Institute of Social Studies

Graduate School of Development Studies

# DEVELOPING COUNTRIES IN THE DISPUTE SETTLEMENT SYSTEM OF THE WTO – THE UNDERDOGS? 1995 – 2005- THE FIRST DECADE

A Research Paper presented by:

**P.W.C. DAVIDAR**
(India)

In Partial Fulfillment of the Requirements for Obtaining the Degree of:

Master of Arts in Development Studies
Specialization:

## Public Policy and Management

Members of the Examining Committee:
Dr. Sunil Tankha
Dr. A. Venkat Raman

The Hague, The Netherlands
December 2006

Enquires:

Postal Address:
Institute of Social Studies
P.O. Box 29776
2502 LT The Hague
The Netherlands

Tel: + 31 70 4260 460
e-mail: vdieren@iss.nl
www.iss.nl

Location:
Institute of Social Studies
Kortenaerkade 12
2518 AX The Hague
The Netherlands

## ACKNOWLEDGEMENTS

*I AM GRATEFUL TO -*

**Dr.Jos Mooij** - for all her guidance in helping me finalize this research paper – particularly for patiently clarifying all doubts and commenting extensively on the draft.

**DrSunil Tankha** - for the counsel in the formative stages of research and for putting me onto the right track. The idea of bringing in Brazil and India proved very useful.

**Dr.Venkat Raman** - for spending several hours in helping me plan the paper and providing me valuable information on formatting – without which the clarity achieved would not have been possible.

**All Faculty of 3102** - for helping us see that qualitative and quantitative aspects can combine for good research. This course was of immense use to me in the writing of this paper.

**Admashu Shiferaw** - who taught us not to fear processing quantitative material on the computer.

**Alan Y, Kerry A, Thomas S, Atul K and Nilo D** - and others in Geneva who spared a lot of their time to give me assistance

**Murali** - for helping me iron out the glitches in moving data from excel format to the paper.

**Ashwinth, Abhishekan and Ashikanth** – who permitted their father to spend long hours before the computer in working on this research paper.

**Shanthi** – my patient and intelligent wife –who provided valuable counsel while the research paper was being done,

**Jesus C** – my eternal friend and guide – who expects me to do my best in everything that I place my feet into. I sincerely hope I did HIM proud.

## CONTENTS

## ABBREVIATIONS

| | |
|---|---|
| ATC | Agreement on Textiles and Clothing |
| AB | Appellate Body |
| DSB | Dispute Settlement Body |
| DSS | Dispute Settlement System |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| IMF | International Monetary Fund |
| NGO | Non-Governmental Organization |
| SCM | Agreement on Subsidies and countervailing measures |
| SPS | Agreement on Application of Sanitary and Phytosanitary measures |
| TBT | Agreement on Technical Barriers of Trade |
| TRIMS | Agreement on Trade-related Investment measures |
| TRIPS | Trade related Intellectual Property Rights |
| UNCTAD | United Nations Conference on Trade and Development |
| USA/US | United States of America |
| WTO | World Trade Organization |

## Introduction

### 1.1 Introduction:

The World Trade Organization was formed with the intention to provide an institutional arrangement to resolve international trade issues between countries. Immediately after the Second World War, the Western bloc of nations and a few others determined to build a stable international trading system that would facilitate trade between countries. The General Agreement on Tariffs and Trade (GATT) was initially agreed to by 23 countries and was meant to facilitate multilateral trade negotiations and tariff reductions/concessions to enable greater flow of trade between nations. Over the years, the volume of trade grew with the result that trade disputes between countries and the methods adopted by countries to promote international business led to controversies and disputes that proved the existing system to be inadequate. Although GATT increased in membership and enabled several hundred-tariff reductions and concessions between member countries, shortcomings were noticed and the effort rectify led to the formation of the World Trade Organization. Although the WTO is yet to rise above various controversies involving trade negotiations, it has institutionalized the dispute settlement process on matters already agreed upon.

Under GATT, a Dispute Settlement mechanism was in place but its structural defects made it less effective. To illustrate, a major shortfall of the GATT Dispute Settlement mechanism was that a single party could block progress in the settlement of a dispute (Chang, 2003). Consensus was the key word. The panels that were to 'hear' the dispute had limitations as their opinions could be blocked by any of the parties involved. A senior official at the WTO Appellate Body Secretariat, said a major improvement in the WTO Dispute Settlement System was –' *GATT had limitations in settlement of disputes but in the WTO the systemic flaws found earlier were set right. In the DSS of the WTO, the principle of reverse consensus has now made it difficult by*

*insisting that all members of the DSB would have to agree to set aside an Appellate Body report. Thus, several improvements have enabled an improved style of functioning.*[1]

## 1.2 Background to the study:

The WTO was formed in 1995 and has been in existence for over a decade. It has evolved from the GATT. The structure and functioning has been ratified by the Parliaments of 149 Member countries. Central to the functioning of the WTO is the dispute settlement mechanism of the WTO and the Agreements signed by the members form the foundation. This has meant the establishment of an institution with a well-defined set of procedures and rules.

Fast-paced globalization with increased international trade has necessitated a serious look at the issue of maintaining stability at the global level. Considering that the relationship between globalization and international trade appears increasingly tight, streamlining the rules of global trade while ensuring a level playing field is a major issue. The possibilities of a syndicate of Developed countries subordinating this institution to its own interests cannot be ruled out. Considering that this institution proceeded from the GATT – which was primarily promoted by the Western bloc of countries for their own trade interests, the apprehension does have a basis.

Over the first decade of its existence, the Dispute Settlement body of the WTO has handled several major international trade disputes brought by member countries. This exploratory study seeks to examine the trends in specific areas of the dispute settlement mechanism that are evident in the first decade of its existence (1995-2005). At the same time, the study focuses attention on the possibility of the Dispute Settlement System of the WTO being the exclusive domain of the Developed countries.

## 1.3 Issues and Challenges:

The academic world that discusses development issues appears divided into two broad groups - those who largely support the activities of the WTO and those who feel that it is not advantageous to developing countries. Some Development experts, NGOs –both global and local - who are fighting global issues and who tend to orient the 'alternative discourse' against international institutions such as the IMF, World Bank and

[1] Interview with senior official at the Appellate Body Secretariat conducted on 21-06-2006 at the Appellate Body Secretariat, WTO, Geneva

choose to add the WTO to the list would form the major part of those opposing it. On the other side, there are those supportive of the WTO and see it as necessary for world today. Both groups tend to utilize data to interpret their individual standpoints. The issues raised in the overall debate are not entered into in this paper. This section deals primarily with the extended debate on this issue with regard to the functioning of the Dispute Settlement System (DSS) of the WTO and whether developing countries benefit from the system.

Among the views expressed against the DSS of the WTO, there are critical viewpoints that have been made that "the dispute settlement process of the WTO is not a neutral technocratic process in its structure and operation" (Shaffer et al, 2003). This implies that the concept of impartiality associated with the formation of the DSS is doubtful in its organizational structure and style of functioning. Considering that the WTO has avoided pronounced weightage given to some countries in other international institutions such as the UN Security Council and has given all member countries equal vote in the DSB, this view does not appear to be entirely justified. A detailed analysis of processed disputes at the DSS and that too over a reasonable length of time would be required to draw such conclusions which appear absent. Shaffer et al further opine that several developing countries prefer not to use the mechanism due to reasons ranging from inadequacy of funds to soft power difficulties in a world with unequal power equations. A substantial ground for an assumption that the legal formalities require huge expenditures is absent.

Lack of legal expertise in WTO law and paucity of financial resources are highlighted as limiting factors for developing countries in accessing the DSS (Matsushita, 2005). The intricacies of International trade law are highlighted as being too complex for developing countries due to inexperience. This argument is limited in scope to the extent that it is devoid of recent efforts being taken by various bodies in capacity building exercises for staff of developing countries to tackle legal issues in the DSS in an effective manner.

A sideline to the debate is noticed when the question is raised on whether Africa needs the DSS at all (Mosoti, 2003). Such an argument has not examined the issue of trade imbalances of the African continent. The system of preferences enjoyed by

African countries from by developed countries is substantial and may lead to fewer disputes.

The interpretations of Agreements, which are the basis for disputes, are criticized as being devoid of the Development dimension (Qureshi, 2003). This assumes that poverty issues take priority over trade issues. Trade is primarily about businesses and profits. Fair trade may be the best that can be expected from trade. Incorporating the development dimension into business is debatable as both are relevant in there own spheres but only indirectly related.

Issues have also been raised on whether Developing countries and poorer countries are in a position to defend their rights within the structure of the DSS of the WTO (Horn, 1999). The answer to this lies in assessing performances by developing countries in the dispute settlement mechanism. Developing countries may also learn to deal with challenges of the DSS through experience which comes with time.

At the other end of the debate are those who deny that there is any bias in the manner of functioning of the DSS WTO and is effective enough in the current world scenario. The low participation by developing countries is seen as due to the low volume of trade and not due to the system (Holmes et al 2003). Low volume of trade need not necessarily lead to low participation. Further, trade despite volume can lead to disputes and the issue is whether lack of participation is due to availability of effective avenues to solve trade disputes.

The GATT dispute settlement mechanism was considered a weak framework when compared to the DSS as it had no power to make rules (Gilpin, 2001). GATT merely provided an environment to negotiate which has been rectified in the WTO. Several areas such as agriculture, intellectual property rights, services etc, fell outside the GATT purview and were included within the gambit of the DSS. Due to the DSS, a permanent institution to deal with international trade disputes was now available.

On account of the DSS, it was now possible to have a strong institution that proves effective for the settlement of disputes (O'Brien, 2004). At the international level, processing of disputes would require a complex set of rules and procedures that would need to be acceptable to all. Although this may be evident in the DSS, the degree to which the strength of the institution is also determined by the extent to which it can

enforce an adverse ruling. Hence, there is the possibility that a powerful country that does not fear trade retaliation may not comply.

It has also been voiced that the dispute settlement procedures of the WTO provides an opportunity for democratic processes to function while at the same time ensuring that the global trading system functions normally (Robert, 2000). The extent to which this statement can be accepted is limited. If by democratic processes the author has meant that the DSS has helped member countries to work towards mutually satisfactory solutions in the process of dispute resolution then there is some truth in this. However, global trading systems functioning normally could also mean that the DSS is meant to ensure that the existing trade imbalances are not affected in a serious manner. Such an implication may not be desirable for developing countries that seek to secure an increased portion of world trade.

Commenting on the issues and challenges of the Dispute Settlement System, a senior official at the WTO said[2] '*It is not easy when you have a flat platform. Due to the large number of countries – there is now a conscious effort to include all. There is now a high level of comfort. The categorization of 'developed vs. developing is not true."*

*In recent conferences – there has been less unhappiness – due to the planning exercise to involve all. The level of awareness is growing now and the nature of issues is also varied. Further, there are implementation concerns. Consensus building is a major effort and there is huge awareness to promote inclusiveness together with genuine thinking to make effective processes.'* An attempt on the part of the researcher on trying to identify conflict areas was met with this response. In fact, http://www.wto.org which is the official website of the WTO portrays anything that can give an impression of an A vs. B situation. The WTO Secretariat seems aware that in order to be successful in dispute resolution, consensus is necessary to the extent possible.

When asked about the reason for fewer African countries participating in the process '*a dispute crops up when business operators have a problem and so there is a chain. For several African countries and Least Developed Countries, the constraints they*

[2] Interview with a senior official in the Legal Affairs Division at WTO held on 21-06-2006 at WTO HQ, Geneva.

*face are too big. Dispute Settlement is not really the answer to the issue facing them.* The implication here is that African countries do not have sufficient volume of trade and hence are rarely involved. This could give rise to the doubt as to whether this is evidence of a biased structure. Such issues can be addressed when the core responsibility of the DSS is identified which is to address trade disputes that arise from the Agreements made under the WTO.

On the issue of efforts to work towards capacity building of developing countries and least developed countries a senior WTO official said '*Advisory Center for WTO law is a partial response and a good beginning'*. The Advisory Center for WTO Law was formed in 2001 to provide assistance to developing and least developed countries. A senior official at the ACWL was interviewed[3] on the issues and challenges and had this to say about the fewer African countries failing to come to the DSS *' there is not enough international trade and hence possibly few trade disputes. Further, preferential access is already in place and they already have duty-free access to most developed country markets. These arrangements are unilateral and don't come within the purview of the DSS. Added to this, often, LDC's and African countries negotiate together. Hence there non-involvement as complainants cannot be faulted.'*

*African countries usually feature themselves as third parties in cases involving preferential issues.'* This statement confirms the earlier comment made about African countries. Also, perhaps the avenues they have to solve their trade disputes are more effective. Together with this is the fact that they have preferential access to several developed countries. Their presence as third parties can be viewed in two different ways, as either that they function best as third parties or that they are in the process of emerging into the world trade scenario and benefit from the exposure of being involved. Thus, the issues and challenges are wide open for discussion and help to assess the extent to which developing countries function as equals or underdogs.

**1.4 Operational Area of the study**

This study is particularly focused on the DSS and the disputes filed within the first ten years of its functioning (i.e., January 1st 1995 to January 1st 2005). Having

[3] Interview with senior official at Advisory Center for WTO Law held on 21-06-2006 in ACWL HQ, Geneva.

agreed to a common platform based on certain principles and agreements, the degree and type of utilization of the DSS, the outcomes of the disputes, the degree of compliance and the patterns evident was the operational area of the study. Due to the limited time available, the content of the Agreements that have been signed by member countries, the non-tariff barriers that are still in search of consensus or the ongoing debates within the WTO do not form a part of this paper.

However, a brief look at two developing countries from two different continents namely Brazil and India is being made. The choice of these two countries was determined by the fact that they have been involved in the highest number of disputes from among the developing countries in the period under study. In the DSS, their experience has been examined to throw light on the factors influencing developing countries as they handle trade disputes with developed countries.

**1.5 Chapterisation**

Chapter 2 provides the analytical framework for this paper. The Stakeholder Analytical Approach has been utilized. The stakeholders in the current study are listed out in perspective. The chapter then moves to defining a 'developed' country as against a 'developing' country. Considering that there is no universally accepted 'list' of developed/developing countries this necessary. The Methodology utilized has been elaborated upon.

Chapter 3 provides understanding of the Dispute Settlement Mechanism of the WTO. A comprehensive list of all the Agreements has been made and a 'dispute' defined. . The Dispute Settlement System is then illustrated - its functioning, duration and stages and processes in the settlements of the disputes.

Chapter 4 deals with the presentation and analysis of the data on disputes dealt with by the DSS in the first decade. The data has been presented in a distinct tabular fashion contrasting the first half of the decade with that of the second half. The extent of involvement by developed/developing countries as complainant and respondent together with the categorization of possible combinations are drawn up. The type of Agreements that formed the subject matter of the disputes, the outcomes, the stages up to which the cases were fought, mutually agreed solutions, wins and losses and finally the degree to

which compliance occurred have been analyzed in the context of the above matrix of developed/developing countries as complainant and respondent.

Chapter 5 provides a brief glimpse at the experience of Brazil and India in the first decade of the WTO. Their experience as complainant/ respondent, and the issue of compliance has been dealt with. Interviews with officials dealing with the dispute settlement system in Geneva provide valuable insight in this chapter.

Chapter 6 provides the conclusions and recommendations of the paper.

## 2 Analytical Framework

### 2.1 Stakeholder Analytical Approach

A higher level of abstraction helps on which the information gathered could be explained. The framework chosen here is that of the stakeholder analysis approach which also serves as a methodological tool. Stakeholders are groups, persons or bodies who are affected or influenced by the issue or project in hand.[4] Stakeholders have been classified into three categories namely Primary, Secondary and Key. *Primary stakeholders* are those who ultimately benefit from the activities of the institution or project. *Secondary Stakeholders* are those who channelise the benefits of the program/project to the primary stakeholders such as an institution built to deliver certain services. *Key stakeholders* possess high influence and power and can determine the success or failure of the effort.

Such an analysis can help to assess the success of the effort on hand. It would also be possible to identify vested interests and conflicts if any. The objectives and purposes of a program or institution may be laudable in a written form but a closer look at the manner of functioning will determine the real purposes being served by the effort. It is possible for Key stakeholders to make the entire program subservient to their goals. An informal syndicate within an institution to exercise influence is possible. The 'de jure and de facto'become relevant in the analysis.

Therefore, an assessment of input-output processes is necessary to understand the institution and the parties to place their 'de facto' position in the

[4] Overseas development Administration (ODA), (1995) Guidance Notes on How to Do Stakeholder Analysis of Aid Projects and Programmes, London; Social Development Department, available at http://www.euforic.org/gb/stake1.htm (last accessed on 04-06-2006)

stakeholder hierarchy. This in turn would enable testing opinions of whether the institutions have been in a position to serve the stated objectives and identify actual trends.

**2.2 Stakeholders in Context**

In this study, the stakeholders have been identified in the context of the Dispute Settlement System of the World Trade Organization. The primary stakeholders are the final beneficiaries of the activities of the institution and in the current context constitute all the Member Countries of the WTO - some of whom either appear as Complainants, Third Parties or Respondents. The settlement of the dispute is their primary concern and the purpose for there involvement in the activities of the DSS is to ensure that issues agreed to mutually are not violated. Therefore, filing of complaints irrespective of another's economic status is a key indicator in determining whether 'all are equal'. Similarly, outcomes also constitute a key indicator in determining the trends that the institution is moving towards. Outcomes could either be winning partially or fully for the complainant and at times can lead to a mutually agreed solution. Sometimes, a 'no decision' can also be reported and the matter kept pending.

The secondary stakeholder in the current context is the DSS of the WTO and its ability to fulfill its role in the settlement of disputes. This entails its responsibility to play an effective role as determined by its original charter in an unbiased manner thereby providing a level playing field. The key stakeholders are the developed countries who determine the direction of international trade and in the current context are also primary stakeholders. They can make the entire system subservient to their individual goals.

Developed countries have determined the direction of the international trade scenario by virtue of their role in history and their comparatively advantageous position in 'trading wealth'. Their focus on certain Agreements, willingness to settle 'mutually', the extent to which the dispute is taken to its final stage, the stages at which the cases have been settled etc, will determine whether the Developed countries are in fact 'de facto' key stakeholders.

When asked about the WTO being seen as an organization set up by Developed countries for there own benefit a senior WTO official said – '*Initially, China*

*was in the original 23 – now there are nearly 150. It is a system in transition – not just developed and developing but economies in transition as well.'*[5] This indicates that it may be too early to conclude that the DSS (which is the focal point of research in this study) exists only for developed or developing countries but also for others who may not fall into this classification such as economies in transition.

**2.3 Definition of 'Developed' and 'Developing' Countries:**

The words 'developed' and 'developing' is used in different forums with reference to countries that have managed to provide for basic needs of their citizens and those who are yet to do so. Often the assumption is made that there is possibly a list that clearly demarcates the two categories. In reality, this is not so. It becomes necessary to clearly define the two categories within the context of this study. Davey elaborates in his analysis of how the developing countries have been doing increasingly well in his article on the first decade of the functioning of the DSS but fails to define the countries that he considers as belonging to the developing world (Davey, 2004). Similarly, Matsushita while commenting that developing country members are making more use of the dispute settlement system than expected has avoided addressing the issue of listing of developing countries (Matsushita, 2005). In an article written by McRae, he has mentioned that the future will witness much involvement of developing countries in the DSS but has avoided listing developing countries by identity (McRae, 2005).

The WTO neither defines a 'Developing' country nor does it draw up a list of developing countries. However, its structure of functioning provides for concessions that need to be given to developing countries in a specific context[6]. Members are free to claim 'Developing' status while this privilege is also checked by the condition that such a claim can be challenged. At the Advisory Center on WTO Law (ACWL), a senior counsel said *'the list of developing countries is not clear. Although the possibility of challenging the claim is there, it is not possible, as a clear categorization does not exist. For example, in some WTO Agreements, China has stated that they are not claiming developing country status.'*[7]

---

[5] Interview with a senior official in Legal Affairs Division, WTO held on 21-06-2006 at WTO HQ, Geneva.

[6] http://www.wto.org/english/tratop_e/devel_e/d/who_e.htm (last accessed on 12-06-2006)

[7] Interview held on 21-06-2006 at the Advisory Center on WTO Law

The UNCTAD, the UN organization that is dealing with trade has published its list of Developing countries that is based on the system of unilateral preferences given by member countries[8]. The list in this case is not uniform, as differences exist in some countries being declared as 'Developing' while others are denied the same status.

Perhaps, the most integrated categorization is that of the World Bank. The World Bank has classified economies of the world on the basis of Gross per capita income (earlier referred to as the Gross National Product)[9]. According to this classification, the groups would be Low income ($825 or less), Lower Middle Income ($826 - $3255), Upper Middle Income ($3256 – $10,065) and High Income ($10,066 or more). This classification, made according to the 2004 GNI per capita, leads to an indication as to the countries that are fully developed and those that aren't. The High Income countries (55), Upper Middle Income countries (40), Lower Middle Income countries (54) and Low-income countries (59) altogether totaling 208 lend itself to a clear demarcation[10].

For the purpose of this study, the categorization made by the World Bank has been adopted. 'Developed countries' are those listed as High Income countries (listed in Appendix 1) and 'Developing countries' relating to the rest. However, this does not apply to the least developed countries as the list has been clearly drawn up and published by the WTO[11]. Although other classifications that are less categorical such as 'more developed' and 'less developed' or more industrialized and less industrialized could have been adopted, the categorization of developed and developing has been adopted, as this is the only classification in the Dispute Settlement System. Least Developed countries have been listed in the WTO website[12].

---

[8] http://www.unctad.org/en/docs/itcdtsbmiac62rev/_en.pdf (last accessed on 12-06-2006)

[9] http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,contentMDK:20420458~menuPK<:64133156~pagePK:64133150~piPK:64133175~thesitePK:239419,00.html (last accessed on 12-06-2006)

[10] http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20421402~menuPK:64133156~pagePK:64133150~piPK:64133175~theSITEPK:239419,00.html#lmidincome (last accessed on 12-06-2006

[11] http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last accessed on 12-06-2006)

[12] http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last accessed on 15-06-2006)

## 2.4 Research Objectives

Firstly, this study was undertaken to look at the pattern of usage in filing of disputes by 'developed' and 'developing' countries. This would be indicative of the level of confidence that the parties have in the system to redress their grievances.

Secondly, as mentioned in the section 1.4, it is an issue as to whether the DSS of the WTO is favorably disposed to developed countries. This disposition draws its strength from the fact that Developed countries played a key role in the formation of the WTO and were also the driving force behind GATT. This study aims to measure the extent of such an orientation –if prevalent – while considering the outcomes of all disputes processed in the DSS within the first decade -1995-2005.

Thirdly, this study also measures the extent to which Developing countries involve themselves in filing disputes or in defending themselves in such disputes. In this context, the study also seeks to identify measures of aggression or lead positions taken by Developing countries in disputes.

Fourthly, the decade under study (1995-2005) has been split into two halves so as to further distinguish whether there has been a change in the second half of the decade as compared to the first half. This would help to reveal trends.

Finally, an effort was made to understand the growing proactive nature of involvement in the DSS of two Developing Countries, namely India and Brazil, in the form of a brief assessment. Their experience of the 'working of the system' in the first decade is also vital for throwing light on the issue.

Overall, the emerging trends as seen in the finalized disputes of the Dispute Settlement System of the WTO in the first decade (1995-2005) were the focus of attention so as to assess the true position of Developing countries as against Developed countries.

## 2.5 Methodology

Documentary research has been the main data source. All disputes in the time period under study (January 1st 1995 –January 1st 2005) have been uploaded on the Internet and are available on the WTO official website namely http://www.wto.org as updated on 24-02-2006 was utilized. As this website is directly managed by the WTO,

the reliability of information was ensured. For the purpose of this study, the data processed and tabulated is valid as up to 24/02/06.

For the entire period (1995-2005), the facts pertaining to each dispute has been described briefly together with the main official correspondence on the issue. This data was accessed for each case with reference to the member country being either 'Developed' or 'Developing' as drawn out in 2.3 above. All factors that were to be the subject of analysis were classified in tabular columns and then coded. The data was classified on the basis of the 'first half' of the decade as being from 1-01-1995 to 1-01-2000 and the 'second half' as being from 1-01-2000 to 1-01-2005. Throughout this study any reference to the first half will mean the first half of the decade and similarly second half as second half of the decade.

The coded data was processed in MS Excel. After processing in MS Excel, the information was tabulated in MS Word table format, which facilitated easy transfer into the Research Paper. Wherever the Chi-square test had to be done, epi-info software application was utilized.

A personal visit was made to the WTO headquarters in Geneva where interviews were conducted with key individuals in the Dispute Settlement System of the WTO. The Advisory Center for WTO Law, which was established to assist Developing countries in handling disputes at the WTO, was also visited and an interview held with one of the key functionaries. Apart from this, interviews were held with senior level functionaries at the Permanent Mission of India and Brazil respectively. Apart from this, available literature, journals, electronic journals, library sources (ISS, WTO library,) have provided relevant material, which has been included in this study.

## 3 WTO Dispute Settlement System

### 3.1 WTO Agreements

Agreements form the basis for functioning of the member countries and are meant to bring in the required stability of the global trading system. The Agreements were finalized in the run-up to the launching of the WTO. Violation of any of the provisions already agreed to could lead to the filing of a complaint and thus establishes the presence of a dispute. All the Agreements are listed here. The WTO has classified

them into six parts.[13] The first part being that of the overall base agreement for the formation of the WTO – and the GATT 1994 document. Then the Agreements are to be seen under five aspects namely goods, services and Intellectual property, Dispute Settlement and review of trade policy mechanisms.

For Goods under GATT –

a) Agreement on Agriculture
b) Agreement on Textiles and Clothing
c) Agreement on Rules of Origin
d) Agreement on Trade-related Investment Measures
e) Agreement on Anti-dumping
f) Agreement on Subsidies and Countervailing measures
g) Agreement on Safeguards
h) Agreement on Import licensing measures
i) Agreement on Application of Sanitary and Phytosanitary measures
j) Agreement on Technical Barriers of Trade
k) Agreement on Customs Valuation

For Services under GATS (General Agreement under Services)

a) Agreement on movement of natural persons
b) Agreement on Air Transport
c) Agreement on Financial Services
d) Agreement on Shipping
e) Agreement on Telecommunications

The Agreement on Trade related Intellectual Property Rights does not have any associate agreements. Then there is the Agreement on Dispute Settlement and the Agreement on review of trade policy mechanisms of respective member countries. The Dispute Settlement Agreement encompasses the rules and procedures for the redressal of violation of issues already agreed to in the above agreements.

---

[13] http://www.wto.org/english/tratop_e/dispu_e.htm#intro (last accessed on 6-6-2006.)

### 3.2 What is a Dispute?

According to the WTO,

*'A dispute arises when a member government believes another member government is violating an agreement or a commitment that it has made at the WTO'.*

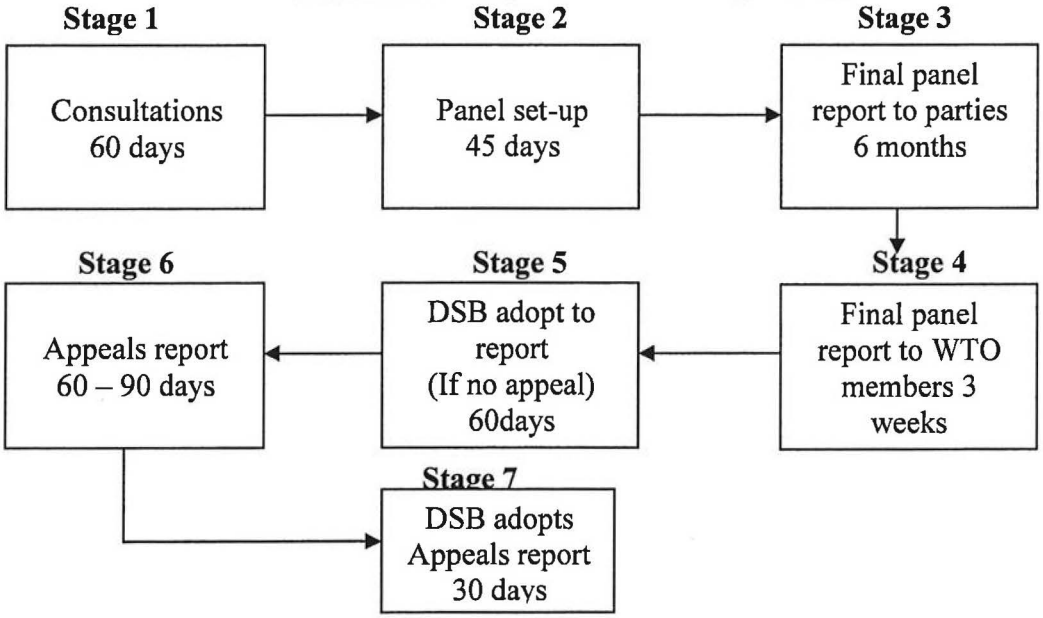
Further, *'the authors of these agreements are the member governments themselves and the agreements are the outcomes of negotiations among members.' 'Ultimate responsibility for settling disputes also lies with member governments through the dispute settlement body.'*[14]

In these extracts, the 'Agreements' hold the key to the working of the Dispute Settlement mechanism.

### 3.3 Dispute Settlement System (DSS):

The Dispute Settlement System of the WTO is institutionalized and improves on the GATT system. The entire process has been systematized with well-defined stages. In the event of an unsolvable dispute, the scope for a decision (equivalent in value to a judgment) being adopted by the DSB has been factored in. The stages and the period of time fixed for each stage is listed below[15].

Figure 3.1 Dispute settlement process




[14] http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#intro (last accessed on 6-06-06)
[15] http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last accessed on 6-06-06)

### 3.4 Processes and Mechanism of functioning:

The Understanding on rules and procedures governing the settlement of disputes referred to as Dispute Settlement Understanding forms the basis for the functioning of the DSS.[16] Rules and procedures in the settlement of disputes through the WTO, the Dispute Settlement Body and its role, the importance to be given to consultations and mutually agreed solutions are incorporated in this document. The information contained in this chapter is drawn substantially from this document. Insights can be drawn from social processes that have been incorporated addressing the sensitivities of the member-countries involved. The purpose of the dispute settlement mechanism according to document 'is to secure a positive solution to a dispute'.

The first stage as mentioned in 3.3 is the consultations stage and is the initial effort in settling the dispute in an amicable manner. The rules provide for confidential deliberations. Although the time duration for each stage is specified in the rules, it is the prerogative of the complainant party to move the dispute onto the panel stage. Article 8 mentions the eligibility conditions for being appointed to the panel. Well-qualified government and /or non-governmental individuals, WTO Secretariat staff, those who are experts in international trade law or policy or served as senior trade policy official of a member country – are eligible to be appointed as panel members. Thus the emphasis is on expertise and panelists are chosen to ensure independence of the members. Certain precautions have been taken to ensure absence of bias. Citizens of parties to the dispute are not eligible to serve as panelists, provided the parties to the dispute agree. A list is maintained at the WTO Secretariat of governmental and non-governmental individuals possessing the requisite qualifications.

Panels are normally composed of 3 to 5 members. The WTO Secretariat proposes nominations for the panel to the parties and for compelling reasons can be opposed. The system is sensitive to ensuring mutual acceptability. If there is no agreement on the panelists, a committee headed by the Director-General is authorized to finalize it. Article 8 – sub clause 10 – also provides for incorporating one panelist from a

[16] http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#1 last accessed on 25-06-2006 –the entire document is available here and all information in 3.3.1 is accessed from this web address.

developing country if the dispute is between a developed and developing country. This can be done by request of the developing country.

The Panel's role is to make an objective assessment and to the extent possible work towards a mutually satisfactory solution. Panel work can be suspended at the request of the complaining party for a period of up to 12 months and if more the established panel lapses. A Panel can benefit from external expert advice. The principle of confidentiality has helped all parties to be at ease during the process of the deliberations. The panel report is perhaps the most important stage as the main process of dealing with contentions of the parties is done here.

The procedures provide for involvement of third parties to the dispute. Third parties are members who assert substantial interest in the issue and are provided an opportunity to be heard by the panel. They make written submissions to the panel. These are given to the parties of the dispute and are reflected in the panel report. Third parties receive submissions of parties to the dispute and are invited to the first meeting of the panel. Participating as third parties provides valuable experience to developing and least developed countries. Third parties cannot appeal.

After the panel stage there is the possibility for the complainant/respondent to accept/appeal the findings of the panel report. The Appellate Body hears an Appeal. After the Appellate Body processes the Appeal, the report of the AB is place before the DSB and then adopted. An unsuccessful respondent has no choice but to comply. The DSB unconditionally accepts the AB report unless by consensus they decide not to do so (within thirty days of its submission.).

A member of the Appellate Body (AB) is appointed for a period of four years and is composed of 7 persons of which any three will serve on a case. AB members should have demonstrated experience in law and international trade and should not be affiliated to any government. The rules provide that the AB shall be broadly representative of the WTO and if there is conflict of interest are not permitted to participate. When this researcher visited the WTO in June 2006, the seven Appellate Body members in office were from Egypt, Brazil, India, United States, Australia, Italy and Japan with the Member from India as the Chairman. (WTO, 2006). The AB member from Australia passed away in January 2006 and his vacancy had yet been filled.

In concluding this section, the mechanism of functioning can be summarized as follows: At the first stage, both the Complainant(s) and the Respondent are encouraged to enter into consultations in the hope of working out a mutually acceptable solution. No compulsion is brought on the parties to move into the second stage. The complainant chooses to move into the second stage when the first stage fails and then the Dispute settlement system takes over moving the issue from stage two until the final stage. If there is an Appeal to the Panel report, then the Appellate Body hears the same within a defined time period. The General Council functions as the Dispute Settlement Body, which deals with the last stage in the finalization of the issue under dispute by adopting the panel report if there is no appeal and in the event of an appeal, adopts the Appellate Body report after the appeal is heard.

Within the DSS, all nations are considered equal and each nation is formally recognized as a single entity that is unrelated to the volume of foreign trade or its power status otherwise. Four governing principles of the Dispute Settlement System are publicized as to guide its functioning and they are 'Equitable, fast, effective and mutually acceptable'[17]. By these principles, the DSS seeks to project a vision that brings all members under its umbrella with a proclaimed outlook towards settlement of international trade issues. In an effort to appear equitable, special provisions have been incorporated for Developing countries and Least Developed Countries (LDCs) among whom the LDCs are more favored.

**3.5 Case Studies illustrative of types of disputes elaborated upon in Findings:**

The following chapter (chapter 4) details the findings of this study. Information utilized for the purpose of analysis has been classified into four distinct categories in the form of all possible combinations amongst developed and developing countries. A single case study is outlined below in each category as a window into the findings chapter.

[17] http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm -last accessed on 10-06-06

### 3.5.1 Developed country as Complainant and Respondent:

DS 212[18] involves a dispute between two developed countries that began on 10-11-2000. The European Communities were the complainant and USA the respondent. The issue was related to subsidies and countervailing duties and as the consultations stage did not yield any result, a panel was requested by the EC and was established. The panel after conduct of hearings upheld the contention of the complainant. The USA appealed the issue before the Appellate Body and after the required hearings it upheld the findings of the panel on some issues while reversing the conclusions on certain areas. The Dispute Settlement Body adopted the Appellate Body report on 8-01-2003 and this required the USA to ensure compliance to the extent incorporated in the AB report. The USA is yet to show full compliance to the satisfaction of the EC. On the issue of compliance, this case considered as 'compliance unresolved or not complied with' category. The third parties in this dispute were Brazil, Mexico, India, China and Korea.

### 3.5.2 Developed country as Complainant and Developing country as Respondent:

DS 87[19] -is a dispute with the complainant (EC) being a developed country and the respondent (Chile) being a developing country. The European Communities (EC) requested for consultations with Chile on the issue of taxation on imported spirits being more than Pisco – a locally brewed spirit. Subsequently, based on the request by EC, a panel was formed and the panel ruled that Chile's system of taxation was not consistent with the Articles of GATT 1994 (the basic Agreement signed in 1994 that was alleged to have been contravened and formed the basis for the dispute.) Chile appealed the decision and after the hearings the Appellate Body upheld the panel's findings on 12-01-2000. As the EC won the case, Chile was required to comply with the outcome. In this case, Chile had to pass legislation and accordingly complied. The third parties in this dispute were Canada, Mexico, Peru and USA.

---

[18] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds212_e.htm last accessed on 10-11-2006.

[19] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds87_e.htm last accessed on10-11-2006

### 3.5.3 Developing country as Complainant and Developed country as the Respondent:

DS 2[20] – a dispute involving a developing country (Venezuela) as the complainant and a developed country (USA) as the respondent. Venezuela formally launched its case on 24-01-1995 alleging that US gasoline regulation discriminated against Venezuela's gasoline and that this violated certain articles of GATT 1994 and the Agreement on Technical Barriers to trade. After the initial phase of consultations did not yield results, a panel was formed on Venezuela's request. The panel's findings concluded against the USA and this was then appealed following which the Appellate Body heard the appeal and upheld the panel's findings. The Dispute Settlement Body adopted the AB report. Thus, Venezuela won the case and this required compliance by the USA. USA complied within the time that was given. The third parties in this dispute were EC and Norway.

### 3.5.4 Developing country as Complainant and Respondent:

DS 22[21] involves a dispute wherein both the complainant and the respondent were developing countries. Philippines (complainant) launched its case on 30-11-1995 against Brazil (respondent) with a request for consultations alleging that a countervailing duty imposed by Brazil on exported desiccated coconuts was not consistent with the WTO and GATT 1994 rules. After failure in consultations, the request for a panel was made. The panel submitted its report and concluded that the grounds quoted by the complainant were not applicable to the dispute. Philippines appealed the matter to the Appellate Body, which upheld the panel report, and this was adopted by the DSB on 20-03-1997. Philippines lost the case and consequently there was no requirement for compliance by Brazil. The third parties in this dispute were Canada, EC, Indonesia, Malaysia, Sri Lanka and USA.

## 4. Findings:

### 4.1 Major countries that are active in the DSS:

Over the first decade, from January 1st 1995 to January 1st 2005, 324 disputes were filed. For the purpose of this study, as mentioned earlier, the complainants/respondents were classified as either belonging to Developed or

[20] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm last accessed on 10-11-2006.
[21] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds22_e.htm last accessed on 10-11-2006.

Developing countries. Although within the period of the study one dispute was involved wherein the complainant was a least developed nation, it has been grouped with developing countries for the purpose of this study. In a few cases, the complainant is a group and in those situations the majority has classified it i.e. if there were more developing countries in that complaint, it would be classified as made by a developing country. In the first half (1st January 1995 to 1st January 2000), 185 disputes were filed and 139 disputes in the second half (1st January 2000 to 1st January 2005).

Although the main categories have been classified as 'developed' and 'developing', it is of interest to list the top 11 countries in each category (listed in order of totality of cases involved).

**Table 4.1.1**

**Major Developed Countries as Complainant and Respondent**

**In disputes filed before the DSS in the first decade - 1995-2005**

| *Name of the Country* | *As Complainant* | *As Respondent* | *Total* |
|---|---|---|---|
| USA | 80 | 88 | 168 |
| EC | 68 | 51 | 119 |
| Canada | 26 | 13 | 39 |
| Japan | 12 | 14 | 26 |
| Korea | 12 | 13 | 25 |
| Australia | 7 | 9 | 16 |
| New Zealand | 6 | -- | 6 |
| Switzerland | 4 | -- | 4 |
| Norway | 3 | -- | 3 |
| Belgium | -- | 3 | 3 |
| Ireland | -- | 3 | 3 |

Table 4.1.1 shows that USA is involved in most number of disputes followed by EC and then Canada. Canada is followed by Japan, Korea and Australia. All the others mentioned above are in the single digit level.

**Table 4.1.2**

**Major Developing Countries as Complainant and Respondent -1995-2005**

| *Name of the Country* | *As Complainant* | *As Respondent* | *Total* |
|---|---|---|---|
| **Brazil** | **22** | **12** | **34** |
| **India** | **16** | **17** | **33** |
| **Mexico** | **13** | **12** | **25** |
| **Argentina** | **9** | **14** | **23** |
| **Chile** | **9** | **10** | **19** |
| **Thailand** | **11** | **1** | **12** |
| **Turkey** | **2** | **7** | **9** |
| **Philippians** | **4** | **4** | **8** |
| **Guatemala** | **5** | **2** | **7** |
| **Colombia** | **4** | **1** | **5** |
| **Ecuador** | **2** | **3** | **5** |

Table 4.1.2 show that Brazil leads with the highest involvement in disputes either as complainant or respondent followed by India and then Mexico, Argentina, Chile and Thailand. All others listed above are at the single digit level.

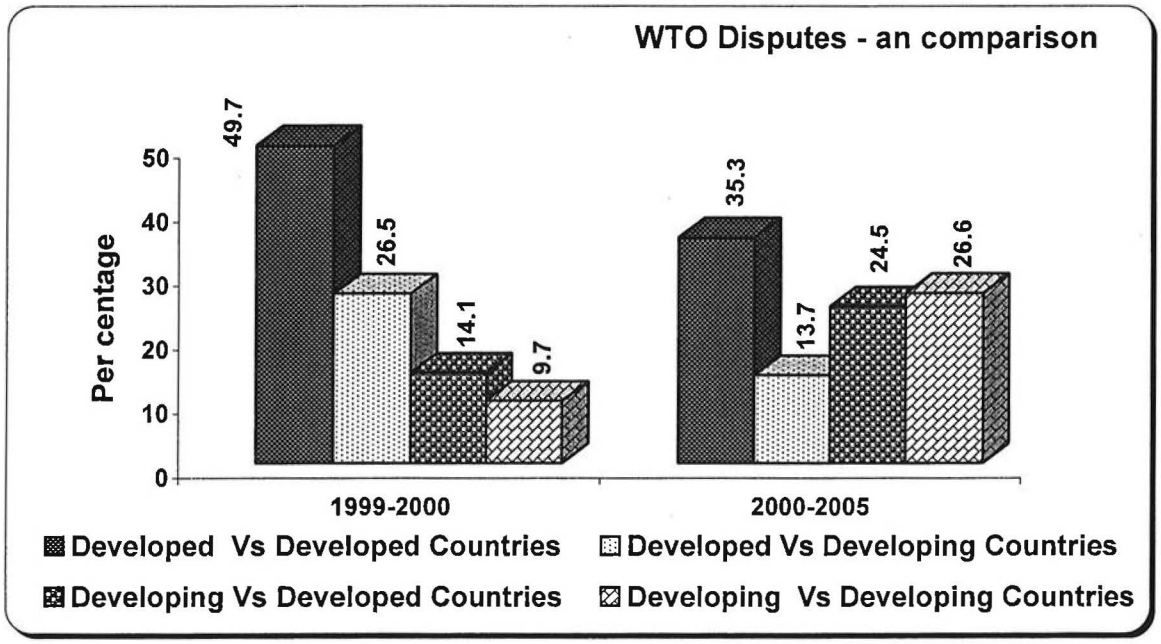
**4.1a. Trends in Complainants/Respondents being Developed/Developing countries:**

In Table 4.1, the disputes have been further classified in four categories (as in 3.4), of all the possible combinations of disputes between developed and developing countries. In the first half of the decade, developed countries were complainants in 76.2% of the cases as contrasted with only 23.8% of the complainants being from developing countries. However, this trend undergoes a change in the second half, when complaints by developed countries constitute only 49% while those by developing countries constitute 51%. There is a marked increase in the presence of developing countries in the second half of the decade that indicates that they were more active in the Dispute Settlement process.

**Table 4.1 WTO Disputes – First Decade: 1995-2005**

| *Complainant Vs Respondent* | *1995-2000* | *%* | *2000-2005* | *%* | *Total* | *%* |
|---|---|---|---|---|---|---|
| Developed Vs Developed Countries | 92 | 49.7 | 49 | 35.3 | 141 | 43.5 |
| Developed Vs Developing Countries | 49 | 26.5 | 19 | 13.7 | 68 | 21.0 |
| Developing Vs Developed Countries | 26 | 14.1 | 34 | 24.5 | 60 | 18.5 |
| Developing Vs Developing Countries | 18 | 9.7 | 37 | 26.6 | 55 | 17.0 |
| Total | 185 | 100.0 | 139 | 100.0 | 324 | 100.0 |

**Figure 4.1 Comparison of percentages between first half and second half of the decade – 1995 to 2005**




Further, Table 4.1 indicates that the flurry of cases of 49.7% in the initial period was between developed countries both as the complainant and respondent whereas developing countries were complainants in 14.1% in disputes against developed countries and 9.7 % against developing countries. There is a turnaround in the second half with a drop in the disputes filed by developed countries against developed countries both

numerically (from 92 down to 49) and percentage-wise (from 49.7% to 35.3%). The second half also records a marginal rise of complainants being developing countries and respondents being developed countries the number of disputes –from 26 to 34 and this accounts for 24.5%. At the same time there is a hundred percent increase (from 18 to 37) in the number of disputes with both complainants and respondents being developing countries. Figure 4.1 provides a bar diagram that illustrates the marked difference between the two halves in percentages.

There is a dominant presence of developed countries in the first half that undergoes a change in the second half with increased involvement by developing countries. Apart from the number of complaints by developed countries taking a downward trend, there is an indication that more developing countries appear to utilize the platform of the DSS to deal with disputes against developing countries. Considering that disputes enter the panel phase only when the possibilities of further consultations seem futile, the presence of more developing countries as complainants shows a willingness to access the process of the DSS to seek redressal for their disputes.

To find out whether these observed differences were significant and not due to chance alone, a test of significance for association – the chi square test – was applied. The chi square got was 28.01 with a 'p' value of 0.000361. This shows that the trends observed are statistically significant.

**4.2 Types of Agreements featured in disputes: 1995-2005**

In 3.1, the various types of WTO Agreements have been listed in full and these form the basis for any complaint. A violation of an Agreement has to necessarily be claimed for a dispute to be taken on record. Therefore, it is of interest to identify those Agreements that have attracted most attention in the disputes. Figure 4.2.1 displays different agreements featured in the disputes. Some of the disputes have involved more than three agreements due to the complexity of the case and have been accounted for in the data presented below.

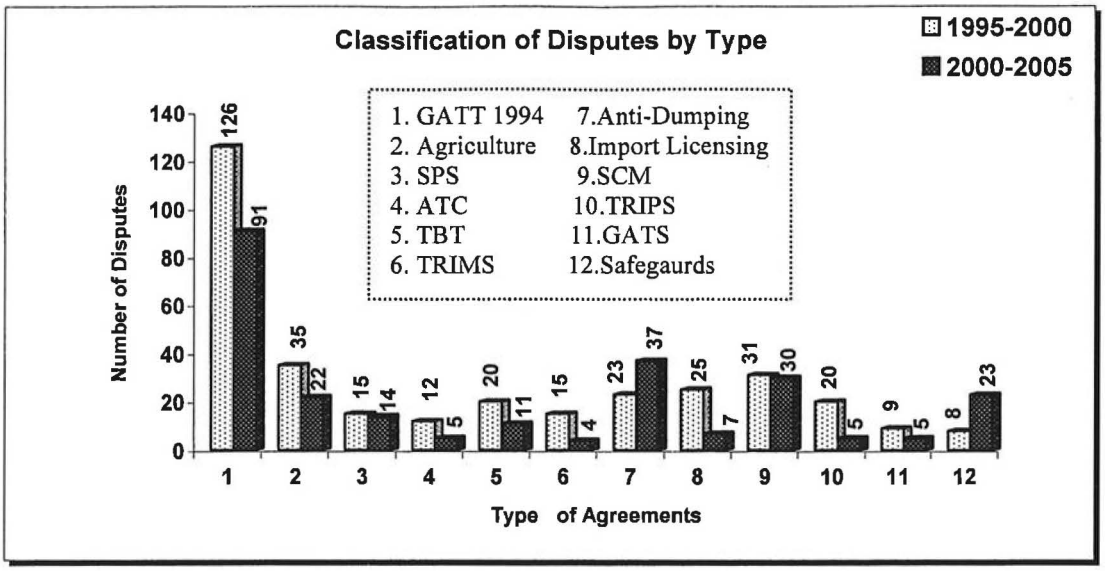



**Figure 4.2.1 Classification of disputes by Agreements: 1995-2005**

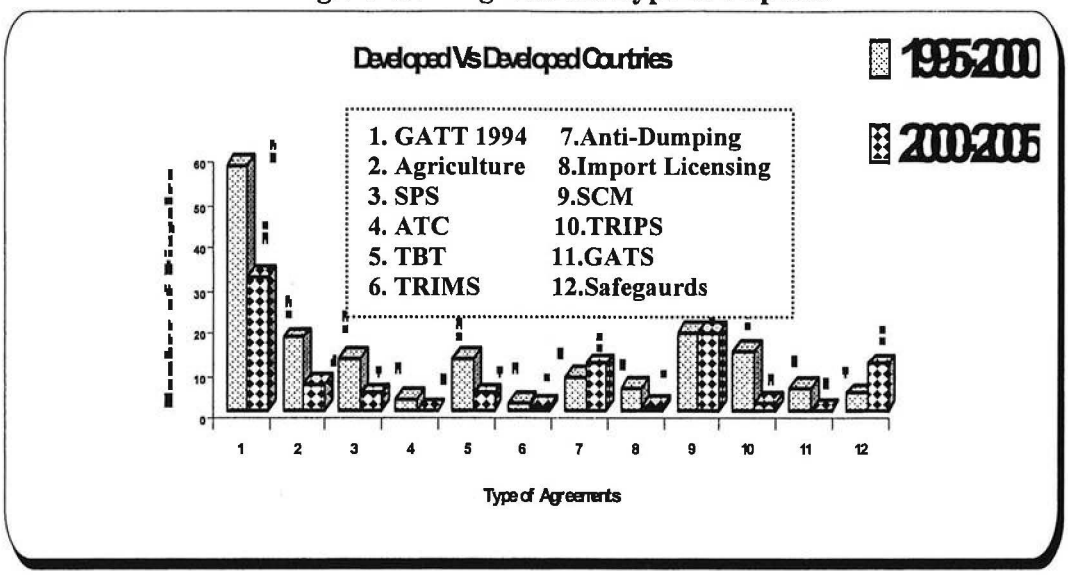
*Abbreviations enclosed – refer to abbreviations chart.*

Note: The type of Agreements correspond to the number listed in the dotted box and are accordingly spread on the 'x' axis with the number at the bottom part of the bar. The numbers above each bar, correspond to the actual number of disputes in which the particular agreement was claimed as the basis of the dispute.

From Figure 4.2, it can be seen that GATT 1994 occupies the highest and is the basis for most disputes. However, if a broad analysis of the overall trend is to be made between the first half and the second half the following can be seen. There is a drop in the following agreements being the subject matter of disputes – GATT 1994 fell from 126 in the first half to 91 in the second half, Agriculture - from 35 to 22, ATC - from 12 to 5, TBT - from 20 to 11, TRIMS – from 15 to 4, Import licensing - from 25 to 7, TRIPS – from 20 to 5 and GATS - from 9 to 5. The figures have almost been constant in the following: namely in SPS with 15 in the first half and 14 in the second half – and SCM with 31 in the first half and 30 in the second half. In two types there is an increase i.e., – Anti-Dumping where it moves from 23 in the first half to 37 in the second half and in Safeguards from 8 in the first half to 23 in the second half. The picture is clearer when the comparison is made between different categories namely developed and developed countries.

Hence, a brief analysis is made with the type of agreements and the complainants/respondents being developed or developing.

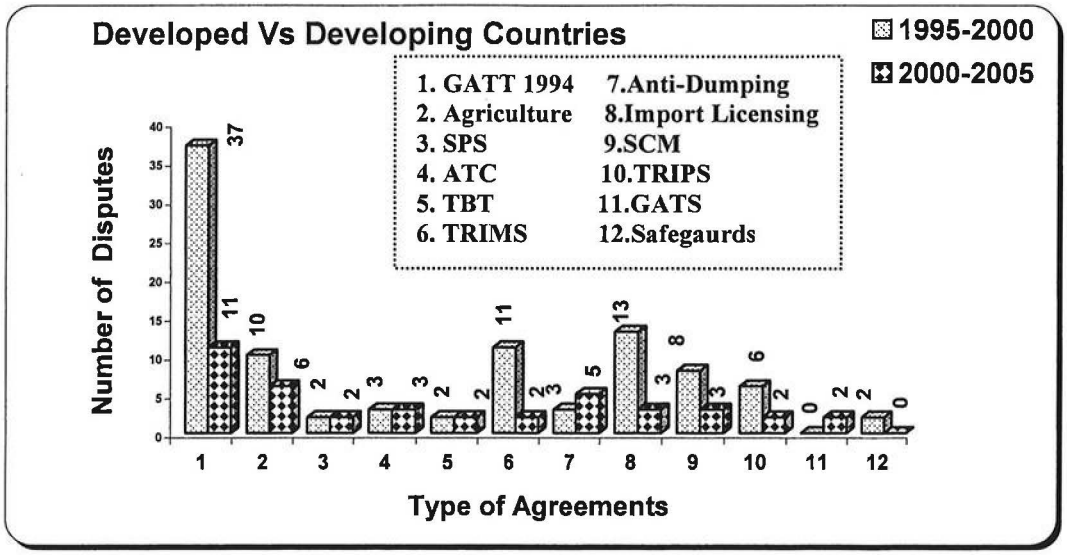
**Figure 4.2.2 Agreement Type in disputes**




As in the overall trend, there is a drop from the first half to the second half in most types with the exception being the Anti-Dumping and the Safeguards agreement wherein an increase is seen in the second half while SCM related disputes remained at a constant level. Generally, this category where both complainants and respondents are developed countries, the trend is in keeping with the overall situation. One aspect that could be the subject of future research is whether developed countries are more anxious to keep their developed country counterparts in check which may be the reason for an increase in Anti-Dumping and Safeguards cases amongst them. The reasons for the same could be explored more in future research.

The Figure 4.2.3 depicts the situation when the complainant is a developed country and the respondent is a developing country. Here, there is a drop in disputes involving

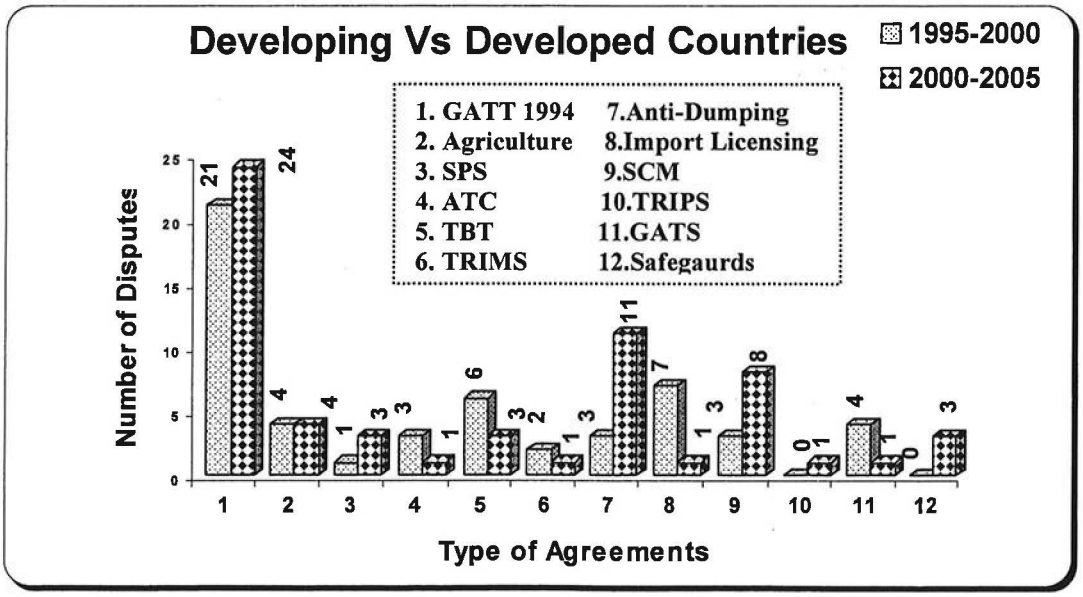
**Figure 4.2.3 Agreement type in disputes**




GATT 1994, TRIMS and Import Licensing, this despite the fact that GATT 1994 is frequently used in disputes. This drop could be due to the simple fact of fewer disputes being filed by developed countries in the second half of the decade. A constant level is seen in SPS, ATC and TBT although the figures are small.

Figure 4.2.4 illustrates the type of agreements that featured in disputes involving developing countries as complainants and developed countries as respondents.

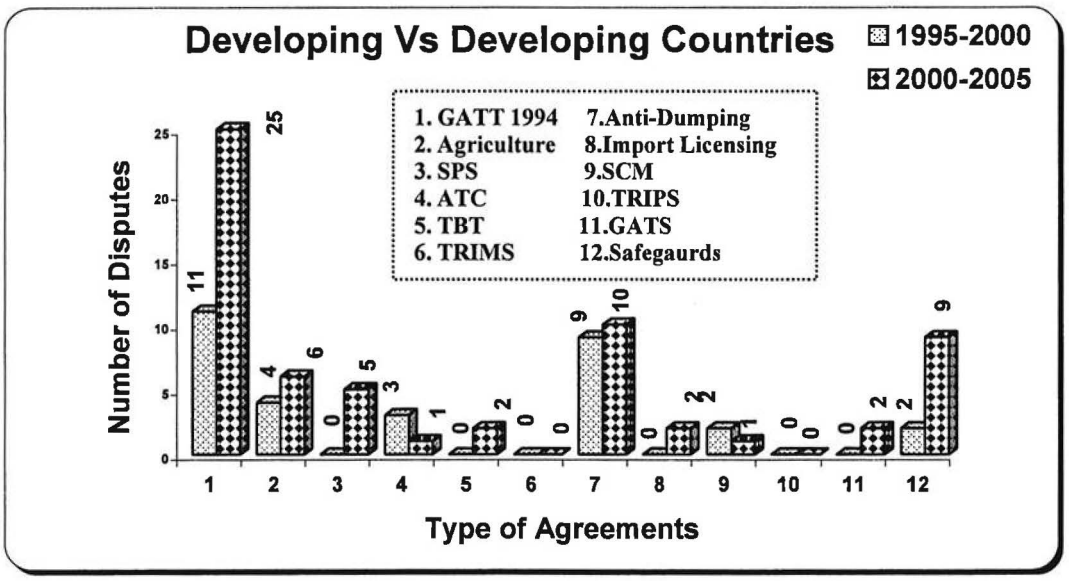
**Figure 4.2.4 Agreement type in disputes**



Here, there is a difference in the types of agreement that are the subject matter of the complaints. Figure 4.2.4 shows an increase in GATT 1994 cases, SPS and SCM in the second half as opposed to the overall trend. This indicates the possibility of trade practices initiated by developed countries in the form of Sanitary or Phytosanitary measures or subsidies and countervailing measures to restrict inroads into their markets by developing countries. However, this would require further study and needs to be researched further. In Anti-Dumping and Safeguards is an increase in the second half that is similar to the overall trend. In Agriculture, the quantum of cases remains constant as opposed to the overall trend that witnesses a drop in the second half.

Figure 4.2.5 displays information as seen when both the complainant and the respondent is a developing country.

**Figure 4.2.5 Agreement type in disputes.**




There is an increase in GATT 1994, Agriculture, TBT, Import Licensing and GATS in the second half as opposed to the first half and this is different from the overall trend. There is an indication here that when both parties are developing countries, the trade issues affecting them are qualitatively different and this would need to be further researched to draw significant conclusions. In SPS and Safeguards Agreements the increased trend in this category is similar to the overall situation in the

second half. TRIMS and TRIPS were not featured in any of the cases in the entire decade thereby possibly indicating that these are not issues between developing countries. Although ATC and SCM show reduced numbers the quantum is marginal and is difficult to be submitted to further interpretation within the scope of this study.

### 4.3 Outcomes to WTO Disputes – 1995 to 2005

The Outcomes to WTO disputes can be measured in four different ways. The first possible outcome is when a 'Win' occurs i.e., when the complainant who initiates the case, wins the dispute and secures a verdict either partially or fully in his favor. It is important to highlight the fact that the official website of the WTO does not utilize phrases such as 'win' or 'lose'. Quite possibly this may have been the adopted approach to avoid controversies or debate in concluded matters that may lead to national sensitivities involving national pride. This study does not inquire into the background for such an approach. For the purpose of this study, a 'win' refers to a dispute in which the complainant has obtained a decision in its favor either partially or fully. Such a decision by the Dispute Settlement mechanism at whatever stage of completion would require action on the part of the respondent to rectify that aspect in which there has been an adverse ruling.

Secondly, the complainant could 'lose' the dispute. In this outcome, the complainant has been unable to obtain a ruling in his favor and therefore there is no requirement on the part of the respondent to rectify that aspect that formed the basis for the complaint.

Thirdly, both parties could arrive at a mutually agreed solution and this would not constitute either a win or a loss to either party although it may require the respondent to make amends to certain trade-related measures prevalent within its jurisdiction. This outcome is a situation of 'no contest' as the matter has been resolved in a consultative manner. In this situation, the time duration stipulated for separate phases may not apply as both parties are intent on working out a mutually acceptable solution and mutual acceptability is one of the governing principles of the WTO.

The fourth possible outcome is when the case does not formally make progress and a decision is not notified. This situation is not limited by the time duration

earlier specified for each stage and could prolong for any length of time under the current procedures. To measure such a situation, for the purpose of this study, it has been recorded as 'no decision'. Such a case recorded in the website as not having been concluded does not infer anything. The reason is that the complainant may not press the dispute as he has found other alternate remedies. Also, there is a possibility that the complainant is satisfied with the present situation and does not want to conclude the matter. The real reason for a 'no decision' is not officially acknowledged. However, if the complainant presses the matter, the DSS responds by moving the case into the panel stage after which the stipulated time durations control every consequent stage and the case has to conclude with either a 'win' or 'lose' situation. Thus, 'no decision' cases can be kept pending for any length of time. This can be summed up in the words of a senior Brazilian official -

*'So, if a 'no decision' is recorded in a case, it could mean anything – primarily it means that the complainant is not pressing the issue for the moment or that an informal understanding has been reached'.*[22]

**Table 4.3: Outcome of WTO Disputes: 1995-2005 (n=324)**

| *Outcome* | *1995-2000* | *%* | *2000-2005* | *%* | *Total* | *%* |
|---|---|---|---|---|---|---|
| **Win** | **65** | **35.1** | **49** | **35.3** | **114** | **35.2** |
| **Lose** | **10** | **5.4** | **5** | **3.6** | **15** | **4.6** |
| **Mutual** | **40** | **21.6** | **21** | **15.1** | **61** | **18.8** |
| **No Decision** | **70** | **37.8** | **64** | **46.0** | **134** | **41.4** |
| **Total** | **185** | **100.0** | **139** | **100.0** | **324** | **100.0** |

In the first half, Table 4.3 displays that the complainant won 65 disputes and this constitutes 35.1% of the cases filed. Of the 185 disputes that were filed only 10 cases were lost by complainants. Mutually agreed solutions are evident in 40 cases and account for 21.6% of the cases during that period. 70 cases are yet to be decided and do not have a notified ending to the dispute. In the second half, the proportionate number of wins (49) remains almost the same at 35.3% and the lost cases show a marginal decline at

[22] Interview a senior official at Permanent Mission of Brazil, Geneva on 22-06-2006 at Geneva

3.6%. The mutually agreed solutions are notified in 21 cases and this constitutes 15.1% of the complaints filed. The proportionate number of 'no decision' cases (64) increases to 46% and this is the only significant change. As mentioned earlier, a 'no decision' does not signify anything and could actually mean that things are 'under control' with the complainant unwilling to push the case further. Overall, the 'No Decision' cases top the table and the reasons could range from national interest to informal compromises, which are beyond the scope of this study. Clear decisions have emerged in 58.6% cases and this indicates that where necessary formal solutions have been possible among countries in a quasi-judicial framework. The Dispute Settlement System has worked to deliver results where the complainant has been unable to secure a solution through a consultative process. This is indicative of a suitable platform now being available in the international arena for member countries to resolve their trade issues. It is of interest that the DSS itself has not yet become the subject of protest in terms of its style of functioning although there are suggestions to improve on it further the details of which are beyond the scope of this study.

The break-up of cases as Developed and Developing countries being complainants and respondents helps to reveal the prevalent trends.

**Table 4.3.1 Outcomes of WTO Disputes: 1995-2005 (n=141)**
**Developed vs. Developed Countries**

| *Outcome* | *1995-2000* | *%* | *2000-2005* | *%* | *Total* | *%* |
|---|---|---|---|---|---|---|
| Win | 34 | 37.0 | 22 | 44.9 | 56 | 39.7 |
| Lose | 8 | 8.7 | 3 | 6.1 | 11 | 7.8 |
| Mutual | 22 | 23.9 | 2 | 4.1 | 24 | 17.0 |
| No Decision | 28 | 30.4 | 22 | 44.9 | 50 | 35.5 |
| Total | 92 | 100.0 | 49 | 100.0 | 141 | 100.0 |

During the first decade, as can be seen in Table 4.3.1, 141 complaints were filed with both complainants and respondents being developed countries, of which 92 pertain to the first half and 49 to the second half. Quantitatively, the number of cases has reduced by almost 50%. In the first half of the decade, the complainant won 37% of the cases filed while in the second half it increased to 44.9%. Considering that there was a drastic

reduction in the number of cases filed in this category, there is difficulty in drawing major conclusions on this score. Similarly, 8 cases were lost in the first half as against 3 in the second. A significant change can be seen in the cases in which mutually agreed solutions were arrived at which drops from 22 cases in the first half to only 2 cases in the second half of the decade i.e., from 23.9% to 4.1%. Comparatively, this could reflect on reduced orientation to mutually agreed solutions among the developed countries and perhaps a growing apprehension about reaching such negotiated settlements. However, such a conclusion would be premature and requires further research. The proportionate percentage of 'no decision' cases increased from 30.4% to 44.9% in the second half.

**Table 4.3.2: Outcome of WTO Disputes: 1995-2005 (n=68)**
**Developed vs. Developing Countries**

| *Outcome* | *1995-2000* | *%* | *2000-2005* | *%* | *Total* | *%* |
|---|---|---|---|---|---|---|
| **Win** | **17** | **34.7** | **3** | **15.8** | **20** | **29.4** |
| **Lose** | **--** | **--** | **1** | **5.3** | **1** | **1.5** |
| **Mutual** | **13** | **26.5** | **5** | **26.3** | **18** | **26.5** |
| **No Decision** | **19** | **38.8** | **10** | **52.6** | **29** | **42.6** |
| **Total** | **49** | **100.0** | **19** | **100.0** | **68** | **100.0** |

Table 4.3.2 above reveals a different trend when the developed countries were complainants and the respondents were developing countries. While the first half of the decade witnesses as much as 17 disputes (34.7%) when the complainant (developed) won their cases, only 3 wins (15.8%) are recorded in the second half of the decade. Developed countries did not lose a single case in the first half and lost only one case in the second half. Mutually agreed solutions were arrived at in 13 cases in the first half and 5 in the second half, which was 26.5% and 26.3% respectively. The dispute wherein 'no decision' has been seen shows a proportionately marked increase as 19 (38.8%) in the first half and 10 (52.6%) in the second half of the decade. However, the chi-square test revealed that the observed differences were not statistically significant.

**Table 4.3.3 Outcome of WTO Disputes: 1995-2005 (n=60)**
**Developing vs. Developed Countries**

| *Outcome* | *1995-2000* | *%* | *2000-2005* | *%* | *Total* | *%* |
|---|---|---|---|---|---|---|
| **Win** | **10** | **38.5** | **19** | **55.9** | **29** | **48.3** |
| **Lose** | **--** | **--** | **1** | **2.9** | **1** | **1.7** |
| **Mutual** | **3** | **11.5** | **3** | **8.8** | **6** | **10.0** |
| **No Decision** | **13** | **50.0** | **11** | **32.4** | **24** | **40.0** |
| **Total** | **26** | **100.0** | **34** | **100.0** | **60** | **100.0** |

Table 4.3.3 brings the results of Developing countries as complainants and developed countries as respondents into focus. In the first half, developing countries won 38.5% (10) of the complaints that they had filed while in the second half they won 55.9% (19). Proportionately, this is the highest among the four categories. Again, similar to Table 4.3.2, not a single case was lost in the first half and only one case was lost in the second half by the complainants. The number of cases with mutually agreed solutions remained constant at 3 in the first half and 3 in the second half. The proportionate percentage of 'no decision' cases dropped from 50% to 32.4% in the second half. In this category, the chi square test revealed that the observed differences were not statistically significant.

Table 4.3.4 shown below displays information in cases wherein the complainants and respondents were developing countries. In this category, there were only 18 disputes (9.7% of the total cases filed) in the first half and 37 disputes (26.6% of the total cases filed) in the second half (as seen in Table 4.1). Of this, 4 disputes were won in the first half (22.2%) and 5 won in the second half (13.5%). Although the complainants in the first half lost 2 cases, none were lost in the second half. The mutually agreed solutions that were declared increased from 2 cases (11.1%) in the first half to 11 cases (29.7%) in the second half. This is indicative of a move towards discussion and settlement to mutual advantage within this category. There appears to be willingness for developing countries to find solutions with one another as contrasted with the difficulty of developed countries in doing the same. So, developing countries have started to reach mutual agreements

more frequently while developed countries have stopped making use of them. However, proportionately the 'no decision' cases remained above 50% both in the first half (55.6%) and in the second half (56.8%). So, the overall trend seems to be in favor of developing countries when the second half is compared to the first half.

**Table 4.3.4 Outcome of WTO Disputes: 1995-2005**
**Developing vs. Developing Countries**

| *Outcome* | *1995-2000* | *%* | *2000-2005* | *%* | *Total* | *%* |
|---|---|---|---|---|---|---|
| **Win** | **4** | **22.2** | **5** | **13.5** | **9** | **16.4** |
| **Lose** | **2** | **11.1** | **--** | **--** | **2** | **3.6** |
| **Mutual** | **2** | **11.1** | **11** | **29.7** | **13** | **23.6** |
| **No Decision** | **10** | **55.6** | **21** | **56.8** | **31** | **56.4** |
| **Total** | **18** | **100.0** | **37** | **100.0** | **55** | **100.0** |

**4.4 Stage-wise completion of cases:**

In 3.3 a detailed note has been written on the different stages of a dispute ranging from Consultation to adoption of the Report by the DSB. An issue that has often been raised and mentioned in chapter 1.3 by Matsushita is that developing countries are not in a position to defend themselves against the legal sophistication and knowledge of the developed countries (Matsushita, 2005). In Western countries, courses on International Law are taught at University level in regular law courses and the same cannot be said of law courses taught in developing countries. Examining the stage at which concluded disputes were won or lost could test the opinion that this puts developing countries at a disadvantage. The capacity to defend effectively can point to the fact that developing countries have the ability to safeguard their interests given some form of a level playing field with known rules and procedures. It is in this context that the current set of tables has been listed. They portray the stage wise completion of cases that were contested and won or lost.

**Table 4.4 Stage-wise details of won/lost disputes: 1995-2005**

| *Settlement Stage* | *Win* | | | *Lose* | | |
|---|---|---|---|---|---|---|
| | 1995-2000 | 2000-2005 | Total | 1995-2000 | 2000-2005 | Total |
| Consultation | 2 | -- | 2 | -- | -- | -- |
| Panel Stage | 1 | -- | 1 | -- | -- | -- |
| Final panel report | -- | -- | -- | -- | -- | -- |
| Report adoption by DSB (Without appeal) | 13 | 13 | 26 | 2 | 3 | 5 |
| Report adoption by DSB (With appeal) | 48 | 36 | 84 | 8 | 2 | 10 |

*Note: The figures pertain only to win/lose cases.*

Table 4.4 clearly illustrates that most cases won or lost by the complainant went onto the final stage of appeal. In the first half, of the cases won, 48 disputes went into the final stage of appeal and report adoption by the DSB and similarly in the second half, 36 cases went onto the final stage. Only 13 cases in both halves of the entire decade were concluded without an appeal after being won by the complainant. Similarly, of the cases lost by the complainant, 8 disputes and 2 disputes went onto the final stage in the first and second half of the decade while 2 and 3 disputes (first and second half) concluded without an appeal. Losing the case without an appeal at the last stage refers to the possibility that either the complainant, who accepted defeat, did not have the resources or abilities to contest it further or for reasons not publicly known did not press the issue further. In this context, it becomes necessary to examine the matter in the light of the complainant being from a developed or developing background.

Table 4.4.1, which displays the details when both complainant and respondent were developed countries shows that of the 32 disputes won by the complainant in the first half, 26 disputes went onto the final stage of Appeal being heard by the Appellate Body and then the report was adopted by the DSB. In the second half, of the 22 cases won by the complainant, 17 cases were decided on appeal with only 5 going through without an Appeal. On the 8 cases that were lost in the first half, 6 went onto the final stage with Appeal. On the other hand, this is not significant in the second half as only one of the three cases went on till the final stage. Overall, this shows that most

**Table 4.4.1 Stage-wise details of won/lost disputes: 1995-2005**
**Developed vs. Developed Countries**

| Settlement Stage | Win | | | Lose | | |
|---|---|---|---|---|---|---|
| | 1995-2000 | 2000-2005 | Total | 1995-2000 | 2000-2005 | Total |
| Consultation | 2 | -- | 2 | -- | -- | -- |
| Panel Stage | -- | -- | -- | -- | -- | -- |
| Final panel report | -- | -- | -- | -- | -- | -- |
| Report adoption by DSB (Without appeal) | 6 | 5 | 11 | 2 | 2 | 4 |
| Report adoption by DSB (With appeal) | 26 | 17 | 43 | 6 | 1 | 7 |

Developed countries preferred to exhaust every avenue of appeal. On the face of it, this also implies that such an approach is possible, as developed countries do not lack in resources. If this argument is true in entirety, then developing countries that are hard-pressed for resources should find it difficult to keep up the pressure on appealing to the AB.

Table 4.3.2 that details the cases wherein developed countries were the complainants and developing countries were the respondents' shows

**Table 4.4.2: Stage-wise details of won/lost disputes: 1995-2005**
**Developed vs. Developing countries**

| Settlement Stage | Win | | | Lose | | |
|---|---|---|---|---|---|---|
| | 1995-2000 | 2000-2005 | Total | 1995-2000 | 2000-2005 | Total |
| Consultation | -- | -- | -- | -- | -- | -- |
| Panel Stage | -- | -- | -- | -- | -- | -- |
| Final panel report | -- | -- | -- | -- | -- | -- |
| Report adoption by DSB (Without appeal) | 6 | 2 | 8 | -- | -- | -- |
| Report adoption by DSB (With appeal) | 11 | 1 | 12 | -- | 1 | 1 |

that of the 17 cases won in the first half, 11 progressed up to the final stage of appeal and often the cases were pursued by the developing countries. In the second half, there were only three cases in all of which one went to the final stage of appeal. The only case that was lost by a developed country was also pursued till the last stage.

Table 4.4.3 shows concluded disputes where the complainants were developing countries and the respondents were developed countries. Of the 25 cases that developing countries won during the decade, barring 4 cases all the rest went onto the final stage of appeal. This may also indicate that developed countries are unwilling to allow a case go without an appeal. It would need to be further researched on whether this is due to developed countries unwilling to lose a dispute until every final avenue of appeal has been exhausted when the respondent is a developing country. However, this is beyond the scope of this study.

**Table 4.4.3 Stage-wise details of won/lost disputes: 1995-2005**
**Developing vs. Developed countries**

| Settlement Stage | Win | | | Lose | | |
|---|---|---|---|---|---|---|
| | 1995-2000 | 2000-2005 | Total | 1995-2000 | 2000-2005 | Total |
| Consultation | -- | -- | -- | -- | -- | -- |
| Panel Stage | 1 | -- | 1 | -- | -- | -- |
| Final panel report | -- | -- | -- | -- | -- | -- |
| Report adoption by DSB (Without appeal) | -- | 3 | 3 | -- | 1 | 1 |
| Report adoption by DSB (With appeal) | 9 | 16 | 25 | -- | -- | -- |

The final table in this category – Table 4.4.4 compares the disputes that have both complainants and respondents being developing countries. As the figures are comparatively small, it would be difficult to read much into it. Nevertheless, it is indicative. Table 4.4.4 reveals that of the 8 disputes that had a decisive verdict, 4 went up to the appeal stage whereas 4 wound up without appeal. The only two cases on record with a loss wound up at the final stage with appeal.

**Table 4.4.4 : Stage wise details of Own / Loss disputes :- 1995-2005**
**Developing Countries Vs Developing Countries**

| Settlement Stage | Win | | | Lose | | |
|---|---|---|---|---|---|---|
| | 1995-2000 | 2000-2005 | Total | 1995-2000 | 2000-2005 | Total |
| Consultation | -- | -- | -- | -- | -- | -- |
| Panel Stage | -- | -- | -- | -- | -- | -- |
| Final panel report | -- | -- | -- | -- | -- | -- |
| Report adoption by DSB ( Without appeal) | 1 | 3 | 4 | -- | -- | -- |
| Report adoption by DSB ( With appeal) | 2 | 2 | 4 | 2 | -- | 2 |

Hence, from the data that has been gathered, it appears that lack of expertise or resources does not appear to be an impediment to developing countries in tackling disputes in the DSS. The possibility of other impediments in developing countries becoming more aggressive would need to be examined separately as the available information in this study does not explore limiting factors if any.

### 4.5 Mutually Acceptable Solutions:

One of the founding governing principles of the WTO is 'mutual acceptability'. Although careful procedures are laid down and an institutional framework has been drawn, the WTO professes that mutually acceptable solutions are more desirable. Mutually acceptable solutions can be arrived at any stage of the dispute settlement process. However, they are more often arrived at in the initial consultations stage itself. Table 4.4 provides a brief abstract of the mutually acceptable solutions arrived at over the first decade.

**Table 4.5 Abstract on mutually acceptable solutions to disputes (n=61)**

| *Settlement Stage* | *Mutually Acceptable Solution* | | |
|---|---|---|---|
| | 1995-2000 | 2000-2005 | Total |
| Consultation | 32 | 14 | 46 |
| Panel Stage | 5 | 7 | 12 |
| Final panel report | 3 | -- | 3 |

Table 4.5, shows that most mutually agreed solutions were finalized in the first stage. 46 disputes were resolved through mutually acceptable solutions in the initial consultation stage of which 32 featured in the first half of the decade. 5 disputes were settled in this manner in the first half at the panel stage while 7 were settled similarly in the second half. Only 3 disputes were settled in a mutually agreed manner when the final panel report was submitted.

Table 4.5.1 presents comparative data combining all categories in which such mutually acceptable solutions have been worked out. More mutually acceptable solutions have been worked out in the first half of the decade than in the second half. In fact, the number is almost double at 40 in the first half and only 21 in the second half. The reasons for the sharp decline in mutually agreed solutions would need to be researched separately and are beyond the scope of this study. Further, developed countries have pursued such solutions initially whereas this has dropped in the second half. The number of mutually acceptable solutions has dropped from 22 to 2 within the category of developed countries being the complainant and respondent. This is definitely a sharp shift and conclusions can be made only after further research. A decline is also witnessed within the category of developed countries as complainants and developing countries as respondents as it drops from 13 to 5 in the second half. This change is similar to the category wherein developed countries were both the complainant and the respondent. There appears to be reluctance in the second half for such solutions.

**Table 4.5.1 Comparative table on Mutually Acceptable Solutions (n=61)**

| *Complainant/Respondent* | *1995-2000* | *2000-2005* | *Total* |
|---|---|---|---|
| **Developed Vs Developed Countries** | **22** | **2** | **24** |
| **Developed Vs Developing Countries** | **13** | **5** | **18** |
| **Developing Vs Developed Countries** | **3** | **3** | **6** |
| **Developing Vs Developing Countries** | **2** | **11** | **13** |
| **Total** | **40** | **21** | **61** |

The third category of developing vs. developed has remained constant at 3 in both half-years. In the last category of developing vs. developing it has climbed from 2 to 11, which is also an indicator that the system is serving more purposes than one. Again, to measure whether these findings were indeed significant, a chi square test was used. The chi-square was 22.74 with a 'p' value of 0.000457, which shows that there is a statistically significant association. There appears to be an increased activity among developing countries to arrive at mutually agreed solutions, which may also imply that they are responding positively to the DSS i.e., varied utilization patterns indicates a certain level of comfort with the system. However, the exact reasons for increased mutual agreed solutions would need further research and go beyond the scope of this study.

### 4.6 The Compliance Issue:

When a complainant obtains a ruling in its favor and this requires the respondent to act in some way in keeping with the decision of the DSS, the issue of compliance becomes a crucial issue that determines the end-result of all the processes in place. It is possible to have perfect rules and procedures but if lip service is paid to adverse judgments then such an institution is bound to fail even with the loftiest of objectives. Related to this factor is the issue of measuring compliance. The official website of the WTO proves very useful in this. Within the summary of each case, wherever a 'win' or 'lose' has resulted, a separate sub-heading is reserved for the implementation status and this clearly outlines whether there has been compliance on the part of the respondent. To illustrate, in DS No.161[23] the complainant (USA) won the case and the respondent (Korea) was required to set right a regulatory scheme that discriminated against imported beef. The implementation status recorded under this case indicates that Korea implemented the recommendations as it lost the case and thus complied.

Table 4.6.1 provides a combined table to portray the issue. There are three distinct possibilities in compliance and these have been listed. In the first case, the respondent may comply without delay or within a reasonable time that the complainant does not object to. These have been marked as 'complied with'.

[23] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds161_e.htm last accessed on 10-11-2006

**Table 4.6.1 Compliance by Respondents in cases won by complainant (n=114)**

| | *Developed Vs Developed countries* | | | *Developed Vs Developing countries* | | | *Developing Vs Developed countries* | | | *Developing Vs Developing countries* | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1995-2000 | 2000-2005 | Total | 1995-2000 | 2000-2005 | Total | 1995-2000 | 2000-2005 | Total | 1995-2000 | 2000-2005 | |
| **Complied with** | 22 | 12 | 34 (60.7) | 16 | 3 | 19 (95.0) | 6 | 8 | 14 (48.3) | 4 | 4 | 8 (88.9) |
| **Delayed Compliance** | 4 | 1 | 5 (8.9) | -- | -- | -- | 1 | 1 | 2 (6.9) | -- | -- | -- |
| **Compliance unresolved *or* not complied** | 8 | 9 | 17 (30.4) | 1 | -- | 1 (5.0) | 3 | 10 | 13 (44.8) | -- | 1 | 1 (11.1) |
| | 34 | 22 | 56 (100.0) | 17 | 3 | 20 (100.0) | 10 | 19 | 29 (100.0) | 4 | 5 | 9 (100.0) |

*Note: Figures in brackets indicates the percentage to total*

Secondly, there is reluctance on the respondent to comply and delay is resorted to but is finally complied with and this has been recorded as 'delayed compliance'. Often in these cases, the complainant finds fault with the respondent for the delay in compliance and compliance takes place more than a year later. Thirdly, the respondent either does not comply or pretends to have complied in a manner that is unsatisfactory to the complainant and the issue remains unresolved. Such cases have been classified as non-compliance. As mentioned earlier, the issue of compliance pertains only to cases where the complainant has won the dispute.

In the disputes wherein the complainants and respondents were both developed countries, compliance by respondents was 60.7% and delayed compliance at 8.9% with non-compliance at 30.4%. Comparatively when the developed countries were the complainants and the developing countries the respondents, the compliance was as high as 95%. In this category, only one case of non-compliance is seen and this constitutes 5% of the cases listed. In the third category with developing countries as the complainants and developed countries as the respondents, the compliance is quite low and stays at 48.3% with delayed compliance at 6.9% and non-compliance at 44.8%. In the last category wherein developing countries were the complainants and developing

countries were the respondents, compliance is high at 88.9% and non-compliance that constitutes a single case at 11.1%.

From the facts enumerated above, there appears to be a low level of compliance when developed countries are respondents. On the other hand, a higher level of compliance is observed when the respondents are developing countries. There appears to be reluctance on the part of developed countries to comply with adverse judgments and this seems more pronounced when the complainants are developing countries. On the other hand, developing countries appear to comply irrespective of who the complainant was.

In order to assess that these findings were not merely by chance and to evaluate them, a chi square test of significance was applied. The chi square value was 8.64 with a 'p' value of 0.003, which is statistically significant thereby showing that the observations are not due to chance alone. Perhaps, developed countries show a lower level of compliance, as they are difficult to retaliate against on account of massive trade imbalances. Also, there is a possibility that developed countries do not want to be seen in their own country as having lost to a poorer country. At this stage, these are merely conjectures and would need to be further researched into before valid conclusions are drawn.

No problem of compliance has been reported in mutually agreed solutions as otherwise these would have become the subject of a further dispute. In disputes where there has been difficulty in compliance, the parties affected have been quick to bring this on record to the DSS and this in turn is featured in the case summary on the official website of the WTO. Perhaps, the ideal end to a dispute is to have a mutually agreed solution as all controversy is put to rest.

**5.1 Brazil and India – an Overview of their experience as Developing countries:**

Brazil is a trade prominent Latin American country and India occupies a similar position in the Asian continent. Brazil is involved in the highest number of disputes in the DSS and is closely followed by India as can be seen in Table 4.1.2. Davey mentions that India has been an active participant although a little less active than Brazil (Davey, 2004). These two are being seen as leaders among developing countries.

Their experience is being looked at in a brief manner to throw further light on individual developing countries and how they fare in the DSS. This will enable us to understand other informal factors.

**5.2 Brazil as complainant and respondent:**

Within the first decade, Brazil featured in 22 cases as a complainant and in 12 cases as a respondent.

**Table 5.2.1 Brazil as complainant – 1995-2005 (n=22)**

| *Outcome* | *Developed countries* | | | *Developing countries* | | |
|---|---|---|---|---|---|---|
| | 1995-2000 | 2000-2005 | Total | 1995-2000 | 2000-2005 | Total |
| Win | 3 | 7 | 10 | -- | 1 | 1 |
| Lose | -- | -- | -- | -- | -- | -- |
| Mutual | -- | 1 | 1 | -- | 1 | 1 |
| No Decision | 2 | 3 | 5 | 2 | 2 | 4 |
| Total | 5 | 11 | 16 | 2 | 4 | 6 |

Table 5.2.1 indicates that Brazil featured as complainant in 7 cases in the first half of the decade and in the second half increased to 15. Of these, Brazil won 3 of the 7 cases in the first half and 8 of the 15 cases in the second half. Brazil lost none of its cases as the complainant and had the privilege of one mutually agreed solution. In 9 cases there has been no decision as yet. The Table 5.2.1 above indicates that Brazil's filing of disputes increased in the second half of the decade of which developed countries formed the bulk with 16 of the 22 cases being against them. Of the 10 cases against developed countries, 9 went up to the final stage i.e. after the full appeal was heard. There appears to be a determined effort by Brazil to stay with the full procedural course in processing a dispute and considering that of the 16 cases with developed countries, 10 were won, the indication is that Brazil has benefited from the functioning of the DSS.

**Table 5.2.2 Compliance record of the respondent when Brazil won (n=11)**

| Compliance | Developed countries | | Developing countries | |
|---|---|---|---|---|
| | 1995-2000 | 2000-2005 | 1995-2000 | 2000-2005 |
| Complied with | 2 | 1 | -- | 1 |
| Delayed Compliance | 1 | -- | -- | -- |
| Compliance unresolved or not complied | -- | 6 | -- | -- |
| Total | 3 | 7 | -- | 1 |

However, on the issue of getting developed countries to comply in cases that they have won, the results do not appear to be encouraging.

Table 5.2.2 indicates the situation. In the first half of the decade, the compliance record was quite good as all three favorable decisions were ultimately complied with. However, in the second half, the response from developed countries has been on the negative side, as 6 of the 7 cases have not been complied with as yet. The only case won against a developing country has been complied with. This indicates unwillingness on the part of developed countries that have lost cases to Brazil to comply. There is potential for further research on the reasons for non-compliance including whether there are other informal power struggles that are latent and which lead to acts of non-compliance. The countries who have not complied include USA, EC and Canada (similar to the case that Brazil has not complied with).

**Table 5.2.3 Brazil as respondent –1995-2005 (n=12)**

| *Outcome* | *Developed countries* | | | *Developing countries* | | |
|---|---|---|---|---|---|---|
| | 1995-2000 | 2000-2005 | Total | 1995-2000 | 2000-2005 | Total |
| Lose | 1 | -- | 1 | -- | -- | -- |
| Win | -- | -- | -- | 1 | -- | 1 |
| Mutual | -- | 1 | 1 | -- | -- | -- |
| No Decision | 6 | 1 | 7 | 1 | 1 | 2 |
| Total | 7 | 2 | 9 | 2 | 1 | 3 |

In Table 5.2.3, Brazil's record as respondent is seen. It has lost one case and is yet to comply. This particular case is a standoff with Canada that holds a similar adverse ruling against Brazil and is also yet to comply. As respondent, Brazil has won a dispute in its favor and has also been part of a mutually agreed solution. In 9 cases, the disputes stand at a 'no decision' situation. There does not appear to be much scope for interpretation on Brazil's record as a respondent.

**5.3 Brazil's experience**

A senior official at the Appellate Body of the WTO Secretariat had this to say of the Brazilian experience – '*Brazil has moved forward significantly – and is also using the help of outside law firms.*'[24] This statement illustrates that Brazil has not hesitated in accessing legal assistance from private law firms. As a developing country Brazil's lead position in involvement in the DSS is perhaps due to the fact that they have not allowed lack of experience or knowledge to restrict their efforts in tackling international trade issues in the DSS.

A senior official in the Brazilian Mission[25] to the WTO provided insights into Brazil's experience at the WTO over the first decade of its existence.

'*Traditionally we have been in the system from GATT. We know how the system works. India and Brazil have participated actively.*'

When asked about Brazil's proactive approach in filing cases in the second half of the decade, his response was –

'*Our experience in the aircraft case*[26] *turned things around. It hit the headlines at home. The DSS became an issue at home and there was a lot of awareness. The public in Brazil now knows of the existence of the DSS system of the WTO. Press coverage helped. In October 2001, there was a decision to create a Dispute Settlement unit to focus on WTO issues. After this the Cotton and sugar cases helped to stabilize our involvement.*'
This reaction may provide insight to the stage at which a developing country may become proactive in accessing the DSS i.e., until a dispute begins to affect a member country in

[24] Interview with a senior official at the Appellate Body Secretariat, conducted on 22-06-2006 at WTO Geneva
[25] Interview held at Permanent Mission of Brazil, Geneva on 22-06-2006.
[26] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds46_e.htm last accessed on 10-11-2006

such a manner as to affect trade or create adverse public opinion at home. It is in such situations that developing countries move towards organizing themselves in dealing with disputes through the DSS. However, this opinion will have to be researched further and is beyond the scope of this study.

On the subject of cases that are still open and a final conclusion is not notified, i.e. with reference to the 'no decision' cases - useful information on informal arrangements and nuances of how the system worked emerged.

'*Cases are not closed due to an informal understanding and sometimes if one of the parties is not convinced that the dispute is over. Often, the private sector would have provided us the impetus to move on the issue and if they show no interest, it can also mean that they are satisfied for the present or are pursuing other avenues. Sometimes, they utilize the country's courts such as US courts to right a wrong and during those times they may prefer that route, while keeping this complaint open. Predominantly, we are here to safeguard the interests of the private sector in our country and not to prove a point. So, if a 'no decision' is recorded in a case, it could mean anything – primarily it means that the complainant is not pressing the issue for the moment or that an informal understanding is reached.* This statement provides further insight on 'no decision' cases and the interplay of factors that lie behind such disputes wherein no settlement is as yet notified. While 'trade' is a broad phrase, it is the country's private sector interests that need to be protected in the international trade arena. Therefore, a dispute where private sector interests are adversely affected is pursued initially and then may not cross over to the panel stage on the insistence of those who brought the issue to light. Once the panel stage is reached, the DSS stipulated time schedule takes over and the process continues till the logical end. The extent to which a dispute is pursued on account of private sector interests or national interest is beyond the scope of the study.

The involvement of developing countries in disputes as third parties was enquired into and whether it served any real purpose.

'The *participation of third parties – you participate, as you are interested. If there are trade interests, one is keen on knowing what will happen. It is a good tool to learn how the system works.'* Involvement as third parties is proving to be an avenue of training to

developing countries as the preparatory work is done by the complainant and the third parties get to benefit from the work done. Also, third parties have the option to file complaints separately and then become the complainant in that dispute.

Considering the overall experience in dealing with developed countries and the poor record in compliance, whether the system seemed biased and unfruitful for developing countries was queried and the reply provided further insight into the situation. *'No – the system is not biased as such. It is as symmetric and reflective of the international system. Sanctions and remedies may be there but are difficult to be complied with when facing a richer country. For a developing country, retaliation is not really possible. There is an imbalanced power equation in that sense. However, it would be worse if there were no DSS. In spite of non-compliance it is more positive. Also, there is lot of room for negotiation'*. The tone of the statement is reflective of the trade imbalances between developed and developing countries. It indicates the vulnerability complex that is associated with developing countries and at the same time highlights the utility of the DSS in playing the role of a workable platform for all member countries to deal with international trade disputes. The manner in which it appears to be indispensable is a pointer to the manner in which developing countries are beginning to view the DSS in spite of obvious power differences.

Finally, on the future prognosis and the scope for developing countries to deal with the system, his reaction was as follows.

*'About developing countries in general – it depends on the pattern of trade they have. Each country has its own method of dealing with a country. There is growing trend of bilateralism and regional trade arrangements. There is constraint of resources for developing countries and it's a costly system and technically complex and requires huge preparation. In fact, we have secured the services of private law firms as they have the required expertise for this area of specialization.'* This feedback provides insight into reasons that member countries are not reacting in a similar manner. Regional trade blocs are becoming increasingly easier for developing countries to solve trade-related problems that are of a regional nature. However, some of the issues raised here such as regional trade arrangements, individual trade arrangements, resource constraints and the like are

beyond the scope of this study and would need to be further researched to look at their effectiveness and the wider ramifications of the same.

### 5.4 India as Complainant and Respondent:

Within the first decade, from 1995-2005, India was a complainant in 16 cases and featured as a respondent in 17 cases.

**Table 5.4.1 India as Complainant –1995-2005 (n=16)**

| *Outcome* | *Developed countries* | | | *Developing countries* | | |
|---|---|---|---|---|---|---|
| | 1995-2000 | 2000-2005 | Total | 1995-2000 | 2000-2005 | Total |
| Win | 4 | 3 | 7 | 1 | -- | 1 |
| Lose | -- | 1 | 1 | -- | -- | -- |
| Mutual | -- | 1 | 1 | 1 | -- | 1 |
| No Decision | 2 | -- | 2 | 1 | 2 | 3 |
| Total | 6 | 5 | 11 | 3 | 2 | 5 |

As seen in Table 5.4.1, in the first half, India won 4 out 6 cases against developed countries and one case against a developing country. In the same period, one case was sorted out with a mutually agreed solution. In the second half, India fared well against developed countries by winning 3 out of 5 cases and lost only one while arriving at a mutually agreed solution in one case. There were only 2 cases in the second half and these are still in the 'no decision' category. India appears to have a fairly good record. Of the 7 cases that were won against developed countries, 5 went up to the final stage of being decided on final appeal. One case that was decided at the panel stage itself in which the respondent terminated the disputed issue has been classified as a win.

**Table 5.4.2 Compliance record when India won: 1995 – 2005 (n=8)**

| Compliance | Developed countries | | Developing countries | |
|---|---|---|---|---|
| | 1995-2000 | 2000-2005 | 1995-2000 | 2000-2005 |
| Complied with | 2 | 2 | 1 | -- |
| Delayed Compliance | -- | 1 | -- | -- |
| Compliance unresolved or not complied | 2 | -- | -- | -- |
| Total | 4 | 3 | 1 | -- |

Again, the compliance record as seen in 5.4.2 has been mixed. In 4 cases won in the first half, only two were complied with and another 2 have been left unresolved on being complied with. Proportionately, this seems better than Brazil. However, in the case of the only win against a developing country, compliance has been done without delay. The real reasons why there has been reluctance on compliance by developed countries would need to be researched further and is beyond the scope of this study.

**Table 5.4.3 India as Respondent: 1995-2005 (n=17)**

| *Outcome* | *Developed countries* | | | *Developed countries* | | |
|---|---|---|---|---|---|---|
| | 1995-2000 | 2000-2005 | Total | 1995-2000 | 2000-2005 | Total |
| Lose | 5 | -- | 5 | -- | -- | -- |
| Win | -- | -- | -- | -- | -- | -- |
| Mutual | 5 | -- | 5 | -- | 1 | 1 |
| No Decision | 3 | 3 | 6 | -- | -- | -- |
| Total | 13 | 3 | 16 | -- | 1 | 1 |

India has lost 5 cases as a respondent but has secured 5 mutually agreed solutions to disputes and this pertains to developed countries in the first half. This is indicative of India's ability to negotiate with developed countries and arrive at solutions that are acceptable to both parties. In the same period, 3 cases are pending as with 'no decision'. In the second half of the decade, three cases by developed countries are still pending as 'no decision' and in one case a mutually agreed solution was arrived at i.e. with Bangladesh – the only LDC till date to file a case in the DSS of the WTO[27]. India has complied with every one of the cases where the decision has gone against it.

**5.5 India's experience:**

The Indian Mission to the WTO was set up to deal with WTO disputes. As part of this study, a senior official[28] was met on 21-06-2006 and 22-06-2006 at the Geneva office and comments elicited.

[27] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm last accessed on 10-11-2006
[28] Interview conducted with a senior official at Indian Mission to the WTO at Geneva

On the reason for cases being left as 'no decision' and the issue appearing to be still pending, several comments proved valuable enough to improve understanding of ground level realities.

*'In certain cases, we have had tremendous interest shown by specific sectors in the Indian corporate world and neglecting these issues would have proved detrimental to Indian business interests. However, after a stage in filing the dispute, a certain solution is arrived at which does not necessarily have to be notified but which satisfies the private sector as well. In such situations, notifying may not help the respondent country's position and hence it is not. The point is to arrive at a solution that solves India's problem in a dispute. Sometimes an issue may not be pressed for diplomatic reasons while on ground the result expected is already achieved.'* [29]

*For instance, in DS 246*[30]*, although in spirit EC has not complied, it has withdrawn preferential treatment to Pakistan and that solved our problem.'* The statement made here is along the lines made by the Brazilian official as to the main purpose of being actively involved in the DSS, which is to protect the interests of the private sector in one's own country. It appears that if the desired effect is achieved then the Mission has accomplished its task and a formal desire to 'win' or 'overcome' is not given importance.

While being asked about the current situation in place after the first decade and the specific Indian approach if any –

*'Informality is now in play. The Industry and Trade Associations normally bring up the issues and then it becomes a complaint. Now that they are organized, it helps. Government plays a key role now in protecting Indian business interests irrespective of which part of the world it is involved in. Also, from 2003, the way India fights cases has changed. The focus has been more on economic diplomacy. The core interest is identified and then every effort is made to sort out the issue. If it is required we are able to pursue and achieve our goals. We were offensive in the stainless steel rods case and won it in three months. The exact trade issue was identified and we zeroed in on what hurts them the most.'* There is an indication here about the reason for the effective tackling of the DSS by both India and Brazil. Assessing the real issues involved is one of them.

[29] Interview held on 21-06-2006 and 22-06-2006 in India Mission to the WTO, Geneva
[30] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm last accessed on 10-11-2006

However, the future may see a trend towards economic diplomacy. There appears to be a realization in both India and Brazil that shrewd assessment and action helps to move forward rather than a confrontationist approach. The import of this statement needs to be examined further and researched upon as economic diplomacy has its own limitations in an arena were trade imbalances are pronounced.

**6.1 Conclusions and Recommendations:**

The purpose of this study was to analyze the functioning of the DSS over the first decade of its existence and check out assumptions that exist on its functioning and biases. The exercise of uncovering the degree to which the professed normative ideals of the institution match with empirical realities in an international trade scenario was completed with clear trends that emerged and has the potential to grow in the future. The DSS that began with a rush of cases by developed countries moved into a situation in the second half of the decade that witnessed developing countries bring their disputes into the DSS. This suggests that there has been no lack of confidence in the working of the institution.

The first major conclusion then is that developing countries were encouraged in the way the Dispute settlement mechanism worked in the initial years of its existence and increased their action in accessing the system. An indication in the pattern of increased usage is that developing countries now had a stable platform to take on serious trade issues with developed countries without any fear perhaps on account of well-defined set of rules and procedures. Redressal of international trade disputes now had a platform. The pattern of usage reveals another major factor. The decline in the quantum of cases being filed by developed countries towards the end of the decade could led to an inference that the system is organized in such a manner that maneuvering of favorable results for developed countries may be difficult. A senior official while on discussion[31] says *'the system is rules-based and gives everyone a voice.'* Another senior official of the WTO Appellate Body Secretariat on the same topic[32] said *'the entire process is 'rules-oriented' rather than 'power-oriented.'* There is no evidence so far that

[31] Interview with a senior official at Legal Affairs division, WTO was held on 21-06-2006 at WTO Geneva
[32] Interview with a senior official at the Appellate Body Secretariat, WTO was held on 21-06-2006.

the DSS is biased towards any particular direction and this is seen in the manner of access and outcomes to concluded disputes.

The type of Agreements that formed the subject matter of the dispute helps to arrive at another conclusion that developing countries are in a position to tackle matters when required irrespective of the type of issue at hand. The strong similarities in the type of Agreements used both by developed and developing countries are definitely indicative that the concerns are similar. The only difference in the types of agreements being the causal factor for the dispute was when both the complainant and the respondent were developing countries and this has already been discussed in the early part of the fourth chapter. However, this is indicative of a major benefit to the developing countries in finding a stable location to resolve trade disputes among themselves that might be regional in nature or of a lesser magnitude.

An undisputable fact that draws attention to this issue is the outcome or verdict to finalized disputes. Time schedules have been largely kept by the Dispute Settlement system once the complainant has confirmed that there is no other way but to complete the cycle in deciding the complaint. A concluded dispute is a win, a loss or a mutually agreed solution and the results show. Considering that developing countries won more cases against developed countries both on a percentage basis and actual quantum, it is difficult to project an image that the institutional system of hearing a dispute is flawed or biased. A point of debate can be made that perhaps the developed countries did not plan their steps properly or that they had not prepared sufficiently in defending a dispute but this would be a self-defeating argument for those who are prepared to voice an opinion that the dispute hearing mechanism is flawed. Looking at the information laid out on the stage-wise completion of the cases it is also safe to surmise that developing countries are able to tackle any complaint within the dispute settlement mechanism. Brazil and India are examples to the developing world and have showed that it is possible to contest cases with developed countries on an equal footing. Brazil has gone one step further in hiring private lawyers to add strength to their team.

Some of these cases have involved the best legal minds of developed countries and appear to place the private sector in an advantageous position to hire the best. Once again, this speaks for the Dispute settlement system of the WTO that has been

designed in such a way that the procedures involved keep the whole system on track. A comment by a senior official at the ACWL [33] in reaction to a question on how the power equations find expression mentioned, '*the bureaucratic level of interplay helps to keep power bullying at bay.*' As representatives of country level missions of both developed and developing countries are located at Geneva, there is scope for a high level of interaction and informality among bureaucrats based there. This may also be the reason preventing power groups and the like in influencing the process and in strengthening economic diplomacy. Added to this, an experienced Secretariat of the DSS is available to ensure that member countries find no cause for complaint about taking partisan roles. As a secondary stakeholder, the DSS appears to have performed its role in providing a reliable platform with transparent rules and procedures.

The category of mutually agreed solutions has a different story to tell. Initially, developed countries pursued it eagerly and then the enthusiasm flagged while this has increasingly been used by developing countries. A mechanism that was created for consultation-oriented solutions based on the principle of 'mutual acceptability' has been found to be useful to developing countries to deal with trade-related manners.

The positive picture that seems to emerge for developing countries in the DSS takes a step backward in the issue of compliance. Compliance by developed countries is not as much as the same by developing countries. It is poor even when the complainant happens to be a developed country and this is indicative of the observation that the defaulting developed countries are reluctant to abide by the rules they acceded to in the beginning. This is directly opposed to the commitment that pervades the compliance by developing countries. Compliance is a major issue. A well-oiled mechanism that is being utilized can be doomed to failure if there is inadequate provision to implement an adverse verdict on a party. Article 3.7 of the Dispute Settlement Understanding informs that compliance is the best result failing which compensation can be ordered as a transitional measure and that Retaliation should be used only as a last resort. Till date, Compensation has not been ordered in any case. Even the rare provision of retaliation was authorized in only six cases. Considering that the remedy available is

[33] Interview with a senior official at Advisory Center on WTO Law was held on 22-06-2006 at ACWL, Geneva.

economic in nature, it is difficult to implement if the country that is to comply is a developed country with substantial economic power such as the United States of America or the European Communities. Often some of the issues of non-compliance go unnoticed and do not receive the publicity that they require. A senior official at the Brazilian Mission while commenting on the issue[34] mentioned *'for a developing country, retaliation is not really possible. There is an imbalanced power equation in that sense. However, it would be worse if there were no DSS'* and this highlights the predicament confronting developing countries who are one of the primary stakeholders.

This is a major issue that remains to be resolved in the DSS and has the capacity to slow down the momentum achieved in the first decade. Civil society could help in this issue as it will ultimately work towards a 'fair trade' situation which is already an issue being campaigned for at the international level. Mobilization of public opinion is key to the issue of compliance that in turn will ensure that the credibility of the dispute settlement process is maintained.

It is appropriate to close with remarks on the issues raised in 1.3 in the light of all that has been discussed in this paper. So far, this study suggests that the Dispute Settlement System is a neutral technocratic process in its structure and operation until the point of the dispute hearing and finalization. The same cannot be said of the 'post-hearing' situation where non-compliance is an issue. There is no evidence so far that lack of economic resources and soft power difficulties have deterred developing countries from filing disputes on developed countries and winning them. Lack of legal expertise has not been an issue and in fact has been strengthened in the turn of the century by the setting up of the Advisory Center for WTO Law in Geneva. The developing countries at this point in time do not seem to be the underdogs except in the issue of compliance; where there appears to be a systemic defect and this would need to be the subject of future reform.

**********

[34] Interview with senior official at Permanent Mission of Brazil held on 22-06-2006 at the Mission Office in Geneva.

## References


Chang Pao-Li, (2003) 'The Evolution and Utilization of the GATT/WTO Dispute Settlement mechanism'– available at http://www.mysmu.edu/faculty/plchang/papers/wto4.pdf (last accessed on 14/06/2006)

Davey J.William, (2004) 'The WTO Dispute Settlement System: The First Decade – available at: http://www.wti.org/conf/documents/Davey-TheWTODisputeSettlementSystem.pdf

Escobar, Arturo (1998) "Whose knowledge, whose nature? Biodiversity, Conversation, and the Political Ecology of Social Movements" in: Journal of Political Ecology, 5:1998

Gilpin Robert, (2001) Global Political Economy: Understanding the International Economic Order (Princeton: Princeton University Press, 2001), pp.77-102 (The Study of International Political Economy)

Griffin Keith, 'Economic Globalization and Institutions of Global Governance', Development and Change 34 (5), 2003, pp.789-808.

Hoffman, S.'Clash of Globalizations' *Foreign Affairs*, July-August 2002, pp.104-115

Holmes Peter; Jim Rollo; Alasdair R Young (2003), 'Emerging trends in WTO dispute settlement system: back to the GATT? Volume 1, published by the World Bank in the Policy Research Working paper series, available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/10/03/000094946_03092310565344/Rendered/PDF/multi0page.pdf) (last accessed on 10-06-06)

Horn Henrik; Petros C.Mavroidis (1999) 'Remedies in the WTO Dispute Settlement System and Developing Country Interests' available at http://www.mre.gov.br/portugues/ministerio/sitios_secretaria/cgc/remedies.pdf (-last accessed on 10-06-06)

Horn Henrik, Petros C Mavroidis, Hakan Nordstrom (1999) 'Is the use of the WTO Dispute Settlement System Biased?' available at http://www.iimahd.ernet.in/~partha/Mavroidis_CEPR2340.pdf (last accessed on 31-10-2006)

Keohane, RobertO. and Joseph Nye (2000), in Joseph S Nye and John D.Donahue (eds), 'Governance in a Globalizing World. Washington, D.C.: Brookings Institution. "Introduction". PP.1, 7-14, 19-38-41

Long, N, Development Sociology: actor perspectives. London: Routledge, 2001, Chapter 2, Demythologising planned intervention, pp.30-38

Matsushita Mitsuo, (2005), 'The Sutherland report and its discussion of Dispute Settlement Reforms', in Journal of International Economic Law, Volume 8 No.3 Oxford University Press, 2005.

McRae Donald, (2005), Developing countries and the "Future of the WTO' in Journal of International Economic Law, Volume 8, No 3,Oxford University Press, 2005.

Mosoti Victor, (2003), 'Does Africa need the WTO Dispute Settlement System', – available at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf (-last accessed on 10-06-2006)

Nye, Joseph. (2002), The Paradox of American Power: Why the World's only Superpower can't go it alone. Oxford: Oxford University Press. Chapter 1, pg 13 on "The American Colossus"

O'Brien Robert and Marc Williams, Global Political Economy: Evolution and Dynamics (Hound mills: Pal grave Macmillan, 2004), pp.113-32 ('The Post-1945 Order)

Qureshi Asif, (2003), 'Interpreting WTO Agreements for the Development Objective' -available at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf (-last accessed on 10-06-2006)

Shaffer, G; Mosoti, V; Qureshi, A (2003) Towards a development-supportive dispute settlement system in the WTO. (International Centre for trade and sustainable development, Geneva, Switzerland, 2003), available at- http://www.eldis.org/cf/search/disp/docdisplay.cfm?doc=DOC12412&resource=f1 (-last accessed on 10-06-2006)

Shaffer Gregory, (2003), 'How to make the WTO dispute settlement system work for developing countries; some proactive developing strategies '– available at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf (-last accessed on 10-06-06)

Strange Susan (1994) States and Markets: An Introduction to International Political Economy, 2nd ed. (London: Pinter, 1994), pp.23-42 ('Power in the World Economy')

**********

## Appendix 1

List of High Income countries classified in this study as Developed countries

**High-income economies (56)**

| | | |
|---|---|---|
| Andorra | Germany | Netherlands Antilles |
| Antigua and Barbuda | Greece | New Caledonia |
| Aruba | Greenland | New Zealand |
| Australia | Guam | Norway |
| Austria | Hong Kong, China | Portugal |
| Bahamas, The | Iceland | Puerto Rico |
| Bahrain | Ireland | Qatar |
| Belgium | Isle of Man | San Marino |
| Bermuda | Israel | Saudi Arabia |
| Brunei Darussalam | Italy | Singapore |
| Canada | Japan | Slovenia |
| Cayman Islands | Korea, Rep. | Spain |
| Channel Islands | Kuwait | Sweden |
| Cyprus | Liechtenstein | Switzerland |
| Denmark | Luxembourg | United Arab Emirates |
| Faeroe Islands | Macao, China | United Kingdom |
| Finland | Malta | United States |
| France | Monaco | Virgin Islands (U.S.) |
| French Polynesia | Netherlands | |

## Appendix 2

### Questionnaire format utilized at Geneva – (Open ended questions)

**Emerging patterns – DSS –WTO-1995-2004.**

1. Initially, the WTO was seen as an organization set up by Developed countries for there own benefit. Your opinions on why this was so – how has the DSS worked against this?
2. Over the past decade, what are the trends seen in the functioning of the WT
   a) Manner of functioning-
   b) Attitude of developed countries to the Dispute settlement process-
   c) Attitude of developing countries to the Dispute settlement process–
   d) Type of Agreements most interested in –Developed
   e) " (Developing)
3. Can you read much into the significance of 3rd parties – Developed countries tagging along with Developing and vice versa? What is real benefit of being 3rd parties? (Whose side are they on –Comp/Respondent?
4. Is there an informal list of developing countries – in the WTO? In the past has there been contention on this i.e., a claim being challenged?
5. On the Panel:
   a) Panel plays a very important role in the dispute settlement process – who chooses the panel – is there a standardized list (like independent referees)? In practice – does the comp/respondent– have a say?
   b) Have there been serious objections to the composition of the panel – how was it resolved?
   c) Why in most cases – panels not appointed immediately? – only on 2nd request?
   d) In several cases – beginning from 1995 - 'No panel – No Commitment' has been mentioned in the case history in the website – what does this really mean?
   e) When is a case considered closed?
   f) What does it mean to 'reserve' their 3rd party rights?

6. Is there a compendium of rules on functioning of panels - dispute settlement procedures in the WTO- to enable better understanding of nuances in functioning of the DSS?

7. Is there a publication on the analysis of functioning of the DSS - between 1995-2004?

8. What is the principle of judicial economy? (DS 241) in Brazil vs. Argentina – poultry anti-dumping duties.

9. When one country is complainant and another is 3rd party – then a separate dispute is listed – 1st one is closed and the 2nd one isn't. ex: DS No-87 and 109. Then DS no 110.

10. Have there been real situations of withdrawal of concessions – penalties being imposed for non-compliance? Developing countries receive tariff preferences and not vice-versa? Who monitors such cases?

11. How is the DSS (WTO) superior to the DSS (GATT)?

12. Which countries have a Permanent Mission in Geneva?

13. International Relations are all about power equations. Have these power equations influenced the running of the DSS – formally or informally?

14. DSS in WTO posing a threat to sovereignty of the member countries – how do see it?

15. Is the DSS a level playing field?

16. The phrase 'mutually agreed upon' can also indicate that one country has been able to bully another into submission. Your Comment.

17. When two countries reach a mutually agreed solution – what happens to the 3rd parties? Where do they stand?

**********

## Appendix 3

## Questionnaire utilized for interview with Permanent Mission of Brazil

**Brazil:**

1. In DS 4 – (gasoline) USA lost the case and committed itself to implement by 1997? Has it done so?
2. In DS 69 – (poultry) has EC complied?
3. In DS 70 (Civilian aircraft), which got over in 2000- has Canada complied?
4. Why is DS 71 still open – when will you consider it closed?
5. In DS 112 – you complained against Peru – (import of buses) consultations (1997). What happened – is it still not over?
6. In DS 154 – against EC – why is not over yet (preferential treatment to some countries –affecting Brazilian coffee.)
7. In DS 208 against Turkey – (anti-dumping duty on steel/iron) no panel/commitment – how long before you move on this?
8. DS no 209 –against EC-(soluble coffee again)- no progress?
9. Ds No 216 – against Mexico –anti dumping measure on electric transformers – no progress?
10. Ds no 217 – against USA – (Act) is there a particular level of difficulty noticed in US compliance when the case goes against them.
11. Ds no 218 against USA – no progress –in consultations? (countervailing duties in carbon steel products from brazil)
12. Ds No 219 against EC –Anti-dumping duties on Malleable cast iron tube or pipe fittings. EC contests the fact that they have not complied with the outcome? Is there a problem of forcing developed countries to implement their due? Are the big blocs – bullying?
13. In Ds No 222 – you were authorized to suspend concessions to Canada – how effective has it been? In 2003 authorization by DSB made –(against Canada – export credit and loan guarantees for aircraft)
14. In Ds No 224–(US patents code) – why no progress – is the US dodging consultations (from 2001).

15. In Ds No 239 – vs. USA –(anti dumping duties on silicon metal from brazil) consultations from 2001 – no progress?
16. In Ds No 266 – EC loses case (export subsidies on sugar) drags its feet on implementation. In this you express concern – did it have any effect? Is the EC bullying?
17. In Ds 267 ( subsidies on upland cotton) here US drags its feet and you request for dropping of concessions – arbitrator is appointed – then you withdraw request – is it due to undue pressure or did they comply? Have you been able to withdraw concessions to a telling effect at all?
18. In Ds 269 vs. – EC -customs classification of boneless chicken cuts- time was given until June 2006 – was it done by EC?
19. DS 46 **(as respdt)** Have you withdrawn the aircraft subsidies as directed (PROEX)? – when Brazil lost the case.
20. In DS 51 certain automotive measures (Japan was complainant) – still in consultation stage – why?
21. In Ds 65 –vs. USA – trade and investment in automotive sector still open –
22. why/ consultations?
23. In DS no116 - measures imposed by Central Bank of Brazil affecting imports – no progress – consultation only.
24. Ds no 183 – no progress – vs. EC –Import Licensing and Minimum import prices.
25. Ds No 197 – USA files case – no progress – Why?

**********

## Appendix 4

## Questionnaire utilized at interview with Permanent Mission of India

**India:**

1. In Ds 34 – did Turkey comply?
2. In Ds no 58 -India and 3 other vs. USA (Shrimp case) –USA delays implementation – are they difficult in agreeing to implement?
3. In Ds 134 – restrictions on import duties of rice vs. EC – no progress – why?
4. In Ds 140 vs. EC – about anti-dumping investigations of unbleached cotton fabrics from India – no progress – only consultations.
5. In DS 141 vs EC – cotton type bed-linen. Problem of compliance noticed – is it a habit with the EC to drag implementation.
6. In Ds No 168 vs. South Africa – anti-dumping duties on pharmaceutical products – no progress – consultation stage only.
7. In Ds no 206 USA loses – did they comply? –anti-dumping and countervailing measures on steel plate from India.
8. In Ds No 217 Subsidy Act – vs. USA here big group of complainants- although' you welcome compliance – feeling that not fully done. Does it stop with a feeling being expressed or does it go beyond that?
9. In DS No 229 vs. Brazil –no progress – jute bags anti dumping duties by brazil.
10. In Ds No 233 measures affecting pharmaceutical products - vs. Argentina – no progress – why?
11. In Ds No246 here India wins the case – EC says they comply – India expresses doubts whether fully complied – does it stop with that. How long do you wait till proceed further – or is that all? (Conditions of granting of preferences for developing countries.)
12. In Ds no 120 **as respdt** – EC was complainant – no progress- (import of raw hides requiring licenses).
13. In Ds no 149 Import restrictions –EC as complainant - claims and counter claims mentioned – no progress – why?
14. In DS 150 – Customs restrictions EC as complainant – no progress – why?

15. In Ds No 279 – Import restrictions US complainant – from 2002 – no progress why?
16. In DS no 304 – anti-dumping measures on certain products –from EC – no progress?
17. In DS No318 – Anti-dumping measures on products from Taiwan – why no progress – from 2004?
18. From 2000 – only 4 cases we are respondents – is it due to heavy economic diplomacy? Or due to excellent compliance record? (11 out of 17 cases we have complied with or settled mutually).

**********