanded by extending the authorization for airmail and telegraphic voting between sessions to all issues designated by the chairperson of the CONTRACTING Parties, as opposed to only those issues concerning balance-of-payment restrictions (Dam, 1970: 337).

Council of Representatives was created in 1960 to replace the Intersessional Committee. The creation of the Council permitted the GATT to complete its transformation from a collegial body meeting at widely spaced intervals to full time international “organization” (Dam, 1970: 338).

The Secretariat of GATT remained small on a shoestring budget until 1958. In 1965 the GATT was able to accomplish its work with 179 full type employees, including secretarial staff, as opposed to 1,547 employees of ILO (International Labor Office). As compared with FAO’s (Food and Agricultural Organization) full time staff of 4,261 - GATT was epitome of efficiency. However, the budget of GATT increased five fold from 1958 to 1966 (Dam, 1970: 340). It had expanded to 150 diplomats headed by a Director-General and supported by a staff of approximately 300 by the year 1990 (Stone, 1997: 120).

GATT’s policies and decisions at the early stages reflect the goals and personality of its first Chief. Prestige and diplomatic skills of Eric Wyndham White - its first Director General - left indelible impact on the Organization, especially on Dispute Resolution System discussed in next chapter (Dam, 1970: 33).

Cunliffe, Hudec and Jacksons seem to be agreed that the 23 member Preparatory Committee set up the 50 member UN to draft the ITO had a number of meetings during 1946 -1947. The Geneva meeting of that Committee had a two-fold purpose. The Committee worked on the draft Charter. It also negotiated a package of tariff reductions, which were contained in 123 interlocking bilateral agreements between the 23 governments involved. An agreement to incorporate these tariff concessions and the other more general commitment not to discriminate was needed. The negotiators achieved this by simply taking the text of the commercial chapter of the

ITO Charter as it then stood and attaching the tariff concessions in a Schedule.¹⁹ The United States was the key player and was able to extract and give tariff concessions under the authority of the RTAA.

The main principles underlying GATT were as follows:

1. There shall be no trade discrimination.
2. There shall be no protection other than that provided by customs tariff (the national treatment principle)
3. Custom’s Unions and free trade grouping are considered legitimate means of trade liberalization.

GATT was technically a provisional agreement with a limited field of action, but its success over 47 years in promoting and securing the liberalization of much of world trade is incontestable. Continual reductions in tariffs alone helped spur very high rates of world trade growth during the 1950s and 1960s. And the momentum of trade liberalization helped ensure that trade growth consistently out-paced production growth throughout the GATT era, a measure of countries’ increasing ability to trade with each other and to reap the benefits of trade – Table 2.1 shows growth in intra-regional trade. The rush of new members during the Uruguay Round demonstrated that the multilateral trading system was recognized as an anchor for development and an instrument of economic and trade reform. But as time passed new problems arose.

Table 1: Intra-regional trade (% of total trade)

Countries	1948	1990
Western Europe	43	72
Eastern Europe	47	48
North America	29	31
Latin America	20	47
Asia	39	48
Africa	8	6
Middle East	21	6

Source: K. Anderson and R. Blackhurst (eds). 1991. *Regional Integration and the Global Trading System*. New York: Harvester Wheatsheaf.

The main issues of consideration under GATT were trade and tariff, employment and development issues were not taken into consideration (as they were intended to be the one of the central issues under the ITO charter). Therefore, GATT was considered to be “Richman’s Club”. Most of the countries belonging

to GATT were industrialized countries, which desired to increase their trade by lowering the tariffs. Developing countries were interested in developing their own industries and protecting them from outside competition to allowing their infant industries to grow. In an effort to meet some of their concerns Part IV dealing with trade and Development was added in 1965.

United Nations Conference on Trade and Development

Developing countries wanted to deal with development and employment issues. They had signaled at an early stage in ITO negotiations that they needed exemption from the full impact of multilateral non-discriminatory free trade. They needed funds to assist in development. As a response to the increasing frustration on the part of developing countries with the pace of their development and the limited contribution made by the GATT and other organizations, UNCTAD (United Nations Conference on Trade and Development) emerged in the early 1960s as an organ of the United Nations General Assembly. UNCTAD provided a powerful stimulus to the consideration of trade and economic issues of primary concern to developing countries. Specific commercial and economic policy issues pursued in UNCTAD include commodity trade, international financial & monetary issues, competition policy, and technology transfer, control of multinationals, development assistance, and maritime policy. (Hart, 1985: 24)

Some of the countries (including the Soviet block and its sympathizers) ascribed the economic difficulties of developing countries to the continuing threat of a new colonialism and to the discriminatory practices of capitalist economics. These countries rejected the GATT approach, which would outlaw all barriers to international trade other than the customs tariff. In the case of the non market economy countries this was impossible because essentially international trade was controlled by other mechanisms ranging from import and export licenses to the way in which state trading organizations operated. These countries called for a new trade organization under the auspices of the United Nations - UNCTAD (Hagras, 1965: 91).

After searching for the root of the foreign trade difficulties facing the developing countries,

the First (of the total of five) Committee (dealing with International Commodity Problems) summed up its findings as follows:

The problem may, therefore, succinctly be stated thus: unless new policy measures in the field of trade, aid and finance provide additional resources for developing countries in the amount required, and a measure of stabilization be brought about in their export earnings at remunerative and equitable levels, it will be exceedingly difficult for developing countries to attain the target rate of growth set by the United Nations Development Decade. (Hagras, 1965: 97)

The most notable achievement of UNCTAD was in generating and promoting support for a Generalized System of Preferences, during the 1960s and early 1970s. As a result, all industrialized countries now have schemes in their tariff policies, which provide for varying non-reciprocal margins of preference for imports from developing countries, and this has expanded their ability to compete in industrialized markets (Hart, 1985: 24)

It can thus be concluded that perhaps "one important" theme of international economic diplomacy in the 1960s and 1970s was the economic development of the third world, and the GATT's legal regime was gradually adapted between 1965 and 1980 to serve as an instrument of development policy; the principle of non-reciprocity in trade negotiations between developed and developing countries was recognized; developed countries were permitted to accord tariff preferences to developing countries; and the developing countries were accorded the right to exchange preferences among themselves in the name of collective autonomy (Roesler, 2000: 107). The reason why developed countries permitted to accord tariff preferences to developing nations can be attributed to Part IV of GATT which came into force de facto in 1965, for those countries which accepted it.

Organization for Economic Cooperation and Development

In 1960 - OEEC (Organization of European Economic Cooperation) (- reorganized into Organization for Economic Cooperation and Development (OECD), with membership drawn from Europe, North America, Japan, and Australasia. It has established guidelines on

matters such as capital movements and multinational enterprises. Articles V and VI provide that members are bound by decisions once they have complied with their constitutional procedures for giving effect to them, and such recommendations as they have voted for. OECD also conducts evaluations of members' domestic economies. These have no binding force but are taken very seriously by international financial markets and thus are also taken seriously by the country concerned. It gradually evolved into think-tank of industrialized countries, providing forum for research and consultation on range of common public policy issues. From GATT perspective, it provides useful complementary research and often serves as forum for preparing new issues, including negotiations on standards and government procurement in 1970s and services and investment in 1980s and 1990s.

GATT to World Trade Organization (WTO)

From 1948 GATT provided the rules for much of world trade and GATT's basic legal text remained the same for almost half a century.

The problem was not just a deteriorating trade policy environment. By the early 1980s the General Agreement was clearly no longer as relevant to the realities of world trade as it had been in the 1940s. To start with, world trade had become far more complex and important than 40 years before: the globalization of the world economy was underway, trade in services - not covered by GATT rules - was of major interest to more countries, and international investment had expanded. The expansion of services trade was also closely tied to further increases in world merchandise trade. In other respects, GATT had been found wanting. For instance, in agriculture, loopholes in the multilateral system were heavily exploited, and efforts at liberalizing agricultural trade met with little success. In the textiles and clothing sector agreements, which removed the textiles sector from GATT rules were negotiated in the 1960s and early 1970s, leading to the Multi-Fibre Arrangement. Even GATT's institutional structure and its dispute settlement system were giving cause for concern.²⁰²⁰

In Pryles et al *International Trade Law*, 1996 Law Book Company, Sydney, the following reasons are put forward to explain why GATT had become less relevant

- significant departures from the non-discrimination principle
- sector exemptions (eg Multi Fibre Arrangement), waivers and import restrictions abuse
- inclusion of non market economies

These weaknesses convinced GATT members that a new effort to reinforce and extend the multilateral system should be attempted. That effort resulted in the Uruguay Round, the Marrakesh Declaration, and the creation of the WTO.

(http://www.wto.org/english/thewto_e/whatis_e/tif_e/factl_e.htm).

WTO organization structure can be seen in the following diagram:

WTO's main purpose was to devise trade agreements that reduce trade-barriers and enhance the flow of goods and services between nations. More than 18 new trade arrangements (according to Petermann's there are 30 multilateral trade agreements) were negotiated during this round. These agreements were:

1. General Agreement on Trade and Tariff 1994
2. Agreement on Agriculture
3. Agreement on the application of Sanitary and Phytosanitary Measures (SFS)
4. Agreement on Textiles and Clothing
5. Agreement on Technical Barriers to Trade (TBT)
6. Agreement on Trade-Related Investment Measures (TRIMS)
7. Agreement on Implementation of Article 6 the General Agreement on Tariffs and Trade 1994
8. Agreement on Implementation of Article 7 the General Agreement on Tariffs and Trade 1994
9. Agreement on Pre-shipment Inspection
10. Agreement on Rules of Origin
11. Agreement on Import Licensing Procedures
12. Agreement on Subsidies and Countervailing Measures
13. Agreement on Safeguards
14. General Agreement on Trade in Services (GATS)
15. Agreement on Trade-Related Aspects of Intellectual Property Rights
16. Understanding of Rules and Procedures Governing the Settlement of Disputes
17. Agreement on Government Procurement
18. International Bovine Meat Agreement

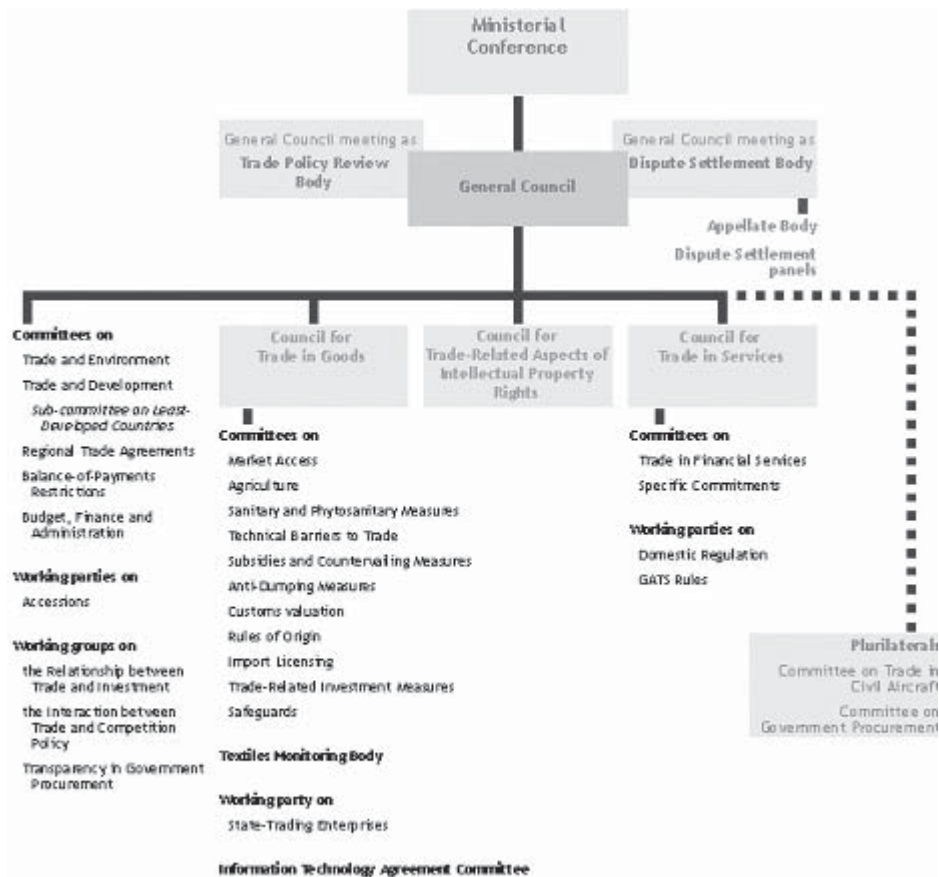
The following nine are considered to be more important than the rest:

1. Trade in Services - GATS.
2. Protection of the Protection Intellectual Property Rights
3. Phasing out the anomalous trade in textiles and bringing in these products under the GATT regime
4. Agriculture products were to be regulated under GATT rules for the first time.
5. Developing countries were integrated into WTO system - thereby eliminating some of the exceptions.
6. Substantial tariff reductions in some sectors
7. New code was established to deal with the subject of subsidies in international trade.
8. New and revised set of procedures for dispute resolution

9. Launching a new institutional structure intended to facilitate and enhance implementation of the Uruguay Round

Liberal Economics/Economic Globalization

Raison d'être for the above described organization is/was to achieve economic globalization and liberalization. This is usually achieved through developing manufacturing facilities in other countries, the internationalization of production, finance and exchange. For example, a multi-national company may depend upon international capital markets to finance the production of a commodity, manufacture it in country offering low-cost labor, and market it to



Key

Reporting to General Council (or a subsidiary)

Reporting to Dispute Settlement Body

Plurilateral committees inform the General Council of their activities although these agreements are not signed by all WTO members

The General Council also meets as the Trade Policy Review Body and Dispute Settlement Body

Source: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm

relatively wealthy industrialized wealthy nations. Another variation may be, when firms from different countries invest money in another country to develop manufacturing facilities or processing of natural resources. Such interdependencies are resulting in greater economic integration between nation-states. This raises an interesting question - whether this development leads to increasing potential for conflict between states/multinationals; governments/multinationals; interest groups /multinationals and or governments?

This is a complex question and cannot be answered within framework of this paper, mainly because of the word limitations. Quoting Pettigrew, 'On the one hand, globalization has brought about remarkable improvements in productivity, and it is accompanied by significant logic of global integration. In fact, the countries that were left out in the past have been able in recent years to become part of the world economy and to improve appreciably the quality of life of their citizens. On the other hand, globalization also entails logic of exclusion both internationally and within individual societies. This logic of exclusion is worrying. It could lead almost inevitably to social disruption, demonstrating that globalization does not produce the results needed for the progress of humanity. (Pettigrew, 1999: 5). 'We have to break with the oversimplified view that sees the market, on the one hand, as subservient to private interests, and the nation state, on the other, as the exclusive custodian of all the universal values associated with the ideas of the common good. The state was at the heart of this commitment to economic interdependence through internationalization. Liberalism and the liberalization of trade that must accompany it emerge and thrive only once the state itself becomes liberal. This trend was intensified in the era of internationalization. With globalization, technological innovation often permits the market and business to flout politico-legal authority or to circumvent it. But until very recently, the state and the political sphere actively supported economic and trade development. (Pettigrew, 1999: 108 – 109)

Although the liberal doctrine guiding the process of economic globalization is conceptually grounded in the liberalism of Adam Smith (1723-1790), there are some important differences. While Smith viewed the economy as one consisting of pure competition, modern liberal thinkers

accept the existence of monopolies and oligopolies. In essence, globalization means elimination of barriers to the trade by working through either different international organizations like GATT, WTO or regional organization like NAFTA, MERCOSUR, ASEAN and others. Paradoxically, such institutions are often the most market-intrusive.

Foundation of present wave of globalization was taken during the post-war economic reforms initiated by formation of Bretton Woods's institutions. Impetus was received by technological innovations and political changes of 1970s.

However, opponents of the globalization and those who oppose creation of above-mentioned institutions feel that these processes undermine sovereignty of the states, erode democratic polities and propagates inequality.

Entrance of less-regulated foreign multinational corporations (MNCs) into domestic economy, to the detriment of labor - weakened domestic legislation attracts MNCs hoping to capitalize on less costly and more compliant labor pools. Absence of government protection puts labor in a position of reliance upon traditional means of self-protection like strikes, lockouts, and sit-ins. Most of the policy makers, scholars view economic globalization as an engine of economic growth and development - posing little threat to internal or external sovereignty nation-states.

III

After having discussed the general structure and functions of different institutions in the last unit, this unit will discuss the dispute resolution system under different institutions in brief and that of WTO in detail.

DISPUTE RESOLUTION PROCEDURE

ITO

Even though, ITO never came into existence, the negotiating history of some of its provisions shows that:

1. "The substantive content of the ITO legal obligations became longer and more lawyer like, the enforcement powers behind them became weaker (Hudec, 467). The main source of substantive breadth [of Article XXVII] was the self protective concern for a large enough escape hatch" (op cit p480).

The other important aspect was that there was a fundamental consensus between the original members as to what these provisions meant. Consensus would therefore provide the guarantee against abuse of the GATT's powers. It was also seen as the primary source of legitimacy of the powers themselves (op cit 481)²¹. This view, if correct provides a valuable insight into the negotiation of a dispute avoidance/resolution mechanism.

2. These provisions as formulated in the ITO Charter negotiations at Geneva were simply copied into the GATT. The provisions were re-negotiated at Havana and although the final ITO version did not replace the versions in GATT, Hudec suggests that since the negotiators were the same persons and since these men served in the GATT during its formative years, one can look at the entire negotiating history of the ITO as evidence of their intent (at p 467).
3. The interpretation of these provisions is found in some of the GATT decisions. Further, the provisions have been retained in the WTO structure as the basis for complaint so that even the ITO negotiations have some fading relevance as a legitimate source of interpretation (Vienna Law of Treaties Article 32).
4. From the point of view of mechanisms for dispute avoidance/resolution DSU can arguably be seen to reflect a swing back to what might be regarded as the original approach - a victory for the lawyers. The weaknesses, which had emerged in the dispute process well before the Uruguay Round had to do with the inevitable breakdown of that consensus as to the proper operation of the escape hatch which was increased as countries tried to avoid obedience to the GATT substantive rules.

GATT

Jackson identifies the following three key aspects of the GATT mechanism as most interesting:

1. Consultation as a prerequisite to moving to laying a formal complaint
2. The grounds of nullification and impairment of benefits did not depend on a breach of a legal obligation

3. The Contracting Parties could not only investigate but rule on such complaints
4. The contracting parties could in serious cases where the matter was not remedied, authorize a contracting party to suspend obligations with regard to the offending party.²²

The origin and meaning of the words nullification and impairment relate to questions of trade damage. As found in Article XXVII they cover both breaches of legal obligations and non-violation nullification and impairment. In early cases governments tried to argue that Article XXVII was confined to breaches of legal obligations but this was rejected. Further, cases such as the *Australian Subsidies case* produced rulings as to what would constitute nullification and impairment.²³

WTO

Like its predecessors WTO offers a mediated trade dispute resolution system under agreed upon rules. Even though it is considered that the cost of settling dispute through any other means than the framework provided by GATT would have been prohibitively expensive, still Least Developed Countries (LDCs) complaint that it is very expensive because LDCs have to hire Western lawyers to assist in argument because of the complexities and new legalism of the Dispute Settlement Understanding (DSU). Refer to DSU under General Discussion below for further details about DSU.

Dispute Settlement Body

The Dispute Settlement Body (DSB) administers all dispute settlement rules and procedures and is made up all WTO members. The DSB has the authority to establish panels and Appellate Body, maintains surveillance of implementation of rulings and authorizes suspension of tariff concessions or other obligations including retaliation under the covered obligations (Goh, 2001).

Decision making by the DSB, keeping with general WTO ethos, is by consensus - whereby no Member present at meeting of the DSB when the decision is taken formally objects to the proposed decision (Article 2.4 of DSU).

GENERAL DISCUSSION

Transition from GATT to WTO

The GATT managed a relative insulation from the “outside” world of international relations and established among its practitioners a closely-knit environment revolving round a certain set of shared values of free trade and shared institutional and personal relationships for the first twenty years (Weiler, 2000).

At this stage the GATT dispute resolution system relied on a mixture of diplomacy and law. The disputing parties tried to work out their disagreements/differences amicably through “consultations under Article XXVI” rather than through litigation - especially because of the congeniality and collegiality among the ambassadors of the few countries member of the Agreement. Diplomats rejected a system that would impose legal solution, which would poison the cooperative spirit (Stone, 1997: 121).

Initially formal “complaints”²⁴ by one state against another were handled in plenary sessions. Later, disputes were dealt with by special ad-hoc committees and subsequently were delegated to a working party, which included the disputants. The working party conducted the investigations and a decision by the Contracting Parties as to what action to take was usually based on its findings. The panel system was adopted in 1952. Panels were recognized to be the standard method for dispute settlement. Central function of the panels was to facilitate a satisfactory diplomatic solution and not to ascertain and apply the law to declare winner or loser (Stone, 1997, 122). To put it in Weiler’s words, “even if the overt diplomacy failed, empanelment was, indeed, a continuation of diplomacy by other means”. In 1996 it was agreed that if a developing country was involved the Director-General could be asked to conciliate. In 1979 this conciliation technique was made available to members generally. It was not much used, presumably because if parties wished to resolve a matter bilaterally they can do so via consultation and usually find an outcome without the need for third party assistance.²⁵

As the number of members increased the original collegiality broke down in 1960s and gave way to more aggressive legalistic tactics of dispute resolution, which were a feature of the 1980s.

Politicization

Nixon Administration started the politici-

zation of the dispute settlement process by increasing the number of complaints before GATT. These actions signaled American resolve to equate commercial interests with legal rights and to defend these rights legally, if required. One of the consequences of such development was passage of the 1974 U.S. Trade Act. Section 301 of the Act as amended enables the U.S. citizens to require U.S. Trade Representative to investigate GATT violations by foreign governments. The Section empowered the administration to retaliate, if violations were found. The Trade Act of 1974 was amended in 1988 which further strengthened the Section by authorizing the President to order retaliation against a foreign government that failed to comply with a panel decision. (Stone, 1997: 127). There have been a number of cases between 1974 and 1990. Refer to Bhagwati and Patrick (editors) for further details. Aggressive Multilateralism Americas 301 Trade Policy and the World Trade System, University of Michigan Press, 1990, Phillip ‘The New Section 301 Trade Wars and Open Markets, 22 Vanderbilt Jnl Transnational law 491’²⁶

Dispute Settlement Understanding

In 1979 GATT members signed an “Understanding on Dispute Settlement”²⁷. Though formally non-binding, the members treated the accord as authoritative - thus legitimizing the panel system as an institutional practice - placing the GATT’s system on legal footing. A legal office was established within the GATT secretariat in 1981. An autonomous group charged with strengthening of the panel was established within the context of Uruguay Round (Stone, 1997: 133).

Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)

In 1989 improvements to the GATT Dispute Settlement Rules and Procedures were made, (L/6489) which provided the mechanism used after the mid term review. Special procedures dealt with disputes arising under the Tokyo Round Codes and the Multi Fiber Arrangement. These varied slightly from the tradition procedures. The Understanding deals with the procedure building on the original provisions of GATT Articles XXVII and XXVIII. (Art 3 DSU)

As can be seen from the diagram above, the

first stage of the WTO dispute resolution process concerns itself with consultation and mediation, as described in article 4 of the DSU. The system of formal consultation foresees a period of approximately 60 days. Normally, formal consultations take place at the headquarters of the Organization, in Geneva, Switzerland. Frequently, the formal consultations are preceded by informal consultations, performed in effect by ambassadors of countries. If the formal consultation is not approved within a maximum time period of 60 days an arbitration panel is automatically formed. Should the parties prefer, the matter may be passed for "good offices," settlement or mediation in the time period of 60 days. The director-general of the WTO may offer good offices at any time during a dispute. In practice, however, the consultation is passed directly for the formation of a panel.

In the WTO dispute resolution system the right of action falls on the sovereign state (which are the members of WTO) thus excluding non-member states and their nationals. In this way, a company prejudiced by a measure taken by a sovereign state cannot resort to the WTO dispute resolution system. Thus, the company would have to convince its government to initiate the process in the name of the sovereign state, an effort always onerous and laborious.

The DSU also admits the participation of third parties in panel activities, but with limited standing to represent its position and to have its position considered towards an arbitration award. The third party may petition for the installation of a proper panel in accordance with its interests, in which case it has full procedural rights. This odd notion of limited third party participation exists on the side of joinder of plaintiffs and is highly compromised from the judicial point of view and can only be explained as the diplomatic taste for intrigue and not as the desire to establish proper legal process.

The request to install a panel is made in writing to the DSB and can take place at the first DSB meeting following the petition. The panel consists of 3 to 5 individuals - independent arbiters (also known as panelists) and is chosen by the parties to the dispute. Should an agreement not be reached as to number of arbitrators within 20 days, the Director-General makes the respective nomination. Should the dispute involve a developing country, and should that country so desire, they can request that the panel

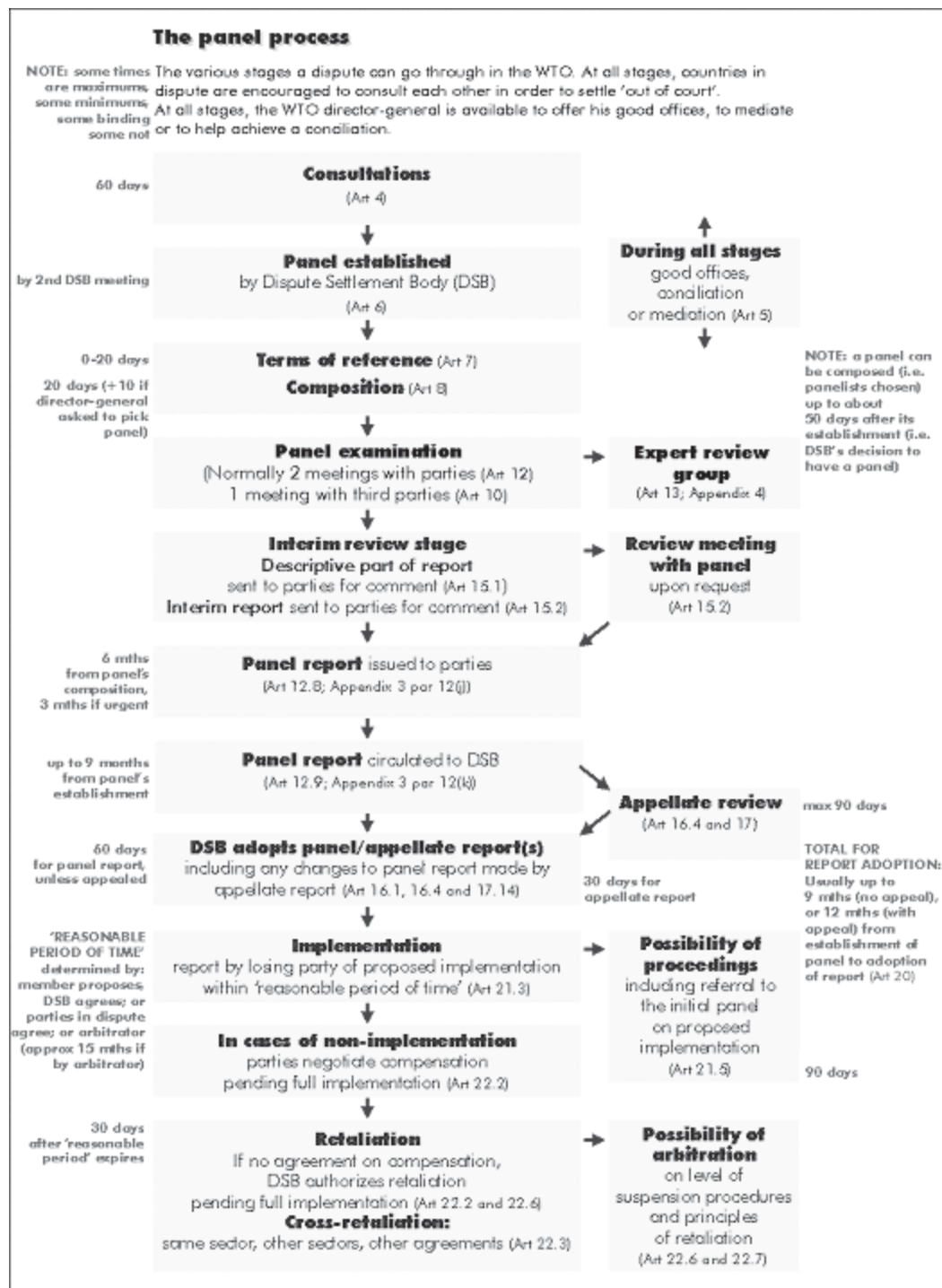
include at least one arbitrator from another developing country. A national of a state who is involved in the dispute cannot be nominated as an arbitrator without the express concordance of the other parties.

Very important for the WTO dispute resolution system is the question of the so-called "terms of reference" which is in reality the substantive petition formulated by the parties in dispute to the DSB for the installation of an arbitration panel. The panels cannot decide outside the terms of reference.

The arbitration decisions are the result of the confidential deliberations of the arbitrators, anonymously, and drawn up without the presence of the representatives of the parties, in accordance with the provisions of the order. There are no deliberations without the testimony of the opposing party. In practice, the WTO secretariat generally, and its legal division in particular, has an important role in providing infrastructure for dispute resolution but little transparency regarding the conduct of the panels. The participation of developing countries is marginal.

The arbitration panel presents a preliminary report to the parties, with written commentary, after which a final award is communicated to the parties and delivered to the DSB for adoption. The communication remains confidential for 20 days, with notification to the parties to convene at the DSB to adopt its contents within 60 days of its decision.

An appeal suspends the implementation of an arbitration award in the first instance. The creation of the appeals body was an innovation of the DSU. It usually has seven arbitrators. The decision has to be taken within 60 days and the appeals body will consider all points raised by the appealing party. The parties involved will unconditionally accept the appeals award, which may modify or reverse the decision being appealed. Once the appellate panel award is adopted, the party at fault must notify of its intentions in regard to the implementation of the decision. In the event that prompt implementation is not feasible, the offending party has a reasonable period of time in which to implement it. Otherwise, this time period will be the period of time as agreed between the parties, within a time frame of 45 days. If not possible within this time period, the time period will be determined by the arbitrators within 90 days of



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

the date of the adoption of the award and cannot exceed a time period of more than 15 months.

In the event of absence or omission of the implementation of the arbitration award by the party at fault, the claimant may initiate a compensation proceeding for the suspension of concessions by the prevailing party to the losing party, in a way that will compensate estimated losses resulting from non-compliance. These measures may take the form, for example, of suspending the MFN clause, for the increase of tariffs relative to determined products, to the detriment of the losing country as an exporter to the prevailing country. This mechanism is activated in conformity with specific rules foreseen by DSU.

Amicus Curiae

Amicus Curiae, a Latin term meaning - friends of the court. They are in principle committed to help the court in search of the truth by furnishing information or advice regarding questions of law or fact. Private persons may appear as amicus curiae in the Supreme Court, either if both parties consent, or if the court grants permission.

Article 13 of DSU (Dispute Settlement Understanding) of WTO allows the Panels to seek such advice. The article reads:

“Each Panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate”.

What happens if such an advice is tendered unsolicited? The Panel in question felt that it is not bound to take the advice into consideration, because it was tendered unsolicited - *Shrimps-Turtles*²⁸ litigation.

However, the Appellate Body Disagreed - and Argued

“That the Panel’s reading of the ‘seek’ is unnecessarily and technical in nature becomes clear an ‘individual or body’ first ask a panel for permission to file a statement or a brief. In such an event, a panel may decline to grant the leave requested. If, in the exercise of sound discretion in a particular case, a panel concludes *inter alia* that it could do so without unduly delaying the panel process’, it could grant permission to file a statement or brief, subject to such conditions as it deems appropriate. The exercise of the Panel’s discretion could, of course, and perhaps

should, include consultation with the parties in dispute. In this kind of situation, for all practical purposes, the distinction between ‘requested’ and ‘non-requested’ information vanishes”.

Appellate Body tried to rectify the situation through their rulings on other cases like *U.S. - CVDs on Steel*²⁹, and later in the EU-Measures affecting asbestos (DS 135/R, DS135/Add1 and DS 135/9), but muddled the matters further causing more resentment and confusion instead of getting to a solution. (Mavroidis). Hoekman recognizes the tension between governments and NGOs on this aspect and the suggests compromise - Hoekman & Mavroidis in WTO Dispute Settlement, Transparency and Surveillance.

WTO members protested against it, because they felt that non-institutional players like NGOs could file their brief, but WTO Members could do so only if they had first acted as third parties before the corresponding panel. Besides it was felt that many friends of the court are in fact of themselves and they have a message to sell. Therefore, such a brief could be biased on whose behalf the brief was tendered Mavroidis.

Concern of Smaller Countries

In Canada, critics such as Ricardo Grinspun of the University of Toronto voiced concern that the new dispute resolution system in general and enforcement measures in particular leave small nations open to influence of their powerful neighbors - dispute resolution forums are used as tools by dominant nations to impose their will on weaker ones. New enforcement provisions of the dispute resolution system undermine Canadian autonomy and sovereignty, by forcing Canada to comply with panel rulings and recommendations that reflect foreign interests (Grinspun, 1983).

The NAFTA and EU in WTO

The NAFTA is a free trade area - in the nature of a confederation among independent sovereigns, each maintaining autonomous political decision making authority within constraints defined by agreement. The NAFTA prescribes the elimination of tariffs and other restrictive regulation of commerce between its Parties, but no common tariffs to goods originating outside NAFTA territory are required. Within the

agreement - political decision-making apparatus of the NAFTA is vested in the Free Trade Commission - the powers normally conferred upon trade ministers by their governments (Abbot, 2000).

The European Union is a customs union prescribes the elimination of tariffs and other restrictive regulation on trade between its member states. As opposed to NAFTA, the EU prescribes common tariffs applicable to goods originating outside EU territories. The EU is based on the concept of a federal polity with an allocation of power between Union Organs - the Council, Parliament and Court of Justice - on one hand, and member state governments on the other side. The European Court of Justice has referred to EC Treaty as a constitutional charter and views itself as the guardian of constitution (Abbot, 2000).

When the GATT was drafted in 1947, it was recognized that some sort of accommodation, for customs unions (like EU) or free trade areas (like NAFTA), was necessary. So Article XXIV was incorporated in the GATT to relieve the members of free trade areas (FTA) of customs unions (CU) from extending the preferential treatment granted within the FTA or CU to non-members. The WTO Agreement adds an Understanding that clarifies elements of the WTO Article XXIV, but none that affects the right of members to control the outcome of the mandatory review process (Abbot, 2000).

The Juridical Interface of the NAFTA and WTO

The legal relationship between NAFTA and the WTO Agreement is determined by examining the text of the treaties and the rules of international law that govern the relationship between treaties concerning the same or similar subject matter. Since, the NAFTA as well as WTO Agreements are written agreements between states governed by international law. Hence, both the "treaties" fall within the definition prescribed by the Vienna Convention on the Law of Treaty (VCLT) (Abbot, 2000).

The VCLT provides that when states are parties to treaties governing the same subject matter, the latter treaty takes precedence over the earlier one.

The NAFTA came into force on January 1, 1994, whereas the WTO came into existence on January 1, 1995. Since, the WTO came into

existence after NAFTA - therefore, according to VCLT, WTO rules should prevail over the NAFTA. However, doubts about the validity of this general principle are raised when one examines a number of factors involving the express text of the NAFTA and the context in which the two agreements were made. Let us examine some of these facts (Abbot, 2000).

The NAFTA text incorporates a general principle regarding its relationship to other international agreements. Article 103 states that:

1. The Parties affirm their existing rights and obligations with respect to each other under the *General Agreement on Tariffs and Trade* and other agreements to which the Parties are party.
2. In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of inconsistency except as otherwise provided by this Agreement.

If WTO is considered to be continuation of the GATT, then NAFTA prevails over WTO within the meaning of Article 103 of NAFTA. However, the situation changes, if one examines the language of the WTO Agreement, which states the GATT and WTO are "legally distinct" (WTO Agreement Article II.4) (Abbot, 2000).

The point has been argued in the literature whether WTO is continuation of GATT or whether WTO is a new organization. Similarly, Article 301 (1) of the NAFTA may have been drafted to add clarity to a particular part of the NAFTA, but it does not resolve ambiguity surrounding the meaning of Article 103 of NAFTA (Abbot, 2000).

As a matter of fact, Article 104 of NAFTA dealing with obligations to certain environment and conservation agreements such as Basel Convention, dealing with Trans-boundary Movement of Hazardous Wastes, provides an exception from general rule of Article 103(2) and prevail over NAFTA rules even if there is inconsistency (Abbot, 2000).

The NAFTA Chapter 20 dispute settlement rules generally permit a complaining Party to select/elect the forum, for the dispute settlement, either WTO or NAFTA - if the case is covered by both the agreements. However, the responding Party gets to choose the forum if the case deals with environmental issue, SPS or technical matters (Abbot, 2000).

Just as there is ambiguity surrounding the

question whether NAFTA or WTO rules prevail, so there is ambiguity whether NAFTA panels may apply the law of the WTO in cases before them. The WTO Agreement does not directly address the issue of its relationship with other international agreements, but the NAFTA does (Abbot, 2000).

The absence of a clearly defined relationship between the WTO Agreement and other international agreements has been a source of concern and controversy. There appears to be a trend in WTO jurisprudence toward willingness to apply agreements outside the WTO Agreement to disputes among Members, and this willingness might extend to the application of regional integration agreements (Abbot, 2000).

The Juridical Interface of the EC and WTO

In close to 50 years of its existence, there is only one decision by ECJ, which declares an EC Act inconsistent with international law. On the other hand, there are close to 30 GATT and WTO dispute settlement inconsistencies between EC law and GATT since 1978. However, the ECJ has never confirmed such inconsistencies. Therefore, the actual consistency has not been effectively been secured (Petersmann, 1998: 79).

ECJ has long been criticized for consistently holding that the GATT does not have direct effect. It has been argued that the continued denial of direct effect proves only that the ECJ has protectionist motives and also that it not concerned about the individual rights (Berkey, Harvard, 1998).

Limits on Article III & Article XX of GATT

National governments may wish to raise revenue through taxes like personal taxes or sale tax and others, discourage consumption like cigarettes. However, it is not permitted under Article III of GATT, if the aim is to protect domestic production. *Canada - Certain Measures Governing Periodicals* - whereby Canadian government offered incentives to Canadian corporations to advertise in Canadian Magazines/Journals – the Panel disallowed it. The following case describes the case under Article XX. In *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, the Thai government argued that a ban

on cigarette imports was necessary to control smoking. This was rejected by a GATT Panel, on the grounds that other instruments were available to achieve the same objective (Hogg, 1998: 63).

IV

After having discussed the formation of WTO, its dispute resolution process and some decisions, this final unit looks at what is the future – what is beyond WTO and brings this paper to a conclusion.

BEYOND WTO/ FUTURE OF MULTILATERAL AGREEMENTS

Hardly had the ink dried on the WTO treaties, negotiations for a new treaty - Multilateral Agreement on Investment (MAI) - started among the OECD countries.

The reasons for urgent need/demand for global investment treaty are quite obvious - international investment flows have been growing at furious pace throughout the 1990s as a result of liberalization and globalization. The total volume of worldwide investment estimated to be \$8.2 trillion (1998), and every year some \$350 billion in new direct investment is added to this total giving an estimated figure of \$9.2 trillion today. Indeed, global investment now outpaces global trade (Barlow, 1998: 8).

At the instigation of the EU the MAI treaty was tabled for the first time at first ministerial meeting of the WTO in Singapore in December 1996. It seems that the aim was to incorporate it into the WTO regime. Several developing countries opposed it, arguing that the proposed investment treaty would not only strip them of their remaining tools for sovereignty but could also become a new instrument of re-colonization. They were successful in having the matter deferred and got the matter referred to a working group for further study (Barlow, 1998: 10). In the upshot widespread civil society opposition strengthened the doubts of many OECD governments including members of the EU such as France and the United Kingdom and led the OECD to abandon the project.

Had MAI been ratified, it would have allowed corporations to pressure governments into eliminating any laws, policies, or programs that could be seen as contrary to corporate interests,

from “costly” labor laws to subsidies for local businesses meant to promote regional development (Barlow, 1998: 2). MAI primarily would have imposed rules on governments, dictating what they could and could not do in promoting profitable transnational investment. In other words, this treaty would have conferred rights on corporations with little or no corresponding obligations (Barlow, 1998: 15). The MAI would have granted transnational corporations the power and mechanisms to sue governments directly for violations of the expropriation rule. In international trade treaties only nation-states have comprehensive powers to sue states, but under MAI a transnational corporation could sue the host country government but not the other way around - the host government could not have sued the guest corporation (Barlow, 1998: 18).

For example, Canada banned the import and transport of MMT, a manganese fuel additive in 1997. MMT is considered a dangerous neurotoxin. It also interferes with the diagnostic system in cars that controls anti-pollution devices. Ethyl Corporation sued the Canadian government under NAFTA’s Chapter 11 investor-state provisions, which allow any corporation of the NAFTA countries to sue any of the governments for failing to uphold their “rights” as enshrined in the investment section of the agreement. Ethyl has asked for nearly \$250 million in damages, arguing that the ban constitutes an illegitimate expropriation of its assets (Barlow, 1998: 61). “Perhaps the most blatant conflict was between the plans absolutely essential need to attract foreign investment, despite the ideological and constitutional problems that created, and its simultaneous call for prevention of foreign domination in the process of attracting foreign resources” (Daniel, 2000: 248) - a dilemma for all the countries, especially developing ones.

MAI would have granted transnational corporations virtually unlimited rights to move capital across the globe on their own terms and for their sole benefit without any limitations or obstacles by the governments.

Unlike NAFTA, MAI contained no general exemption for health - an exemption that would allow governments to protect the health of their citizens, for example, by regulating the behavior of tobacco companies. The Canadian government at present forces the tobacco companies

to label the cigarette cartons in a given fashion or impose high taxes on tobacco. That right would have been taken away under MAI (Barlow, 1998: 29).

Another feature of MAI was that once a country signs on to this treaty, it is virtually locked in for twenty years, according to the proposed draft provisions. In normal treaties like NAFTA, the abrogation clause allows a member country to withdraw after giving six months notice. But under the MAI proposals, a country would not be able to withdraw for the first five years and, after that, the investment rules would remain in effect for another fifteen years (Barlow, 1998: 21).

Whether it is question of securing social justice or defending the environment, of restructuring the power of the media or combating international crime, the individual nation-state always finds itself over-stretched, and attempts to coordinate international efforts just as regularly break down. But if the government on every burning issue of the future can do no more than evoke the overwhelming constraints of the international economy, then the whole of politics becomes a spectacle of impotence, and the democratic state loses its legitimacy. Globalization turns out to be a trap for democracy itself the foremost task of politicians of the past century was to restore the state and primacy of politics over economics.

Fifty years ago, the Universal Declaration of Human Rights became the cornerstone of the United Nations, enshrining the supremacy of human and civil rights over political and economic tyranny. While the Declaration spelled out the inalienable rights of individuals and peoples, the accompanying Covenants (the International Covenant on Economic, Social, and Cultural Rights) were largely designed to ensure that nation-states maintained their obligations to enhance and protect people's basic human rights in their own countries. But MAI is considered to be Charter of Corporate Rights - discarding most of the Human Rights! (Barlow, 1998:21)

Another human rights concern that emerges from WTO/MAI is that its procedure for dispute resolution does not allow for the participation of individuals or non-profit citizen's organisations. Non-State officials (would) make binding decisions affecting the environment, labor standards, health, safety, and human rights,

but the groups concerned about these issues (would) are not be allowed standing before the arbitration, third-party-status, or even access to information about the proceedings. This is consistent with exclusion of NGOs from the entire WTO/MAI negotiating process to date and disregards the right of civil society to play a role in the development and enforcement of international law (Barlow, 1998: 78).

The tension between multinational economic interests (MAI) and economic interests of individuals is encapsulated in HR Declaration. This is a complex issue which cannot be explored further in this paper. However there is no doubt about the frustrations experienced by private parties and multinationals who find that what they perceive as their legitimate interests are adversely affected by government action or inaction. These concerns are exacerbated by the lack of effective mechanisms to deal with their complaints.

The reluctance of sovereign states to allow private persons, non government entities and business entities to take legal action before international adjudicative bodies to challenge breaches of international agreements which impact on their interests. The interest of states in excluding private parties from having any status in international dispute settlement mechanisms is deeply entrenched. Experience by governments of the "bad publicity" of such access before human rights bodies can be expected to discourage governments from acceding to such pressure. However, there are precedents for giving private entities right of suit before domestic tribunals for breaches of treaty obligations³⁰

This sort of compromise has the advantage that the complaining party has the comfort of having its complaint investigated by an impartial body. For the government concerned the disadvantage is that it may be the defendant to such a proceeding and may have to provide compensation as well as remedy the offending provision (the Canadian experience under Ch 11 of NAFTA you mention is an example). The advantage is that by domesticating the dispute, the government party to the treaty has the opportunity to prevent it from becoming an embarrassing international concern.

All these point to some thorny issues of constitutionality. According to some legal scholars, the international arbitration panel

process embodied in NAFTA and the WTO *DSU process* represents an unconstitutional delegation of judicial powers. By delegating judicial powers to a forum outside the constitutional system, the new trade and investment regimes violate the balance of powers laid down in Constitutions of different countries. (Barlow, 1998: 85)

Sovereignty Issues

Some U.S. lawmakers have expressed their reservations regarding the sovereignty issue by granting judicial powers to the Panels of WTO. For example, Rep. N. Gingrich stated, "we are being required by a non-state actor to comply, this sounds like a clear violation of sovereignty" (U.S. House Committee on Ways and Means 1994: 29)

Every time the executive signs a treaty it is relinquishing a portion of its sovereignty. In the case where an international judicial process is involved as part of the treaty either the constitution of the country does not represent a problem or it can be avoided by arguing that the judicial power of a state is concerned with resolution of disputes between private citizens or the state and the citizen. This domestic judicial power does not extend to resolution of disputes between states involving breaches of treaty obligations. (In theory it would be possible for example the Australian High court to hear a dispute involving two states but its jurisdiction to do so would be founded in the agreement between the two states to give it that authority - just like the foundation of the power of an arbitrator). The process for resolution of such disputes is for sovereign states to agree between them either ad hoc or in a treaty. The distinction being made is blurred because the Executive may try and invest the judicial arm with extra territorial power to resolve disputes over matters in which its citizens have an interest but the validity of this is questionable.

On the other hand, others like Reps Armev and Kolbe have extolled the Uruguay Round and the WTO's new dispute resolution system as freeing individuals and companies from unnecessary intervention by national governments, by taking away the ability of governments to constrain private parties through such devices as tariffs and non-tariff barriers, and by insuring that governments adhere to

these rules. – and that new DRS no threat to sovereignty (U.S. House, Committee on Ways and Means, 1997)

General Discussion

Ugly images broadcast from Seattle, Washington, in late November 1999, captured public attention as they depicted more than thirty thousand protestors belonging to hundreds of different organizations protesting at the third ministerial conference of WTO. The most common grievances of the protestors was that the process of economic globalization brought about by such phenomena as the WTO directly and indirectly sovereignty of nation-state and increase in the powers and rights of transnational corporation - its negative impact on the employment and well being of common person is causing all this frustration, which is being expressed in the form of violent protests.

As a matter of fact, free trade also implies free competition - lots of small businesses instead of mammoth corporations. Globalization is helping in creating big transnational through mergers. Gone are the days of 'Small is beautiful' and the big corporations encouraging young entrepreneurs among its personnel to form small businesses of their own.

To conclude, it could be said - yes to free trade, but no to creation of mega-corporations. Perhaps a more sophisticated way to put it might be to acknowledge the reality of the transnational mega corporation but argue that ways must be found to subject it to rules, which prevent it from overwhelming a nation state and make it responsible for its activities in relation to individuals. Its all a bit pit in the sky but so are reductions in EU agricultural subsidies. .

CONCLUSION

There has been marked increase in number of disputes in the system. According to Hudec, there were over 200 cases during the first 40 years of GATT's existence. That number has already been surpassed during the first slightly more than half a decade of WTO's existence. Most of these disputes can be attributed to the major powers, the United States and the European Communities against each other. Is it due to change in DRS that no one/power can prevent the creation of the panels and smooth running of the DRS? Or it is because the

Members have more faith in the System and feel that their rights can be defended more effectively?

It is in a way - strong incentive for parties to negotiate mutually acceptable solutions, rather than submitting the dispute to the binding decisions of the automatically established panels under DSU. This is another point in favor of the newly established dispute resolution system.

1. It is important to remember that the whole thrust of WTO DSU is to obtain a solution to conflicts through consultation. Resort to the adjudicative process is a second best option
2. The general view is that so far as the WTO is concerned, it is basically working well as a means of conflict resolution but, however one categorizes them 'non violation', 'politically sensitive' and so on, the too difficult cases arise and WTO DSU will not be able to achieve a successful outcome. This is not unusual in domestic disputes where the resolution mechanism is mediation, arbitration or other measures short of adjudication.
3. No amount of fine tuning of the process will get around this because there will be cases where sovereign interests will not give way to the judicial process. It must always be remembered that unlike domestic law enforcement the international arena cannot provide effective penal sanctions for non compliance- the rogue state danger is too great.
4. This should not deter WTO members from attempting to provide solutions to problems, which have emerged particularly in areas which turn on redrafting provisions to remove ambiguities, to respond positively to demands for greater access by non states and better transparency as well as to the problems which the LDCs have with the existing system.
5. The issue of creating a regime to govern competition policy is an important one but at this stage it may be that there is insufficient consensus in the world to try and harmonies law through the WTO. It is more important for the WTO to concentrate on getting its mind around the intersection of trade and competition policy concerns. Were Rules to be drawn up at this stage,

which had any chance of general acceptance they are likely to be too general to amount to justiciable obligations and could not usefully be subject to WTO dispute resolution?

NOTES

1. Protection is protecting domestic industries against foreign competition by means of tariffs, subsidies, import quotas, or other restrictions and/or barriers placed on the imports of foreign competitors.
2. For example, manufacturers were happy when Corn Law was repealed, because their expansion was hampered by protection of grain. Because the Corn Law protected the interests of landed interests. (Encyclopedia Britannica, 3, 635).
3. Corn Laws were imposed as early as 12th century. The laws became politically important in the late 18th century and the 1st half of the 19th century, during the grain shortages caused by growing population of Britain and also due to blockade imposed in the Napoleonic Wars. The Corn Laws were finally repealed in 1846. (Encyclopedia Britannica, 3, 635).
4. Napoleon III's vigorous support of free trade resulted in the pioneering Cobden-Chevalier Treaty of 1860 which, while it undoubtedly harmed a minority of trades, vastly improved the majority, increasing prosperity and mutual trust. (http://www.britannica.com:80/magazine/article?email=1&content_id=194747)
5. The purpose of imposing a tariff is generally revenue collection, the protection of local industry or both.
6. It raised US tariffs on over 20,000 dutiable items to record levels and protracted the Great Depression
7. Allen & Unwin, 1951, London
8. at p 498
9. The law that provided authority for the US government to enter into bilateral agreements for reciprocal tariff reductions. Through successive extensions and amendments, it continued till 1962, when it was superseded by the Trade Expansion Act of 1962.
10. The most-favored-nation clause binds a country to apply to its partner country any lower rate of import duties that it may have already granted or will later grant to imports from some other country. The clause may cover a list of specified products only, or specific concessions yielded to certain foreign countries. Alternatively, it may cover all advantages, privileges, immunities, or other favorable treatment granted to any third country whatsoever. (Encyclopedia Britannica, 907, 21)
11. Maybe it could be attributed to Batra's - The Laws of Social Cycles - in which he explains that there are four types of elite or ruling classes - warriors, intellectuals, acquirers and laborers. Batra feels when acquirers are ruling - then this ruling class becomes so self-centered and corrupt that large majority of the people are reduced to poverty. (Batra, 1997, 34 - 35)
12. The value of the RTAA as a negotiating tool for the United States was not perceived until the negotiation of the WWII financial agreements between the US and its allies. Article VII of the master lend lease agreement 1942 with the United Kingdom signaled the United States success in securing the end of the British preferential system. This commitment was the price for securing American support. The RTAA mechanism made it possible for the Executive to secure this important concession. Cunliffe op cit 6 61-662
13. This could be attributed to American psyche - there are periods of introversion and extraversion in their foreign policy. Klingberg suggested the following cycles since 1776:

Periods of Introversion	Periods of Extroversion
1776 - 1798	1798 - 1824
1824 - 1844	1844 - 1871
1871 - 1891	1891 - 1918
1918 - 1940	1940 - 1967
1968 - 1989	1990 - ????

 It is difficult to state whether it will continue as predicted in the book (Silva, 1990: 187 - 188)
14. Cunliffe op cit pp644-645. In subsequent pages the writer explains in depth the problems which the Fund had to address and the way in which it operates. (http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm)
15. Cunliffe op cit p636 and discussion on subsequent pages. This approach is reflected in the policy of co-operative consultation that pervades its activities ranging from the decision-making by executive directors to the balance which the Bank tries to achieve between not dictating economic policies to a government while requiring full discussion of the economic health of a country recipient of a loan. While governments may question whether this is still the bank's approach it provides a good example of a technique aimed to pre-empt the "conflict" between a debtor country and the Bank, particularly given that any analogy between of the bank acting like a private institution falls away when it is a country as opposed to a person or private company which is bankrupt.
16. It is worth noting that the USSR refused to participate and discouraged its satellite countries to do so Cunliffe op cit p 552
17. Cunliffe op cit pp 660-672 provides useful background.
18. R E Hudec 'Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment, 59 Minnesota Law Review 461, 466 It is argued in Ch 3 below that this pragmatic decision meant that the negotiating history of the ITO was relevant to Rulings as to what the words of the dispute resolution provisions meant.
 - . domination of US, EU and Japan who dealt with issues outside GATT
 - . multinational corporations which are not governed by any treaty
 - . growth of non tariff barriers arguably outside

- GATT such as voluntary export restrictions . agricultural protectionism especially EU and US . inadequacies in dispute resolution mechanism. (p750)
19. (R.E.Hudec "Retaliation Against 'Unreasonable' Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment", 59 Minnesota Law Review 461 at 467
 20. J J Jackson "The Role and Effectiveness of the WTO Dispute Settlement Mechanism", Brookings Trade Forum 2000 179-129
 21. 2 GATT BISD 193 (1969) and see discussion in Hudec op cit at 483 et seq. Jackson op cit text to fns 12-14.
 22. The primary method of enforcing GATT/WTO law is the dispute settlement mechanism, triggered by a formal complain from a contracting party. WTO secretariat itself has no standing to bring proceedings against countries which infringe the rules. There are two main forms of surveillance which parties can use to determine whether and in what way state's behavior violates the goals of treaty: centralized "police patrols" and centralized "fire alarms". Police patrol surveillance takes the form of regular reporting requirements to the General Council of contracting parties as well as standing committees comprised of representatives of the member states and serviced by WTO Secretariat. Fire alarm oversight at the domestic level is accomplished creating access for private producers to bring GATT/WTO-related complains to the attention of their governments. Section 301 offers enough opportunity for U.S. corporations to bring their complains to the attention of their government to enable U.S. to raise these issues/co mplaints before DSB (Servilla, 1996).
 23. R Planck 'An Unofficial Description of How a GATT Panel works or Does Not, (1987) 4 Jnl of Intl Arbitrations , p62
 24. It had been hoped that the United States would remove the 301 mechanism or at least discontinue it after the Uruguay Round. In 1996 private US petitioners were still invoking it. An Australian manufacture of leather car seats was receiving a government subsidy. The subsidy was attacked under s301 and simultaneously the US Government invoked the WTO dispute mechanism. There was a positive finding against the subsidy by the WTO Panel and the s301 action was dropped.
 25. Dispute Resolution Understanding that codifies newly created dispute settlement rules and procedures; the dispute settlement body (DSB) that creates dispute resolution panels and is responsible for adopting, implementing, and enforcing their rulings; and dispute resolution panels that adjudicate trade disputes between nations (DSU, 1994)
 26. United States - Import prohibition of certain shrimps products. WT/DS58/AB/R. 12 October 1998.
 27. Appellant Body report on United States - Imposition Of Countervailing Duties on Certain Hot-Rolled Lead and Bismouth Carbon Steel Products Originating in United Kingdom, WTO Doc. WT/DS138/AB/R of 10 Here the AB dealt with the issue of whether it could receive such briefs in absence of any reference to its having the power to do so. The AB rules that in absence of an express prohibition it could. Because it had authority to determine its working procedures
 28. Examples of this are found in the EU regime with its doctrine of "direct effect" measures giving private parties right of suit before domestic courts and in NAFTA Ch 11. Another example is the US 301 mechanism (discussed elsewhere) where the Executive can be forced by a private party to instigate proceedings before WTO for alleged breaches of that treaty. Another example is found in the WTO anti-dumping and subsidy regimes which require governments to provide a domestic regime for investigation and remedy of complaints by private parties against other private parties for breaches of domestic law (giving effect to treaty obligations).

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APPENDIX A

CHAPTER I

PURPOSE AND OBJECTIVES

Article I

RECOGNIZING the determination of the United Nations to create conditions of stability

and well-being which are necessary for peaceful and friendly relations among nations,

THE PAIRTIES to this Charter undertake in the fields of trade and employment to co-operate with one another and with the United Nations.

For the Purpose of

REALIZING the aims set forth in the Charter of the United Nations, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter.

TO THIS END they pledge themselves, individually and collectively, to promote national and international action designed to attain the following objectives:

1. To assure a large and steadily growing volume of real income and effective demand, to increase the production, consumption and exchange of goods, and thus to contribute to a balanced and expanding world economy. ,
2. To foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment.
3. To further the enjoyment by all countries, on 6qual terms, of access to the markets, products and productive facilities which are needed for their economic prosperity and development.
4. To promote on a reciprocal and mutually advantageous basis the reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in inter-national commerce.
5. To enable countries, by increasing the opportunities for their trade and economic development, to abstain from measures which would disrupt world commerce, reduce productive employment or retard economic progress.
6. To facilitate through the promotion of mutual understanding, consultation and cooperation the solution of problems relating to international trade in the fields of employment, economic development, commercial policy, business practices and

commodity policy.

Accordingly they hereby establish the INTERNATIONAL TRADE ORGANIZATION through which they shall co-operate as Members to achieve the purpose and the objectives set forth in this Article.

CHAPTER VIII

SETTLEMENT OF DIFFERENCES

Article 92

Reliance on the Procedures of the Charter

1. The Members undertake that they will not have recourse, in relation to other Members and to the Organization, to any procedure other than the procedures envisaged in this Charter for complaints and the settlement of differences arising out of its operation.
2. The Members also undertake, without prejudice to any other international agreement, that they will not have recourse to unilateral economic measures of any kind contrary to the provisions of this Charter.

Article 93

Consultation and Arbitration

1. If any Member considers that any benefit accruing to it directly or indirectly, implicitly or explicitly, under any of the provisions of this Charter other than Article 1, is being nullified or impaired as a result of
 - (a) a breach by a Member of an obligation under this Charter by action or failure to act, or
 - (b) the application by a Member of a measure not conflicting with the provisions of this Charter, or
 - (c) the existence of any other situation the Member may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to such other Member or Members as it considers to be concerned, and the Members receiving them shall give sympathetic consideration thereto.
2. The Members concerned may submit the matter arising under paragraph 1 to arbitration upon terms agreed between

them; *Provided* that the decision of the arbitrator shall not be binding for any purpose upon the Organization or upon any Member other than the Members participating in the arbitration.

3. The Members concerned shall inform the Organization generally of the progress and outcome of any discussion, consultation or arbitration undertaken under this Charter.

Article 94

Reference to the Executive Board

1. Any matter arising under sub-paragraphs (a) or (b) of paragraph 1 of Article 93 which is not satisfactorily settled and any matter which arises under paragraph 1 (c) of Article 93 may be referred by any Member concerned to the Executive Board.
2. The Executive Board shall promptly investigate the matter and shall decide whether any nullification or impairment within the terms of paragraph 1 of Article 93 in fact exists. It shall then take such of the following steps as may be appropriate:
 - (a) decide that the matter does not call for any action;
 - (b) recommend further consultation to the Members concerned;
 - (c) refer the matter to arbitration upon such terms as may be agreed between the Executive Board and the Members concerned;
 - (d) in any matter arising under paragraph 1 (a) of Article 93, request the Member concerned to take such action as may be necessary for the Member to conform to the provisions of this Charter;
 - (e) in any matter arising under sub-paragraph (b) or (c) of paragraph 1 of Article 93, make such recommendations to Members as will best assist the Members concerned and contribute to a satisfactory adjustment.
3. If the Executive Board considers that action under sub-paragraph (d) and (e) of paragraph 2 is not likely to be effective in time to prevent serious injury, and that any nullification or impairment found to exist within the terms of paragraph 1 of Article 93 is sufficiently serious to justify such action, it may, subject to the provisions of paragraph 1 of Article 95 'release the Mem-

- ber or Members affected from obligations or the grant of concessions to any other Member or Members under or pursuant to this Charter, to the extent and upon such conditions as it considers appropriate and compensatory, having regard to the benefit which has been nullified or impaired.
4. The Executive Board may, in the course of its investigation, consult with such Members or inter-governmental organizations upon such matters within the scope of this Charter as it deems appropriate. It may also consult any appropriate commission of the Organization on any matter arising under this Chapter.
 5. The Executive Board may bring any matter, referred to it under this Article, before the Conference at any time during its consideration of the matter.

Article 95

Reference to the Conference

1. The Executive Board shall, if requested to do so within thirty days by a Member concerned, refer to the Conference for review any action, decision or recommendation by the Executive Board under paragraphs 2 or 3 of Article 94. Unless such review has been asked for by a Member concerned, Members shall be entitled to act in accordance with any action, decision or recommendation of the Executive Board under paragraphs 2 or 3 of Article 94. The Conference shall confirm, modify or reverse such action, decision or recommendation referred to it under this paragraph.
2. Where a matter arising under this Chapter has been brought before the Conference by the Executive Board, the Conference shall follow the procedure set out in paragraph 2 of Article 94 for the Executive Board.
3. If the Conference considers that any nullification or impairment found to exist within the terms of paragraph I (a) of Article 93 is sufficiently serious to justify such action, it may release the Member or Members affected from obligations or the grant of concessions to any other Member or Members under or pursuant to this Charter, to the extent and upon such conditions as it considers appropriate and compensatory, having regard to the benefit

which has been nullified or impaired. If the Conference considers that any nullification or impairment found to exist within the terms of sub-paragraphs (b) or (c) of paragraph I of Article 93 is sufficiently serious to justify such action, it may similarly release a Member or Members to the extent and upon such conditions as will best assist the Members concerned and contribute to a satisfactory adjustment.

4. When any Member or Members, in accordance with the provisions of paragraph 3, suspend the performance of any obligation or the grant of any concession to another Member, the latter Member shall be free, not later than sixty days after such action is taken, or if an opinion has been requested from the International Court of Justice pursuant to the provisions of Article 96, after such opinion has been delivered, to give written notice of its withdrawal from the Organization. Such withdrawal shall become effective upon the expiration of sixty days from the day on which such notice is received by the Director-General.

Article 96

Reference to the International Court of Justice

1. The Organization may, in accordance with arrangements made pursuant to paragraph 2 of Article 96 of the Charter of the United Nations, request from the International Court of Justice advisory opinions on legal questions arising within the scope of the activities of the Organization.
2. Any decision of the Conference under this Charter shall, at the instance of any Member whose interests are prejudiced by the decision, be subject to review by the International Court of Justice by means of a request, in appropriate form, for an advisory opinion pursuant to the Statute of the Court.
3. The request for an opinion shall be accompanied by a statement of the question upon which the opinion is required and by all documents likely to throw light upon the question. This statement shall be furnished by the Organization in accordance with the Statute of the Court and after consultation with the Members substantially interested.
4. Pending the delivery of the opinion of the Court, the decision of the Conference shall

- have full force and effect; *Provided* that the Conference shall suspend the operation of any such decision pending the delivery of the opinion where, in the view of the Conference, damage difficult to repair would otherwise be caused to a Member concerned.
5. The Organization shall consider itself bound by the opinion of the Court on any question referred by it to the Court. In so far as it does not accord with the opinion of the Court, the decision in question shall be modified.
- Article 97**
Miscellaneous Provisions
1. Nothing in this Chapter shall be construed to exclude other procedures provided for in this Charter for consultation and the settlement of differences arising out of its operation. The Organization may regard discussion, consultation or investigation undertaken under any other provisions of this Charter as fulfilling, either in whole or in part, any similar procedural requirement in this Chapter.
 2. The Conference and the Executive Board shall establish such rules of procedure as may be necessary to carry out the provisions of this Chapter.