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**DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO:
NEED FOR IMPROVEMENT AND CLARIFICATION**

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Foreword

At the time of adoption of the WTO Agreement in 1994 at Marrakesh, the view was widely shared that the establishment of an effective mechanism for resolving disputes through the Dispute Settlement Mechanism (DSU) would make a significant contribution to the strengthening of the multilateral trading system. Experience with the working of the DSU during the last eight years has turned to be highly satisfactory on the whole. However, while no fundamental flaws have been found, on several aspects members have felt the need for adjustments in the procedures. It was in this context that the Ministries agreed to the negotiations in the new round on improvements and clarifications of the DSU.

Several proposals have been made in the negotiations seeking changes and elaboration of the procedures contained in the DSU. Mr. S. Narayanan, who was India's Ambassador and Permanent Representative to the WTO during the period 1995-2001, has evaluated these proposals and made recommendations on the position that would be in the best interest of India to adopt on some of the key proposals. His approach is of gradualism rather than of radical and rapid change.

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I Introduction

It is widely recognised that the contribution of the WTO Agreement to the strengthening of the multilateral trading system has been significantly enhanced by the establishment of an effective mechanism for resolving disputes through the Dispute Settlement Understanding (DSU). The DSU introduced several new features in the pre-existing GATT 1947 system, which reinforces the quasi-judicial character of the mechanism. These include explicit time frames for the settlement of disputes, the right to almost automatic establishment of a panel upon the request of a complaining party, the automatic adoption of panel reports unless it is decided by consensus not to adopt (“negative consensus rule”), the establishment of a standing Appellate Body to hear appeals from panel reports and stronger procedures for implementation of panel and Appellate Reports, including the right to retaliation and specific rules on cross retaliation in certain circumstances. On account of these features the DSU has provided the fastest and most effective dispute resolution system available in any international organization. In the new framework, an impressive amount of jurisprudence has been developed by the panels and the Appellate Body within the very limited period of about eight years.

At Marrakesh, in April 1994, when the Ministers adopted by consensus the Marrakesh Agreement establishing the World Trade Organisation, there was some amount of nervousness among the participating countries over the DSU on account of the fact that several of the new features, and in particular the virtually automatic adoption of panel and Appellate Body reports, were untested in practice. Consequently, one of the decisions adopted by the Ministers at Marrakesh was that the DSU would be reviewed within four years, after the entry into force of the WTO Agreement and a decision taken on whether to continue, modify or terminate the dispute settlement rules and procedures. When this review process was undertaken a number of suggestions were made for modifying some of the provisions of the DSU but there was no suggestion to terminate the DSU. Moreover, during the review process, nobody even remotely suggested that the automaticity built into the system by way of negative consensus rule in respect of adoption of panel and Appellate Body reports needed to be changed. The review process remained inconclusive, as there

was no consensus on the suggestions. During the Ministerial conference at Seattle, Japan and EC with the support of a number of countries, proposed certain amendments to the DSU to tackle some of the problems that had arisen in securing the implementation of the decisions of the Dispute Settlement Body in individual cases. However, the total collapse of the Seattle Ministerial Conference prevented any serious discussion of the issue, let alone acceptance of the proposals.

In the first eight years of its operation the DSU seems to have stood well the test of time and the vicissitudes of resolving disputes involving the two largest trading Members. It is fair to say that the WTO Members are on the whole satisfied with the working of the DSU. The Dispute Settlement mechanism is being extensively used by developed as well as developing countries in order to protect their trade interests. It is found that between 1.1.1995 and 31.3.2003, the total number of complaints notified to the WTO is 286 covering about 207 standard DSU matters. During this period the total number of Appellate Body reports and panel reports adopted is 69 (Not including reports resulting from proceedings pursuant to Article 21.5 of the DSU). During this period, there were mutually agreed solutions, in respect of 40 cases. A statistical analysis shows that out of 286 complaints notified during the period, 179 were complaints by developed countries. (111 against developed countries and 68 against developing countries). During the same period complaints by developing countries were 101. (59 against developed countries and 42 against developing countries. Six complaints were both by developed and developing country Members, (all the six were against developed country Members). The extensive use of dispute settlement system both by developed and developing countries indicates that Members find the system, *prima facie*, to be useful. The developing countries have been quite successful in their disputes against powerful developed Members of the WTO in areas like textiles, anti-dumping and safeguards. However, developing countries are also facing a number of difficulties. Implementation of the recommendations and rulings of the DSB, especially by powerful Members of the WTO, has been far from satisfactory, thus eroding the credibility of the system to some extent. There is also a tendency on the part of powerful developed Members to appeal against panel reports in a rather routine fashion, which are adverse to them with a view to gain further time. Thus, the process of dispute

resolution is proving to be expensive as well as time consuming on the perspective of developing country Members.

In the first two or three years, after the establishment of the WTO, the DSU was being described as the jewel of the WTO. However, subsequently when some high-profile disputes (*Bananas* and *Hormones* in particular) threw up new challenges there was recognition that while there was no major flaw in the system, it was by no means perfect. Members began to feel that some adjustments to the system were needed. Since the review process had remained inconclusive, during the preparatory process for the fourth Ministerial Conference at Doha, the feeling grew among Members that the opportunity provided through the possible launching of new negotiations in certain areas should be utilized to initiate negotiations in respect of DSU also.

Accordingly the Doha Ministerial Declaration contained the following mandate on negotiations in the area:

“We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter”.

In calling for negotiations “on improvements and clarifications of the dispute settlement understanding” Ministers seem to have limited the scope of such negotiations. The idea is not to rewrite DSU or to bring about a fundamental change. Only improvements and clarifications are envisaged. The second aspect is that there is a reference to “work done thus far”. This alludes in particular to the proposal given by a group of countries during Seattle Ministerial Conference on tackling some of the issues that had arisen. The assessment at that time was that this proposal spearheaded by Japan and EU had very good support. Another important aspect of the mandate is that the negotiations relating to DSU have been kept outside a single undertaking. The idea is that DSU negotiations should not become part and parcel of political compromises.

At the negotiations that have followed developed and developing countries including India made several proposals for improvements and clarifications. This study looks at these proposals from the perspective of developing countries in general and India in particular. The objective of this paper is to critically examine the major proposals on the table with a view to recommending the position that India should take in the negotiations. It is obvious that any improvement and clarification that strengthens the DSU must in principle be in the interest of developing countries, which depend more on the rule-based trading system and hence have a greater stake in the system.

The paper is structured as follows. Part II gives a brief overview of the evolution of the dispute settlement machinery in GATT/WTO and Part III examines in detail the provisions of the DSU. Part IV contains a critical review of the proposals that have been made and Part V summarizes the conclusions reached.

II Evolution of the Dispute Settlement System under the GATT

II.1 Dispute Settlement in GATT 1947

GATT 1947, as originally adopted in 1948, contained elaborate provisions for resolution of differences between contracting parties. Several Articles of GATT, which deal with individual obligations, specify arrangements for settling differences as well. In certain matters, only bilateral discussions were provided for and in some others there was provision for recourse alternatively to bilateral consultations or to consultation with the Contracting Parties (full membership). Certain articles, which governed specific obligations, provide for multilateral consultation after bilateral efforts have failed while others provide only for multilateral consultation. In some of these provisions the effort to solve differences did not go beyond bilateral and multilateral consultations, but in other cases there was provision for compensatory withdrawal or suspension of concessions or obligations. Besides individual provisions, GATT also had a central dispute settlement machinery in Articles XXII and XXIII and the procedures prescribed in them applied to all obligations. Article XXII and XXIII read as follows:

Article XXII: Consultation:

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of the Agreement.
2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article XXIII: Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of;
 - a) the failure of another contracting party to carry out its obligations under this Agreement, or
 - b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
 - c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 © of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties

which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United National and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contacting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary, (Director General) to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

II.2 Early Practice under GATT 1947

Article XXII provides for a broad authorization for consultation “with respect to any matter affecting the operation of this “Agreement”. Originally this Article contained provision only for bilateral consultation between the contracting parties. Subsequently, at the Review Session, provision was made for consultation between a contracting party and the Contracting Parties, when bilateral consultations fail. In 1958, the Contracting Parties adopted the procedures for consultation under Article XXII on matters affecting the interests of a number of Contracting Parties. In terms of these procedures, a notification obligation was imposed and a third party having substantial trade interests in the matter was given the right to join the consultations. Despite, the notification obligations imposed by the 1958 procedures the tendency was to treat consultations as private affairs. Article XXII was generally made use of where it was felt that patient negotiations could yield the results. Where a contracting party felt its interests were seriously jeopardized and wanted quicker relief, it took recourse to Article XXIII. In spite of the language of Article XXIII making it very broad in its application, in practice Article XXIII had been invoked only

when there was a case of nullification or impairment of a benefit accruing to a contracting party, whether because of a breach of GATT obligations, or through “non-violation”.

Right from the beginning the practice adopted by Contracting Parties, was to take the assistance of a smaller body to investigate complaints. In the early days of GATT, in one or two cases, the Chairman of the Contracting Parties, was requested to investigate the complaints. After this initial stage, a practice of referring the matter for detailed examination to a working party was developed. The approach of the working parties, was of conciliation and compromise and not of adjudication. After some time, the Contracting Parties began to feel that the findings and recommendations of the working parties did not meet the tests of objectivity and impartiality and they desired to have a procedure, which was of at least quasi-judicial nature. This resulted in the adoption of the panel system. Initially, the practice was to appoint sessional panels. However, from 1955 onwards, Contracting Parties began to appoint *ad hoc* panels consisting of three to five persons drawn from countries having no direct interest in the dispute. As in the case of reports of the working party the reports of the panels were treated as advisory opinions on the basis of which the Contracting Parties made their findings and recommendations.

II.3 Special Procedures for Developing Countries

In April 1966, the Contracting Parties adopted special procedures for cases in which a dispute was raised by a developing country against a developed country. These procedures provided for three new important elements that were designed to help developing countries. After the failure of bilateral consultations there was a possibility of mediation by the Director General to resolve the dispute. If mediation efforts also failed the aggrieved developing country acquired the right to get the matter referred to a panel. Another significant element of the new procedure was that the Contracting Parties could authorize retaliatory measures by the developing country concerned, and in addition, consider further measures to resolve the matter if they found, on examination of the panel report that the complaining developing country continues to suffer from nullification or impairment of any benefit under GATT, 1947. In spite of the fact that these special

procedures, for developing countries, constituted a substantial improvement over the general procedures, the special procedures were not used extensively.

One of the results of the Tokyo Round of multilateral trade negotiations was the, “Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance”, which was adopted in 1979. This Understanding had an annex titled “Agreed Description of the Customary Practice of GATT in the Field of Dispute Settlement (Article XXIII:2)”. The primary aim of the Understanding with its Annexure was to codify the customary practice. However, certain elements, which were an improvement over the customary practice, were also introduced in the “Understanding”. Three years later, the 1982 Ministerial Declaration strengthened and clarified further the various elements of the Understanding. The Understanding contained an optional provision for conciliation in the event of failure of bilateral consultation. The Ministerial Declaration elaborated the provision further by providing for conciliation by the Director General or by an individual or a group of persons nominated by the Director General. But neither the Understanding nor the Ministerial Declaration prescribed any time limit for the process of conciliation. The Understanding did not establish a right to the constitution of a panel. It provided for early constitution of panels without indicating any specific time-frame. It reinforced the element of mediation even in the generally quasi-judicial panel procedure by requiring the panel to consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution. It also provided for circulation to the parties of descriptive part of the report and the conclusions before they were circulated to the Contracting Parties. However, it did not provide for any rigid time limit for completion of panel proceedings. The Understanding stated that on receipt of the panel report the Contracting Parties would give it prompt consideration and take appropriate action within a reasonable period of time.

Besides codification of the customary practice of GATT in regard to its Dispute Settlement Machinery, the Tokyo Round also established independent procedures for consultation and dispute settlement in five of the six agreements on non-tariff measures namely, Agreements on Technical Barriers to Trade, Government Procurement,

Interpretation and Application of Articles VI, XVI and XXIII (Subsidies Code,) Implementation of Article VII (Customs Valuation Code) and Implementation of Article VI (Anti Dumping Code). There were significant differences between the procedures set out in the agreements on non-tariff measures and those of the Understanding. All the five codes provided for a right of a constitution of a panel after the failure of conciliation, while the Understanding did not. All the five codes prescribed specific time limits to be observed by the panels to submit their reports, though the individual time limits varied. Because of the explicit right to a panel as well as time limits for different stages of panel procedures, the conditions of access to the panel procedures as embodied in the five codes were far better than the Understanding.

In the period following the Tokyo Round there was a large increase in recourse to Article XXIII:2. These disputes brought out some of the limitations of the procedures, which were codified during the Tokyo Round. Therefore, the subject of Dispute Settlement received considerable attention during the preparation of Ministerial Meeting of 1982. Concern was expressed at the delays in selection of panelists, time taken by panel to submit their reports, mixing up of role of mediation and role of adjudication by the panels, blocking of panel reports by interested parties.

II.4 The Uruguay Round

During the Uruguay Round (UR) negotiations relating to Dispute Settlement the objective of the negotiators was to remove the weaknesses experienced in implementing Dispute Settlement procedures under GATT, 1947. The establishment of panels and adoption of panel reports had become a major problem under the GATT, 1947 because of the propensity of some powerful Contracting Parties to delay establishment of panels and block adoption of panel reports. The feeling was widely shared that there was an urgent need to make the Dispute Settlement process more judicial and less political. Following the Mid Term Review Meeting of the Uruguay Round, it was decided to make operational certain improvements on which agreement had already been reached during the negotiations without waiting for the conclusion of negotiations. Accordingly, the Contracting Parties adopted the “Decision on Improvements to the GATT dispute

settlement rules and procedures” on 12 April, 1989 on a trial basis for being applied from 1.1.1989 till the end of Uruguay Round. One of the significant elements of this decision was that the establishment of a panel became automatic in the second meeting of the Council. However, in respect of adoption of panel reports this decision did not change the practice of adoption by consensus, although it contained an exhortation that “the delaying of the process of dispute settlement shall be avoided” directed mainly towards powerful contracting parties.

At the end of Uruguay Round of negotiations, an “Understanding on Rules and Procedures governing settlement of disputes” (DSU) was adopted and this is included in Annex 2 to the Marrakesh Agreement establishing World Trade Organisation (WTO).

The Dispute Settlement Understanding, which is now one of the WTO agreements, has four important features designed to strengthen very substantially the quasi-judicial nature of process. They are (a) right to a panel; (b) rigid time limits for various stages; (c) introduction of an Appeal process; (d) automaticity in adoption of panel/Appellate Body reports. The main features of the Understanding are examined in the next part.

III An Analysis of the Provisions of the Dispute Settlement Understanding

Article 1 specifies the coverage and application of the Dispute Settlement Understanding (DSU). It is mentioned that the rules and procedures shall apply to disputes in respect of all agreements (called covered agreements), listed in Appendix 1 to the Understanding. The Appendix contains the Agreement establishing the WTO, Annex 1A, 1B, 1C, 2, and 4 of the Agreement establishing the WTO. Thus, the only WTO agreement not covered by the DSU is the Trade Policy Review Mechanism, obviously because the Trade Policy Review Mechanism is not intended to serve as a basis for the enforcement of specific obligations under the agreements or for dispute settlement procedures. This Article also clarifies that the rules and procedures of the DSU shall apply subject to such special or additional rules and procedures on dispute settlement understanding contained in the covered agreements as were identified in Appendix 2. In a way, one can say that

Appendix 2, is an indication of the extent to which the integrated dispute settlement understanding derogates from the objective of “Integrated Understanding”. For instance, one of the special or additional rules listed in Appendix 2, relates to certain provisions of the Agreement on Textiles and Clothing. The Agreement on Textiles and Clothing has established a Textiles Monitoring Body (TMB) in order to supervise the implementation of the ATC, to examine all measures taken under the ATC and their conformity with the provisions of the ATC. Therefore, any dispute based on the alleged violation of the provision of the ATC, has to be dealt by the TMB first, and a WTO Member can bring the matter before the DSB only if the matter remains unresolved even after the issue of a recommendation by the TMB. Similarly, Annex 2, provides for expedited procedures in respect of subsidies agreement. It is further clarified, that if there is any difference between the rules and procedures contained in the main understanding and those contained in Appendix 2, then the latter prevail.

Article 2, provides for the establishment of the Dispute Settlement Body (DSB). This provision states that the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions under the obligations under the covered agreements. Its provision also states that in respect of a plurilateral trade agreement only those Members that are parties to the Agreement can participate in decisions or actions taken by the DSB with respect to that dispute. Paragraph 4 of this Article contains a very important stipulation. It stipulates that DSB can take decisions only by consensus. In other words, this specific rule relating to decision making in DSB, is a departure from the general decision making rule contained in Article IX, of the Marrakesh Agreement establishing the World Trade Organization. In DSB, decisions have to be taken only by consensus, and there is no provision for voting in the absence of consensus.

Article 3, contains general provisions. This Article affirms Members’ adherence to the principles for the management of disputes applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified through the dispute settlement understanding. Paragraph 2, of this Article states that DSU serves to

preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements, in accordance with customary rules of interpretation of public international law. It is basing on this provision that the Appellate Body has made extensive use of the Vienna Treaty of Interpretations in dealing with disputes. Paragraph 2, also states that recommendations and rulings of the DSB cannot add to or diminish the rights and other obligations provided in the covered agreements. However, many WTO Members feel the recommendations and rulings of the Appellate Body have an impact on their rights and obligations. Paragraphs 5 and 6 of this Article deal with what are known as mutually agreed solutions. There are two stipulations attached to mutually agreed solutions: (i) mutually agreed solutions have to be consistent with those agreements under which the matter was formerly raised and shall not nullify or impair benefits accruing to any Member under those agreements, not impede the attainment of any objective of those agreements; (2) mutually agreed solutions have to be notified to the DSB promptly. The idea behind these stipulations is that mutually agreed solutions between parties should not adversely affect the interest of other Members and that such solutions should not be inconsistent with the provisions of the relevant agreements. Under paragraph 8 of this Article, there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement and therefore, it is up to the Member against whom the complaint has been brought to rebut the charge. Para 9, recognizes that the dispute settlement rights of the Members are without prejudice to the rights of Members to seek and adopt collective interpretations of any provision of the WTO agreement as well as multilateral trade agreements as envisaged in Article IX.2 of the Marrakesh Agreement establishing the World Trade Organization. Para 10 envisages that Members will engage in dispute settlement procedures in good faith, in an effort to resolve the dispute.

Article 4, of the DSU deals with consultations. This Article requires Members to enter into consultations with each other and to give sympathetic consideration to the representations made concerning measures affecting the operation of any covered agreement. Paragraph 4, provides for strict time periods for the consultation process. Paragraph 6, envisages that consultation should be confidential. All consultations are to be

notified to the DSB. If however, the consultation does not result in any fruitful result, then the Agreed party may ask for the establishment of a panel so that the matter may be adjudicated upon. Paragraph 8, provides for accelerated time frames in respect of disputes involving perishable goods. Paragraph 10, states that during consultations Members should give special attention to the particular problems and interests of developing country Members. It is worth noting that the language of this paragraph is non binding and non operational. Paragraph 11, provides for participation of third parties in the consultation process subject to certain stipulations. First, the Member concerned should notify its interest to the consulting Members and the DSB within the stipulated time period of its interest to be joined in the consultations. Second, the Member to which the request for consultation is addressed agrees that the claim of substantial interest made by the third party is well founded. In practice Members, wishing to be joined in the consultations as third parties in different disputes have had many frustrations with the operations of this paragraph. The way this paragraph is currently worded, the Member to whom the request for consultations is addressed is the sole authority to decide as to whether another Member has substantial interest or not in the matter and thus accept or deny the claim of that Member to be considered as a third party.

Article 5 states that good offices, conciliation and mediation be undertaken voluntarily if the parties so agree. This Article also provides that the Director General may offer good offices, conciliation or mediation with a view to assisting Members to settle a dispute.

Article 6 deals with the establishment of panels. This Article gives the complaining party the right to have a Panel established if it so desires. The only implication of this provision is that the defending party can block the establishment of a panel in the first meeting. However, if the complaining party repeats its request a second time the panel gets automatically established. The legalistic language in which paragraph 1 of Article 6 is worded has given rise to differing interpretations regarding “at the latest at the DSB Meeting following that at which the request first appears as an item on the DSB’s agenda”. However, it is fair to say that if the complaining party is serious about getting a

panel established, he can get it done at the second meeting of the DSB. Many WTO Members are of the view that a complaining party must have the right to get a panel established in the very same meeting of the DSB in which it makes a request. Paragraph 2 of Article 6, indicates the details to be contained in the panels requests.

Article 7 of the DSB deals with terms of reference of panels and indicates the language for standard terms of reference.

Article 8 deals with the composition of the panels. The panels shall be composed of well qualified government and/or non governmental individuals, persons who have served as a representative of the WTO Member or in the secretariat, and individuals who have taught or published on international trade or policy etc. Panels shall normally be composed of three Members, unless the parties agree otherwise, in which case the panel will consist of five members. The secretariat will maintain an indicative list of panelist from which panelists may be drawn. The panelists are to serve in their individual capacity and not as representatives of the governments or organizations. Nationals of Members whose governments are involved in the dispute are not to serve on the panel unless the parties agree otherwise. If there is a dispute between a developing country and developed country, and the developing country so requests, the panel shall include at least one panelist from a developing country Member. Normally, the parties to the dispute are expected to agree on the names of the panelists based on the nominations proposed by the Secretariat. If there is no agreement on the panelists, within 20 days after the date of the establishment of the panel, at the request of either party, the director general shall determine the composition of the panel in consultation with the Chairman of the DSB and the Chairman of the relevant council of committee. While Article 8, relating to composition of panels appears simple and straight forward, in practice the task of composition of panel has become extremely difficult because of the tendency of some Members to be extremely choosy and cautious in accepting individuals as panelists. This has resulted in two things: (i) the panel composition is taking lot of time and very rarely a panel is formed within twenty days of the date of establishment of the panel. (ii) increasingly the composition of the panel is being determined not on the basis of mutual agreement between the parties, but on the

basis of DG's determination. There are some Members who feel that the present system of composition of panels is flawed and that it requires review.

Article 9 deals with procedures for multiple complaints. This Article envisages that a single panel may look into multiple complaints related to the same matter. If more than one panel is established to examine the complaints related to the same matter, to the extent possible, the same persons shall serve as panelists on each of the separate panels and the time table for the panel process in such disputes should be harmonized.

Article 10 deals with third parties. This Article provides that any Member having a substantial interest in a matter of before a panel should notify its interest to the DSB. Such a Member will have an opportunity to be heard by the panel and to make written submission to the panel. Such third party submissions will be given to the party to the dispute and will also be reflected in the panel report. The Article further provides that third parties can receive the first submission of the parties. This Article also provides that the third party has the right to take recourse to normal dispute settlement procedures if it considers that a measure already the subject of the panel proceeding nullifies or impairs benefits accruing to it under any covered agreement. There is lot of dissatisfaction among WTO members about the limited scope of rights given to third parties under this Article.

Article 11 deals with the function of the panels. According to the Appellate Body this Article also indicates the standard of review to be adopted by the panel. According to this Article, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with relevant covered agreements and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

Article 12 deals with panel procedures. According to this Article, panels should follow the working procedures contained in Appendix 3, unless the panel decides otherwise after consulting the parties to the dispute. This Article envisages that the panel

should produce its final report within six months of its establishment. The time period is three months in cases of urgency including those relating to perishable goods. Paragraph 9 of this Article provides for the outer time limit for panel report and it is nine months. Paragraph 11 provides that if one or more of the parties is a development country Member, the panels report should indicate the form in which account has been taken of relevant provisions of differential and more favourable treatment for developing countries that form part of the covered agreements which have been raised by the developing country Member. It is worthwhile noting here that while the language of para 11 is mandatory; it is not in operational terms. Therefore, no real benefit accrues to developing countries because of this paragraph.

Article 13 gives specific authority to panels to seek information and technical advice from any individual or body which the panel deals appropriate. This Article also provides that panels may seek information from any relevant source and may consult experts to obtain opinion on certain aspects of the matter. It is worthwhile noting here that Article 13 is relevant only for panels and that *prima facie* this Article enables panels to seek technical advice and expert opinion whenever it desires to do so. The Appellate Body has interpreted this Article, as enabling panels as well as the Appellate Body, to deal with unsolicited Amicus Curiae Briefs. This interpretation of Article 13 by the Appellate Body, has proved to be highly confidential.

Article 14 provides that panel deliberations are to be confidential and that opinion expressed by individual panelists are to be anonymous.

Article 15 stipulates that the panel should issue an interim report for consideration of parties before a final report is finalized. This Article also stipulates that the final report shall include a discussion of the arguments of the parties at the interim review stage. Many WTO Members appear to hold a view that the interim review stage in the panel process is one that could be easily dispensed with, with a view to make the panel process more expeditious. In practice there has not even a single case, where a panel has made major changes in its findings on the basis of comments received from the parties at the interim

review stage. At best, the panels have attempted to strengthen their reports on the basis of comments, received at the interim review stage. This has resulted in a situation where some Members see merit in not offering comments on the interim report and attacking the weaknesses in the panel report at the appeal stage.

Article 16 deals with adoption of panel reports. The most important aspect of this Article is that the negative consensus rule applies to adoption of Panel reports. That is, the panel report shall be adopted by the DSB unless the DSB decides by consensus not to adopt the report. This represents a fundamental change from the system that is prevailing during the GATT period. In the new framework provided by the DSU a losing party does not have the capacity to block the adoption of the panel report. The negative consensus rule ensures automatic adoption of panel/Appellate Body reports (adoption of Appellate Body reports is also governed by negative consensus rule). It is seen that since inception of the WTO all panel and/or Appellate Body reports have been adopted on the basis of negative consensus rule. At this point of time, it is almost impossible to visualize a situation where DSB would decide by consensus not to adopt a panel or Appellate Body report since the prevailing party in the dispute would never be willing to be a party to such a decision. Article 16 also provides that Members should be given 20 days time to consider the panel report and that the panel report should be adopted within 60 days of its issuance to the Members of the DSB. In other words, the adoption of the panel report has to take place between 21 and 60 days of its issuance. However, the final report will not be adopted if one of the parties to the dispute formally notifies the DSB of its intentions to appeal or the DSB decides by consensus not to adopt the report.

Article 17, deals with the subject of Appellate Review of the appeals filed from panel cases. This article provides for the establishment of a standing Appellate Body. Under the old GATT system there was no provision for appeal for panel reports. During the Uruguay Round Negotiations, negotiators felt that since the new system provides for automatic adoption of panel reports, there should be scope for appeal in situations wherein panels misinterpret the legal provisions. Therefore, it was decided to set up a standing Appellate Body with the stipulation that the scope of an appeal should be limited to issues

of law, covered in the panel report and legal interpretations developed by the panel. Article 17 also provides that the Appellate Body shall be composed of seven persons, three of whom shall serve on any one case and they shall serve by rotation. The Appellate Body Members are to be appointed for a four year term and may be reappointed only once. The Article also stipulates that the Appellate Body Members should be persons of recognized authority, with demonstrative expertise in law, international trade and the subject matter of covered agreements generally. Para 5 of the article provides that the Appellate Body shall conclude its deliberations normally within 60 days but in any case not later than 90 days from the date of notification. Para 13 of the article states that the Appellate Body can uphold, modify or reverse the legal findings and conclusions of the panel. The adoption of Appellate Body reports is on the basis of negative consensus rule (as is the case with the adoption of panel reports). Para 4 of the Article states that only parties to the dispute and not third parties can appeal a panel report. Para 9 of the Article give the authority to the Appellate Body to drop the working procedures in consultation with the Chairman of the DSB and the director general and communicate the working procedures to the Members for their information.

Article 18 deals with the communication with the panel on the Appellate Body. This article requires that all communication addressed to the panel or Appellate Body, concerning matters under consideration shall be treated as confidential, but should be communicated to the other side. However, a party to a dispute is not precluded from disclosing statements of its own position to the public. This is meant to ensure transparency. This article also stipulates that a party to a dispute should, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public. Experience has given rise to two types of concerns regarding this article. There is no prescribed time limit within which a party to a dispute should provide, on request, a non-confidential summary of its submissions. The second concern relates to the material provided by the WTO secretariat to the panels. This material is not available to the parties to the dispute and this raises issues relating to due process.

Article 19, provides that the panel or the Appellate Body concludes that a measure is inconsistent with the covered agreement, it shall recommend that the Member concerned brings the measure into conformity with that agreement. It is further mentioned that in addition to its recommendations, the panel of the Appellate Body may suggest ways in which the Member concerned could implement the recommendation. In practice, sometimes panels have suggested ways in which the Member concerned could implement the recommendations. However, it should be borne in mind while the only possible recommendation of the panel or the Appellate Body is that the Member concerned bring the measure into conformity with the relevant agreement and it is absolutely binding on the Member concerned, the panel on the Appellate Body has the discretion to suggest ways in which the Member concerned could implement the recommendation and the suggestion regarding ways of implementation is not binding on the Member concerned.

Article 20 provides for time frames for DSB decisions. The period provided is 9 months where there is no appeal and it is 12 months where there is appeal.

Article 21 deals with the surveillance of implementation of recommendations and rulings of the DSB. Para 1 of this article lays emphasis on the need for prompt compliance with the recommendation or the rulings of the DSB. Para 2 is a provision in favour of developing countries but this provision does not have much operational content or binding effect. Para 3 requires that a Member shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB, within 30 days of the adoption of the panel or Appellate Body report. Members are entitled to a reasonable period of time to do so. This article also provides as to how the reasonable period of time can be arrived at either through mutual agreement between the parties or through binding arbitration. The normal period for implementation is 15 months from the date of adoption of a panel or Appellate Body report. Para 5 of the article provides for establishment of a compliance panel where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings. The phrase in this article “through recourse to these dispute settlement procedures” has given rise to differing interpretations like as to whether consultations should precede the

request for the establishment of a compliance panel, whether the consultation period is sixty days, whether the establishment of the compliance panel is mandatory only at the time of the second request and whether there could be an appeal against the finding of a compliance panel. Para 6 provides for surveillance of the adopted recommendations or ruling. The issue of implementation shall be kept on the agenda of the DSB meeting six months after the expiry of reasonable period of time and shall remain on the agenda until the issue is resolved. The Member concerned has to give a status report on the implementation at least 10 days prior to each meeting.

Article 22 deals with compensation and suspension of concessions. If the recommendations or rulings are not implemented a Member may receive compensation or suspend concessions or other obligations in relation to the other Member. However, these are temporary measures without prejudice to the obligations to the Member concerned to bring the measure into conformity with the covered agreements. Compensation is voluntary and if granted, shall be consistent with the covered agreements. Where a Member fails to negotiate an acceptable compensation then the Member may invite the DSB to authorize the suspension of concessions or other obligations under the covered agreements, if such a course is not prohibited in that covered agreement. Para 3, provides that the complaining party may seek suspension of concessions with respect to the same sector as that in which the panel or Appellate Body has found a violation or other nullification or impairment of its rights. If that is not practicable or effective, it may seek suspension under the same agreement; failing which it may seek suspension in other sectors under another covered agreement. Paragraph 6 provides that when a losing party fails to bring the measure into compliance with the relevant covered agreement and when there is no mutually acceptable compensation decided upon, then on the request of the prevailing party the DSB shall grant authorization to suspend concessions or other obligations and the DSB shall decide this issue on the basis of negative consensus rule. The relationship of Article 22.6 with Article 21.5 has been the most debated subject under the DSU and this is known as a sequencing issue. Article 22.6 states that the authorization to suspend concessions for other obligations shall be granted within 30 days of the expiry of the reasonable period of time. Some delegations have argued that if they have to wait

for the compliance panel constituted under Article 21.5 to give its findings before taking the recourse to Article 22.6, they will lose their right to suspend concessions since in terms of Article 22.6 the DSB has to grant authorization within 30 days of the expiry of reasonable period of time and since the compliance panel has 90 days time to submit its report after the date of referral of the matter to it. According to these delegations therefore multilateral determination of compliance and non-compliance is not a prerequisite for taking recourse to Article 22.6. Article 22.6 while providing for the grant of authorization to suspend concessions or other obligations almost automatically, also provides that if the Member concerned objects to the level of suspension proposed or claims that the principles and procedures indicated in para 3 have not been followed the matter shall be referred to arbitration. Normally, the original panel shall do such arbitration and the arbitrators shall complete their work within 60 days after the date of expiry of a reasonable period of time. Article 23 is designed to strengthen the multilateral trading system. Article 24 deals with special procedures for least developed country Members. Article 25 deals with arbitration as an alternative means of dispute settlement. This article clearly provides that resort to arbitration shall be subject to mutual agreement of the parties. Article 26 prescribes procedures regarding non-violation complaints. Article 27 deals with the responsibilities of the secretariat in dispute settlement matters.

IV Review of Proposals relating to

IV.1 Permanent Body of Panelists

In the ongoing negotiations aimed at improvements and clarifications of the Dispute Settlement Understanding (DSU), the European communities have come out with a major proposal relating to establishment of a permanent body of panelists. Some delegations characterize this as “professionalisation of the panel system”.

Article 8 of the DSU deals with the subject of composition of panels. Article 8 (1) indicates the type of background “well qualified governmental and/or non-governmental panelists” should have. This provision while describing different types of background which a panelist should have, is worded in such a way that it is not restrictive. Article 8(2)

provides that panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience. Article 8(3) provides that citizens of Members whose governments are parties to the dispute or third parties as defined in Paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise. Article 8(4) provides for maintenance, by the secretariat, of an indicative list of governmental and non-governmental individuals from which panelists may be drawn as appropriate. Article 8 (5) provides that a panel should normally consist of three persons unless parties to the dispute agree for a panel of 5 members. Article 8 (6) envisages that the Secretariat should propose nominations for the panel to the parties to dispute and that the parties to the dispute shall not oppose nominations except for compelling reasons. Article 8(7) provides that if there is no agreement on the panelists within 20 days after the date of the establishment of the panel, at the request of either parties, the Director General should determine the composition. Article 8(10) provides that when a dispute is between a developing country Member and a developed country Member, the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

The European Communities have in their proposals explained the reasons as to why they seek a change in the procedure relating to composition of panels and want to move from ad hoc to a system of more permanent panelists. The main reasons given by the EC can be summarized as;

- a) a more permanent system of panelists is likely to lead to faster procedures and increase the quality of panel reports.
- b) There is growing discrepancy between the need for panelists and the availability of ad hoc panelists. There are many more panels under the WTO than in GATT. Furthermore, total duration of the cases is increasing, because of the frequent recourse to compliance panels and to arbitration on the suspension of concessions, procedures which are normally handled by the original panelists. On the supply side it has proved more and more difficult to find qualified panelists who are not nationals of Members involved in the dispute. The mismatch between demand and supply is resulting in delay in selection of panelists and increasing dependence on the DG for the selection of panelists. A permanent system of panelists will

reduce the time required for selecting panelists and the time just gained could be allocated to other parts of the Panel procedure.

- c) The increased complexity of the substance of the cases brought before the panels both from a factual and a legal point of view results in a situation where panelists appointed under the present ad hoc system come under greater strain.
- d) A permanent system of panelists would enhance the legitimacy and credibility of the panel process in the eyes of the public.
- e) The System of permanent panelists can be used to ensure greater involvement of panelists from developing countries
- f) A more permanent system of panelists would lead to faster proceedings and better and more consistent rulings.

EC being the main proponent of the system of permanent panelists has advanced arguments as indicated above to justify its proposal. There may be some truth in each of the arguments given by EC. At the same time it is possible to pick holes in at least some of the arguments of EC. But what is needed is an overall and balanced view of the proposal.

It is no exaggeration to say that many trade diplomats, legal experts involved in the WTO system, as well as academics are extremely concerned with the present arrangements relating to the composition of panels. There is a widespread perception that the WTO secretariat plays an unduly important role in the selection of panelists and that the secretariat, willy nilly, comes under certain amount of pressure from one major delegation during the process of selection of panelists. Many legal experts including some former Appellate Body members feel that the panelists selected under the current ad hoc system do not have adequate time or background or necessary legal expertise to deal with complicated cases. It is fair to say that, the present system appears to give too much of discretion to the Secretariat in the matter of selection of panelists. It is also the general experience of at least some of the developing country delegations that one major delegation, whenever it is the respondent in a dispute tries to delay the composition of the panel as much as possible resulting in a situation where the complainant has no choice except to seek DG's intervention. Obviously, DG who is burdened with far more

important items of work depends upon the Deputy Director General concerned as well as Directors and others concerned in the choice of panelists. Experience shows that the choice of panelists by the DG has not been as objective and as broad based as one would have expected. This is because the secretariat is able to influence the process in two ways. (a) It is the secretariat, which initially suggests names for consideration by virtue of Article 8 (6) of the DSU. The Secretariat guards its power in this area very zealously and views a situation where the parties to the dispute directly get in touch with each other in order to arrive at mutually acceptable names as not supported by the provision of DSU. If the names proposed by the secretariat are not acceptable to one or more parties, then it is the secretariat, which decides the final composition. Thus, there is no way a person who is not suggested by the secretariat or who is not acceptable to the secretariat (what ever be the reason) can become a panelist. (b) the concept of indicative list of panelists found in the DSU was designed to provide a large number of names from which the secretariat can choose panelists. There are a large number of names available in the indicative list. However, experience shows that some of the eminent legal experts whose names are included in the indicative lists have not been proposed even once by the secretariat for consideration of the parties to the dispute during the last seven years. It is also seen that some diplomats are repeatedly proposed by the secretariat for panels. These circumstances have created a general perception that certain amount of good will of the secretariat is necessary if one is to be considered by the secretariat for being proposed as a panelist.

It should also be conceded, in fairness to the EC that the present system of ad hoc panelists is resulting in a situation where at least some of the panelists are not able to devote enough time for the tasks before them and therefore the panelists inevitably depend on the Secretariat for guidance/support.

In view of the above, it is obvious, that the present system of ad hoc panelists needs to be revised with a view to bring about greater degree of professionalism and a reduced role for the Secretariat in the choice of panelists. The main proposal for changes in the panel system has come from EC. The original proposal of EC is contained in document

No. T/DS/W/1 dated 13 March, 2002. EC has subsequently modified its proposals slightly.

1. Panels shall be composed of three individuals included on the roster of panelists established by the DSB. The panelists shall be appointed by the DG on a random basis within 5 days from the establishment of the panel.
2. Notwithstanding paragraph 1, the parties may agree at the time of the establishment of the panel that panels may include up to two individuals from outside the roster with particular expertise on the subject matter of the dispute. The Chairman of the panel shall always be an individual included on the roster of panelists and will be appointed by the DG on a random basis within 5 days from the establishment of the panel. The parties may agree on the individuals outside the roster to serve on the panel or request the Director-General, in consultation with the parties and the Chairman of the panel to nominate these individuals. If no agreement has been reached on the panelists from outside the roster or no request for their nomination to the DG has been made within 10 days from the establishment of the panel, at the request of a party, those members of the panel shall be drawn from the roster by the DG on a random basis....
3. The roster shall include a number of persons as determined from time to time by the General Council. The DSB shall include persons on the roster for six-year terms and no person shall be re-appointed. However, the terms for the initial inclusion on the roster shall be either [three, four, five or six years], with an equal number appointed for each period, as determined by lot [and with those appointed for [three or four] years eligible exceptionally for re-appointment to six-year terms]. The roster should comprise persons of recognized authority, with demonstrated expertise in international trade law, economy or policy and the subject matter of the covered agreements generally, and /or past experience as a GATT/WTO panelist. It shall be broadly representative of membership in

the WTO. All persons included on the roster shall stay abreast of dispute settlement activities and other relevant activities of the WTO.

4. Within three months after establishment of the initial roster, the panelists included on the roster shall draw up rules on conflict of interests to be applicable to the permanent panelists in the exercise of their duties and in determining their suitability to serve in any particular dispute. Such rules shall be drawn up in consultation with the Chairman of the DSB and the Director-General, and submitted to the DSB for adoption.
5. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.
6. The panelists included on the roster may draw up additional working procedures for panels as necessary to the extent not already provided for the DSU. Such procedures shall be drawn up in consultation with the Chairman of the DSB and the Director General, and submitted to the DSB for adoption.
7. Panelists shall be provided with appropriate administrative and legal support as required.
8. The expenses of panelists shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.
9. Within three months after establishment of the initial roster, the panelists included on the roster shall draw up rules on conflict of interests to be applicable to the permanent panelists in the exercise of their duties and in determining their suitability to serve in any particular dispute. Such rules shall

be drawn up in consultation with the Chairman of the DSB and the Director-General, and submitted to the DSB for adoption.

10. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.
11. The panelists included on the roster may draw up additional working procedures for panels as necessary to the extent not already provided for the DSU. Such procedures shall be drawn up in consultation with the Chairman of the DSB and the Director General, and submitted to the DSB for adoption.
12. Panelists shall be provided with appropriate administrative and legal support as required.
13. The expenses of panelists shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

The first major concern with EC's proposal is that all panelists in future will be chosen from a group of 15-24 individuals. Currently, in the indicative list of panelists, there are about 500-600 names. Moreover, there is no bar on selecting individuals whose names do not figure in the indicative list as panelists. It is going to be a very difficult job to arrive at a permanent panel of 15-24 names. Another worrying aspect is that some major delegations may effectively veto some individuals who are known for their fierce independence and refusal to yield to any type of pressure. Therefore, the system of permanent panelists might mean that we restrict the area of selection to a limited number of 15-24 individuals with the additional risk that these individuals, while they may possess legal and technical expertise, may not necessarily be well known for their independence

and capacity to resist pressure. Thus, EC's proposal in a way amounts to leap into the unknown.

Other countries who have submitted proposals regarding permanent roster of panelists are Thailand, Canada and the African group.

Thailand's proposal envisages minimum departure from the present system. This system envisages approval of a roster of panel chairs by the DSB comprised of individuals who may be appointed as Chair of a Panel by lot. According to Thailand, in addition to retaining the current practice (i.e. mutual agreement on a complete panel based on nominations proposed by the secretariat or panel composition by the DG at the request of either party), a further option would be provided that allows a party to request that the panel chair be appointed by lot. Following appointment of the panel chair, the parties can continue with the process of panel composition based on nominations proposed by the secretariat or DG appointment of the remaining panelists. According to Thailand, the system has the following benefits.

1. Parties will have greater control over the panel composition process, and will retain the right to have the panel composed within 30 days of panel establishment
2. Parties retain the possibility of agreeing on panelists nominated by the Secretariat, and have the option of a more flexible automatic system for panel composition, supplemented by a more dedicated and experienced pool of Panel Chairs.
3. Parties have the added option of having an experienced Panel Chair appointed at any stage during the panel composition process, while retaining the ability to agree on panelists with necessary expertise in the subject matter of the relevant covered agreements.

Canada's proposal involves replacement of the current indicative list by a panel register. The panel register will be prepared by asking each WTO member to nominate

one individual for placement on a panel roster. While nominating an individual, each Member will be required to provide a statement of qualifications of the nominee. The nominations will be scrutinized by a Committee, which will be the same as the Committee for selection of Appellate Body Members, who will make sure that the nominations meet the requisite level of expertise to serve as a panelist. Canada's proposal envisages that the secretariat will propose potential panelists to the disputing parties drawing from the panel roster. The disputing parties will be able to propose "off roster" candidates. In the absence of an agreement between the disputing parties the DG will compose the panel from the panel roster keeping in view the issues involved in the dispute. If however, the DG determines that insufficient expertise is available from the roster for a particular dispute, the Director General will be able to appoint an individual other than from the roster to serve as a panelist in that dispute. Canada's proposal envisages that Article 8.3 of the DSU will be respected.

In my view EC's proposal in its current form amounts to a leap into the unknown. We can perhaps have a combination of the present system and the system proposed by EC. We can envisage a system along the following lines:

- a) A roster of Panel Chairpersons should be established by the DSB. This roster should be prepared and maintained with the approval of DSB on the basis of recommendations from a Selection Committee constituted for this purpose by the DSB. The selection committee could perhaps be the same as the one which selects Appellate Body Members.
- b) The parties to the disputes should arrive at a panel of three names or five names within 20 days from the date of establishment of the panel. The parties to the dispute can consider the nominations proposed by the secretariat as provided for in Article 8(6) of the DSU. However, this should not preclude parties from interacting directly without the involvement of the secretariat or suggesting names from the indicative list on their own for consideration by the other party.

However, the parties cannot choose any name from the roster of panel Chair persons.

- c) If there is no agreement between the parties (within 20 days) from the date of establishment of the panel, the parties do not any longer have a right to establish a mutually agreed panel and the responsibility for establishing the panel passes on to the DG (There should be no possibility for the parties to extend the 20 days time limit even on the basis of mutual agreement. Experience shows that the delay in constitution of panels is essentially due to the parties dragging their feet and normally the respondent delays the process especially if the respondent happens to be a powerful developed country. If there is no mutual agreement within 20 days, the parties should have no further say in the composition of the panel).

- d) When there is no mutual agreement between the parties within twenty days, the DG can determine the panel as envisaged in Article 8(7) of the DSU with the following stipulations:
 - i) The Chairman of the panel should be from the roster of panel chairpersons.

 - ii) The selection of the Chairperson from the list of panel chairpersons should be on the basis of a pre-determined formula that would eliminate scope for discretion or manipulation.

 - iii) Other two or four members of the panel will be taken from the indicative list. While selecting two/four panelists from the indicative list, DG should give preference to the persons in respect of whom there might be agreement between the parties.

Even in the system suggested above, one can probably pick many holes. The preparation of list of permanent panel chairpersons will face the same type of problems as

envisaged in the preparation of list of permanent panelists. In fact one could not even argue that the preparation of the list of permanent panel chairpersons will be more problematic than the preparation of the list of permanent panelists. However, we have to remember that the EC's proposals envisages that in future all panelists will be selected out of the list of 15 to 24 of permanent panelists. On the other hand the proposal above is that the permanent list will be resorted to only if the parties to the dispute are not able to mutually settle the panel composition between themselves. Moreover, the list will be utilized by the DG only for selecting, on a random basis, the chairperson. The other two members of the panel will be taken from indicative list. As things stand now, the indicative list has become meaningless. Even when DG determines composition of the panel he is not giving particular consideration to the large number of names available in the indicative list. The scheme envisaged above indicates that in a situation where DG determines the composition of the panel because of the failure of the parties to agree on the composition within the 20 days limit, he has to select the chairperson from the list of permanent chairpersons and the other two or four members have to be picked up from the indicative list.

The EU's proposal in its current form virtually deletes Article 8(3). It is better that Article 8(3) continues to be respected. This would mean that when the DG determines the composition of the panel by selecting the Chairperson from the list of permanent chairpersons and the members of the panel from the indicative list of panelists he has to keep in mind Article 8 (3) of the DSU. In the present stage in the evolution of the WTO system one cannot think of abrogating Article 8(3) of the DSU.

It is no doubt true that while composing appellate body benches, there is no requirement of exclusion of an appellate body member from the bench because of his/her nationality. For one thing, one cannot equate the panel process and the appellate body process. In the case of panel process there is a specific provision in the form of Article 8(3) of the DSU while there is no such specific provision in respect of appellate body process. The agreed rules of procedures of the Appellate Body do not contain a provision similar to Article 8(3) because

- a) a similar provision would have prevented appellate body members belonging to US and EU from sitting on benches dealing with disputes involving these countries. This would have resulted in a situation wherein appellate body members from US and EU would have had much less work compared to other members thereby, creating considerable problems for the functioning of the appellate body.
- b) The rules envisaged that the appellate body will function on the basis of “collegiality”. This meant that every appellate body member had the right to offer his views in respect of every dispute. Against this backdrop, nationality of the member ceased to be a major issue.

In the system of permanent panelists proposed by EU or in the system of permanent panel chairpersons envisaged above, because of the large number involved it is not possible to follow the principle of collegiality. Moreover, considering the large number of panels being established in the WTO, it is unlikely that the panelists from one or two WTO Members will be under worked. This is particularly true in a situation where we are going to have only a roster of permanent chairpersons and when this roster will be operated only if the parties are not able to mutually agree on the composition of the panel within 20 days. Hence, the continued relevance of article 8(3).

It is possible that EC may argue that proposal above i.e. moving to permanent panelists only when the parties do not agree and having only a list of permanent chair persons rather than a list of permanent panelists changes the fundamental characteristics of their proposal. One can respond by saying that one is not comfortable with the thought of drawing all future panelists from a limited list of 15 – 24 individuals. Apart from the concerns already highlighted, there is another aspect, which should be kept in view. Since panelists are currently drawn from different backgrounds and from different countries there is certain amount of awareness developing among academics, lawyers, and governments of different Members about panel procedures. This, to some extent is enhancing the

credibility and acceptability of the system. The implication of the EU's original proposal was that all government officials would be virtually debarred because of their affiliation with their national governments. However, the EU has modified its proposals subsequently to say that government servants on temporary leave from their government may serve as permanent panelists. EU's proposal is a bit vague about the full time nature of academics and legal experts. Presumably, they do not have to give up their current professional work/responsibilities to be eligible to become permanent panelists. By continuing to respect Article 8(3) of the DSU many of the complications which are inherent in the EU proposal could be avoided. In my view national governments have made a great contribution by agreeing that nationality of the members of the Appellate Body concerned will not be relevant for constituting a Appellate Body bench. It is necessary for the WTO system to show certain degree of sensitivity to the concerns and problems of national governments and ensure that Article 8(3) continues to be respected in the composition of the panels. The world has not evolved into a situation as yet in which nationality of the panelists is not a sensitive issue. EC may still argue that one of the primary objectives of their proposal is to provide for a full time activity in order to ensure panelists of high quality and expertise. According to EC their proposal will ensure that panels will be able to handle procedural developments, such as preliminary rulings and the handling of business confidential information as well as the increased complexity of the assessment of facts in a better fashion. Though not stated explicitly till now, EU at some stage may also argue that their system will be able to handle the situation of compliance panels better since the original panelists being drawn from a list of full time permanent panelists, will be easily available to perform the role of compliance panel. Similar arguments will also be made in case Appellate Body gets powers to remand cases to the original panel.

One has to concede that there are many advantages in drawing panelists from a list of full time permanent panelists. However, one cannot be blind to the fact that a system full time of permanent panelists will change the system more profoundly than generally understood. As pointed out by Professor Thomas Cottier, a system of permanent panelists will affect the balance of power in the WTO. The relationship of panels and the Secretariat

will change to the extent panels develop own expertise and independence. The combined effect of permanent body of panelists and the appellate body will bring about an overall legal culture into the organization, reducing a sense of ownership which the trade diplomats currently have towards the system. Therefore it is necessary to move towards the system of permanent panelists gradually and cautiously. Basically the EU's proposal would imply that all panelists will be drawn from a pool of 15-24 panelists except when both the parties agree at the time of establishment of the panel that panels may include up to two individuals from outside the roster with particular expertise on the subject matter of the dispute. Even in that exceptional situation the Chairman will be drawn from the permanent roster only. My suggestion implies that the parties to the dispute still retained the possibility of agreeing on the panelists. When they don't, the DG will select the Chairman of the panel from a permanent list of Chair persons on a random basis and the two panelists will be selected from the indicative list. It is true in the system suggested by me some of the advantageous of the system proposed by EU will not be there. However, the system suggested by me still provides for parties agreeing on a panel, which is very good from the point of view of credibility and acceptability of the system. In case the parties cannot agree the system suggested by me is such that it will significantly reduce the scope for discretion and manipulation in the composition of the panel. My own expectation is that if the roster of permanent chair persons is prepared carefully with credible names, over a period of time, a trend will emerge in which the parties to the dispute will prefer the chair person to be drawn from the roster. In my view EU proposal is too radical for the current times. The system will have to go through the following stages: a) a situation in which there is still a possibility of parties to the dispute agreeing on panelists and in the absence of such an agreement, DG choosing on a random basis the Chair person from a list of full time permanent Chair persons and the other two panelists from the indicative list. (b) a situation in which the Chair person is chosen on a random basis from a list of full time permanent chair persons without any reference to the preference of the parties and for the possibility of mutually agreeing on the names of two panelists and the DG nominating two persons in case there is no agreement between the parties. (c) a situation in which the parties to the dispute will have no say in the composition of panel and the chairperson as well as the other two members of the panel will be drawn from a permanent list of

panelists on a random basis. (This is virtually the current proposal of the EU though it has provided for the possibility of drawing panelists from outside the list if the expertise required for dealing with a dispute is not available within the list).

It is clear that EU's proposal is not getting as much support as one would have expected, considering the inherent merits of the proposal. This is because of the fact that the system is not ready for such a radical change, in spite of the fact that, many delegations are unhappy with the present system of ad hoc panelists. The proposals from Thailand and Canada also indicate their preference for a gradual change.

As far as qualifications are concerned EC has said that permanent panelists should have major demonstrated expertise in international trade laws, economy or policy, and/or past experience as a GATT/WTO. This formulation, besides being ambiguous, is more restrictive than Article 8(1) of the DSU. In case the idea of a list of permanent panelists or the idea of a list of permanent panel chairpersons goes through, it has to be ensured that the prescribed qualifications do not become different from what is envisaged in Article 8(1) of the DSU. This article does not prohibit non-lawyers from functioning as panelists. This provision does not also prohibit persons who have no previous experience of serving as panelists from being appointed as panelists. After all, those who claim experience as panelists today, became panelists on the first occasion without any previous experience! Any stipulation that the permanent list of panelists or permanent list of chair persons should include only those who had served as panelists earlier will be highly restrictive besides being inequitable for the reasons referred to earlier. Similarly, a stipulation that only lawyers could be included in the list of permanent panelists or permanent chair persons will also be highly restrictive. Such a stipulation has not been made even in respect of appellate body members and it will be extremely odd if such a restriction is made in respect of permanent panelists or permanent chairpersons of panels.

IV.2 The Amicus Curiae Submissions

On the subject of Amicus Curiae Submissions proposals have been made by the European Communities (EC) the United States, the African Group, India and others as well as Chinese Taipei.

The EC Proposal on the subject of regulation of Amicus Curiae Submissions starts with the following sentence:

“The DSU as interpreted by the Appellate Body now allows the submission of Amicus Curiae briefs on a case by case basis”. This is an slightly misleading statement by the EC. The US proposal on the subject is worded very cleverly. The US proposal states : “In light of experience to-date, with Amicus Curiae Submissions to Panels and the Appellate Body, Members may wish to consider whether it will be helpful to propose guideline procedures for handling Amicus Curiae Submissions to address those procedural concerns that have been raised by Members, Panels and the Appellate Body”. The US proposal implies that panels and the Appellate Body have the right to entertain Amicus curiae submissions and what is required is only guidelines to handle procedural concerns expressed by Members. Both EC and the US appear to be preceding on the basis as if there is no serious problem about entertaining Amicus curiae submissions and that what is required is only laying down of procedures for handling Amicus curiae submissions.

The approach of EC and US to the subject of Amicus curiae submission is at variance with the discussions which took place in the special session of the general council held on 22nd November, 2000. After a detailed discussion of the communication from the Appellate Body to the Chairman of the DSB contained in document WT/DS135/9, the General Council, by consensus, requested the chairman of the General Council to convey to the Appellate Body the strong feelings of the Membership about Appellate Body’s approach to the subject of Amicus Curiae Submissions and serious concerns of the membership about the action of the Appellate Body in outlining procedures for receipt and consideration of Amicus Curiae briefs when an overwhelming number of Members have

repeatedly pointed out that the Appellate Body has no authority to seek Amicus Curiae briefs or accept unsolicited Amicus Curiae briefs.

The issue of Amicus Curiae briefs came into sharp focus first in the Shrimp Turtle case. The Panel in this case considered that it was not entitled to accept amicus curiae briefs under Article 13 of the DSU and observed that accepting non-requested, information from non-governmental sources would be, in their opinion, incompatible with the provisions of the DSU as currently applied. In that case, the Appellate Body over-ruled the panel by saying that the panel's reading of the word "seek" is unnecessarily formal and technical in nature and said that a panel has discretionary authority either to accept and consider or reject information and advice submitted to it, whether requested by a panel or not. When the relevant report came up for adoption, a large number of Members pointed out that the Appellate Body, by giving a new interpretation to certain DSU provisions, had overstepped the bounds of its authority by undermining the balance of rights and obligations of Members. In that meeting, the only delegation which defended the approach of the Appellate Body was the United States.

Subsequently, in the Bismuth Carbon Steel case, the Appellate Body stated that neither the DSU nor the working procedures explicitly prohibited acceptance or consideration of such briefs. On the basis of this curious logic, the Appellate Body said 'we are of the opinion that we have the legal authority under the DSU to accept and consider Amicus curiae briefs in an appeal in which we find it pertinent and useful to do so'. Again, when this report came up for adoption, a number of delegations expressed serious concern regarding the Appellate Body's interpretation of the treatment of Amicus curiae briefs. Many delegations also pointed out that the acceptance by the Appellate Body of Amicus curiae briefs is not a procedural but a substantive matter and that the issue cannot be dealt with under Rule 16(1).

In the Asbestos case the Appellate Body tried to introduce procedures for dealing with Amicus curiae briefs on the alleged ground that these procedures are necessary to discipline the process and allow the division hearing the appeal to manage in a fair, legal

and orderly manner, a difficult, practical situation which the members of the Appellate Body anticipated would arise in that appeal. The action of the Appellate Body in issuing so called additional procedures under Rule 16(1) of the working procedures for appellate review created considerable amount of disquiet among WTO members. Because of the strong feelings of Members on the subject, a special general council meeting was called on 22nd November, 2000 in which almost every Member criticized the Appellate Body's action in strong terms. The most important thing is that when the Chairman summed up the proceedings of the meeting and said that he will convey informally strong feelings of the membership to the Appellate Body, there was no disagreement and thus there was consensus. Of course, the Chairman of the General Council in his summing up stated that the membership will have to consider and come to a clear decision on the subject of Amicus Curiae briefs., if they want to avoid the vacuum which the Appellate Body has been trying to fill.

Subsequent to the general body meeting of 22nd November, 2000 the Appellate Body withdrew the additional procedure purported to have been issued under Rule 16(1)

In the light of the above, there is no basis for the EC's claim that the DSU as interpreted by the Appellate Body now allows submission of Amicus curiae briefs on a case by case basis.

In the last few years, India, almost all other developing countries as well as a good number of developed countries have been voicing their strong opposition to the introduction of Amicus curiae briefs in the WTO dispute settlement system on the following grounds:

1. acceptance of Amicus curiae briefs changes the inter-governmental nature of the organization by providing space to non-governmental actors to influence the process as well as outcome of the dispute settlement system
2. acceptance of Amicus curiae briefs changes Members' rights and obligations. Acceptance of Amicus curiae briefs would necessarily mean their

examination by parties to the dispute and responding to arguments contained in the briefs. This necessarily adds to the obligations and consequently to the burden of the parties.

3. Article 17.9 of the DSU and by extension, the working procedures for Appellate Review were not applicable to substantive issues
4. acceptance of Amicus curiae briefs will mean additional financial resources and also additional time.
5. Most of the Amicus curiae briefs would be submitted by interest groups with narrow focus. This will come in the way of the dispute settlement system balancing the interest of all stake holders
6. The argument that consideration of Amicus curiae briefs would increase the public support for the dispute settlement mechanism is not based on any clear empirical evidence. It is possible that in a system of dispute settlement where Amicus curiae briefs are freely allowed and narrow interest groups hog the limelight, the common man may feel that the system is not capable of taking a balanced view of various interests nor sub-serving larger public interest
7. Acceptance of Amicus curiae briefs would result in a curious situation in which NGOs and other non-governmental actors will have better rights in the matter of intervening in the Appellate Body Process.

The African group in their proposal has suggested that unsolicited information be directed to the parties and not to the panel. The group also proposed that in deciding whether to seek information, panels consult the parties and their legal advisors. The African group also proposes the reaffirmation of the use of the expert review groups under Article 13.2 and Appendix 4 procedures. It would appear that the thrust of the African proposal is to put some limitation on the ability of panels to seek information under Article 13 of the DSU. In my view it may not be desirable to try to build in some restrictions on the right to seek information under Article 13.

The Indian proposal has the effect of preventing panels and Appellate body from considering unsolicited information.

The main thrust of the proposal of Chinese Taipei, is that allowing consideration of unsolicited Amicus curiae submissions, as proposed by EU, would create situation where those Members with the least social resources could be put at a disadvantage. In other words, Chinese Taipei, is not in favour of considering unsolicited Amicus curiae briefs. With regard to the US proposal to create some guideline procedures for handling of Amicus curiae submissions, to address Members' concerns, Chinese Taipei questions the need for this because it believes it is already adequately covered by precedence from past cases for the panel and the Appellate Body to follow. It is not clear as to whether Chinese Taipei, have appreciated the fact that the Appellate Body has created a wrong precedent enabling it to consider unsolicited Amicus curiae briefs.

A large number of developing countries as well as some developed countries continue to feel strongly against providing for the possibility of Amicus curiae submissions in the WTO dispute settlement process. Therefore, countries like India and others can continue to voice their opposition to the idea. These Members of the WTO must make it abundantly clear to US and EC that an overwhelming number of members have strongly expressed themselves against the attempt of Appellate Body to provide for receipt and/or consideration of Amicus curiae briefs in gross violation of the provisions of the DSU and that they cannot accept the premise that DSU as interpreted by Appellate Body provides for Amicus curiae submissions and that what is to be done now by the membership is only to evolve appropriate rules and guidelines for the receipt and consideration of Amicus curiae briefs.

The Appellate Body is to some extent influenced by political considerations rather than legal considerations in interpreting DSU in such a way as to acquire power for itself to receive and consider Amicus curiae submissions. It is the general feeling of a large number of WTO members that the Appellate Body is concerned that if the WTO Dispute Settlement system does not provide for handling of Amicus curiae briefs, it will not gain the required degree of acceptance in US and EU, two most powerful members of the WTO. Therefore, the Appellate Body is persisting with its interpretation of DSU provisions and

continues to claim that it has a right to receive Amicus curiae briefs, because there is no prohibition against it in the DSU. The proposals from India and the African group are intended to prevent this types of interpretation of DSU by the Appellate Body. If these proposals go through it will be a happy situation. However, it will be a miracle if EU and US agree to the proposals made by India and the African group. Thus, it is likely that there will be a stalemate in the DSU negotiations with regard to Amicus Curiae briefs, because of reluctance on the part of US and EC to accept any proposal, which would prevent panels and appellate body from receiving and considering Amicus curiae briefs on the one hand and the reluctance of other members to agree to any proposal which would legitimize receipt and consideration of Amicus curiae briefs by panels and appellate body. If no deal is finally arrived at with regard to Amicus curiae briefs, I am afraid that it will embolden Appellate body further and the Appellate body will continue to do whatever it wants secure in the belief that WTO membership will not be able to build a consensus against the Appellate Body's interpretation in the relevant rules. In this situation, countries like India are really faced with a Hobson's choice and they should try to make the best out of a bad situation.

The EC's proposal is drafted in such a way that panels as well as the Appellate body are enabled to consider unsolicited Amicus curiae briefs subject to certain conditions. The EC has proposed its new article as Article 13bis. If we see the structure of the DSU as well as the language of article 13, it deals only with the right of a Panel to seek information. In fact, in Articles 17, dealing with Appellate Review there is no power given to the Appellate Body, to seek information as has been given to the Panels under Article 13. In fact, many delegations, in the Special General Council Meeting, held on 22 November 2000, pointed out that only the panels have been given the right to seek expert opinion and argued that if at all a way has to be found for dealing with unsolicited Amicus curiae briefs, it can be only done at the panel stage and not at the Appellate Body stage. There is also another powerful argument as to why Amicus curiae briefs should not be entertained at the Appellate Body stage. Article 17.6 of the DSU states that an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel. According to Article 17.3 of the DSU the Appellate Body Members are

expected to have a demonstrated expertise in law. The Amicus curiae briefs are normally about facts and assessments and not about legal issues. In fact quite a few delegations pointed out in the special general council meeting held on 22 November, 2000, that persons having demonstrated expertise in law do not need assistance of Amicus curiae briefs in dealing with issues of law. Moreover, when Amicus curiae briefs are allowed both at the panel and the Appellate Body stage, a curious result follows, in the sense that Non-members get better rights than Members. This anomaly can be avoided if consideration of unsolicited Amicus curiae briefs is restricted to the Panel stage. In view of all these considerations, a possible compromise is to provide for the possibility of considering unsolicited Amicus curiae briefs, subject to certain conditions, at the panel stage and not at the Appellate body stage

EC proposal relating to Amicus curiae submission contained in Article 13bis closely follows the elements procedure outlined by the Appellate Body in document WT/DS135/9. The proposal contains a two-stage approach namely an application for leave and an effective submission. In response to India's questions EC has given certain clarifications regarding that proposal. These clarifications are in the desirable direction, especially EC assertion that the panel/appellate body will not address new claims, if any raised in the Amicus curiae briefs, though they may address new arguments. It is difficult procedure suggested by EC for dealing with Amicus curiae submissions. What we have to insist is that unsolicited Amicus curiae briefs can be considered only at the Panel stage, and that there should be an accompanying decision, which will prevent the Appellate Body from misinterpreting the DSU and considering unsolicited Amicus curiae briefs at the Appellate Stage.

Assuming that there is an agreement to limit consideration of Amicus curiae briefs to the panel stage and that the procedures suggested by EC for consideration of Amicus curiae briefs are accepted, four things have to be ensured.

1. It should be explicitly stated that NGOs or organizations submitting Amicus curiae briefs will not be entitled to any personal hearing, that there is no

obligation on the part of the panel to deal with all the claims/arguments contained in Amicus curiae submissions. (EC's proposal covers the second element but does not cover the first element explicitly).

2. A decision of the panel to allow or disallow submission of Amicus curiae brief by any particular applicant shall not be a subject matter of appeal.
3. It must be categorically stated that agreement for the possibility of Amicus curiae submissions at the panel stage in the WTO system is given purely as an experimental measure. The changes introduced in the DSU with a view to provide for Amicus curiae submissions will automatically lapse after three years unless there is a consensus to extend the period of validity of these provisions. To some extent the WTO system is getting into an unknown situation by providing for Amicus curiae briefs at the panel stage in the WTO dispute settlement system. If experience shows that developing countries' interests are seriously affected because of the introduction of Amicus curiae briefs, they should be able to go back to status quo ante.
4. Concurrence for a provision in the DSU relating to Amicus curiae submission at the Panel stage, should not be given easily by developing countries and if given ultimately should fetch for them something in return. It is generally believed that US has enormous interest in providing for Amicus curiae briefs. EC's interest is also enormous, though EC's interest may not be as predominant as that of US. If countries like India ultimately agree for Amicus curiae submission at the panel stage, they should get at least the following two in return.
 - a) A clear amendment for the DSU providing for multilateral determination of compliance or non-compliance before retaliation could take place (i.e. sequencing issue)

- b) Through a clear amendment, we should make it impossible for anybody to resort to carousel unilaterally.

In fact EC will have no problem with these two elements. In fact, EC has given a detailed proposal in order to ensure sequencing between Article 21.5 and Article 22.6. As regards carousel, Thailand and Philippines have given a detailed proposal making carousel illegal and EC has said that it can support this proposal.

IV.3 Third Parties

During the course of the implementation of the DSU, the subject of the rights of third parties has come to the forefront. According to the existing provisions of the DSU, whenever, a Member other than the Consulting Members (that is a Third party), considers that it has a substantial trade interest in the consultations being held, such Member may notify the consulting Members and the DSB within a prescribed time limit, of its desire to be joined in the Consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interests is justified. On a number of occasions a Member's request to be joined in the consultations has been refused on the ground that the Member concerned does not have substantial trade interests in the consultations being held. Thus one problem area is the use of two different phrases, namely "substantial trade interest" and "substantial interest" in the same article namely, Article 4.11 of the DSU.

In terms of Article 10.2 of the DSU, any Member (i.e. a Third Party) having a substantial interest in a matter before a panel and having notified its interest to the DSB shall have an opportunity to be heard by the Panel and to make written submissions to the Panel.

According to Article 10.3 of the DSU, the Third Parties shall receive the submissions of the parties to the dispute in the first meeting of the panel. On the basis of this provision, third parties are being allowed to participate in the first meeting of the panel

and not in the subsequent meetings. Again, third parties only receive the first submission to the panel and not subsequent submissions.

Again, in terms of Article 17.4 of the DSU only those Members who are third parties before the panel can make written submissions to and be given an opportunity to be heard by the Appellate Body.

A number of proposals have been made regarding third party rights. Most of these proposals are designed to enhance the third party rights in the dispute settlement process. However, Chinese Taipei, has sounded a note of caution, and stated that third party rights should be kept within reasonable limits.

As regards, conditions to be joined in consultations there are proposals from Costa Rica, Jamaica and Chinese Taipei. Costa Rica's suggestion is that whenever a third party considers that it has a substantial interest in consultations being held, such Member shall be joined in the consultations as long as the request is made within the prescribed time limit. Jamaica has suggested that guidelines should be developed to prevent arbitrary refusal of third party requests for consultation. Chinese Taipei is not in favour of Costa Rica's proposal and feels that "substantial trade interests" should continue to be the requirement for third party participation.

I am of the view that Costa Rican proposal deserves support. Experience shows that some major delegations arbitrarily refuse the request for joining in the consultations. The suggestion of Jamaica and Chinese Taipei that we should develop guidelines to prevent arbitrary refusal of Third Party requests for joining in the consultations is not very realistic in as much as it is very difficult to arrive at a consensus based definition of substantial trade interest. There does not appear to be any basis for the fear expressed by Chinese Taipei that if the rules relating to Third Parties joining in the consultations are relaxed, the sanctity of the consultation process will be adversely affected. Even under the existing provision of Article 4.11 of the DSU, if a party's request for joining in the consultations is refused, that party can seek direct consultations, which cannot be refused.

Experience shows that Members request to be joined in the consultations only when they have a genuine interest. Many small and poor developing countries feel that by joining in the consultations they can have a clear idea as to whether a particular dispute will have implications for their own interests. Costa Rica's proposal is straight forward and deserves to be supported thereby enabling Members to join in the consultations, whenever they so desire, without the fear of any obstruction. By providing for an easy process to join in the consultations, developing countries, can be helped to avoid the necessity of seeking direct consultations just to know whether their interests are involved or not in a particular dispute.

There are also proposals from European communities, Costa Rica and Chinese Taipei with regard to dead line for expressing third party interest. Article 10.2 of the DSU as it stands now does not impose any time limit for notifying third party interest of the DSB. EC has proposed addition of phrase "Within Ten Days". Costa Rica has made a clearer proposal by saying that the Third Party interests should be notified within ten days after the date of the establishment of the panel. Chinese Taipei supports the Costa Rican proposal.

Costa Rican proposal can be supported in as much as it only formalizes the current practice.

There are a number of proposals providing for enhanced the Third Party rights at the panel stage. EC's proposal is that Third Parties should receive all documents or information submitted to the Panel except certain factual confidential information and except for any submission made following the interim panel report. EU has also proposed a Third Party may observe any of the substantive meetings of the panel with the parties except for portions of sessions where factual confidential information is discussed. Japan's proposal is identical to the proposal given by EU. Costa Rica has suggested the Third Parties shall receive a copy of all documents or information submitted to the panel. It has also suggested that third parties should have the opportunity to be present at all stages of proceedings. The African proposal is similar to the proposal of Costa Rica. While

agreeing with the Costa Rican proposal, Chinese Taipei has suggested that participation of third parties in the dispute should not be allowed to increase the complexity of the dispute. Jamaica has suggested that the panels should consider the submissions of enhanced third party participation even if the parties did not make similar submissions to the proceedings. However, Chinese Taipei has argued that in the interest of judicial economy the panel and appellate body should not be bound to take into consideration, the views and arguments presented by a third party, but should need only address those claims relevant to the solving the matter at issue in the dispute.

Costa Rica has also proposed that the Third parties should have the right to comment on the descriptive portion as well as the interim report. It has also proposed that third parties should have the right to receive the comments of parties on the descriptive part as well as responses to the questions put by the panel.

While certain amount of enhanced status for third parties in the dispute settlement process is desirable, the effect of the Costa Rican proposal is to virtually treat third parties on par with parties to the dispute. Such a situation is not desirable in and only the following elements need favorable consideration:

- a) A right to join in the consultation when any Member feels that it has a substantial interest. (not necessarily substantial trade interests).
- b) Entitlement to receive all information and documents
- c) Presence at all substantive meetings of the panel.

However, third parties need not be given the right to comment on the descriptive part or the interim report nor should there be a stipulation that all arguments of third parties should be discussed by the panel reports. The proposal that Third Parties should receive the final report at the same time as the parties does not appear to be very reasonable.

As things stand now, Members who have not notified their third party interests at the panel stage cannot become third parties at the appellate stage. This stipulation has created some difficulties for some Members in certain situations. Some times, panel reports come out with some findings or observations, which could not have been even remotely anticipated at the time the panel was being constituted. In the light of this some Members might want to become Third Parties at the appellate stage. Such a possibility is not provided for in Article 17.4 and this situation has to be remedied. As regards, the Appellate stage is concerned there are proposals from Costa Rica as well as India and others suggesting that Article 17.4 of the DSU be modified along the lines of Article 10.2 of the DSU. In other words, Members who are not third parties, at the panel stage should have a possibility of becoming third parties at the appellate stage if they so desire. The amendment suggested by Costa Rica to Article 17.4 is appropriate and deserves to be supported.

India has also pointed out how the Appellate Body is interpreting Article 17.4 in such a way as though it is a discretion of the Appellate Body to give an opportunity to a Third Party to make an oral presentation and that a Third Party which has not made a written submission has no right to make an oral presentation. The Indian proposal tries to rectify the situation by giving the right to Third Parties to make an oral presentation before the Appellate Body. This is a good proposal and deserves to be pursued vigorously.

IV.4 Panel Working Procedures

There are a number of proposals relating to Panel Working Procedures. The subject of Third Parties has been dealt with separately. In this section, only two of the proposals relating to Panel Procedures are discussed because of their far-reaching nature.

Input provided by the Secretariat:

On this subject there are proposals by the LDC group as well as a joint proposal by India and a number of developing countries. The LDC group has suggested that assistance provided to the panel, particularly the legal research undertaken by the Secretariat and

other commentary prepared in the course of and for use in the case, should be provided to the parties. The LDC group has pointed out this will enable the parties to the dispute to appreciate better the decisions of the panels. The LDC group also feels that their proposal is part of the quest for openness and transparency of the dispute settlement system. India and others have suggested an amendment to para 10 of Appendix 3 dealing with working procedures. Their suggestion is to add the following sentence to para 10 of Appendix 3. ***“Any document, notes, information, etc., submitted by the Secretariat to the panel shall be given promptly to the parties to the dispute, whose views on such documents, notes, information, etc., shall be taken into consideration by the panel”.***

The proposals made by the LDC group as well as India and others amount to the same thing in substance namely, due process as well as transparency vis-à-vis the parties.

One can conceptually argue that transparency has to be provided at three different levels.

- a) Transparency from the point of view of Members participating in the dispute (whether as parties or third parties),
- b) Transparency from the point of view of non-participating Members and
- c) transparency from the point of view of the general public.

Under the present system the Secretariat gives lot of input to the panel but the parties to the dispute are unaware of the secretariat input. In the India patent case, the panel report alluded to the negotiating history of Article 70.8 and 70.9 of the TRIPS Agreement. Obviously, it was the secretariat input, but the panel never gave an opportunity to India to comment on the secretariat input. (In fact in its DSB statement at the time of adoption of the report, India regretted this situation). It is informally learnt that in disputes involving EC and US, during the initial meetings of the panel convened for the purpose of determining panel procedures, US violently objected to any idea of secretariat input being made available to the parties, though reportedly EC was in favour of such an approach. It could be argued by some that if a procedural requirement is imposed

providing access to the parties to the material provided by the secretariat, the panel may get the material from the secretariat informally and that no purpose will be achieved. The could, no doubt, happen. But when three panel Members are involved it cannot happen very easily. Even if that happens the panel cannot make explicit use of the material in its report. Due process requirement will be met only if the parties have access to all the material available to the panel.

During the DSU Review EC has made a suggestion that before each hearing the parties to the dispute should have access to the file before the panel and the Appellate Body. This file should include not only the submissions but also any analysis and background information provided by the WTO secretariat and the legal secretariat of the Appellate Body. EC does not seem to have included this item in its proposal for DSU negotiations.

It is good that LDC group as well as a number of developing countries have suggested that the secretariat input to the Panel should be made available to the parties to the dispute. There will be significant opposition to the proposal from some quarters. However, this should not deter any country, which has made this proposal. Of the three types of transparencies alluded to earlier, US always emphasizes only transparency to the public. But the other two types of transparency are even more important. However, US does not appear to lay emphasis on transparency from the point of view of parties to the dispute or third parties. In fact, US has made a proposal that meetings of the panels and the Appellate Body should be thrown open to the public. It should be possible to point out to the US the dichotomy in their approach to the subject of transparency of panel procedures and highlight the importance of the other two types of transparency.

Opening of Panel Meetings to the Public

The EC has suggested the following addition to para 2 of Appendix 3, Working Procedures. “However, the parties may agree within 10 days from the date of

establishment of the panel that the panel hearing shall be open to the public in whole or in part”.

The US has proposed that the DSU should provide that the public may observe all substantive panel, Appellate Body, and Arbitration meetings with the parties, except those portions, dealing with confidential information.

The African group does not consider it appropriate at this point in time for the dispute settlement process to be open to the public. According to the group the implications of such a course of action for business and WTO Members and the utility of such a course of action for the public in developing country Members, will have to be examined carefully before any decision is taken. Chinese Taipei have expressed serious reservation about opening up the dispute settlement process to the general public. According to them, this will undermine the government to government process of dispute settlement.

Both EC and US have suggested that the precise modalities of opening panel and Appellate Body proceedings to the public would have to be decided by the DSB.

Both EC and US in their submissions have referred to the practice in fora like the International Court of Justice, the International Tribunal for the Law of the Sea and pointed out that these fora are open to the public. In response, it can be pointed out that these fora do not entertain amicus curiae submissions (this can be got double checked) and a point made that there cannot be selective adoption of practices in other fora.

It can be also legitimately pointed out that WTO dispute settlement system deals with significant trade interests of powerful business entities and that even the silence presence of media, NGOs and business interest groups could put some sort of psychological pressure on the panelists and the Appellate Body Members.

It must however be appreciated that it is going to be very difficult to obtain support for any position which might be perceived to be negative. I recall that when the transparency issue was being discussed in the context of Amicus curiae briefs, some delegations including some developing country delegation argued that they are not against silent presence of NGOs and others in the panel proceedings and the Appellate Body proceedings and what they are against is “participation”. In fact these delegations viewed Amicus curiae briefs as amounting to participation.

The situation is that if some delegations strongly Amicus curiae briefs and succeed in mustering sufficient support for that position, they are likely to be told that at a minimum they should permit silent presence of NGOs and others in the dispute settlement proceedings. If the proposal relating to Amicus curiae briefs goes through in some form or other, there may be an argument that if Members can go as far as accepting Amicus curiae briefs, why cannot they agree to throw open the dispute settlement proceedings to the public.

There should be clarity on one thing. The EC proposal, perhaps in anticipation of difficulties in obtaining consensus for throwing open dispute settlement proceedings for the public, suggests that parties can decide whether the proceedings should be thrown open to the public. We should be opposition to the efforts to introduce changes to the DSU by suggesting certain aspects can be decided by the parties concerned. Once in one dispute the proceedings are thrown open to the public, it will be impossible for parties in another dispute to say that the proceedings will be thrown open to the public. EC and US will always project themselves as champions of transparency and hint that countries like India are opposing transparency. Right at the initial stages of negotiation, it should be made clear that every amendment to the DSU, whether explicit or implicit, has to be done through consensus and no situation could be left to the parties to a dispute to decide, if such a decision is going to have implications for other Members of the WTO and future disputes. In fact, India had serious concerns about the move of

one delegation to telecast its trade policy review since it was rightly felt that it will be impossible for other delegations to resist pressures to follow suit.

In the past whenever the subject of throwing open dispute settlement proceedings to the general public was raised, India's position was that dispute settlement proceedings constitute the last phase, whereas negotiations and review of implementation of agreements normally come before dispute settlement. We have been hinting that before we decide to throw open dispute settlement proceedings to the general public we should throw open the meetings of other WTO bodies like general council, goods council, TRIPS council etc., to the general public.

It may not be a bad idea to throw open meetings of all WTO bodies to the public, media etc. Currently, what gets publicity in the press are the statements of EC and US and the press briefings by the WTO secretariat. Unfortunately, International media do not get to know quickly enough what developing countries stated in a meeting since developing countries are not able to devote adequate resources, human and financial, towards media relations and media management. WTO secretariat, consciously or unconsciously bias, gives importance to developed countries views rather than developing countries' views. This distorted situation can be corrected if the media is allowed to be present in the meetings.

We can legitimately argue that in order to enhance the acceptability and capability of WTO we should first throw open meetings of regular WTO bodies like general council etc., to the public and that opening up the dispute settlement proceedings should come at a later stage. We can also point out that the panel and Appellate Body proceedings are highly legalistic and the general public cannot make out anything even if they are present in the dispute settlement proceedings and that the general public is more likely to be interested in the meetings of WTO bodies other than panels and the Appellate Body.

The motivation behind the proposal by EC and US appears to be more tactical rather than any serious interest in real external transparency. Always their proposals are confined to opening up panel and Appellate Body proceedings. They are making it appear as though developing countries like India are opposing their proposals for greater transparency. It is time now for India and other developing countries to change their strategy. In my view, India should propose that meetings of all WTO bodies should be thrown open to the public and transparency issue from the point of view of the general public is not limited to dispute settlement proceedings alone. This can result in two things; either the whole proposal gets bogged down or all the WTO bodies meetings are thrown open to the public.

It is necessary for India to explain its new approach to other developing countries and try to muster support. Greater transparency in the WTO will be in the long term interests of countries like India. Greater transparency is likely to reduce the influence of the Secretariat over the process and also reduce the scope for behind the scene influence of major delegates.

Any decision to open up meetings of WTO bodies and/or dispute settlement proceedings to the general public can be a time limited decision, say for three years, and there could be a provision that extension of this period will require consensus. Members can in actual practice see how the new situation plays out and retain the ability to reverse the decision to open the proceedings to the general public, if it is considered necessary and desirable.

IV.5 Mutually agreed Solutions

Article 3.5 and 3.6 of the DSU read as follows:

“All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any

Member under those agreements, nor impede the attainment of any objective of those agreements.”

“Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto”.

There are proposals from India and others as well as Japan on this subject because of the fact that many delegations do not notify the mutually agreed solutions and even if they do, not in great detail as to enable other delegations to judge as to whether the mutually agreed solution is consistent with covered agreements. EC and US avoided notifying their mutually agreement on rules of origin for a long time though this agreement had adverse impact on India’s exports. The main thrust of both the proposals is that mutually agreed solutions should be notified within sixty days from the date of such agreement. The other element of the two proposals is that the notification should contain sufficient details. But the real problem is that even after the proposed amendment things may not improve unless there is a consequence for non-notification. It may be appropriate to propose, in addition to what is already on the table, that failure to comply with this obligation should have the effect of disabling the parties from invoking dispute settlement procedures in respect of that matter. Hopefully such a stipulation will ensure that mutually agreed solutions will get notified and also get notified in time i.e. within the proposed time limit of 60 days.

IV.6 Appellate Body and Appellate Review

A number of proposals have been made with regard to Appellate Body and Appellate Review. Two of these more important proposals relate to the total number of Appellate Body Members and term of the Appellate Body Members. European Union has suggested an amendment to Article 17.1, which would state that the total number of Appellate Body Members may be modified from time to time by the General Council. Thailand has submitted a proposal suggesting an amendment to paragraph 1 of Article 17 of

the DSU with a view to increasing the number of the Appellate Body Members. Japan has also suggested an amendment to article 17.1 so that the number of the Appellate Body Members could be modified as required by the decision of the DSB or the General Council. Japan has also proposed that at the same time a process should be established for considering adequacy of the number and making recommendations to the DSB or the General Council on its modification, taking account of all related factors such as work loads and implications on the budget.

There does not appear to be any need for amending Article 17.1 at this stage. During the last three or four years the membership had occasion to look into this subject. At no point of time a strong case was made for increasing the number of Appellate Body members. In fact there was a period in the early part of the year 2001, when Appellate Body did not have a single case before it. It is the general expectation that there may not be any undue increase in the workload of the Appellate Body in the foreseeable future. During the currency of this debate, some Appellate Body members have been suggesting that there should be made “full time” so that they can enjoy facilities like pension, etc. The most important point to be borne in mind is that increase in the number of Appellate Body members will inevitably mean increased budgetary allocation to the Appellate Body and therefore, one has to look into this very, very carefully. A permanent increase in the number of Appellate Body members can be justified only on the basis of sustained increased workload on a long time basis. There is another aspect, which should be borne in mind. Sometimes the motivation behind the proposal to increase the number of Appellate Body members is to get one’s own national as an Appellate Body member. If at any future point of time, the membership is convinced that there is need to increase the number of Appellate Body members, they can do so by amending Article 17.1 at that point of time. There is no need to make an enabling amendment at this point of time. It should be borne in mind that any amendment to the DSU can be done only by consensus and voting is not possible. If an amendment is made now to Article 17.1 stating that the General council can increase the number of Appellate Body members then the increase can be effected through voting, legally speaking. Any amendment to Article 17.1 providing for the possibility of increasing the Appellate Body members will immediately generate

pressures to increase the Appellate Body members on the basis that by amending Article 17.1 the Membership have impliedly accepted the case for increase in the number of Appellate Body members. There is another risk. If we build into the DSU a provision for possible increase in the Appellate Body members what is likely to happen in future is that whenever the selection process for selecting Appellate Body members gets tough, the selection committee may choose the easy option of recommending an increase in the Appellate Body members. This is by no means a far-fetched thought. At least one powerful delegation informally floated the idea of increasing the number of Appellate Body members in order to get its candidates in, after realizing that its candidate is not likely to make it in the normal selection process. One cannot also ignore the fact that the number DDGs and even senior position in the Secretariat had increased, unrelated to actual requirement or justification just to accommodate competing claims. It will be sad, if the Appellate Body also get into a similar situation.

Therefore, no proposal for amending Article 17.1 of the DSU with a view to increase the number of Appellate Body members either immediately or with a view to provide for the possibility increasing the number of Appellate Body members in future should be supported.

Regarding the term of the Appellate Body members there is a proposal by India and others. According to the present system the term of Appellate Body members is four years and they can get extension for a second term of four years provided there is consensus in the DSB. This situation is not in keeping with the dignity of the Appellate Body members nor is it conducive for independence for the Appellate Body members. At the end of the four year term, the Appellate Body members have to depend on the same membership whose disputes they adjudicate for their extension. The fact that no Appellate Body member has been denied extension for a second term so far should not make one overlook the real risks to the system in the present situation. One cannot completely rule out the possibility of powerful delegations withholding consensus for the extension of a particular Appellate Body member just because they do not like the member concerned. Therefore, there is very good justification for the proposal submitted by India and others that the

Appellate Body members should be eligible for a non-renewable single term of six years. The proposal by India and others is based on very rational consideration and it is a good proposal. However, if the proposal meets with any resistance India and others should simply say that they are not pursuing the proposal. In other words, what I am suggesting is that India and others should not pay a price for getting acceptance of such an eminently reasonable proposal.

India and others have suggested that Appellate Body should develop guidelines as to what information should be contained in the notice of appeal. Obviously this proposal has been made in the light of the fact that some notices of appeal have been extremely vague and brief thereby making it impossible for the respondent to get a good idea about the nature of the appeal from the notice of appeal. The jurisprudence developed by the Appellate Body regarding the nature and scope of details to be included in the notice of appeal has also not been very clear. Therefore, the proposal that the Appellate Body should develop guidelines as to the details to be included in the notice of appeal is a good proposal. which deserves to be supported.

IV.7 Examination of Remand Authority for the Appellate Body:

EC has proposed that DSU must contain a clear remand authority for the Appellate body. It is true that when a panel fails to examine all the relevant facts carefully the Appellate body gets into some difficulty since the Appellate Body's role is limited to legal findings and legal interpretations developed by the panel. The proposal of EC is simple and straightforward. However, remand authority for the Appellate Body is not likely to be an unmixed blessing. When a case is remanded to the panel, to that extent there will be delay. It is necessary that when the Appellate Body remands a case to the original panel or the compliance panel, the panel concerned should know clearly as to why the matter concerned has been remanded to it and what is expected of. The language proposed by EC states "with the necessary findings of law and/or directions so as to enable the panel to perform its task". One can consider this adequate direction/indication to the panel/compliance panel. However, ECs proposal does not appear to be clear about the time frame. The EC proposal says that when the Appellate Body makes a remand, the

DSB shall establish the panel within ten days after the request has been forwarded to the Chair of the DSB. It is not clear how a DSB meeting could be convened giving ten days notice in such a way that DSB establishes the panel within ten days. However, this is a minor matter, which can be adjusted. Perhaps, there will be no need to convene a DSB meeting for this purpose and the task can be left to the Chairman of the DSB with this stipulation that he will inform the DSB about the action taken by him. EC's proposal does not specify any time frame for disposal of the remanded matter by the original panel. Perhaps the idea is that the Appellate Body, while remanding the matter should indicate the time frame. Perhaps, the element of direction regarding time limit can be built into EC language. But more importantly, I would like an additional stipulation in the language suggested by EC that the same case cannot be remanded more than once will be desirable. During the negotiations, the risks involved providing for remand authority to the Appellate Body should be kept in view. This authority should not be allowed to be used in such a manner as to manipulate the constitution of Appellate Body benches. Methodologies have to be found to ensure that this does not happen. It is also possible that the Appellate Body may be tempted to use their remand authority to gain some extra time in respect of politically difficult/sensitive cases. Nothing can be done in this area through rules and it should be left to the good sense and wisdom of the Appellate body.

IV.8 Compensation

The objective of any dispute raised by a Complainant is to ensure that the Respondent brings the offending measure into conformity with covered agreements either by withdrawing the measure or by appropriately modifying the measure. Article 19 of the DSU states: "where a Panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.

Article 22.1 of the DSU reads as follows:

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not

implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

Soon after coming into force of WTO on 1.1.1995, many academics as well as trade experts felt that the power to retaliate by withdrawal of concessions available to a prevailing party in a dispute will ensure prompt implementation of the rulings and recommendations of the DSB by the losing party. However, experience shows that this is not the case. Of late, there is certain amount of disenchantment with the power to retaliate by way of withdrawal of concessions or other obligations in as much as retaliation has its own costs for the retaliating country. The problem is particularly acute if a developing country has to retaliate against a developed country. Experience has also shown that in as much as DSU provides only for an extremely limited period of 20 days, after the expiry of reasonable period of time, to work out a mutually acceptable compensation package, the prevailing party is, willy-nilly, forced to resort to retaliation. There is a feeling in some quarters, that compensation is a better route, compared to retaliation since compensation has to be provided on an MFN basis while retaliation is specifically directed against the losing party. However, in practice it has been seen that since a compensation package has to be mutually agreed between the complaining and the defending party the complaining party is likely to demand compensation in those products in which it has a competitive edge compared to other suppliers. Thus, in the compensation route observance of MFN is likely to be more in letter than in spirit.

Most of the proposals on the table relating to compensation are designed to make the compensation route easier. In my view, the compensation route is not an unmixed blessing. Once the compensation route becomes more easily accessible and generally acceptable there would be less interest in bringing the measure into conformity with the relevant WTO agreement. This has happened in the Beef Hormone case where EC preferred the compensation route and is not even making an attempt to remove the

offending measure. There may be another risk involved in making the compensation route easier and more popular. Weak developing countries may be forced to accept compensation packages, which may not really mean much. As pointed out earlier, the expectation that compensation would be available on MFN basis, has not been borne out in practice.

Against this backdrop, let us look at the proposals on the table. Australia, Japan, EC, Ecuador, African group, LDC group, and Jamaica have given proposals on the subject of compensation.

The Australian proposal suggests a DSB decision stating that (a) Members will fully observe the requirement in Article 3.7 of the DSU that the provision of compensation is a temporary measure pending withdrawal of the measure found to be WTO inconsistent. (b) Members will not enter into compensation arrangements which amount to waiver of their obligations; (c) Member should ensure that compensation is consistent with the covered agreements. The Australian proposal also states that compensatory measures should be such that they are available to all WTO Members. It also states that in circumstances where it is not practical to apply compensatory measures that are generally available, a non-implementing Member will, on request, agree to expedited arbitration under Article 25 of the DSU that would determine the right of a third party to negotiate compensation as well as the level of that compensation. The critical element in the Australian proposal is that in case the compensation measure is not available on an MFN basis, the aggrieved Members should be able to seek arbitration and get appropriate compensation. It would appear that the Australian proposal is significantly influenced by the tendency of US and EC to work out compensation packages which are mutually satisfactory, but which adversely affect the interests of other WTO Members.

The other proposals on the table, are basically proposals suggesting procedures for taking recourse to the compensation route.

Japan proposes addition of a sentence at the end of para 1 of Article 22 as indicated below.

“If, assessing the detailed status report provided under paragraph 6(b) of Article 21, the complaining party considers that the Member concerned is unable to implement the recommendations and rulings within the reasonable period of time, the complaining party may request negotiations with the Member concerned, with a view to developing mutually acceptable compensation. The Member concerned shall, if so requested, enter into negotiations with the complaining party within 20 days from the date of the request, unless it declares its confidence in full compliance within the reasonable period time”.

The European Communities has proposed an amendment to Article 22(2) to make the compensation rule procedurally easier. Under the EU proposal in the following four situations the Respondent shall, if so requested by the complaining party, enter into consultations with a view to agree on a mutually acceptable trade compensation:

1. If the Member concerned does not notify DSB within the prescribed time limit its intentions to implement the recommendations or rulings of the DSB
2. The Member concerned does not notify within the stipulated time limit that it has complied.
3. The compliance panel or the Appellate Body report pursuant to Article 21bis find that the Member concerned has not complied.
4. The compliance panel or the Appellate Body report pursuant to Article 21bis finds that the Member concerned has not complied with the terms and conditions of a mutually agreed solution notified under Article 3.6 that are subject to the disciplines of a covered agreement.

The EC proposal also envisages that within thirty days from the date of request for consultation, the Member concerned shall submit to the other Member a proposal of mutually acceptable trade compensation. In case an arbitration had taken place, the proposal for compensation should be consistent with the award of the compensation. The

EC proposal further envisages that if no proposal for compensation is submitted within the thirty days time limit prescribed or if no agreement is reached within thirty days from the submission of the proposal, for a mutually acceptable compensation the complaining party can seek authorization to suspend concessions or other obligations under covered agreements.

The basic thrust of the Ecuador proposal is that Article 21.3(c) should be broadened so that the arbitrator while fixing a reasonable period of time could also determine the annual level of nullification of impairment. According to Ecuador, if the compliance panel finds that the Member concerned has defaulted in compliance, then at the time of the adoption of the compliance panel report, the Member concerned must propose a compensation package equivalent to the level of nullification or impairment which is predetermined. The Ecuador proposal also envisages, that at the time of adoption of the report by the DSB, the Member concerned must obligatorily propose compensation equivalent to the nullification and impairment suffered.

The main thrust of the African proposal is that the compensation should be in the form of cash.

The proposal of the LDC group is that compensation should be mandatory. The LDC proposal also states that compensation should not take the form of enhanced market access, if this will prejudice other Members. The LDC group also prefers compensation in cash.

Jamaica suggests that with regard to developing country Members compensation should be in the form of increased market access in agreed sectors of the developed country member.

It may be not be desirable to make compensation mandatory as proposed by the LDC group. The Australian proposal is the one, which we should be looked at seriously. This proposal provides reiteration of some of the provisions already contained in the DSU

and also provides for a remedy to deal with a situation when compensation package is not worked out keeping in view MFN obligation.

The EC proposal is more procedural and does not deal with a situation where the compensation package is not available on MFN basis.

It may not be desirable to insist that compensation should only be in the form of cash.

The existing DSU provides that the losing party should enter into negotiations for developing mutually acceptable compensation, if so requested by the prevailing party. The DSU also states that compensation is voluntary and if granted, shall be consistent with covered agreements. Some of the proposals on the table move in the direction of making the losing party compulsorily offer a compensation package if the prevailing party so requests. I do not think it is wise to make compensation route obligatory.

In brief, the Australian proposal with regard to compensation deserves support. In respect of other proposals on the table, the only element that could be supported is the one which provides for determination of the level of nullification and impairment at an earlier point of time as compared to the present situation, so that if both parties want to go down the compensation route, the compensation could be fixed without delay. In fact, an early determination of the level of nullification and impairment will perhaps facilitate decision by the parties involved with regard to the compensation.

IV.9 Determination of Compliance:

Article 21.5 of the DSU reads as follows:

“Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90

days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.”

Experience gained so far in dealing with the provisions of Article 21.5 shows that there is need for bringing about clarity with regard to the various elements in Article 21.5. Article 21.5 states *inter alia* that where there is a difference of opinion about compliance or otherwise with the rulings and recommendations of the DSB, such a dispute shall be decided through recourse to these disputes settlement procedures. In the past, differences of opinion have arisen among WTO Members as to whether consultations are a pre-request before asking for the establishment of a compliance panel. While some delegations felt that consultations are mandatory since normal dispute settlement procedures have to be followed, others argued that there cannot be consultation for a period of 60 days, when the compliance panel itself is expected to circulate its reports within 90 days. In the past, there have also been differences of opinion as to who can request the establishment of a compliance panel. In the Banana dispute, EC the losing party, sought the establishment of a compliance panel with the hope of preventing US from taking recourse to Article 22.6 directly. However, US objected to this on the ground that a losing party cannot seek the establishment of a compliance panel. The WTO Membership while generally in favour of a multilateral determination of compliance or otherwise, has also been sensitive to the concerns expressed that a losing party should not use the compliance panel mechanism to get more time for implementation. The other question relating to Article 21.5 has been the question of appeal. There is no explicit reference to the question of appeal in Article 21.5. However, Article 17.1 and 17.4 are worded generally and do not explicitly rule out the possibility of an appeal from the finding of a compliance panel. In specific disputes the parties to the disputes have entered into a bilateral agreement providing for (a) the right of the prevailing party to take recourse to Article 22.6 after the compliance panel gives its report even though the time limit prescribed in Article 22.6 might have expired in the meanwhile. (b) possibility of appeal by either party after the receipt of compliance panels findings.

Both European Communities and Japan have submitted detailed proposals for a new article under the title Article 21bis, “determination of compliance”. Both EC and Japan have made minor modifications to their original proposals in order to respond to each other’s concerns as well as the concerns of other WTO Members. The two proposals are similar but not identical. The starting point for both the proposals is that where there is disagreement between the complaining party and the Member concerned as to the existence or consistency with a covered agreement of the measure taken to comply with the recommendations or rulings of the DSB, such disagreement shall be resolved through recourse to dispute settlement procedures provided for in the proposed Article 21bis.

As far as the issue as to who can seek the establishment of a compliance panel both proposals indicate it is the complaining party who can seek the establishment of a compliance panel. This is natural since it is not likely that a Respondent would seek the establishment of a compliance panel. What happened in the Banana case, was rather unnatural. In that case, the Respondent viz. EC sought the establishment of a compliance panel merely to prevent US from taking recourse to Article 22.6 straight away on the plea that the thirty days time limit has to be observed. Moreover, unlike at the time of the Banana case, the sequencing issue is now more or less resolved in practice, if not through an amendment to the DSU. Moreover, the proposals regarding the timing of the request for the establishment of a compliance panel is such that it would be natural and logical only for the complaining party to request for the establishment of a compliance panel.

As far as the timing of the request is concerned the Japanese proposal does not envisage any consultations before a request for establishment of a compliance panel is made. In fact, the Japanese proposal explicitly states “while consultations between the Member concerned and the complaining party are desirable, they are not required prior to a request for a compliance panel under paragraph 2”. The Japanese proposal envisages that the request for a compliance panel can be made anytime after (i) the Member concerned states that it does not need a reasonable period of time for compliance pursuant to paragraph 3 of Article 21; (ii) the Member concerned has submitted a notification pursuant to paragraph 6(c) of Article 21 that it has complied with the recommendations or rulings

of the DSB; or (iii) ten days before the date of expiry of the reasonable period of time whichever is earlier. Such request shall be made in writing.

The EC's original proposal had a similar provision but it was for the purpose of seeking consultations and not for the establishment of a panel as is the case with the Japanese proposal.

There is an Indian-Indonesian proposal on the table stating that consultation should be considered mandatory before seeking establishment of a compliance panel.

The EC has subsequently amended its proposal providing *inter alia* consultations under Article 21bis could be requested at any time after "Thirty days before the date of expiry of the reasonable period of time". According to EC, since it has proposed that consultations should be held within 20 days and since their latest proposal is that consultations could be requested for anytime after Thirty days before the date of expiry of reasonable period of time, it would imply that, as in the Japanese proposal, a compliance panel could be requested ten days prior to the end of reasonable period of time.

It is better to provide for consultations before the stage for the request for the establishment of a compliance panel comes. In this sense the EC proposal is better than the Japanese proposal. EC's proposal also provides for third parties joining the consultations. The Japanese proposal gives a time period of 90 days for the compliance panel to submit its report; so does the EC proposal. The demand contained in the Indian proposal is to increase this period to 120 days. Since, there is a serious concern among the Membership that there should be a minimum scope in the system for the losing party to delay implementation, it is better to give only 90 days time for the compliance panel. India and others have given proposals separately for additional time for developing countries, for making their submissions before their panel and also for reasonable period of implementation. While these proposals can be defended, it is difficult to argue in favour of extending the time available to the compliance panel to do its work. Understandably, India's proposal with regard to 120 days for the compliance panel is neutral as to whether

the parties involved are developing or developed countries. Perhaps, India need not press this proposal too much. Both the EC and Japanese proposal provide for appeal to the Appellate body. Both the proposals envisage that once the compliance panel and /or the Appellate body find that the Member concerned has not complied with DSB recommendations the Member concerned will not be entitled for any further implementation time. Both the proposals envisage that the compliance panel shall establish its own working procedures and that most of the provisions of the DSU shall apply to the compliance panels proceedings except to the extent that such provisions are incompatible with the time frame provided in the proposed new Article 21bis or that the new Article 21bis provides for more specific provisions.

To sum up, EC's proposal on compliance is reasonable and deserves to be supported.

IV.10 Sequencing between Articles 21.5 and 22 of the DSU

The "Sequencing" issue relates to the relationship between a decision by a WTO Member to request the compliance panel (Article 21.5 of the Dispute Settlement Understanding) to rule on the adequacy of implementing measures by another WTO Member found to be inconsistent with its WTO obligations and the repercussions of such decision to the former Member's right to request authorization to adopt counter measures (Article 22.2 and Article 22.6 of DSU) provided for in the DSU. The WTO case law reveals different approaches on this subject. The sequencing issue came into prominence first in the Banana dispute.

Article 21.5 DSU reads:

"Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot

provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.”

Article 22.2 DSU reads: “If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements”.

Article 22.6 of the DSU reads as follows:

When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator¹⁵ appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

In the Banana dispute, US argued on the basis of the language of the first sentence of Article 22.6 that the WTO Member loses his right to suspend concessions other

obligations unless he makes the request to DSB in such a way that the DSB is able to grant authorization to suspend concessions or other obligations within 30 days of the expiry of reasonable period of time. Since, the compliance panel constituted under Article 21.5 of the DSU has 90 days period to submit its report and since the time frame provided in Article 22.6 is 30 days from the expiry of reasonable period of time, US argued that there is no logical sequencing between Article 21.5 and Article 22.6 of the DSU. This effectively meant that a prevailing party can unilaterally determine whether the losing party has complied with the DSB's recommendations in a dispute or not and was not necessarily obliged to seek the verdict of compliance panel. In a number of disputes subsequent to the Banana dispute, parties have found creative solutions to ensure that a multilateral determination of compliance or otherwise is made before suspension of concessions actually takes place. Almost all WTO Members are desirous of amending the DSU so as to reflect a clear sequencing between Article 21.5 and Article 22 of the DSU.

Australia, Jamaica, European Communities, Ecuador and Japan have made proposals on the sequencing issue.

Australia's proposal is that DSB should adopt a decision to provide for an understanding on agreed procedures, under Articles 21.5 and 22 of the DSU applicable to all current disputes, (unless the parties have already entered into a bilateral understanding for that dispute) and future Disputes. This understanding can be adapted for a particular dispute at the agreement of both parties. It would appear that Australia is proposing a decision incorporating an understanding about sequencing rather than a clear amendment of the relevant provisions because of some constitutional problems it faces in seeking approval for amendments to a Treaty already approved by its parliament.

The Jamaican proposal provides for a clear sequencing between Articles 21 and 22.

The EC have proposed a new Article called Article 21bis be inserted after Article 21. This new Article provides for detailed procedures where there is disagreement between the complaining party and the Member concerned as to the existence or

consistency with a covered agreement of measures taken to comply with the recommendations or rulings of the DSB. The first para of this new Article stipulates that when there is a difference of opinion regarding compliance, such a difference shall be resolved only through a compliance panel. Besides, Para 9(ii) of Article 21bis proposed by EC reads as follows:

- (i) If the compliance panel or the Appellate Body report finds that the Member concerned has failed to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations or rulings of the DSB in the dispute within the reasonable period of time, then:
- (ii) “after circulation of the compliance panel or the Appellate Body report, a complaining party that was a party to the compliance proceeding may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements pursuant to Article 22. The DSB shall grant authorization to such request only after the adoption of the compliance panel or Appellate Body report”.

Japan has also proposed insertion of a new Article after Article 21, namely, Article 21bis, dealing with the subject of determination of compliance. Japan’s proposal also stipulates that differences regarding compliance or non-compliance shall be resolved through a compliance panel. Japan has also proposed that Article 22.2 should be amended, *inter alia*, in such a way that a complaining party can seek authorization of the DSB to suspend concessions only if there is a finding by the compliance panel or the Appellate Body that the Member concerned has failed to bring the measures found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations or rulings of the DSB.

Ecuador supports the approach of EC who have proposed a new Article, Article 21 bis which essentially ensures the requirement of a multilateral determination of non-compliance before resorting to suspension of concessions.

Right from the days of Banana dispute, India has always been arguing that the prevailing party cannot unilaterally determine as to whether the losing party has complied with the recommendations of the DSB or not. India has always maintained that where there is a difference of opinion between the parties to the dispute as to whether the losing party has complied with the rulings and recommendations of the DSB, the matter could be adjudicated only by a compliance panel. It has also been India's consistent position that there is a logical sequence between Article 21.5 and Article 22.6. The effect of both EC and Japanese Proposals is to provide for sequencing between Article 21.5 and Article 22, though the approaches are slightly different. EC brings in the thought of sequencing in para 9(ii) of the proposed Article 21bis. Japan has also proposed a new Article 21bis which is similar to EC's proposal in most parts. However, Japan's proposed Article 21bis does not directly deal with sequencing as is done by EC through para 9(ii). Japan has proposed an amendment to Article 22.2 to achieve sequencing. In fact, in the revised proposals, EC and Japan have sorted out minor differences, which were there in their original proposals. It is appropriate for India can go along with either EC or Japanese proposal as regards sequencing. However, the proposals relating to compliance and sequencing are interrelated. In respect of compliance, I have suggested support to EC's proposed Article 21bis, rather than Japan's proposed Article 21bis. EC's proposed Article 21bis, incorporates elements relating to compliance as well as sequencing. Therefore, for the sake of convenience, it is better to go along with EC's approach relating to sequencing as incorporated in the proposed Article 21bis.

IV.11 Arbitration to Determine the level of Nullification or Impairment/Arbitration to Suspend Concessions or other obligations.

In the present DSU, Articles 22.2 to 22.7 deal with the suspension of concessions or other obligations under the covered agreements. Article 22.2 provides that if no satisfactory compensation has been agreed within 20 days after the date of expiry after a

reasonable period of time, the prevailing party may seek authorization from the DSB to suspend concessions or obligations in respect of the Member concerned. Article 22.3 provides that the complaining party should first seek to suspend concessions in the same sector and if this is not practical, it should seek to suspend concessions or other obligations in other sectors under the same agreement. If this is also not possible the complaining party can seek to suspend concessions or other obligations under another covered agreement. Basically, this provision tries to ensure that suspension of concessions takes place in an orderly and hierarchical manner. Suspension of concessions should preferably take place in the same sector in which the violation had taken place, in other sectors under the same agreement and under any other covered agreement, in that order.

Article 22.4 establishes the requirement of equivalence between the nullification or impairment and suspension of concessions or other obligations. Article 22.6 provides for arbitration when the Member concerned objects to the level of suspension proposed or claims that Article 22.3 has not been followed. Time provided to the arbitrator is sixty days.

Article 22.7 provides that the arbitrator should look into only the level of suspension proposed and makes sure it is equivalent to the level of nullification or impairment. The Arbitrator can also check whether Article 22.3 has been followed. Article 22.8 states that suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the WTO inconsistent measure is removed.

A number of proposals have been made with regard to amendments to Article 22. Some of these proposals deal with arbitration to determine the level of nullification or impairment while other proposals deal with authorization to suspend concessions or other obligations.

Arbitration to determine the level of nullification or impairment

The European communities have proposed additional sub-paragraphs at the end of paragraph one in Article 22. The idea behind this proposal is that at any point of time before the submission of the request for authorization for suspension of concessions or other obligations as provided for in Article 22.2, the parties may agree to request for arbitration to determine the level of nullification or impairment caused by the offending measure. The proposal covers further element like arbitration being carried out by the original panel, 45 days time period for the arbitrator and the finality of arbitrators decision. The proposal contemplates 45 days time period for the arbitrator.

The important thing about the EC proposal is that this course of action will be triggered only if both parties agree. The basic motivation behind EC's proposal is to facilitate the compensation route. In fact, EC had proposed an amendment to Article 22.2 in which it is mentioned that when arbitration referred to in paragraph 1, has taken place compensation proposal should be consistent with the award of the arbitrator.

Thailand and Philippines has proposed a detailed amendment to Article 22.7. In their proposal it is mentioned that in order to enable the arbitrator to determine whether the level of suspension proposed is equivalent to the level of nullification or impairment, the complaining party shall provide sufficient information on trade and data. The proposal also envisages that the complaining party shall submit to the Arbitrator a detailed proposal containing a list of concessions or other obligations it intends to suspend, consistent with the level of nullification or impairment determined by the arbitrator and with due respect to paragraph 3 of Article 22. The arbitrator will make sure that the level of suspension is equivalent to the level of nullification or impairment. The complaining party will submit a request to DSB for an authorization to suspend concessions or other obligations consistent with the decision of the arbitrator. The most important aspect of the proposal by Philippines and Thailand is that the complaining party cannot suspend concessions or other obligations other than those contained in the list of concessions or other obligations on the basis of which the arbitrator has determined that the level of suspension is equivalent to the level of nullification or impairment. The complaining party cannot modify the list except

by mutual agreement with the Member concerned or for technical purposes. When the list has to be modified for technical purposes it has to be cleared by the Arbitrator and approved by the DSB. Basically, the proposal from Thailand and Philippines is designed to ensure that “carousel”, a practice frequently resorted to by the United States, is not permitted. Before the Seattle Ministerial Conference, both EC and Japan were in the forefront of opposition to carousel. However, either because of pressure from US or because of reluctance to displease US in any manner, they softened their opposition to carousel. But during the current stage of negotiations, it is found that EC is supportive of Thailand and Philippines proposal designed to outlaw carousel.

The main thrust of proposal by Ecuador is that the mandate or terms of reference on arbitration set out in Article 21.3 (C) of the DSU should be broadened by determining an annual level of level of nullification or impairment in addition to fixing a reasonable period of time for implementation.

Korea has proposed that Article 21.5 panel be required to determine a level of nullification or impairment.

Authorization to Suspend Concessions or Other Obligations

Ecuador, Japan, European communities have made proposals with regard to authorization to suspend concessions or other obligations.

Ecuador’s proposal is that implementation of Article 22 of the DSU should be allowed when (a) there is no disagreement regarding the fact that the Member concerned has not complied; (b) compensation has not been granted or (c) a compliance panel has found that the party concerned did not comply. Japan has proposed amendments to paragraph 2 and paragraph 6 as well as a new paragraph after paragraph 8, with consequent re-numbering of existing paragraph 9 as paragraph 10. The amendment proposed by Japan to paragraph 2 of Article 22, basically provides that before a complaining party requests the DSB authorization to suspend concessions or other obligations, there must be a finding

by a compliance panel that the Member concerned has not complied with the DSB's recommendations. (i.e. sequencing).

The Japanese amendment to Article 22.6 has the effect of reducing the time available to the arbitrator to 45 days from 60 days. The effect of a new sub paragraph namely sub para 9 proposed by Japan is that it enables the Member concerned to request a termination of the authorization given by the DSB for the suspension of concessions or other obligations on the ground that it has eliminated the inconsistency of or the nullification or impairment of benefits under the covered agreements identified in the recommendations or rulings of the DSB.

The amendment proposed by the EC to paragraph 6 of article 22 has the effect of reducing the time available to the arbitrator to 45 days. The EC proposal also envisages that the time available will be only 30 days if the arbitration procedure under paragraph 1 of the Article (that is determination of the level of nullification or impairment) had taken place.

EC has also proposed an additional sentence in paragraph 8, which envisages products which are on route before the date of application of the suspension of concessions or other obligations shall be exempted from such suspension. EC has also proposed a new para, para 9 after para 8. Basically, the purpose of this addition is to ensure that a Member concerned who has eliminated the inconsistency or the nullification or impairments of benefits under the covered agreements identified in the recommendations or rulings of the DSB has the possibility to request termination of the authorization given by the DSB for suspension of concessions or other obligations. EC has proposed that the Member concerned may request termination of the authorization of suspension of concession or other obligations given earlier by the DSB on the ground that it has eliminated the inconsistency or the nullification or impairment of benefits under the covered agreements. EC's proposal envisages that the DSB meeting 20 days after the receipt of the request shall withdraw their authorization unless the complaining party objects to the withdrawal. In such a situation, the matter shall be resolved through recourse to Article 21bis. If the

compliance panel finds the claim of the Member concerned to be correct, the Member concerned can request a meeting of the DSB, to be held ten days after the receipt of the request and in that meeting the DSB shall withdraw the authorization unless it decides the consensus not to do so.

In the event of the compliance panel not finding the claim of the Member concerned to be valid, and if the measures taken to comply by the Member concerned are found not to be consistent with a covered agreement or not to comply with the recommendations or rulings of the DSB in the dispute, any party may request an arbitration to determine the level of nullification or impairment caused by the measures concerned. Such arbitration shall be carried out by the original panel, as far as possible and the arbitrator has to complete the job within 45 days. If the level of nullification and impairment determined by the arbitrator in this situation, differs first from the level determined under the paragraph 6 of the Article the Member concerned can request for a meeting of the DSB to modify the authorization for suspension of concessions or other obligations. At such meeting the DSB shall accordingly modify the authorization unless it decides by consensus not to do so. After this, the complaining party shall bring the suspension of concessions and other obligations into conformity with the modified authorization of the DSB.

It would appear that EC's proposal is designed to deal with a situation where a losing party claims that it has taken some measures to comply but is challenged by the complaining party.

IV.12 Improving Flexibility and Member Control in WTO Dispute Settlement

The United States and Chile have submitted a Paper suggesting that there should be mechanisms that would enhance the parties' flexibility to resolve the dispute and Members' control over the adoption process. In their proposal US and Chile have suggested

- (a) making provisions for interim reports at the Appellate Body stage

- (b) providing a mechanism for parties, after review of the interim report, to delete the mutual agreement findings in the report that are not necessary or helpful to resolve a dispute.
- (c) Some form of partial adoption procedure
- (d) Providing the parties a right, by mutual agreement, to suspend panel and Appellate body procedures
- (e) Ensuring that the Members of panels have appropriate expertise to appreciate the issues presented in a dispute.
- (f) Providing some form of additional guidance to WTO adjudicative bodies

To say the least, the nature of US proposal takes one by surprise. As regards introduction of interim review stage in the Appellate Body proceedings, it will be difficult to accommodate this within the sixty days time limit. Moreover, the Appellate Body deals only with issues of law. Obviously, the Appellate Body would give its legal findings after taking into consideration the submissions on both sides regarding the legal issues before it. It is unlikely that the interim review stage will add any value. Even in the case of panel procedures, one is hardly aware of any case where a panel fundamentally changed its findings on the basis of comments received on its interim report. It is surprising that US is proposing to introduce interim review stage in the Appellate Body proceedings at a time when a good number of delegations seem to feel that the interim review stage in the panel proceedings should be dispensed with.

The proposal to delete some portions of the Appellate Body report, at the interim review stage, by mutual consent between the parties, is also not something one can support. If this idea is introduced, relatively weak Members may come under pressure from the powerful ones to agree to delete some portions, thus, adversely affecting the credibility of the dispute settlement system.

The proposal regarding partial adoption procedure, in my view, is unrealistic. There have been many situations where US single handedly supported some observations in the Appellate Body report though every other Member felt that the Appellate Body had

erred. It is unlikely that certain portions of the Appellate Body report could be de-linked from their relevance to the findings. It looks as though this partial adoption suggestion is being made with a view to test the mood of Members with regard to automaticity of the dispute settlement system of the WTO. India should never agree to any proposal, which would even remotely have adverse implications for the automaticity of the dispute settlement system,

Again the proposal to suspend the panel and appellate body procedures by mutual agreement is rather risky since weaker parties may come under pressure.

Another element of the US proposal relates to the panelists. The US proposal implies that the panelists, selected under the present system, do not have the necessary expertise. However, the US proposal is silent as to how it could be ensured that panelists possess the required expertise. In this connection it is recalled that US has not been in favour of EC proposal with regard to permanent panelists.

The last element of the US proposal says that some form of additional guidance, should be provided to WTO adjudicative bodies regarding the nature and task presented to them as well as rules of interpretation of the WTO agreements. This element of the US proposal appears to cover panels, as well as the Appellate Body. In other words, US is suggesting that Members should provide guidance to the Appellate Bodies on rules of interpretation of WTO agreements! When the Appellate Body argue, in the context of Amicus Curiae briefs that the Appellate Body is entitled to do anything as long as it is not prohibited. the US delegation was the only delegation which supported this strange interpretation in today US is suggesting Members should give guidance to Appellate Body on interpretation of WTO agreements.

It appears to me that US has submitted this paper because it has lost a number of disputes in the last one year or so. Some people believe that US somehow wants to eliminate or reduce the automaticity of the dispute settlement system.

In my view the US paper deserves to be vehemently opposed. If the US proposals go through, it will be the beginning of the end of the dispute settlement system as it exists now. Many developing countries, might have their own concerns or problems with the dispute settlement system. But they should appreciate that what the US is attempting is a fundamental change in the system, which would be to the detriment of weaker players.

V Conclusions

Basing on the discussions relating to various proposals, the following broad conclusions emerge:

1. With regard to permanent body of panelists, advantage lies in having a combination of the present system and the system proposed by the European Communities (EC). Under this system a roster of Panel Chairpersons should be established by the DSB. The parties to the dispute can mutually agree on the panel composition, with the stipulation that the parties cannot choose any name from the roster of Panel Chairpersons. If within twenty days, the parties cannot mutually agree on the composition of the panel, the responsibility for composition should pass on to the DG. The DG will compose the panel by choosing the Panel Chairperson from the roster of Panel Chairpersons on the basis of a formula, which would eliminate scope for discretion or manipulation. DG will choose the other two or four Members from the indicative list. In composing the Panel Article 8 (3) should continue to be respected. As far as qualifications for the Panelists are concerned Article 8(1) provides the requisite guidance and there should not be any attempt to follow a more restrictive approach.
2. As regards Amicus Curiae Briefs, strong opposition could continue to be expressed against providing for the possibility of Amicus Curiae submissions in the WTO dispute settlement process. However, in order to avoid the possibility of the stalemate in the DSU negotiations on this subject resulting in a situation of enabling the Appellate Body to continue with its current approach to Amicus

Curiae Briefs on the specious argument that what is not explicitly prevented by DSU is permissible, a possible compromise will be to provide for the possibility of considering Amicus Curiae Briefs, subject to certain conditions, at the panel stage but not at the Appellate stage. The procedure suggested by EC for consideration of Amicus Curiae submissions, incorporating a two stage approach is reasonable. Acceptance of the idea of giving consideration to Amicus Curiae Briefs to the panel stage should be contingent upon taking an accompanying decision which will prevent the Appellate Body from misinterpreting the DSU and considering Amicus Curiae Briefs at the Appellate stage. The compromise relating to Amicus Curiae Submissions will lapse after three years unless there is a consensus to extend the period.

3. There is need and scope for enhancing third party rights in the dispute settlement process. A right to join in the consultations when there is substantial interest, entitlement to receive all information and documents and a right to presence at all substantive meetings of the panel are some of the elements of third party rights which deserve support. However, third parties need not be given the rights to comment on descriptive part or the interim report. There need be no stipulation that the panel should discuss all arguments of third parties. With regard to Article 17.4 proposals by Costa Rica and India are in the right direction since they seek to remove the existing anomalies.
4. The proposal that secretariat input to the panel should be made available to the parties to the dispute deserves support. In respect of the proposal to open up panel meetings to the public, it could be legitimately argued that the priority should be to throw open meetings of regular WTO bodies like the General Council to the public and opening up panel and Appellate Body proceeding should come at a later stage. Any possible decision to open up meetings of WTO bodies and/or panel and Appellate Body proceedings to the general public could be a time limited decision subject to extension by consensus.

5. The proposal that mutually agreed solutions should be notified within sixty days from the date of the agreement and that relevant notification should contain sufficient details is a good proposal. In addition, it should be suggested that failure to comply with this obligation would have the effect of disabling the parties from invoking dispute settlement procedures in respect of the particular matter.
6. Any proposal for amending Article 17.1 of the DSU with a view to increase the number of Appellate Body members either immediately or with a view to provide for the possibility of increasing the number of Appellate Body members in future should be strongly opposed. The proposal by India and others that the Appellate Body members should be eligible for a non-renewable single term of six years is a good proposal. Similarly, the proposal that the Appellate Body should develop guidelines as to the details to be included to the notice of appeal is a good proposal.
7. The proposal to invest the Appellate Body with remand powers is a good one but certain methodologies have to be worked out to ensure that this authority is not misused. The Australian proposal with regard to compensation deserves support. The only element in other proposals that could be supported is the one, which provides for determination of the level of nullification and impairment at an earlier point of time as compared to the present situation.
8. With regard to determination of compliance EC's proposal is reasonable and deserves to be supported.
9. There is a *de facto* recognition now of sequencing between Articles 21.5 and 22 of the DSU. The proposals of EC and Japan with regard to sequencing are almost identical. Since the proposals relating to compliance and sequencing are interrelated, it is better to go along with EC's approach relating to sequencing as incorporated in the proposed Article 21bis, which incorporates elements relating to compliance as well as sequencing.

10. The proposed amendment to Article 22.7 by Thailand and Philippines, which has the effect of outlawing “carousel”, deserves strong support.

11. The US and Chile proposal titled “improving flexibility and Member control in WTO dispute settlement”, which incorporates elements like partial adoption procedure, providing additional guidance to the WTO adjudicating body, etc., will have the effect of undermining the critical elements of the present DSU and should therefore be strongly opposed.

It will be appropriate to utilize the opportunity provided by the DSU negotiations to bring about certain improvements in the DSU as indicated above.