

**AN ANALYSIS OF THE DISPUTE SETTLEMENT BODY OF THE WORLD
TRADE ORGANISATION**

BY

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DECLARATION

I, **Daniel Paul Ugwu**, hereby declare that the information contained in this dissertation is my work and that it has not been presented in any form for any award elsewhere. Information contained from other literary publications have been duly acknowledged.

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CERTIFICATION

The dissertation entitled “An Analysis of the Dispute Settlement Body of the World Trade Organization” by UGWU, DANIEL PAUL meets the regulations governing the award of the degree of Masters of Laws (LL.M) of Ahmadu Bello University, Zaria, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to God, the Author and Completer of my faith, my sweet, caring and beautiful wife, Pastor Mary Dan Paul and my beautiful children, Danielle Mary-Grace Charisa, Davina Debra Paula and Derrick David Charis Dan Paul Jnr.

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ABSTRACT

The World Trade Organization (WTO) was established with the primary function of ensuring the smooth and free flow of trade and services. At the heart of the WTO, is the Dispute Settlement System that ensures that disputes are resolved as soon as possible. This research aims at analyzing the role of the WTO and its Dispute Settlement body in settling trade disputes. This research specifically examines the WTO Dispute Settlement System; identifies the objectives of the system and whether or not the system allows for the actualization of these objectives. The research also evaluates its performance and makes recommendations based on research findings. The essence of the research is how the system can be made more effective and accessible to developing and least developed member nations especially Africa. In undertaking this task, the research employs the doctrinal research method. Trade disputes in the WTO usually arise when a member state or states take a measure or measures that the WTO considers to be inconsistent with the obligations set out in the WTO agreements. Settling trade disputes in a timely and structured manner is important in order to realize the practical value of the commitments of the member states. The central objective of the WTO Dispute Settlement System is to provide quick and accessible dispute resolution to the multilateral trade system. In addition, the system is to preserve and clarify the rights and obligations of the members under the WTO Agreements, as well as ensure that disputes are settled promptly. In carrying out its mandate, the WTO Dispute Settlement System has decided several disputes among member nations of the WTO, covering diverse areas of the WTO agreements. In fact, the performance of the WTO Dispute Settlement System has been generally described as an ongoing institution that needs a lot of reforms. The Dispute Settlement System has many challenges, obstacles and problems, which make it impossible for it to achieve its set out goal perfectly. Thus, the objectives of the system have not been satisfactorily met due to implementation problems, inadequate funding, lack of transparency and access to the system, ad hoc nature of panels, as well as lacuna in the DSB. Considering the importance of the WTO's role of settling trade disputes to the stability of the global economy, adequate attention ought to have been given to the system. Accordingly, the DSB should be adequately funded that would meet the increased workload of the DSB. The lacuna in the DSU should be corrected and the system made more transparent and accessible to the public. Furthermore, the system ought to adopt adequate panelists that can meet the increased complexity of the substance of cases presented before panels. The Research will explore how the DSB can better serve the interest of third world countries and Africa.

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LIST OF ABBREVIATIONS

ACP	-	African, Caribbean and Pacific Group.
AD	-	Agreement on Anti-Dumping Measures.
BC	-	Before Christ.
DSB	-	Dispute Settlement Body.
DSU	-	Dispute Settlement Understanding.
EC	-	European Communities.
ECOSOC	-	United Nations Economic and Social Council.
EEC	-	European Economic Communities.
EU	-	European Union.
GATS	-	General Agreement on Trade in Services.
GATT	-	General Agreement on Trade and Tariff.
GPA	-	Agreement on Government Procurement.
IMF	-	International Monetary Fund.
ITA	-	Agreement on Information Technology Equipment.
ITC	-	International Trade Centre.
ITO	-	International Trade Organization.
MFN	-	Most Favoured Nation.
MTA's	-	Multilateral Trade Agreements.
NTB	-	Non-Tariff Barriers.
PTA's	-	Plurilateral Trade Agreements.
SCM	-	Agreement on Subsidies & Countervailing Measures.
SPS	-	Agreement on the Application of Sanitary and Phytosanitary Measures.
TBT	-	Agreement on Technical Barrier to Trade.
TCA	-	Agreement on Civil Aircraft.
TPRIM	-	Trade Policy Review Mechanism.
TRIM	-	Agreement on Trade Related Investment Measures.
TRIPS	-	Agreement on Trade-Related Aspects of Intellectual Property Rights.
UN	-	United Nations.
UNCTAD	-	United Nations Conference on Trade & Development.
UNDP	-	United Nations Development Programme.
US	-	United States of America.
WTO	-	World Trade Organization

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

International Trade has been of immense importance in the existence of the nations of the world and its economy because no nation is completely self-reliant or sufficient. Also, the needs and wants of people in all parts of the world are better served by exchanging goods and services.¹ Trade increases the standard of living for all modern countries. For some, foreign market takes a third to a half of the total output and the standard of living depends crucially on the international division of labour that foreign trade permits.² However, there are opinions to the effect that international trade has negative effects on the standard of living of the nations of the world and consequently, trade barriers are necessary to protect the earth's natural environment, reduce domestic unemployment and also prevent the exploitation of the world's impoverished workers.³

International trade has played and continues to play critical role in the ability of countries to grow, develop and be economically powerful throughout history. International transactions are becoming increasingly important in recent years as countries seek to obtain the more benefits that accompany increased exchange of goods, services and factors. It is worthy to note that little is known about the earliest trade. However, English flint used to make primitive tools, which was widely traded in Europe thousands of years before Christ, and so was the salt from the mines in Central Europe. Moreover, the Egyptians as far back as 3000 B.C. ranked far in Africa in search of gold, antimony and slaves. By 1700 B.C., the Cretans traded extensively by sea.⁴

Every sovereign nation is free to establish laws, taxes and regulations governing its foreign trade. Initially, these nations used certain policy instruments to protect their country and citizens that are players at the international market against certain consequences that might arise as a result of unrestricted trade practices and thereby interfere with free trade. Some of these

¹ Standard Educational Corporation, (2001) New Standard Encyclopedia Chicago, USA: World Book Inc. Vol. 7, page 151.

² The World Book Encyclopedia (2001) Chicago USA: World Book Inc. Vol. 10 page 347, 348, 361 – 368

³ Sharp A.R., Charles G.P. Economic of Social Issues, {2002} 15th Edition, Mcgraw-Hill, New York, pages 240 – 24.;

⁴ The New Encyclopedia Americana, International Edition, (USA; Grolier Incorporated, 1985) Vol. 26 at 910.

instruments include: import tariffs, export taxes, and subsidies, import quotas, voluntary export restraint, government procurement provisions, domestic content provisions, trade related investment measures, etc.⁵ These measures to a great extent interfere with free trade.

However, in the 19th century, there was an important change in government⁶ policies towards trade, away from mercantile protectionism, all brands freer trade – fewer prohibitions and lower duties on foreign trade. Furthermore, after World War II, various circumstances combined to obstruct world trade. The nations found it convenient to agree to rules that limit their own freedom of action in trade matters, and generally to work towards removal of artificial and often arbitrary barriers to trade. Thus, in 1947, the major trading countries, initiated comprehensive multilateral negotiations in an effort to prevent a post war contraction of world trade similar to the tariff war of the 1930's.⁷ The negotiations resolved in the formation of the General Agreement on Tariff and Trade (GATT).

The agreement (GATT) incorporated a code of international trade rules, made provisions for multilateral trade negotiations, established a procedure for adjudicating trade grievances among member states and provided for the continuing review of actions by member countries. The implementation of GATT resulted in the reductions in tariffs, coupled with improvements in transportation and communication at the time, foreign trade for instance grew and by the dawn of 1970 and early 1980's the value of total world goods and trade reached an almost \$300 billion a year and \$56 billion to \$60 billion for annual services.⁸

It should be noted that such increase indicated a greater international interdependence and a more complex international trade network encompassing not only final consumable goods but also capital good, intermediate goods, primary goods and also commercial services. Thus, not only did individual nations experience the economic benefits that accompany international trade but also realized that her economic prosperity depends on economic prosperity in the world as a

⁵Appleyard, R. D. / Field J. A (1997) International Economics, 3rd Edition, (Irwin/McGraw – Hill) page 13.

⁶ These Changes were Notable in Britain, France and Most Other European Nations. For further information, see the World Book Encyclopedia Loc. Cit., at pages 910 – 916.

⁷The New Encyclopedia Americana, International Edition, 1995 USA: Collier Incorporated,) Vol. 26, page 296

⁸Op. cit. n. 3.

whole. It is also a well-known fact that while increased interdependence has many inherent benefits, it also brings with it a greater adjustment requirements and greater needs for policy coordination among trading partners.

Consequent on the above, in September, 1986, new round of negotiation – the Uruguay Round began. Member states who participated in the round established groups to work on the different areas of the negotiation, including the four areas dealing with GATT itself (example – dispute settlement procedure and the complementation of the Non-Tariff Barriers Codes (NTB) of the Tokyo Round)⁹. The round recorded certain achievements, some of which included the adoption of new procedure for the settlement of disputes and the creation of the World Trade Organisation (WTO).

It is further important to note that since the Marrakesh Agreement of 1994 entered into force on 1st January, 1995, the World Trade Organisation now provides the principal forum for negotiations on multilateral trading relations among member states, and for the binding settlement of disputes arising under WTO agreements¹⁰. At the centre of the multilateral trading system are the WTO agreements which are the legal ground rules for international commerce. Essentially, they are contract guaranteeing member countries important trade rights. They also bind governments to keep their trade within agreed limits to everybody's benefits.

Also, member nations, upon convinced of the need to provide security and predictability to the multilateral trading system, preserves the rights and obligations of the member states under the agreements and to be able to clarify the rights and obligations of the member states through interpretation, created a dispute settlement system, which is continued in the understanding on Rules and Procedure governing the settlement of Disputes (DSU).

Generally, a policy of free trade will inevitably involve some conflict with international environmental agreement or an environmental protection requirement in national law, which has the effect of restricting trade in certain commodities. Although some environmentalists condemn

⁹ GATT Negotiations Essential to Maintain Strong Multilateral Trading System, IMF Survey, December 12, 1988, pages 386 – 389.

¹⁰Trebilock and House, The Regulation of International Trade, 2nd Edition, (London, 1988, at 7.

free trade as bad generally for the environment,¹¹ most focus their critique on specific issues, arguing that; the role of multilateral trading system may pose difficulties for the implementation of unilateral environmental agreements that use free trade restrictions to protect the environment.

1.2 Statement of the Research problem

A greater percentage of the disputes arising in the World Trade Organisation are essentially about unkept promises. It arises often when one country adopts a trade policy measure or takes some actions that one or more members consider to be inconsistent with the obligations set out in the WTO agreement. Thus, a member-state believing that free trade has been undermined or blocked by another state or group of states can seek to have such barriers declared a violation of WTO principles and objectives.

The importance of the WTO's role of settling trade disputes to the multilateral trading system and consequently, to international trade relations generally, cannot be over-emphasized. Settlement of trade disputes is very important and a central pillar to the multilateral trading system for there to be stability of the global economy. There is no doubt that settling trade disputes in a timely and structured manner plays an important role in the economic life of every nation of the world. Consequently, it is expected that the WTO would provide a fast, efficient, dependable and rule oriented system to resolve trade related disputes.

In addition to the above, as a result of the importance of a prompt settlement of trade disputes to the stability of the global economy, the role of the WTO in resolving trade disputes must receive adequate attention if the goals of the WTO Dispute Settlement System are to be attained. The quick resolution of trade disputes by the WTO Dispute settlement Body would add credibility and predictability to the world trading system and prevent member countries from taking unilateral preemptive action. This therefore raises the question of the effectiveness and efficiency of the WTO's Dispute Settlement System.

¹¹ Joseph D. (1995) Law & Practice of the World Trade Organisation, 2 Volumes (New York: Oceana, Starting December).

Despite the fact that the Dispute settlement System of the WTO is very important in providing security and predictability in international trade and consequently, to the promotion of the global economy, developing and least developed member states especially Africa despite her trade endeavor is bereft of activities before the WTO, Africa as a continent trades and will continue to trade. The DSB remains one of the most unexplored subjects among developing and undeveloped states of the World Trade Organisation.

Furthermore, the new dispute settlement system can only meet all the expectations if its provisions and its importance to the promotion of the global economy are fully understood by those who must use it. Thus, the choice of this work is therefore, imperative to further explore present developments in the WTO Dispute Settlement Body, particularly, the none active participation of third world and developing Countries especially Africa in the activities of the WTO. Obviously, this work will serve as a significant contribution to knowledge.

1.3 Aim and Objectives of the Research

The aim of this research is to analyze the Dispute Settlement Body of the World Trade Organisation in resolving trade dispute under International Law, with a view to offering recommendations for the effective and efficient resolving of trade disputes among member states.

The objective of this research includes;

1. To examine the Dispute Settlement System under WTO.
2. To evaluate WTO's performance in settling disputes.

1.4 Research methodology

This study employs doctrinal research method. Doctrinal research method means theorizing without considering the practical consequences, it is a conceptual research. Accordingly, the primary source of data shall include the Marrakesh Agreement establishing the WTO, the WTO Agreements, especially the Dispute Settlement Understanding (DSU) and Reports of cases handled by the WTO.

Also, law text and materials on the WTO and its dispute settlement system, WTO's Annual Reports documentations and other publications, articles and journals (published and unpublished) and official reports in this area shall be the secondary sources of data.

1.5 Scope of the Research

The scope of this research covers the role of the WTO in resolving trade disputes under international law. However, for a better understanding of this role of the WTO, the aims and objectives of the WTO's Dispute Settlement System, the trade disputes within the jurisdiction of the WTO, as well as the procedures involved in settling dispute in the WTO shall be discussed. Furthermore, the activities of the WTO Dispute Settlement System as it relates to the settlement of violation and non-violation complaints under GATT 1994, Agreement on Subsidies and Countervailing Measures, Agreements on Agriculture and the Antidumping Agreement as well as compliance disputes under DSU between 1995 and 2007 shall be highlighted.

1.6 Literature Review

The WTO was established on the 1st January, 1995 when the Marrakesh Agreement of 1994 entered into force. The present Dispute Settlement System was created as part of WTO Agreement during the Uruguay Round. It is embodied in the understanding on Rules and Procedure governing the settlement of disputes commonly referred to as DSU.

They are books published by Oceana Publishing Company which are primarily a selective collection of the principal primary documents and summaries: GATT/WTO "Marrakesh" Agreements, Understanding and Ministerial Decisions. These books provides an excellent access to primary WTO documents, the introduction and the commentary are, on the other hand, of little help.

However, in recent times, several notable authors have specifically dealt with the Dispute Settlement Body of the World Trade Organisation. Some of these authors include; *Ernst-Ulrich*

*Petersmann*¹², *Chengwi, Liu*¹³, *Palmer and Mavroidis*¹⁴. *Changwei, Liu's* work is a systematically elected compilation of Reports issued by various panels and the standing Appellate Body, then adopted by the DSB under the WTO jurisdiction by the end of May, 2002, in category of subjects such as causes of action, initiation of panel proceedings, functions of panels, rates of evidence and special rules governing anti-dumping disputes, and so on which are in most cases ruled as preliminary issues, or procedural objections. However, the text is not exclusive, and dealt with only the issues in dispute settlement proceedings relating to Article XXIII of the GATT 1994, Articles 3, 4, 6, 7, 10, 11, 13, 21, 23 and 26 of the DSU; Articles 17.4, 17.5, 17.6, of the AD Agreements and Arts. 31, 32 of the Vienna Convention and so on. The book did not discuss the WTO system of settling disputes. This dissertation aims at analyzing the role of the Dispute Settlement Body of the WTO in settling trade disputes. It will also examine the Dispute Settlement System; identify the objectives of the system and whether or not the system allows for the actualization of these objectives.

The text by *Ernst-Ulrich Petersmann* on the other hand is primarily an academic and conceptual analysis. It traces the history of the much more political and diplomatic dispute settlement practice up to 1994 and presents the injection of much greater legal elements by the 1994 modernization of the panel/appeal method. The book also discusses some current issues of interest notably the relation of GATT/WTO law to conflicting multilateral trade agreements and the complex role of “non-violation” complaints in GATT/WTO law. The book concludes with new challenges to the dispute settlement mechanism, in particular to trade in services, to intellectual property rights and restrictive business practices. The author, a committed anti-protectionist argues against the inter-state tendency in international trade law restricting trade law to diplomats and the favour of giving private companies judicial remedies. Helpful annexes

¹²Petersmann E.U (1997), The GATT/WTO Dispute Settlement System, International Law, International Organisation and Dispute Settlement, (London: Kluwer Law International,

¹³Chengwi L. WTO Dispute Settlement Mechanism: An Analysis of the DSU on Positivism, (Northampton, MA: Edward Elgar Pub., 1999 – 2005).

¹⁴Palmer, D and Petros C. M (1999), Dispute Settlement in the World Trade Organisation – Practice and Procedure. (The Hague, London, Biston: Kluwer Law International.

include a list of panel reports, of disputes initiated already under the 1994 dispute settlement mechanism and relevant rules for dispute settlement and the WTO appellate body. However, the book dealt largely with the old GATT system, case law and policy questions. Consequently, this research will analyze the Dispute Settlement Body, its organs, agencies and further discuss the Dispute Settlement System.

*Palmetre David and Petros C. Mavroidis*¹⁵ book which appears to be the most current and detailed work on the Dispute Settlement Mechanism of the WTO, in its first chapter, provides a historical introduction, starting with the failed attempt to create an International Trade Organisation (ITO), moving on to negotiations of GATT and finally, to the WTO. The authors examined in detail the jurisdiction of the Dispute Settlement Body under the DSU. In chapter three, the sources of law relevant to the settlement of disputes are analysed, following the order established in Article 38 (1) of the Statute of the International Court of Justice. On this basis the authors go on to explain each stage of the panel process in one chapter. Chapter four thus examines the panel process itself and addresses the legal problems that have been raised, such as burden of proof and standard of review issues. Chapter five is devoted to special rules and procedures for developing countries and under each of the Multilateral and Plilateral Trade Agreements covered by the DSU. The appellate process is set out in chapter six, followed by a chapter on adoption and implementation of reports and another on remedies. Chapter nine of this text sums up some of the findings in a short conclusion.

Palmetre and Mavroid have achieved firstly, the complete and systematic introduction to the WTO dispute settlement system. Although this is by no means the first book on the subject, earlier publications have dealt largely with the old GATT system, case law and policy questions or international dispute settlement in general. *Palmetre and Mavroid* focus exclusively on the new system, without discussing in depth academic questions and policy issues related to

¹⁵Palmeter, D and Petros C. M (1999), Dispute Settlement in the World Trade Organisation – Practice and Procedure. (The Hague, London, Biston: Kluwer Law International.

international dispute settlement and the way these questions were solved (or not solved) in the DSU. This lack of indepth discussions can be regarded as a shortcoming of the work. Issues like the appropriate standard of review in panel proceedings, which are the subject of dozens of articles in all relevant periodicals, are tested in two paragraphs without quoting any literature for further reading. The work is not very comprehensive and conclusive commentary on the law of the DSU. It falls short of adequately identifying and evaluating how effective the WTO dispute settlement system is. Thus, the choice of this study is to further explore present developments in the trade Dispute Settlement System of the WTO and find out how well the WTO has lived up to its mandate of settling trade dispute as well as make number of recommendations to strengthen the WTO Trade Dispute System.

1.7 Organisational layout

This work has been conveniently broken down into 6 (Six) chapters. Chapter one contains the general introduction on which the thesis is predicated. It deals with the preliminary issues that will ensure the understanding of the entire work. These among others include; the background to the study, statement of the research problem, aim and objectives of the research, scope of the research, literature review and organisational layout.

Chapter two covers international trade, international trade law, the establishment of World Trade Organisation, objectives, functions, scope and status of the WTO.

Chapter three discusses the legal framework for trade disputes, domestic legislation as an object of a dispute, possible objects of complaint to the WTO Dispute Settlement System.

Chapter four reveals the stages for settling dispute in the WTO Dispute Settlement System, it also focuses on the legal effects of Dispute Settlement Body's Recommendation/Ruling, and it reviews participation in the proceedings, legal issues arising therefrom and developing countries in the proceedings.

Chapter five discusses the dispute settlement body of the WTO, the scope and importance of the system, reviews applicable laws to legal interpretation of WTO Agreements within the

system, WTO Agencies within the system is also highlighted. It concludes with a discussion on composition and functions of the WTO Dispute Settlement Body.

Chapter six is the last and the concluding chapter. It summarizes the entire discussion made in the work and brings out recommendation for reforms and improvement.

CHAPTER TWO

INTERNATIONAL TRADE AND WORLD TRADE ORGANISATION

2.1 Introduction

The World Trade Organisation (WTO) came into existence in 1995. It is the successor to the General Agreement on Tariff and Trade (GATT), which has operated provisionally since 1947. The WTO is concerned with the economic policies of world trade and seeks to foster cooperation. Hence it provides a common institutional framework for the conduct of trade relations among its member states.¹⁶

The agreement that established the WTO created a permanent forum for member governments to address issues affecting their multilateral trade relation as well as to supervise the implementations of the trade agreements negotiated in the Uruguay Round.

Consequently, the World Trade Organisation apart from being a permanent trade policy formulator which creates rules for world trade which are binding under International Law, it is also a guardian of the agreements. Thus, the WTO oversees the implementation, administration and operation of the multilateral trade agreements i.e. General Agreement on Trade & Services (GATS) and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which are legally binding on the members, and three other agreements on Government Procurement (GPA), Civil Aircraft (TIA) and Information Technology Equipment (ITA) which are effective at the plulateral level for those WTO members that have signed the agreements.

The objectives of the agreements are the fight against protectionism and the promotion of free trade by the progressive elimination of custom tariff and other trade barriers, as an equal treatment forms the basis for the two guiding principles of the WTO – the most-favoured nation treatment and the national treatment.

¹⁶Jean P. "North America & Europe respond to the Challenges of the Environment and the Economy". International Environmental Law and RegulationsJournal Volume 2 page 10.

The WTO operated in much the same manner as the GATT, which it replaced but oversees a wider variety of Trade Agreements and benefits from a number of the improved decision-making procedures. It has a legal personality and enjoys privileges and immunities similar to those of specialized agencies of the United Nations.¹⁷

2.2 International Trade and Globalization

International trade is both reflecting and contributing to the global economic recovery, with the improved international economic environment proving particularly beneficial for most developing countries. Growth in the volume of world trade more than doubled to almost 8 percent in 2010, with the developing countries accounting for most of the increase. It should be noted that the depreciation on dollar meant that growth was ever higher in nominal terms and the same factor was partially responsible for the increase in the international prices during the year under review.

Trade performance continued to be uneven across regions and countries in 2010, although this was less acute than in the period between 2006 and 2009, when trade contracted in the developed economics. The transition economies sustained relatively high rates of growth in their trade but it was the recovery of trade in the developing countries that largely fuelled the acceleration of world trade during 2002 and 2003. In these two years, developing countries' contribution to trade growth went well beyond their share of world trade: the share of developing in world exports and imports to about 31 percent, but these economies generated over 80 percent of the acceleration in trade in 2002 (with the remainder coming from the developed economies, in particular those of North America and Japan) and about 50 percent in 2003. Faster growth in international trade was brought about by the developed economies as trade continues to recover in Europe, North America, but growth in international trade decelerates to developing countries as China's trade growth declines to more sustainable levels.

¹⁷Jackson J. H. World Trade and the Law of GATT;(1969) Cap 3&4 Virginia U.S.A. The Bobblo-Werril Co. Inc. page 13

Much of the developing countries' trade dynamism has been concentrated in East Asia – where increasing integration of production has been a noticeable feature underlying the fast growth of intraregional trade and, in particular, in China. Owing to its buoyant economy and the improvement of the world economy, China's volumes of exports and imports grew about 32 percent in 2003. China's strong import demand was particularly relevant for East Asian countries, including Japan, and supported overall growth in the region. Other regions were positively affected as well. For instance, Brazilian exports to China doubled in dollar terms in the period under review (2003 – 2008), making China Brazil's third most import and export market within the period.

It should be noted that Latin America and Africa benefitted from the growth in demand for oil and non-oil commodities. Export of agricultural raw materials, minerals and base metals strengthened during the years as industrial production picked up in the developing countries, China and other Asian countries. In Latin America, improved export performance in 2008 was buoyed especially by increases of exports to Argentina, Brazil and the Asian countries. Generally, Mexico – the region's largest exporter – was adversely affected by increased competition in the market of the United States of America for the third consecutive year.

“Globalization” refers to the growing interdependence of countries resulting from the increasing integration of trade, finance, people, and ideas in one global market place. International trade and cross-border investment flows are the main elements of this integration.

It is important to state that globalization started after World War II but has accelerated considerably since the mid-1980s, driven by two main factors. One involves technological advances that have lowered the cost of transportation, communication, and computation to the extent that it is often economically feasible for a firm to locate different phases of production in different countries. Doctrinal evidence suggests that globalization has significantly boosted economic growth in East Asian economies such as Hong Kong (China), the Republic of Korea, and Singapore. But, not all developing countries are equally engaged in globalization or in a production to benefit from it. In fact, except for most countries, the East Asia and some in Latin

America, developing countries have been rather slow to integrate with the world economy. The share of sub-Saharan Africa in world trade has declined continuously since the late 1960s, and the share of major oil exporters fell sharply with the drop in oil prices in the early 1980s. Moreover, for countries that are actively engaged in globalization, the benefits come with new risks and challenges.

For participating countries, the main benefits of unrestricted foreign or international trade stem from the increased access of their producers to larger, international markets. For a national economy that access means an opportunity to benefit from the international division of labour, on the one hand, and the need to face stronger competition in world markets on the other hand. Domestic producers produce more efficiently due to their international specialization and the pressure that comes from foreign competition, and consumers enjoy a wider variety of domestic and imported foods at moderate costs.

It should also be noted that active participation in international trade entails risks, particularly those associated with strong competition in international markets. In addition, governments of developing countries often argue that recently established industries require temporary protection until they become more competitive and less vulnerable to foreign competition.

The costs and benefits of international trade also depend on factors such as the size of a country's domestic market, its natural resource endowment, and its location.

Despite the risks, many countries have been choosing to globalize their economies to a greater extent. One way to measure the extent of this process is by the ratio of a country's trade.

Over the past decades, patterns of international trade have been changing in favour of trade between developed and developing countries. Developed countries still trade mostly among themselves, but the share of their exports going to developing countries grew from 20 percent in 1995 to 22 percent in 2005. At the same time, developing countries have increased trade among themselves. Still, developed countries remain their main trading partners, the best markets for their exports, and the main source of their imports.

Most developing countries' terms of trade deteriorated in the 1980's and 1990's because prices of primary goods – which used to make up the largest share of developing country exports – have fallen relatively to prices of manufactured goods. Between 1995 and 2005, real prices of oil dropped almost fourfold, prices of cocoa almost threefold, and prices of coffee about twofold.

In response to these changes in their terms of trade, many developed countries are increasing the share of manufactured goods in their exports, including exports to developed countries.

It should be noted that regional trade blocks can contribute to transition countries' economic stabilization but they also carry risks of diverting trade from potentially more beneficial trade partnerships with other countries. Ten transition countries in Central and Eastern Europe and the Baltics have applied for the membership in the European Union, and nearly all transition countries have applied to join the World Trade Organisation (WTO).

2.3 The Establishment of the World Trade Organisation

One of the results of the Great Depression and World War II was strengthened political will to end protectionist policies and to limit government interference in international trade. Before the end of the 2nd World War, trade leaders in the Allied Countries had come to realize the significant contribution that trade tension had made in leading to its outbreak. As a result of this, a consensus emerged that there was a critical need for international cooperation in establishing discipline within economic relations in order to prevent reoccurrence.¹⁸

By the year 1944, representatives of countries attending the Breton Wood's Conference established the basic Organisational setting for post war economy designed to further macro-economic stability. Specifically, the framework that arose created three Organisations – The International Trade Organisation (ITO), the World Bank (WB) and the International Monetary Fund (IMF).¹⁹

¹⁸ Gabriel M. *International Trade and Business: Law, Policy and Ethics*, 1998 Australia Cavendish Publishing Company Ltd.

¹⁹ In 1934, GATT Congress empowered the President to negotiate and implement reciprocal tariff reduction agreements. It was under this power that the USA participated in the negotiation resulting in the GATT. This authority been reviewed periodically,

Furthermore, in 1946 at the February meeting of the United Nations Economic and Social Council (ECOSOC), a resolution was passed to prepare a convention to establish a world Organisation whereby signatory countries would join in an effort to establish ground rules for trade among them. This effort was to be embodied in the International Trade Organisation. Consequent upon this resolution, the Havana Conference was held between November, 1947 and March, 1948 when the charter for the International Trade Organisation (the Havana Charter) was drafted. However, at an earlier meeting of the Havana Conference held in Geneva from April to October, 1947, multilateral tariff negotiations were conducted and with unusual foresight, the General Agreement on Tariff and Trade (GATT) has been drafted concurrently with the International Trade Organisation (ITO) charter.²⁰

By a provisional protocol signed on 30th October, 1946 and effective from 1st January, 1948, the signatory countries²¹ agreed to apply the provisions of GATT until the ITO would take over supervision of its operation upon ratification of the Havana Charter. They also agreed to accept some of the trade rules of the draft ITO charter ahead of its agreement, to protect the gains made from the tariff reductions. Thus, the GATT incorporated the agreed tariff reductions along with a code of conduct aimed at preserving the trade benefits flowing from tariff reductions by restricting certain government practices that would operate to circumvent the tariff commitments. The code of conduct was part of the anticipated ITO charter. However, as the Havana Charter which would have established the ITO was never ratified, the GATT Agreement²⁴ remained the only multilateral instrument governing international trade.

An informal Organisation was²² built around the GATT to discuss trade related issues and negotiate further liberalization. Eight rounds of talks were held of rising complexity and difficulty but each advancing tariff reduction.²³ At the eight trade round – the Uruguay Round,

for three-year periods, and during the Tokyo and Uruguay Rounds become associated with “fast track” authority. The eight original signatories were; Australia, Belgium, Canada, France, Luxemburg, the Netherlands, the U.K. and the U.S.A.

²⁰ Twenty-three countries signed what was called the First Act authenticating the text of the GATT (55 UNTS 194: TIAS 1700).

²¹ Gabriel M. Op. Cit Chapter 10

²² Dorothy J.B The International Law Journal of George Town University Vol. 24, Number 1 (1992)

²³ Nancy D, Fears Over “Gatzilla” the Trade Monster Financial Times January 30, 1992 page 3.

which was the most extensive of all, 116 nations decided that its Final Act would further liberalize trade measures and establish a permanent structure – the WTO to manage international trading procedure and protocol. Ministers’ meeting in Marrakesh, Morocco in 1994 agreed to the final act. Concurrently, in Marrakesh, a majority of GATT countries approved the establishment of the WTO²⁴, which is a permanent Organisation with permanent, enforceable rules.

The Uruguay Round negotiations also made a major revision of the original GATT rules, as well as created new rules related to trade services, relevant aspects of intellectual property, dispute settlement and trade policy review. Thus, the WTO incorporates GATT rules as its principal rule-book for trade in goods. Both the revised GATT Rules and the new rules are set out in a range of international trade agreement covering these fields, and are referred to as the WTO Agreements. The complete set of rules consists of about 30 agreements.²⁵ Through these agreements, the WTO members operate a non-discriminating trading system that spells out their rights and their obligations.

Thus, the WTO exists to regulate international trade. It should be noted that its key principle is non-discrimination, ensuring that similar products from different countries are treated the same way. Currently, the WTO has nearly 150 members including China, the European Community, Japan, the USA, together with many developing states, accounting for over 97% of world trade. Around 30 others are negotiating membership as at 2001.²⁶

2.4 Objectives, Functions, Scope and Status of the World Trade Organisation

2.4.1 Objectives

The objectives of GATT have been subsumed into WTO. These objectives include raising the standards of living and incomes, ensuring full employment, expanding production and trade, and allowing for the optimal use of the world’s resources. These objectives have been extended to give the WTO a mandate to deal with trade services, to the need to promote sustainable development and to protect and preserve the environment in a manner consistent with

²⁴ Paul M. Save The Dolphins – Free Trade Bus Week, February 17, 1992, at 130 – D (Industrial Technology Edition).

²⁵ Gabriel M. Op Cit Chapter 12.

²⁶ Law and Practice of the WTO Vol. I 2001: U.S.A. Oceanic Publication Inc.

various levels of national economic development; to the need for positive efforts to ensure that developing countries, and especially the least developed among them, secure a better share of the growth in international trade.²⁷

Consequently, the WTO's overriding objective is to keep trade flow smoothly, freely, fairly and predictably. The WTO does this by;

- a. Administering Trade Agreements.
- b. Acting as a forum for trade negotiations.
- c. Settling trade disputes.
- d. Cooperating with other international Organisations involved in global trade, commerce and economic policy making.²⁸

In addition to the above listed, the WTO also assists developing countries in trade policy issues, through technical assistance and training programmes. It also grants waivers, submits proposed amendments for the vote of members and approves the accession of new members.²⁹

Under Article III, the WTO is to oversee the application of the various WTO agreements and serve as the framework for member government to conduct their trade relation under those agreements. The WTO is therefore responsible for the surveillance of the implementations of the GATT and its associated agreements, GATS, Agreement on TRIPS and WTO's other legal instruments.

In line with its objectives of assisting developing countries in trade policy issues, developed member-states of WTO have, as a matter of policy, been contributing to WTO technical assistance funds. To this end, between April and September, 2005, Italy and the United States among others donated various sums of money to the WTO to carry out this role.³⁰ Most African countries, as well as those from Asia and Latin America benefitted from the assistance.³¹ The WTO has rendered assistance to Togo, Kiribati, Democratic Republic of Congo, Tuvahi,

²⁷ Article 1 of GATT

²⁸ Ibid, Article III.

²⁹ Long O. Law and its Limitation in the GATT Multilateral Trade System (1985). The Hague: Marlines Nighoff. page 45&54,

³⁰ Jackson Op Citpg 8711.

³¹ GATT Bisa (1stSupp), 59 (1953); GATT 1994 Article III.

Zambia, among others.³² The WTO has also organized seminars, workshops, briefing sessions and technical missions for the developing nations, either solely or in corroboration with ITC, International Monetary Fund (IMF), World Bank, United Nations Conference on Trade and Development (UNITAD) and United Nations Development Programme (UNDP).³³

The WTO has taken a giant stride in trying to live up to its responsibility of carrying out review of individual member's national trade policy. Consequently, it has carried out reviews of the trade policies of many of its member states, among which are Canada (1996 and 1998), Brazil (1996), Chile (1997), Togo (1999), Zambia (1996), Uganda (1999).³⁴

Moreover, the WTO has not related in its effort to comply with its mandates under Article III. Thus, when the United States complained that the European Union (EU) was giving preferential treatment to member countries who are into the importation of banana, such as Chiquita and Dole, grew banana primarily in Central America rather than the Caribbean, and persuaded the executive branch of the U.S. government to ask that the EU abandon its preferential treatment. The WTO ruled that the EU's policies were a violation of its obligations under the WTO Agreements, and allowed the United States to impose retaliatory tariffs of up to \$191 million.³⁵ Subsequent to the WTO ruling, Brussels indicated that it would revise its trade policies, in consultation with Washington and growers in the Caribbean and Latin America, rather than appeal the ruling within the WTO.

2.4.2 Functions

The WTO provides a forum for continuous negotiations among its member countries for the further liberation of the trade in goods, services and for discussions on other trade related issues that may be selected for the development of rules and disciplines. Thus, the Article also anticipates future negotiations among WTO members both on matters covered by existing WTO

³² Article III GATT

³³ Article III (1-4) GATT 1994.

³⁴ INTO: 1991-2001

³⁵ Hingoram R. C. Modern International Law (1990) Oxford IBH Publishing Co. PVF Ltd New Delhi. Page 90.

Agreements, as well as other subjects. Although any negotiations regarding amendments or additions to existing governments would take place under the WTO auspices, the WTO agreement does not preclude negotiations in other subjects related to those agreements.

In addition, the WTO administers the Trade Policy Review Mechanism (TPRM) and the Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU). It also cooperates with the International Monetary Fund and the World Bank.

Consequently, the WTO carries out periodic review of individual member's trade policies. This review is aimed at finding out how fair countries are following the disciplines of, and its commitment made under the multilateral Agreements. By carrying out such review periodically, the WTO acts as a watchdog to ensure that its rules are carried out and this contributes to the prevention of trade friction. Thus in 1999 and 2005, the WTO carried out a review of the trade policy and practices of the Republic of Guinea.³⁶ The WTO also reviewed the trade policy of the United States in 1999.³⁷

Moreover, the Trade Policy Review Mechanism within the WTO allows members to discuss an individual country's trade policy regime. This is done in order to:

- i. Increase the transparency and understanding of WTO members' trade policies and practices through regular monitoring;
- ii. Improve the quality of public and inter-governmental debate on the issues; and
- iii. Enable a multilateral assessment of the effects of policies on the world trading system.³⁸

The WTO Agreement also provides for a common system of rules and procedures applicable to disputes arising under any of its legal instruments. Thus the WTO is responsible for settling trade disputes among its member countries on the basis of the rules of its legal

³⁶ Christopher D. S. "The Gnat is Older than Man: Global Environmental and Human Agenda referred to in American Journal of International Law, July 1994 Vol. ii. No. 3 page 467.

³⁷ United Nations Environmental Program by decision 14/30 on 17th June, 1987.

³⁸ Krueger (Ed) The WTO as an International Organisation, Chicago, 1998.

instrument. It is clear from the foregoing that the WTO provides a framework used by national governments to implement trade legislation and regulations as well as provides a forum for collective debate, negotiations and adjudication of trade disputes.

2.4.3 Scope and Status of the World Trade Organisation

The scope and the status of the WTO are clearly outlined in Article 11. The Article provides that the WTO is a common institutional framework for trade relations between member countries, and clarified which agreements are parts of the WTO Agreement. It also specifies the various trade agreements that will apply to member governments.

According to the Article, by accepting membership in the WTO, each government will automatically become a party to 24 agreements and legal instruments referred to as Multilateral Trade Agreements (MTAs), which are set out in Annexes 1, 2 and 3. However, certain WTO agreements referred to as “plulateral trade agreements” (PTAs) and contained in Annex 4, will apply only between WTO members that accept them. Currently, there are four PTAs: The Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the Agreement Regarding Bovine Meat, and the International Dam Agreement. Nearly all the instruments contained in the Final Act are intended to be binding on the signatories of the Final Act. The only exceptions are four pluralatral Agreements which binds only those members that have signed them.

Thus, the WTO Agreement has 4 Annexes. These Annexes incorporates each of the various MTAs and PTAs. Annex 1A contains multilateral agreements on Trade in goods that forms part of the overall WTO Agreement. Annex 1B incorporates the General Agreement on Trade in Services (GATS). Annex 1C sets out the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). Annex 2 contains the Dispute Settlement Understanding (DSU), while Annex 3 sets out the Trade Policy Preview Mechanism (TPRM). The PTAs are set out in Annex 4. Furthermore, paragraph 4 of Article 11 establishes the relationship between the GATT 1947 and GATT that is contained in Annex 1A of the WTO Agreement (GATT 1994). GATT 1947 and GATT 1994 has five components which are; GATT 1994; GATT 1947 as

amended over the years but with the exception of the protocol of Provisional Acceptance, the instrument adopted under GATT 1947; the Understandings contained in Annex 1A of the WTO Agreement and the Marrakesh Protocol to GATT 1994 contained in Annex 1A of the WTO Agreement together with the national schedules in 5 appendices. Thus, GATT 1994 comprised more rules than GATT 1947. In addition, GATT 1994 is to be applied on a permanent basis, not provisionally as was the case with GATT 1947. Moreover, GATT 1994 is not considered to be successor agreement to GATT 1947. Thus, if a government withdraws from GATT 1947 and joins the WTO, it will have no GATT obligations to countries that have not also joined the WTO.

Article VIII provides for the status of the WTO. According to paragraph 1, the WTO shall have legal personality, and each member of the WTO is required to accord to WTO sufficient legal status for it to exercise its functions. The Article also requires each member of the WTO to accord to the officials of the WTO and the representatives from member governments such privileges and immunities as are necessary for the independent exercise of their functions in connection with WTO.

Under paragraph 4, each member is also required to accord the WTO, its officials, and representative from member governments the requisite privileges and immunities similar to those stipulated in the 1947 U.N. Convention on the privileges and immunities of specialized agencies.

Although the WTO shares similar goals as GATT, it is much more than just an extension of GATT – its scope is much broader and the nature of the Organisation is different. GATT was a collection of trade rules bounded together by the multilateral agreements but WTO on the other hand, has institutional and legal foundation, it is a permanent institution with a large staff and secretariat.

Although GATT had been in existence for a number of decades, its application was on a provisional basis, while the WTO was created as a permanent institution. GATT rules applied only to merchandise goods or tangible products. WTO agreements apply to merchandise goods, and cover intellectual property and trade in services. Many of the GATT arrangements were

plilateral and therefore selective in nature. Most of the WTO arrangements are multilateral and involve the entire WTO membership. The WTO has also instituted a more efficient system for setting disputes that is much less susceptible to blockage as was the GATT system.³⁹

2.5 Judicial Independence in the World Trade Organisation

Although the notions of separation of powers in government has been in existence for decades,⁴⁰ it was the Baron de la Brede et de Montesquieu who presented this idea with clarity in his book *The Spirit of Laws* published in Geneva in 1748. As Montesquieu explained, “When the legislative and executive powers are united in the same power, or in the same body of magistracy, there can be then no liberty Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers.”⁴¹

Judicial independence in the international legal order is not as clearly defined as in national legal orders. Obviously, no super national executive or legislative branch exists from which a judicial branch could aspire to be independent. Yet judicial independence does become salient in two contexts. One is the judicial context of a general world or regional court from interference by states. It was this context that Hudson J. referred when he used the term “judicial independence” in his study of “International Tribunals”.⁴² The other context is the independence of a judicial entity within an international Organisation.

It should be noted that provision for judicial review of the acts of an international Organisation originated in 1921 in the Convention Instituting the Definitive Statute of the Dambe.⁴³ A “territorially interested” state was permitted to challenge a decision of the International Commission of the Dambe as being “ultra vires” or violative of the

³⁹Marrakesh 1994 Agreement Establishing the WTO Article III, V, VIII, XII.

⁴⁰Ibid Article III

⁴¹Montesquieu, *The Spirit of Laws* 262 (David Wallace Carrithers ed., 1977 (Book XI, Chapter 6, Paragraphs 5&6.

⁴²Hudson, M.O. *International Tribunals, Past and Future* (1944). Page 20 & 25

⁴³Treaty of Versailles, Arts 411 – 412.

convention.⁴⁴This matter was to be heard by the special jurisdiction set up for that purpose by the League of Nations.

The judicialization of trade relations began in the first multilateral treaty on trade restrictions – the Abolition Convention of 1927. It contained a general dispute procedure which provided for an optional advisory opinion by a technical body in the League of Nations and then, upon agreement, for arbitration or reference to the PLIJ.⁴⁵ For disputes of a legal nature, the treaty provided for a referral to the PCIJ.⁴⁶ The Convention of 1927, however, did not go into force. Later efforts under the League to provide for dispute settlement in trade matters were also unsuccessful.

2.5.1 The World Trade Organisations' Judiciary and Its Independence

As *Giorgio Sacerdoti* has pointed out, there is an important distinction between remedies against acts of international Organisations and procedure for the settlement of state-to-state disputes. What the World Trade Organisation has is the latter. Its *sui generis* dispute mechanism has jurisdiction only for cases about whether one WTO member's actions violate WTO law or impair trade benefits.⁴⁷ Thus, the WTO Agreement provides no right of action by a member against an administrative action by the Organisation, one of its subsidiary bodies, or the Director-General.⁴⁸

It is important to quickly add that only the member governments of the WTO may lodge cases. Thus, many actors that might have interest in insisting that WTO rules be honoured are excluded from the WTO judicial process. For instance, the WTO Agreement on Subsidies and Countervailing Measures requires that in conducting countervailing duty investigations, the

⁴⁴Convention Instituting the Definitive Statute of the Dambe, 23 June, 1921 17 AJIL Supp. 13 (1921).

⁴⁵Ibid Article 38

⁴⁶International Convention for the Abolition of Import and Export Prohibitions and Restrictions, 8 November 1927, 97 LNTS 393, Art. 8 (not in force) Article 8 and not apply to the key disciplines in the treaty.

⁴⁷Ibid Article 8

⁴⁸Havana Charter for an International Trade Organisation, 24 March 1948, Articles 93 – 94.

national authorities are to accord industrial users and representative consumer Organisations an opportunity to provide information relevant to the investigation.⁴⁹

The WTO Agreement dealing with member-to-member disputes is the Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU).⁵⁰ Strictly speaking, the DSU did not create a “judicial” system. As Joseph Wailer has remarked, the WTO Appellate Body is not called a “Court”, even though “that is exactly what the Appellate Body is”⁵¹.

Many analysts have pointed to the “judicialization” or “legalization” of WTO procedures in contrast to the less judicial procedures in the WTO predecessor, the General Agreement on Tariffs and Trade (GATT)⁵². Invocation of the DSU by a member is referred to as a “case” and as a “complaint”.⁵³ A case or complaint can allege that there is an “infringement of the obligations”, a “violation of obligations” or an impairment of benefits. At the end of a proceeding, the Panel issues a “report” (not termed a decision).⁵⁴ An appeal may be taken on “issues of law covered in the panel report and legal interpretations developed by the Panel”.⁵⁵

The DSU Panels have compulsory jurisdiction. As complainants, WTO members agree to refrain from making a determination that is a violation of a WTO agreement has occurred except through recourse to the DSU.⁵⁶ As respondents, WTO members cannot delay the initiation of a

⁴⁹Giorgio S, Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Body, the International Trade Law and the GATT/WTO Dispute Settlement 247, 254 (Ernst-Ulrich Petersmann ed., 1997).

⁵⁰Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 1.1, 3.3.

⁵¹Wailer J.H.H, The Rule of Lawyer and the Ethos of Diplomats – Reflections on the Internal and External Legitimacy of WTO Dispute Settlement, 35 JOURNAL OF WORLD TRADE 191, 200 – 01 (2001).

⁵²The GATT Panels were often described as “arbitral”. The DSU contains a separate track for “arbitration” that is distinct from the regular panels that decides whether a party has violated WTO rules. Compare DSU Article 25 (arbitration) with Articles 1, 21, 5 (Panels). A failure to implement an arbitral award may be complained about via regular WTO panel, DSU Article 254.

⁵³Arie R, From Diplomacy to Law: The Judicialization of International Trade Relations, 17 North Western or Journal of International Law and Business 775 (1997)

⁵⁴DSU Articles 3.7, 3.8.

⁵⁵Ibid Articles 3.3, 3.8, 23.1.

⁵⁶Ibid Articles 12.7, 21.5.

panel beyond the first meeting of the Dispute Settlement Body (DSB) at which the matter is raised.⁵⁷

The WTO dispute system differs from most other international Organisations in that the DSB can authorize economic countermeasures against a government that fails to honour its WTO obligations.⁵⁸ This feature draws attention to the WTO and may lead governments to take their international obligations more seriously.

Many commentators see a distinct separation between the judicial and political branches of the WTO. For example, *FriederRoessler* explains that “the purpose of the complex institutional structure established by the WTO Agreement is to divide decision-making power between different political organs – executive, legislative, as well as judicial.”⁵⁹ *Jose Alvarez* warns that the “legalization” in the WTO “should not fool us into thinking that the fundamental political issues can simply be handed over to the WTO’s judicial branch”.⁶⁰ *JoostPauwelyn* states that WTO panels and the Appellate Body “lead a separate existence as the judicial branch of the WTO.”⁶¹

Although the word “judicial” is not used, the organic act establishing the WTO does establish a judicial system. It comprises the DSB, the standing Appellate Body, and appointed panels. Each unit has a distinct function. The function of the DSB is to administer the DSU rules, establish panels, adopt panel and Appellate Body reports, and maintain surveillance of governmental implementation of adopted reports.⁶² The function of the standing Appellate Body is to hear appeals from panel decisions and, when needed, to recommend that the defending

⁵⁷ *Ibid* Articles 17.5, 17.13.

⁵⁸ *Ibid* Articles 14.3, 17.11.

⁵⁹ Frieder R, Are the WTO’s Judicial Organs Overburdened, in *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* 308, 325 (Roger B. Porter, Pierre Sauve, Arriud Subramanian & AmericoBeviglia – Zampetti eds., 2001).

⁶⁰ Jose A, How not to Link: International Conundrums of an Expanded Trade Regime, 7 *Widener Law Symposium Journal* 1, 19 (2001).

⁶¹ Joost P, the Use of Experts in WTO Dispute Settlement, 51 *International and Comparative Law Quarterly* 323, 338 (2002).

⁶² DSU Articles 2.1, 6.1, 7.3, 16.4, 17.14, 21.6.

government bring its measure into conformity with WTO rules.⁶³ The “standing” nature of the Appellate Body shows the intention of the founding governments to establish a judicial entity. The function of WTO panels “is to assist DSB in discharging its responsibilities.”⁶⁴ In particular, the panels makes an objective assessment of the facts and the applicability of and conformity with WTO rules, and then may recommend that the defending government brings its measure into conformity with WTO rules.⁶⁵

The DSB consists of representatives of all WTO members.⁶⁶ It is the DSB that actually makes the “decisions” in disputes by adopting panel report and Appellate Body reports.⁶⁷ Because the DSB consists of nothing more than the member governments acting collectively, one can question whether there is truly a judicial branch in the WTO. Certainly, the DSU does not direct each governments representative on the DSB to act in any way other than in its national interest. The status of the WTO General-Council as a political/legislative body⁶⁸ – combined with the fact that the DSB is just the General Council by another name⁶⁹ – may seem to contradict the idea that the WTO treaty system provides for a distinct judicial function.

Nevertheless, its key procedural rule demonstrates that dispute being formally subordinate to the DSB, the panels and Appellate Body do in fact have authority to adjudicate.⁷⁰ The key rule is that the DSB is directed to adopt panel and Appellate Body reports unless there is a consensus not to do so.⁷¹ This rule of negative consensus means that any report proposed for adoption by the complaining party will automatically be adopted (because the complaining party

⁶³Ibid Article 17.1, 19.1

⁶⁴DSU Article 11.

⁶⁵DSU Agreement, Article IV.2, IV.3.

⁶⁶DSU Article 20

⁶⁷WTO Agreements Article IV.1, IV.2.

⁶⁸Ibid Article IV.3.

⁶⁹William J. D, WTO Dispute Settlement: Segregating the Useful Political Aspects and Avoiding “Over-Legalization”, in *New Directions in International Economic Law* 189, 209 (1999).

⁷⁰DSU Article 16.4, 17. 14

⁷¹Deborah Z. C. The “Constitutionalization” of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development in International Trade, *12 European Journal of International Law* 39, 44 (2001).

would not join a consensus against adoption). This has been demonstrated consistently in WTO practice.⁷²

Although the stated purpose of the DSB is to settle disputes, the role of the Appellate Body in clarifying the law can have important systemic effects. Deborah Z. Cass hypothesizes that the Appellate Body has been “instrumental in building a constitutional structure with the WTO system.”⁷³ Based on a review of WTO case law, she argues that the judicial interpretations “are changing the international trade law system and leading to a greater resemblance between it and a constitutional system.”⁷⁴ If indeed the WTO’s judicial interpretations are becoming more like a constitutional system, then the need for judicial independence becomes even more apparent.

The question that readily comes to mind here is whether there is judicial independence in the WTO? A simplistic answer to this question is that WTO’s judicial branch lacks independence because its central organ, the DSB, is a political body composed of member representatives, and this is hardly independent of governments. Yet that answer is not satisfactory. One needs to assess whether panels and the Appellate Body operate independently of:

- (1) the DSB and the WTO General Court;
- (2) the members of the WTO; and
- (3) the WTO Director General and Secretariat.⁷⁵

A review of DSU rules shows that its drafters sought to insulate the Appellate Body and the panels from governmental interference. The DSU points to “independence of the members” as one criterion for choosing panelists.⁷⁶

⁷²Robert O. K, Andrew M & Anne-Marie S Legalized Dispute Resolution: Interstate and Transnational, 54 International Organisation 457, 459 – 60 (2000).

⁷³Deborah Z. C. The “Constitutionalization” of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development in International Trade, 12 European Journal of International Law 39, 44 (2001).

⁷⁴*Ibid. op. cit.*

⁷⁵DSU Article 5.2 When Government Officials Serve as Panelists, they do so in their individual capacity and WTO members are directed not to give them instructions.

Although the DSU does not explicitly address “judicial independence” within the WTO, it is interesting to note that several WTO agreements directs governments to provide for an independent judicial review of administrative proceedings.⁷⁷ So the normative importance of judicial independence was recognized by the parties drafting the WTO. The WTO agreements places value on the “independent exercise” of functions carried out by” officials” of the WTO and by the representatives of the members.⁷⁸

Unlike a basic arbitral model, litigant governments do not set to choose any one on the panel. As prescribed by DSU rules, the panel is choosing from a roster compiled by governments.⁷⁹ In each proceeding, the panelists are nominated by the Secretariat subject to the agreement of the disputing parties. If an agreement cannot be reached, however, the Director-General will appoint the panel and can add other names. None of the panelists can be a citizen of the disputing parties, unless the parties so agree.⁸⁰

Once appointed, WTO panels have authority to obtain needed information and to determine their jurisdictional competence. Information is addressed in DSU Article 13 (Right to Seek Information) which says that “Each panel shall have the right to seek information and technical advise from any individual or body which it deems appropriate”. It is interesting that this provision expresses a “right” for the tribunal itself. A recent study of the prerequisites for effective supranational adjudication notes the importance of a guaranteed capacity to generate facts that have been independently evaluated.⁸¹ A similar point has been made by trade law scholars who underline that access to information is essential for WTO panels.⁸² The question of

⁷⁶ Ibid Article 8.3

⁷⁷ Lawrence R. H & Anne-Marie S, Toward a Theory of Effective Supranational Adjudication, 107 Yale Law Journal 273, 303 (1997).

⁷⁸ Florentino D. F& Peter L. H V. B, The Dispute Settlement System of the World Trade Organisation: Institutions, Process and Practice, 75 Philippine Law Journal 1, 30 – 31 (2000).

⁷⁹ United States – Anti-Dumping Act of 1916, Report of the Appellate Body, WT/DS136/AB/R, adopted 26 Sept. 2000 para. 54 & No. 36.

⁸⁰ Dispute Settlement Body Minutes of Meeting held in Centre William Rappard in 5 April, 2001, WT/DSB/M/103, para. 47.

⁸¹ Philip M. N. (1996) GATT Doctrine, 36 Virginia Journal of International Law 379, 454 & 429.

⁸² Konstantin J. J, True Appellate Procedure or Only a Two-Stage Process? A Comparative View of the Appellate Body Under the WTO Dispute Settlement Understanding, 30 Law & Policy in International Business 193, 197, 213, 228 (1999).

the competence of the panel to determine its own competence is not specifically addressed in the DSU. Nevertheless, the Appellate Body has suggested that panels do have that competence.⁸³

The DSB selects the seven persons Appellate Body.⁸⁴ Its members have a four-year term with a possibility of reappointment. They cannot be affiliated with any government.

DSU rules seek to attain autonomy for panels and the Appellate Body. The Article states that panel and Appellate Body deliberations shall be confidential. In addition, other DSU provisions declare that “There shall be no *exparte* communications with the panel or Appellate Body concerning matters under consideration.”⁸⁵ Although the panels rely upon a secondment of staff assistance from the WTO Secretariat, the Appellate Body has its own Secretariat.⁸⁶

From the time that the DSB establishes a panel to the time that the Appellate Body issues its report (or if no appeal to the time of the panel report), DSU rules do not provide any role for the DSB in the adjudicative process.

It is only after the reports are circulated that the DSB regains a role. Appellate Body reports are to be adopted by the DSB within 30 days and un-appealed panel reports within 60 days.⁸⁷ The DSB deliberations are to some extent *pro forma* since reports are almost certain to be adopted because of the above-mentioned negative consensus rule. Nonetheless, the DSU deadlines “the right of members to express their views” on a panel or Appellate Body report.⁸⁸ To facilitate discuss, members having objections to a panel report are directed to circulate written reasons at least 16 days prior to the DSB meeting.⁸⁹ During the DSB debate, government delegates will sometimes criticize the substance of an Appellate Body report. For instance, when

⁸³WTO Agreement Article XI.1,

⁸⁴DSU Article 2.4

⁸⁵ DSU Article 14.1

⁸⁶WTO Agreement Article IX; X.

⁸⁷Chuunni, B.S. WTO and Environment: Legitimisation of Unilateral Trade Sanctions, 37 *Economic & Political Weekly* 133 (2002).

⁸⁸Alvarez, J.E. Judging the Security Council, 90 *American Journal of International Law* 1, 35 (1996).

⁸⁹European Communities – Measures Affecting Asbestos and Asbestos Containing Products, Report of the Appellate Body, WT/DS/35/AB/R, adopted 5 April 2000, paras. 50 – 51.

debating the Asbestos decision, Judis stated that it was difficult to agree with the Appellate Body's interpretation of the GATT's national treatment requirement.⁹⁰

The adoption of panel and Appellate Body reports gives these bodies independence. Nicholas, P.M. suggested in 1996, that the requirement of a consensus to block adoption "could create a partial de facto independence for the panels and the Appellate Body, which no longer must worry about crafting reports that appeal to all, or even a majority of the members."⁹¹ The workability of DSU rules for enabling panels and the Appellate Body to carry out their adjudicative functions independently is not being questioned today. Ironically, what is being questioned is whether the Appellate Body has grown independent of WTO members.

The controversy over amicus curiae briefs in the WTO has received considerable scholarly attention, so only a brief summary will be given here.⁹² In shrimp, the Appellate Body ruled that a panel has authority to accept non-requested information, and is therefore not precluded from considering amicus briefs proffered to it.⁹³ In head bars, the Appellate Body ruled that it had legal authority to decide whether to accept and consider amicus curiae briefs.⁹⁴ Both of these decisions were accepted and adopted by the DSB, although many governments criticized them during the debate. In Asbestos, the competent division of the Appellate Body – following a few days of consultation with other members of the Appellate Body and the parties to the dispute – promulgated a special procedure exclusively for the Asbestos appeal that set rules for any application for leave to file a written brief in the case.⁹⁵ Even as the Appellate Body was drafting and notifying these procedures, about nine private actors sent in submissions, thus

⁹⁰Daniel P, WTO Appellate Body under Fire for Move on Acceptance of Amicus Briefs, BNA Daily Report for Executives, 27 November, 2006, at A1.

⁹¹ *Ibid.*

⁹² Report of the Appellate Body Note 1'07, paragraphs. 53, 55 – 56.

⁹³ General Council, Minute of Meeting held on 22 November, 2006 WT/GA/M/60.

⁹⁴ Minutes of Meeting held on 22 November 2000, *Supra* note 113, Brazil (para. 45), Egypt, (para. 13) India (para. 36), Uruguay (para. 7).

⁹⁵ Measures Affecting Asbestos and Asbestos Containing Products, Report of the Appellate Body, WT/DS/35/AB/R, adopted 5 April 2000, paragraphs. 50 – 51.

confirming the Appellate Body's assumption that there would be considerable interest in offering non-governmental views. The announcement of the new procedure led to a furor in the WTO and call for a meeting of the General Council.

In the day running up to the General Council's meeting, the Appellate Body rejected all of the applications for leave to file an *amicus* brief. After the General Council meeting, the Appellate Body continued to reject all applications and to discard an actual brief.

The fragility of judicial independence in the WTO can be seen in the minutes of the General Council convened to discuss the Appellate Body's action. Almost all of the government's delegates who spoke criticized the Appellate Body for adopting the new procedure, causing it to be posted on the internet, and for continuing to try to open WTO dispute settlement to *amicus* briefs despite the clear disapproval of this cause expressed by the many WTO governments. Even the delegates from Canada, the complaining party in the dispute and an appellant, expressed concern that the Appellate Body division had chosen to adopt these new procedures.

Numerous criticisms were leveled at the Appellate Body. One was the Appellate Body had no legal authority to establish a procedure for considering petitions for leave to submit an *amicus* brief. It should be noted that only one government, the United States, countered that the Appellate Body did have such authority.

Governments also made the point that the Appellate Body members, having expertise in law, could not possibly need input from non-government briefs. The delegates probably thought they were being clever in making this point, yet it is troubling if one takes it seriously, because the governments are saying that the Appellate Body should not have control of its sources of information. Finally, another common criticism was that the Appellate Body had ignored the demonstrations of WTO members following previous decisions that contravened *amicus* briefs. In other words, the delegates were arguing that if the government express displeasure with a decision that they adopt, the Appellate Body should take account of these view points in future adjudications.

It is important to note that the criticism at the General Council meeting amounted to a double barreled attack on the Appellate Body. First, that the Appellate Body should not make legal decisions without reference to the political sentiments of government. Second, that the Appellate Body and perhaps also the panels are without authority to utilize information in Amicus briefs. That said, one needs to be careful about over generalizing from this one disappointing episode. Note importantly, that nothing like that happened before Asbestos, or since then. The governments have typically been respectful of the Appellate Body. It is important to state that every Appellate Body report has been adopted, no government has called the DSB to decline to adopt a report.⁹⁶

⁹⁶Daniel P, WTO Appellate Body under Fire for Move on Acceptance of Amicus Briefs, BNA Daily Report for Move on Acceptance of Amicus Brief, BNA Daily Report for Executives, 27 November, 2006 page 1

CHAPTER THREE

TRADE DISPUTES WITHIN THE JURISDICTION OF THE WORLD TRADE ORGANISATION

3.1 Introduction

The World Trade Organisation Agreements contain the substantive rights and obligations of the members of the World Trade Organisation. Consequently, these Agreements determine the possible grounds and valid basis for a dispute. However, the rules and procedures of the DSU apply to only disputes brought in pursuant to the consultation and dispute settlement provisions of the covered agreements⁹⁷. In line with the foregoing, the basis or cause of action for a dispute under the World Trade Organisation dispute settlement system must be found in the provisions on consultation and dispute settlement of these covered agreements.

Under the DSU⁹⁸, the provision on consultation and dispute settlement on the WTO Agreements are Articles XXI and XXIII of GATT 1994; Article 19 of the Agreement on Agriculture; paragraph 1 of Article 11 of the agreement on the Application of Sanitary and Phytosanitary (SPS) measures; Article 8.4 of the Agreement on Textile and Clothing; Article 14 of the Agreement on Technical Barriers to Trade (TBT); Article 8 of the Agreement on Trade Related Investment Measures (TRIM); Article 17.2 of the Agreement on the Implementation of Article VI of GATT 1994;⁹⁹ Article 19.2 of the Agreement on Implementation of Article VII of GATT 1994;¹⁰⁰ Article 7 and 8 of the Agreement on Pre-shipment Inspection; Articles 7 and 8 of the Agreement on Rules of Origin; Articles 6 of the Agreement on Import Licensing Procedures; Articles 4 and 30 of the Agreement on Subsidies and Countervailing Measures (SCM); Article 14 of the Agreement on Safeguards; Article XXII and XXIII of the General

⁹⁷Article 1.1 and Appendix 1 of the DSU.

⁹⁸Ibid, Article 4.11 and Footnote 4.

⁹⁹Commonly Called the Anti-Dumping Agreement.

¹⁰⁰Commonly Called the Customs Valuation Agreement.

Agreement on Trade in Services; and Article 64 of the Agreement on Trade Related Aspects of Intellectual Property Rights.

3.2 LEGAL BASIS FOR A DISPUTE IN THE WORLD TRADE ORGANISATION'S DISPUTE SETTLEMENT SYSTEM

It is worthy to note that GATT 1994 does not change the text, that of Articles XXII and XXIII of GATT 1947, and these Articles, which were the basis of GATT dispute settlement mechanism, are also the basis of the WTO system. In fact, the DSU is in effect an interpretation and elaboration of Articles XXII and XXIII of GATT 1994. Consequently, all the dispute settlement provisions listed above either rely on or have similar provisions within Articles XXII and XXIII as a basis for settlement.¹⁰¹

However, when a dispute is brought under more than one covered agreement, the legal basis for the claims to be assessed separately under the different agreements. This was the case in the European Communities (EU) – Bananas dispute,¹⁰² where the United States involved the dispute settlement system against the EU banana regime under GATO and GATT 1994.

Under the WTO dispute settlement system, a member may ask for a dispute settlement with another WTO member if the complaining member believes that the other member has violated a WTO agreement or otherwise nullified or impaired benefits accruing to it from any of the covered agreements.¹⁰³ Accordingly, Article XXIII.1 of GATT 1994 states thus:

If any contracting party should consider that any benefit is being nullified or impaired or that the attainment of any objective of the agreement is being impeded as the result of;

¹⁰¹ Article 3.1 of DSU Provides that Members Affirm their Adherence to the Principles for the Management of Dispute as Heretofore Applied Under Article XXII and XXIII of GATT 1947, and the Rules and Procedures as Further Elaborated and Modified Therein.

¹⁰² This is the case for all the provisions listed above, except Article 8.10 of the Agreement on Textile and Clothing; Article 117 of the Agreement on Implementation of Article VI of GATT 1994, Article 14 of the Agreement on Implementation of Article VII of GATT 1994; Article 4 of the Agreement on Subsidies.

¹⁰³ European Communities (EC) – Banana III, Regions for the Importation, Sale and Distribution of Bananas, Appellate Body Report, WT/D527/AB/R, adopted 25 September 1997, DSR 1997: 11,591, paragraphs 252 and 253.

- (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 Agreements; 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.”

This provision deserves special attention for it sets out the conditions under which a WTO member can invoke the dispute settlement system. Indeed, it provides for three alternative options upon which a complaint may rely. However, before a complaint can rely on any of these options, the occurrence of any of the options must have resulted in the direct or indirect nullification or impairment of benefits accruing to a member or the impediment of the attainment of any objective of the agreement on question.

Thus, the WTO dispute settlement system provides for three kinds of complaints, to wit, violation complaint, non-violation complaint and situation complaint.

Violent complaint occurs when a member state of WTO fails to carry out its obligation under any of the covered agreements. However, for a violation complaint to succeed, the complaining member state must establish that there was an infringement of obligation by another member state, and that the infringement directly or indirectly resulted in the nullification or impairment of a benefit that accrued to it under the covered agreement concerned. In fact, a complaint would win the dispute once it satisfies the Panel or Appellate Body that these two conditions exist.

In line with the practice developed under the GATT system¹⁰⁴, and codified in the DSU¹⁰⁵, whenever an infringement of an obligation has been established, the existence of nullification or impairment of benefit is presumed. Accordingly, Article 3.8 of DSU provides that in any case where there is an infringement of an obligation assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. Thus, a breach of the rules of a covered agreement is normally presumed to have an adverse impact on other parties to that covered agreement, and in such cases, it shall be up to the member against whom the complaint has been brought to rebut the charge.

The Appellate Body has concluded that this presumption relates only to the nullification or impairment of benefit when an infringement of obligation has been established, and is not concerned with the issue of whether or not there is such an infringement.”¹⁰⁶

It is clear from the wording of the sub-Articles that the presumption if created is a rebuttable one. However, there has been no single case of a successful rebuttal in the history of GATT and in the WTO till date. Thus, the GATT panels in Italy – Agricultural Machinery Dispute¹⁰⁷ rejected the attempt by the Respondent to show that there was no actual trade impact from the infringement of its obligation.

Furthermore, in the Japan – Leather II (United States) Dispute,¹⁰⁸ the GATT Panel were of the view that the fact that an import quota had not been fully utilized was not sufficient to prove the absence of nullification or impairment of benefits because quotas give rise to increased transaction costs and uncertainties that could affect investment plans.

¹⁰⁴ Article 1.1 of the DSU.

¹⁰⁵ Uruguayan Recourse to Article XXIII of GATT, Panel Report, adopted on 16th November, 1962, BISD115/96, paragraph 15.

¹⁰⁶ Article 3.8 of the DSU.

¹⁰⁷ United States – Wool Shirts and Blouses; Measures Affecting Imports of Woven Wool Shirts and Blouses from India; Appellate Body Report, WT/DS33/AB/R and Corr. 1, adopted 23 May 1997, DSR 1997 1,323 at 334 and 335.

¹⁰⁸ Italian Discrimination Against Imported Agricultural Machinery, Panel Report, adopted 23 October 1958, BISD 75/60 paragraphs 21-2; Canada – FIRA: Administration of the Foreign Investment Review Act, adopted 7 February 1984, 131SD 306/140, paragraph 6 - 7.

In another case worth mentioning,¹⁰⁹ the GATT Panel rejected the claim that the GATT-inconsistent measure caused no or insignificant trade effects, and the agreement that the national treatment requirement in GATT 1947 did not protect expectations on export volumes, but expectations on the competitive relationship between imported and domestic products. In short, one GATT Panel went as far as to observe that the presumption had, in practice, operated as irrefutable presumption,¹¹⁰ and the WTO dispute settlement body has adopted this reasoning.¹¹¹

In practice, one the WTO Panels and Appellate Bodies have concluded that the Respondent violated a rule of covered agreement, they typically cite the Article, except in disputes brought under the GATS. However, where the Respondent made an exceptional attempt to rebut the presumption, the Panel/Appellate Body dedicates a brief paragraphs on the issue of nullification or impairment, at the end of their report.¹¹²

It is worthy of note that an international trade agreement such as the WTO Agreement can never be a complete set of trade rules without gaps. Consequently, it is possible for a WTO member to take measures that although inconsistent with the agreement, but nevertheless frustrates one of its objectives or undermines trade commitments contained in the agreements. In fact, the benefit a member legitimately expects from another member's commitment under the WTO Agreement can be frustrated by measures prescribed by the Agreement, as well as ones consistent with the Agreement. As a result, the non-violation provides a means to redress the imbalance that occurs when a member frustrates another member's benefit by taking measures that are consistent with the WTO Agreement.

According to a GATT Panel in the European Economic Communities – Oilseeds 1,¹¹³ the purpose of this remedy was to encourage member parties of GATT 1947 to make tariff

¹⁰⁹Japan – Leather II (US), Panel on Japanese Measures on Imports of Leather, Panel Report adopted 15 May 1984, BISD 315/94, paragraphs 54 – 56.

¹¹⁰United States – Superfund: Taxes on Petroleum & Certain Imported Substances (Superfund), Panel Report, adopted 17 June, 1987, BSD 34S/136, paragraph 5.1.9.

¹¹¹Ibid, paragraph 5.1.7.

¹¹²European Communities – Banana III, Op. Cit. at 591, paragraphs 252 and 253.

¹¹³Source – World Trade Organisation, 2005 Press Release of 16th September, 2005, Press/416.

concession. Therefore, the Panel held that “when the value of a tariff concession has been impaired by a contracting party giving concession as a result of the application of GATT – consistent measure, the contracting party receiving such concession – whose expectation of improved competitive opportunities is frustrated by that measure – must be given a right of redress.”¹¹⁴

However, according to the WTO Panel and Appellate Body, this remedy should be approached with caution and should remain an exceptional remedy,¹¹⁵ especially since the members negotiated the rules that they agreed to follow and they would expect to be challenged for actions that are not inconsistent with those rules only in exception circumstances.¹¹⁶

According to the DSU¹¹⁷, the complaining party must present a detailed justification in support of any complaint relating to a measure that does not conflict with the relevant covered agreement. It is clear from this provision that there is no presumption of impairment or nullification in relation to non-violation complaint.

By the combined effect of the text of Article XXIII.1(b) of GATT 1994 and the concept of impairment or nullification of benefit,¹¹⁸ for a non-violation complaint to succeed, the complainant must establish the existence of three conditions. The WTO Panel in *EC-Asbestos Dispute*,¹¹⁹ stated that the three conditions include the application of a measure by a member of the WTO, the existence of a benefit accruing under the applicable agreement and the nullification or impairment of a benefit as a result of the application of the measure. Under GATT 1947, 14 cases involving non-violation claims brought under Article XXIII.1(b) were

¹¹⁴European Economic Communities – Oilseeds 1 Payment and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feeds Proteins, Panel Report, adapted on 25 January, 1990, BISD 375/86, paragraph 144.

¹¹⁵Ibid, paragraphs 144 and 145.

¹¹⁶Japan – Film Measures Affecting Consumers Photographic Film and Paper, Panel Report, WT/DS 44/12, adopted 22 April, 1998, DSR 1998: IV, 3, paragraph 10.37.

¹¹⁷Ibid, paragraph 10.36.

¹¹⁸Article 26.1(a) of DSU.

¹¹⁹Note that Article 21.1 of DSU also covers the other kind of non-violation complaint which combines “the measure applied by a member” with the impeded “attainment of any objective of GATT 1994”, instead of combining the non-violation measure with “nullification or impairment of a benefit”, as it typically happens in non-violation complaints.

considered by working parties and panels. The claim succeeded in six of these cases,¹²⁰ and the GATT Council adopted the report in three cases.¹²¹

The DSU specifically address situation complaint in terms of Article XXIII.1(c) of GATT 1994. The DSU¹²² provides that a Panel can only make rulings and recommendations when a party considers that any benefit accruing to a directly or indirectly under covered agreement is being nullified or impaired or the attainment of any objective of a covered agreement is being impeded as a result of the existence of any situation other than a violation or non-violation complaint. In addition, the complaining party is obliged by DSU to present a detailed justification in support of any agreement with respect to this complaint.¹²³

According to the DSU, in situation complaint, the rules and procedures of the DSU apply only up to the point of circulation of the Panel's report to members, while the GATT dispute settlement rules and procedures contained in the decision of 12th April, 1985¹²⁴ apply to the adoption of Panel's report and surveillance and implementation of recommendation and rulings. This means that in situation complaints, the reverse consensus rule does not apply to the adoption of the Panel report and the authorization of the suspension of obligation in the event of non-implementation of rulings. Consequently, any member can block these decisions from being taken by preventing a positive consensus.¹²⁵

¹²⁰EC – Asbestos; Measures Affecting Asbestos and Asbestos-Containing Product; Panel Report WT/DS 138/R and Add. 1, adopted 5 April, 2001, as modified by the Appellate Body Report, WT/DS 135/AB/R, paragraph 8.283.

¹²¹Australian – Ammonium Sulphate: The Australian Subsidy on Ammonium Sulphate, Working Party Report adopted 3rd April, 1980, BISD 11/188; Germany – Sardines: Treatment by Germany of Imports of Sardines, Working Party Report adopted 31 October, 1952, BISD 18/53; EC – Citrus, Panel Report, 7 February, 1985, unadopted, L 15776; EEC – Canned Fruit: Production Aids Granted on Canned Peaches, Canned Pear, Canned Fruits, Cocktail and Dried Grapes, Panel Report, 20 February 1985, unadopted. L/5778; EE-C Oilseeds 1, Op. Cit.; EEC – Oilseeds II, Follow-up on the Panel Report “Payments and Subsidies paid to Processors and Produces of Oilseeds and Related Animal-Feed Proteins” Paid Report 31 March 1992, BISD 395/91.

¹²²GATT Analytical Index, 6th Edition, 1995, pages 668 – 671.

¹²³See Generally Article 26.2 of DSU.

¹²⁴Ibd, Article 26.2(a).

¹²⁵GATT Decision of 12th April, 1989 on the rules and procedures governing dispute settlement under GATT, BISD 365/61–67.

Under GATT 1947, situation complaint was intended to address situations of macro-economic emergency,¹²⁶ and members relied on it to complain about withdrawn concessions, failed re-negotiations of tariff concessions and non-realized expectation on trade flows. However, none of these complaints resulted in a Panel's ruling.¹²⁷ Consequently, GATT practice did not provide guidelines on the criteria for a legitimate situation complaint.¹²⁸ Moreover, this type of complaint has not been brought to the WTO dispute settlement system.¹²⁹

From the foregoing, it can be safely concluded that two types of complaint play a practical role in the WTO dispute settlement process, that is, the violation complaint and less frequently, the non-violation complaint. However, in some cases, these two types of complaints are raised in the alternative, and if the panel finds that there is no violation, the complaint would request the panel to find that there is non-violation nullification or impairment.¹³⁰

3.2.1 Legal Framework for Trade Disputes (The Covered Agreements)

The agreements covered by the DSU can be broadly categorized into five,¹³¹ namely; GATT 1994, General Agreements on Trade in Goods, GATS, TRIPS and the WTO Agreement.

The WTO Agreement does not contain specific provision on consultation and dispute settlement to deal with matters arising under the WTO Agreements itself. However, it is one of the covered agreements under the DSU together with the DSU itself.¹³²

¹²⁶ Article 26.2 of the DSU implicitly excludes the possibility of an appeal against a Panel Report based on a situation complaint. This appears to preclude the Appellate Body from reviewing the legal criteria found by a panel to be the requirements of a valid situation complaint on the basis of Article XXIII.1(i) of GATT 1994 and Article 26.2 of the DSU.

¹²⁷ For instance, in cases of general depression, high unemployment, collapse of the price of a commodity and balance-of-payment difficulties.

¹²⁸ GATT Analytical Index, Op. Cit., pages 668 – 671.

¹²⁹ Ibid, page 67.

¹³⁰ Source – World Trade Organisation, 2005 Press Release of 16th September, 2005, Press/416 obtained from.

¹³¹ Japan – Film, Op. Cit. at 1179; EC – Asbestos, Op. Cit, page 135.

¹³² Article 1.1 and Appendix 1 of DSU.

Most of the multilateral agreements on trade in goods¹³³ apart from GATT 1994, includes an express reference to Article XXII and XXIII of GATT or paraphrases the criteria in them. In these cases, the requirements and types of complaint open to WTO members are the same as discussed above, with minor adaptations. For instance, when one talks of failure to carry out obligations or of benefits accruing to a party, it means obligations or benefits accruing under the respective agreement in question.

However, although the SCM Agreement¹³⁴ refers to Article XXII and XXIII of GATT 1994, the Agreement went further to specifically prohibit the requirement of claims of nullification or impairment of benefit¹³⁵ in relation to the prohibited subsidies.¹³⁶ Consequently, Article 3.8 of the DSU is not applicable to disputes under the SCM Agreements.¹³⁷

Article XXII and XXIII of GATS¹³⁸ contain its dispute settlement provisions. These provisions provide for only two types of complaints, which are the violation complaint and the non-violation complaint. Consequently, situation complaint does not exist in GATS. In addition, there is no provision relating to the impediment of the attainment of any objective of GATS.

In regards to violation complaint, GATS¹³⁹ stipulates that any WTO member who considers that another member has infringed its obligation under the GATS shall have recourse to the DSU. Implicitly, GATS abandoned the requirement of nullification or impairment in addition to the failure to carry out obligation. Consequently, Article 3.8 of the DSU does not apply to complaints brought under GATS.

However, the relation to non-violation complaint, GATS made similar provisions to that contained in Article XXIII.1 (b) of GATT 1994. Therefore, a member can allege the nullification

¹³³Davey, William J., *The WTO Dispute Settlement System in Trade Environment and the Millennium* 119 Cury P. Sampson/W. Bradu Chambers Eds (Tokyo: United Nations University Press 1999) at page 170.

¹³⁴See Annex 1A of the Marrakesh Agreement of 1994, establishing WTO.

¹³⁵Article 30 of SCM Agreement.

¹³⁶*Ibid*, Article 4.

¹³⁷*Ibid*, Article 3 defines the prohibited subsidies to include Export Subsidies and Import Substitution Subsidies.

¹³⁸Not in that there is no presumption of nullification or impairment; but in the sense that there is no nullification or impairment that needs to be presumed.

¹³⁹The GATT as contained in Annex 1B of the WTO Agreement.

or impairment of a benefit it reasonably expects to accrue to it under a specific commitment of another member, even though that other member did not take any measure inconsistent with GATS.¹⁴⁰

The TRIPS Agreement¹⁴¹ made reference to Article XXII and XXIII of GATT 1994. Consequently, one could safely conclude that the three types of complaint are the requirements for nullification or impairment of benefits, or the impediment of any objective of TRIPS Agreement apply to disputes brought under TRIPS Agreement.

However, the TRIPS Agreement excludes the application of non-violation and situation complaints to disputes under it for the first five years of the entry into force of the WTO Agreement.¹⁴² The Agreement mandated the TRIPS Council to examine the scope and modalities for the application of these complaints to TRIPS Agreement during the five years moratorium and submit recommendations to the Ministerial Conference for approval.¹⁴³

The period of five years expired on 31st December, 1999 and the TRIPS Council has not submitted any recommendation in relation to this to the Ministerial Council. This resulted in a controversy among the WTO members on whether the non-violation complaint and the situation complaint can be brought under the TRIPS Agreement since the five years had expired and the Ministerial Conference had not approved any recommendation on the scope and modalities for their application.

In relation to this controversy, it is believed that since the five years moratorium had expired and the TRIPS Council had not submitted any recommendation to the Ministerial Council, WTO members can bring non-violation and situation complaints under the TRIPS Agreement. However, notwithstanding this, neither non-violation complaint nor situation complaint has been brought under the TRIPS Agreement.¹⁴⁴

¹⁴⁰ Article XXIII.1 of GATS.

¹⁴¹ Ibid, Article XXIII.3.

¹⁴² Article 64.1 of TRIPS.

¹⁴³ Ibid, Article 64.2.

¹⁴⁴ Ibid, Article 64.3.

The WTO Ministers at their fourth ministerial session in 2001 directed the TRIPS Council to continue its examination of the scope and modalities for the application of non-violation and situation complaints under the TRIPS Agreement and to submit its recommendation to them at their fifth session that took place in September, 2003.¹⁴⁵

3.3 Possible objects of a complaint to the Dispute Settlement Body of the World Trade Organisation.

The different types of complaint available under the covered agreements having been discussed, the imperative question that arises here is – What can constitute the object of a complaint? In other words, against what can the complaint be directed? The answer to this question would serve to delineate the jurisdiction of the WTO Panels and Appellate Body.

The DSU gives the DSB jurisdiction over all disputes that arise between members under any of the covered agreements.¹⁴⁶ However, the object of a dispute when viewed in legal terms depends on the contents of the agreement in question, that is to say, on the type of complaint possible under the particular agreement and the substantive provision in question. This being the case, the possible objects of a complaint on the basis of the common structure of the provisions of the covered agreement can be categorized as follows;

A provision that prohibits certain actions¹⁴⁷ can be infringed by positive actions.¹⁴⁸ Therefore, inaction¹⁴⁹ cannot infringe on such a provision.¹⁵⁰ According to a Panel,¹⁵¹ the positive action in a question could be a formal regulation. However, an informal instruction

¹⁴⁵WTO Press Release, Op. Cit. 16.

¹⁴⁶Paragraph 11.1 of the Doha Decision on Implementation.

¹⁴⁷The failure to abrogate a laid that impedes exports should not be qualified as omission in the technical sense, as the violation is found in the law in question, which is a positive act.

¹⁴⁸Japan – Semi Conductors: Trade in Semi-Conductors, Panel Report, adopted 4 May 1988, BISD 35S/116, paragraph 117.

¹⁴⁹For instance, Article XI of GATT 1994 prohibits export restrictions. An informal instruction issued by the government of a member states, once such instruction effectively restricts exports amounts to a violation of the Article, and therefore considered to be a positive action.

¹⁵⁰Examples of such provisions include: Article 25.1 of the TRIPS Agreement requires members to provide for the protection of new or original independently created industrial designs; Article 12.2 of the Agreement of Safeguards and Article X.1 of GATT 1994 containing notification and transparency requirements, and Article 12.3 of the Agreement of Safeguards on Consultation.

¹⁵¹Article 6.2 of the DSU.

issued by the government of member states, if it effectively carries out the prohibited act, would amount to a positive action.¹⁵²

On the other hand, where the provision of a covered agreement¹⁵³ requires the taking of positive actions and do not prohibit certain actions, the situation becomes different. Here, the member states are required to pass and apply laws to meet such obligations. Therefore, inaction or an omission to pass and apply the necessary laws would be at the heart of a violation of the obligation, and a violation complaint can be brought when a member has done nothing or where the laws passed and applied do not for some reasons meet the required standards.

The DSU¹⁵⁴ requires a complainant to identify in its request for the establishment of a panel, the specific “measures” at issue. In Guatemala – Cement 1 dispute,¹⁵⁵ the Appellate Body stated that “measures” in Article 6.2 of the DSU include any act of a member, whether or not legally binding, a member government’s non-binding administrative guidance and also an omission or a failure to act on the part of a member.

From this statement of the Appellate Body, it is clear that the term “measures” in the Article should not be understood to refer only to complaint against positive acts and to exclude inactions, especially since the Article applies to all complaints and complaints can be pursued against inactions where the provision of the covered agreement in question requires positive action.

Thus, in conclusion, it is arguable that what can become the object of a violation complaint essentially depends on the obligations underlying the claim.

The WTO Agreement is an international agreement binding the WTO members under public international law. It binds only the signatory states and separate customs/territories. Thus,

¹⁵²Guatemala – Cement 1; Anti-Dumping Investigation Regarding Portland Cement from Mexico, Appellate Body Report, WT/DS60/AB/R, adopted 25 November, 1998, DSR 1998; IX, 376, Footnote 47.

¹⁵³Japan – Film Op. Cit., paragraph W.52.

¹⁵⁴Japan – Semi Conductor, Op. Cit. paragraph 117; GGC-Desert Apples; Restriction on Dumping of Desert Apples – Complaint by Chile, Panel Report, adopted 22nd June, 1989, BISD 365/93, paragraph 126; Argentina – Hides and Leather; Measures Affecting the Export of Bovine Hides and Import of Finished Leather, Panel Report, WT/DS 155/R and Corr. 1, adopted 16 February 2001, paragraphs 11.17, 11.12 and 11.51.

¹⁵⁵Ibid, paragraph 10.56.

private actors cannot infringe the obligations contained therein. Consequently, as a general rule, only governmental measures of member states can be object of a complaint in the WTO dispute settlement system.

In *Japan – Film*,¹⁵⁶ the Panel acknowledged that WTO Agreement is an international agreement, in respect of which only national governments and separate customs/territories are directly subject to obligations, and it follows obligations. On this basis, actions by private enterprises which limited exportation of semi-conductors from Japan were attributed to Japan.¹⁵⁷

In regards to situation complaint, it is arguable that a member may be held liable for private actions, against which the member did not act. However, this has not been tested in both the GATT and WTO systems.

Under the traditional public international law, which are typically states, are responsible for the activities of all branches of government within their system of governance, and also for all regional levels or other sub-divisions of government.¹⁵⁸

This principle applies in WTO system. Thus, the DSU¹⁵⁹ specifically provides that dispute settlement system can be invoked in respect of measures taken by regional or local governments or authorities within the territory of a member. However, this would not be the case where the covered agreement in question expressly excludes such acts taken by regional or local government from the coverage of certain obligations.

During the implementation phase of the measures taken by the regional or local governments, particular rules apply. As a result, where a regional or local authority of a member – by implication that the term measure in Article XXIII.1(b) and Article 26.1 of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of government, not those of private parties. However, this notwithstanding, the Panel was of the view that while this truth

¹⁵⁶Japan – Semi Conductor, Op. Cit. paragraph 102.

¹⁵⁷Shaw.M N., International Law 2nd Edition, (Cambridge: Groticus Publication Limited, 1986) page 126.

¹⁵⁸Article 22 DSU.

¹⁵⁹See Ibid, Article 22.9; Article XXIV 12 of GATT and Article 1.3(a) of GATTS.

may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions.

However, in such case, whether such private action could be attributed to the member state in question and therefore actionable would depend on the peculiarities of each case,¹⁶⁰ and sufficient governmental involvement is the decisive criteria in determining when the private action would be deemed to be a governmental measure.¹⁶¹

For government involvement to be sufficient, private behavior must be a very strong tie to some governmental action. Hence, there must be an administrative structure or legislation by the government which operated to exert maximum possible pressure in the private sector to act in a manner inconsistent with that government's WTO takes a measure that is inconsistent with the provision of a covered agreement, such member must take such reasonable measures that are available to it to ensure compliance.¹⁶²

¹⁶⁰ Article 14 of the TBT Agreement.

¹⁶⁰ Article XVI.4 of the WTO Agreement.

¹⁶¹ For instance claims about Taxes which discriminate against imports and contravenes Article 111.2 of GATT 1994 are typically directed at the tax legislation and not at the tax imposed on a specific shipment of goods at a specific time in the recent past.

CHAPTER FOUR

DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANISATION

4.1 Introduction

The Dispute Settlement System of the World Trade Organisation has been praised as one of the most important innovations of the Uruguay Round. However, this should not be misunderstood to mean that the system was a total innovation as GATT had a dispute settlement system, which evolved quite remarkably over nearly 80 years of the basis of Articles XXII and XXIII of GATT 1947.

By the rudimentary rules of GATT 1947¹⁶³, member states were empowered to jointly deal with any dispute between individual member states. Accordingly, in the early years of GATT 1947, disputes were decided by the rulings of the Chairman of the GATT Council. Later, the disputes were referred to working parties composed of representatives from all interested member states, including the members that are in dispute. In resolving disputes, the working parties made reports that were adopted by their consensus decisions.

Panels later replaced the working parties of the GATT system. The Panels, which comprised of three or five independent experts unrelated to the disputing parties, wrote independent reports with recommendations and rulings for resolving the dispute. These reports were relevant to the GATT Council and become legally binding on the parties to the dispute upon their approval by the GATT Council. Thus, the GATT Panels built up a body of jurisprudence, which remained important today, and followed an increasingly rules-based approach and judicial style of reasoning in their reports.

Several principles and practices that emerge in the GATT dispute settlement system were, over the years, codified and sometimes modified in decisions and understandings of the member states of GATT 1947.¹⁶⁴ The most important of these decisions and understandings

¹⁶³ Article XXIII: 2 of GATT 1947.

¹⁶⁴ Denning, J F, McKenna & Cuneo, Law and Practice of the World Trade Organisation, Statement of Agreements Administrative Action: The WTO Agreement and the Uruguay Round Act, (New York; Oceana Oceana Publications Inc: 1998) Booklet/Released 98 – 8 (General Editor McKenna & Cuneo) written by Linda C. Reif at page 4.

included the Decisions on Procedures under Article XXIII¹⁶⁵; the Understanding on notification, consultation, dispute settlement and surveillance¹⁶⁶; the decision on dispute settlement contained in the Ministerial Declaration of 29 November, 1982¹⁶⁷; the Decision on Dispute Settlement of 30th November, 1984¹⁶⁸.

Furthermore, most of the plurilateral agreements that emerged from the Tokyo Round of multilateral trade negotiations of member states of GATT, known as the “Tokyo Round Codes” contained code-specific dispute settlement procedures, which like the codes as a whole, were applicable only to the signatories of the codes and only with regards to the specific subject matter.

4.2 The Dispute Settlement System of the World Trade Organisation

The GATT system was relatively successful as an international dispute settlement mechanism. In fact, notwithstanding the flaws in the system, yet, it worked better than might be expected, and some have argued that it worked better than those of the World Court. It produced 100 or so formal decisions more than the International Court of Justice during a comparable period of between 1947 and 1986.¹⁶⁹ One exclusive academic study of the GATT dispute settlement system conducted that countries with legitimate complaints achieved complete satisfaction in some 60 percent of the cases and partial satisfaction in most of the rest.¹⁷⁰ It is worthy of note that out of 233 cases initiated under the system as at September 1988, panel or working party reports were completed on 73 cases, others were either settled or withdrawn. Moreover, the compliance record of GATT Panel recommendations was very respectable in that

¹⁶⁵BISD 145/18 decided on 8th April, 1966.

¹⁶⁶268 BISD 210 (1980), adopted on 28th November, 1979.

¹⁶⁷BISD 295/13 (1982).

¹⁶⁸BISD 318/9.

¹⁶⁹Davey, W. J., The WTO Dispute Settlement System in Trade, Environment and the Millennium 119, Cury P. Sampson & W. Bradnee Chambers Eds. (Tokyo, New York, United Nations' University Press, 1999) Chapter 5, at 146.

¹⁷⁰Hudec, R E., Embracing International Trade Law, (Salem, NH: Butterworth Legal Publishers, 1993).

of approximately 117 cases for which there is information, only about 8 – 10 have resulted in panel reports which have not been followed.¹⁷¹

However, the development of the GATT dispute settlement system, which involved the GATT Council and the Tokyo Round Codes Committees, was trailed by certain inherent weaknesses. These weaknesses were brought about by the rules of positive consensus¹⁷² that existed under the system. Under the system, positive consensus was required to refer a dispute to the panel; to adopt a panel's report; as well as to authorize counter measure against a non-implementing member and the disputing parties were not excluded from participating in the decision making. In other words, the Respondent (that is, member state whom action was being questioned) could block the establishment of panel, the adoption of panel's report and the authorization of counter measures against non-implementation of the report.

Thus, the GATT system was criticized because under its consensus decision-making rules, a party could prevent the dispute settlement process from starting and, even if the process was allowed to go forward, a losing party, could prevent formal adoption of a decision against it and losing parties did so more frequently over time.¹⁷³ Without adoption, the report remained the limbo. It had no status in GATT but only expressed the views of three or five experts and the dispute remained unsolved.

Furthermore, in some instances, where rules pertaining to a specific subject matter existed, both in GATT 1947 and in one of the Tokyo Round Codes, a complainant had some leeway for “forum-shopping” or forum-duplication”, that is choosing the agreement and the dispute settlement mechanism that promised to be the most beneficial to the interest or launching two separate disputes under different agreements on the same subject matter. For instance, Article VI

¹⁷¹Jackson, H J The World Trading System Law and Policy of International Economic Relations, (London, England, The MIT Press, Cambridge: 1991) Chapter 4, pages 92, 98 – 101.

¹⁷²Positive Consensus meant that there had to be no objection from any contracting party to the decision.

¹⁷³By GATT Analytical Index, 6th Edition, 1995, pages 668 – 671, of the 25 Panel reports circulated in the five-year period from 1986 to 1990, only 3 were not adopted. Of the 24 reports circulated in the five-year period from 1991 – 1995, 11 were not adopted.

of GATT 1947 and the Tokyo Round SCM (Subsidies and Countervailing Measures) Code represent, as among GATT 1947 member states, a package of rights and obligations regarding the use of countervailing measures. The Appellate Body in the Brazil-Desiccated Coconut Dispute¹⁷⁴ noted the fact that Article VI of the GATT 1947, could be invoked independently of the Tokyo Round SCM Code under the previous GATT system as demonstrated by the panel in the US-Canadian Pork dispute.¹⁷⁵

As a result of the foregoing, there was a perception that the GATT system was not adequate. It was also believed that cases that should have been resolved in the system were never even brought to it because of this perceived shortcoming.

In the 1980's, the system deteriorated as member states increasingly blocked the establishment of panels and the adoption of panel reports. This resulted in a decreasing confidence by the member states in the ability of the GATT system to resolve difficult cases, which in turn, led to individual member states taking more unilateral actions against other parties in order to enforce their rights, instead of invoking the GATT dispute settlement system.¹⁷⁶

For instance, in 1970 and 1980's, the United States Steel Industry argued for protection against European and Asian Steel imports. The United States firms were less efficient and had higher costs than the European and Asian Firms. The United States invoked Section 301 of its Trade Act of 1974, not to provide consumers with less expensive and better quality products but to protect the domestic firm from going out of business. In the end, Section 301 action threatened to cut them off from the American market, foreign steel producers implemented voluntary restraint agreement.¹⁷⁷

¹⁷⁴Brazil – Desiccated Coconut: Countervailing Duty applied by Brazil, dispute brought by Philippines and Sri Lanka, Appellate Body Report, DS 22 and DS 30 respectively at page 17.

¹⁷⁵United States – Canadian Pork Countervailing Duty imposed by United States on Imported Pork, Panel, DS 167.

¹⁷⁶This is now excluded by Article 23.1 of the DSU.

¹⁷⁷Curzon, Gerald and Victoria C, 1976, The Management of Trade Relations in the GATT, in Andrew Schonfield, Ed., International Economic Relations of the Western World, 1959 – 1971 (Oxford: Oxford University Press, 1991), page 156.

As these inherent weaknesses in the GATT system led to increasing problems in the 1980's, many of the member states of GATT 1947 felt that the system needed improving and strengthening. Accordingly, negotiations on dispute settlement were included and given high priority on the agenda of the Uruguay Round Negotiations held between 1986 and 1994.

In the Uruguay Round Trade negotiations, the United States in particular wanted to improve and strengthen the dispute settlement system. Traditionally, the United States had supported a more judicial-like system in GATT, whereas major powers such as the European Communities and Japan preferred a system that stressed the negotiated settlement of disputes.¹⁷⁸ However, one of their major concerns in international trade was what they viewed as inappropriate US unilateralism and they became convinced during the course of the Uruguay Round that one way to restrain US unilateralism would be to strengthen the GATT dispute settlement system and persuade the United States to commit to use the improved system in lieu of taking unilateral action.¹⁷⁹

However, midway through the Uruguay Round negotiations, the negotiating members of GATT 1947 were ready to implement some preliminary results of the negotiations on certain issues. Consequently, they adopted the decision of 12 April, 1989, on improvement to the GATT Dispute Settlement Rules and Procedures.¹⁸⁰

The WTO dispute settlement system was part of the result of the Uruguay Round, and is embodied in the understanding of rules and procedures governing the settlement of disputes, commonly referred to as the Dispute Settlement Understanding (DSU). The DSU, which constitutes Annex 2 to the WTO Agreements, sets out procedures and rules that define today's dispute settlement system. It introduced procedures and rules for resolving trade disputes that were much improved over the GATT procedures and in its first 18 months, the WTO settled

¹⁷⁸Davey, W J. "Dispute Settlement in GATT", Fordham Journal of International Law 11(1), 1987, 51.

¹⁷⁹Davey, W J. The WTO Dispute Settlement System in Trade, Environment and the Millennium 119, Op. Cit.

¹⁸⁰BISD 365/61 (Montreal mid-term 1989 Decision), Implemented on a Provisional Basis Pending the conclusion of the Uruguay Round.

more than 50 trade disputes.¹⁸¹ In fact, the most significant innovation of the DSU is that it eliminated the above highlighted inherent weakness in the GATT procedure. Importantly, is the quasi-automatic adoption of dispute settlement reports which is a new feature of the WTO dispute settlement mechanism.

4.3 Function, Objectives and key features of the System

For several decades now, many countries have come to recognize the crucial role that dispute settlement mechanism plays for any treaty system. This is particularly the case for a treaty system designed to address the myriads of complex economic questions of international relations today and to facilitate the cooperation among nations that is essential to peaceful and welfare enhancing role of those relations.

Consequently, the WTO dispute settlement system is mandated to perform certain important functions and has certain significant and key features. These functions, objectives and key features may be considered as follows:

4.3.1 Functions

(a) Providing Security and Predictability to the Multilateral Trading System

The system is a central element in providing security and predictability to the multilateral trading system¹⁸². Accordingly, the DSU states that the central objective of the system is to provide security and predictability to the multilateral trading system. International trade in the WTO is understood as the flow of goods and services between member states.¹⁸³ However, such trade is typically not conducted by states but rather by private economic operators. These market operators need stability and predictability in the government laws, rules and regulations applying to their commercial activities, especially when they conduct trade on the basis of long-term transaction.

¹⁸¹Malonis, J A., Encyclopedia of Business, 2nd Edition, (London: Cale Grump 2000), page 1033.

¹⁸²Article 3.2 of Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU), Annex 2 of the 1994 Marrakesh Agreement establishing the World Trade Organisation.

¹⁸³The World Book Encyclopedia, (Chicago, USA; World Book Inc. 2001) IXII.10 at page 348.

In the light of the foregoing, the DSU aims at providing a fast, efficient, dependable and rule oriented system to resolve disputes about the application of the provisions of the WTO Agreement. It is believed by the WTO member states that by reinforcing the rule of law, the WTO dispute settlement system would make the trading system more secure and predictable. Thus, whenever a WTO member alleges non-compliance with the WTO Agreement, the trading system provides for a relatively rapid resolution of the matter through an independent ruling that must be implemented promptly, or the non-implementing member will face possible trade sanctions.¹⁸⁴

(b) Preserving the Rights and Obligations of WTO Members

Dispute in the WTO is mainly about broken promises. It arises when one WTO member adopts a trade policy measure that one or more other members consider to be inconsistent with the obligations set out in the WTO Agreements. In such a case, any member who feels aggrieved is entitled to invoke the provisions of the DSU in order to challenge that measure.

Whenever the parties to a dispute fail to reach a mutually agreed solution, the complaint is guaranteed a rule based procedure in which the merit of the claims would be examined by an independent body, and under which the respondent whose measure is being challenged could defend if it disagrees with the claims raised in the complaint.

Furthermore, even if the complainant succeeds, the desired outcome is to secure the withdrawal of the measure found to be inconsistent with the WTO Agreement, compensation and countermeasures being available only as secondary and temporary response to a contravention of the WTO Agreement.¹⁸⁵

In addition, the DSU stipulates that the recommendations and rulings of the Dispute Settlement Body should reflect and correctly apply the rights and obligations of the parties as they are set out in the WTO Agreement. The recommendations and rulings

¹⁸⁴See Article 3.7 and 22 of DSU.

¹⁸⁵Ibid.

must not change the WTO law that is applicable between the parties, and cannot add or diminish the rights and obligations of the parties as provided in the covered agreement.¹⁸⁶ Consequently, 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 agreement nor impede the attainment of any objective of those agreement. Hence, even dispute settlements through bilateral arbitration and mutually agreed arrangements must be transparent and consistent with WTO law. In this way, the system serves to preserve the members' rights and obligations under the WTO Agreement.

(c) Clarification of Rights and Obligations through Interpretation

According to the DSU, the dispute settlement system is intended to clarify the provisions of the WTO Agreement in accordance with customary rules of interpretation of public international law. The DSU thus recognizes the need to clarify WTO rules and mandates that this clarification takes place pursuant to customary rules of interpretation. In addition, the DSU implicitly recognizes that panel may develop legal interpretation.¹⁸⁷

One might think that such an interpretation cannot occur in the WTO dispute settlement proceedings because Article IX.2 of the 1994 Marrakesh Agreement establishing the WTO vested exclusive authority to adopt interpretations of the WTO Agreement on the Ministerial Conference and the General Court.

However, it is arguable that the exclusive authority of this Article must be understood to refer to the adoption of authoritative interpretations that are of general application to all WTO members, unlike interpretations by the dispute settlement body that are applicable only to the parties and to the subject matter of a specific dispute. Hence, Article 3.9 of the DSU states that the DSU's mandate to clarify WTO rules is without prejudice to the

¹⁸⁶Ibid, Articles 3.2 and 19.2.

¹⁸⁷Ibid, Article 17.6.

rights of members to seek authoritative interpretation under Article IX.2 of the WTO Agreement.

The DSU refers to the customary rules of interpretation of public international law as the methods of interpretation. It is a known fact that customary international law is normally unwritten. However, the Vienna Convention on the Law of Treaties codified some of the customary rules of interpretation. Notably, the convention¹⁸⁸ embodies many customary rules of interpretation. Although the DSU did not make direct reference to the Articles of the convention, the Appellate Body has ruled that these Articles can serve as a point of reference for discussing the applicable customary rules.¹⁸⁹

According to Article 31 of the Convention, the WTO Agreements are to be interpreted according to the ordinary meaning of the words to the relevant provisions, viewed in their context and in the light of the object and purpose of the agreement. However, in practice, the dispute settlement body seems to rely more on the ordinary meaning and on the context rather than on the object and purpose of the provision to be interpreted.

Thus, the statement by the Appellate Body in *Japan – Alcoholic Beverages II* that Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretative process” interpretation must be based above all upon the text of the treaty”.¹⁹⁰ According to another division of the Appellate Body, a treaty interpreter must begin with and focus upon the text of the particular provision to be interpreted. It is the words constituting that provision read in their context that the object and purpose of the state parties to the treaty must first be sought.¹⁹¹

¹⁸⁸ See Article 31, 32 and 33 of The Vienna Convention on the Law of Treaties.

¹⁸⁹ *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, DSR, 1996:1, 3 at pg. 23; *Japan – Taxes on Alcoholic Beverages II*, Appellate Body Report, DSR 1996:1, 97 at p.104.

¹⁹⁰ *Japan – Alcoholic Beverages II: Taxes on Alcoholic Beverages*, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/ AB/R, adopted 1 November, 1996, DSR 1996: 1, 97 at paragraph 11.

¹⁹¹ *United States – Shrimp Import Publication of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, adopted 6 November, 1998 DSR 1998: VII 2755 at paragraph 181.

By Article 32 of the convention, reference can be made to the negotiating history of the Agreement to confirm interpretation made in accordance with the ordinary meaning, context, object and purpose, as well as the situation where the result of such interpretation is ambiguous, obscure, manifestly absurd or unreasonable.

On the other hand, Article 33 of other convention made provision for the interpretation of treaties authenticated in two or more languages. The WTO Agreement is authenticated in English, French and Spanish.¹⁹²

In conclusion, the members of the WTO recognize that the dispute settlement system serves to preserve their rights and obligations under the covered agreements, and to clarify the existing provisions by those agreements in accordance with rules of interpretation of public international law.

4.3.2 Objectives

(a) Mutually Agreed Solution as the Preferred Solution

Under the DSU,¹⁹³ the primary objective of the dispute settlement mechanism is to secure a positive resolution of a dispute, preferably through a solution that is mutually acceptable to the parties to a dispute and consistent with the covered agreement. Accordingly, the DSU enjoins panels to give adequate opportunity to parties to a dispute to develop a mutually satisfactory solution.¹⁹⁴

It is clear from the above provisions of the DSU that unlike other judicial systems, the priority of the WTO dispute settlement system is to settle disputes, preferably through a mutually agreed solution that is consistent with the WTO Agreements, and to make rulings or to develop jurisprudence.

¹⁹²Source – World Trade Organisation, press Release of 23rd April, 2004.

¹⁹³Article 3.7.DSU.

¹⁹⁴Ibid, Article 11.

(b) Prompt Settlement of Disputes

It is well known that justice delayed is justice denied. Consequently, to be achieved, justice must not only provide an equitable outcome, but must also be swift. In line with this saying, the DSU¹⁹⁵ emphasizes that the prompt settlement of dispute is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of members.

In order to achieve efficiency, the DSU sets out in considerable detail, the procedure and corresponding deadline to be followed in resolving disputes, including the right of a complainant to go on with a complaint even in the absence of agreement by the respondent.¹⁹⁶ Moreover, where a case is adjudicated, it should normally take not more than 9 months or 12 months from the date of establishment of a panel for a panel's ruling or appellate body's report respectively.¹⁹⁷ Consideration of disputes would even take lesser time in cases which the parties or panel or appellate body considers to be urgent, including those disputes that concern perishable goods.¹⁹⁸

(c) Prohibition against Unilateral Determination

The WTO members, via the DSU, have agreed to resort to the dispute settlement mechanism for settling their disputes instead of taking unilateral actions.¹⁹⁹ In other words, members of the WTO have agreed to abide by the agreed procedures under the DSU; to respect the rulings of the dispute settlement body once they are issued; and not to take the law into their own hands.

The DSU, in order to prevent the detrimental effect of resolving dispute by taking unilateral actions, provides that the WTO members must have recourse to the WTO system of settlement dispute whenever they seek redress against another member under the WTO

¹⁹⁵Ibid, Articles 3.3.

¹⁹⁶Ibid, Articles 4.3 and 6.1.

¹⁹⁷Ibid, Article 20.

¹⁹⁸Ibid, Articles 4.9 and 12.8.

¹⁹⁹Ibid, Article 23.

Agreement.²⁰⁰ Moreover, the complaining member should only take action based on the findings of an adopted panel or appellate body report or arbitration around and must respect the procedures stipulated in the DSU for the determination of the time for implementation, as well as impose countermeasures only when authorized by the dispute settlement body.²⁰¹

4.3.3 Key Features

(a) Exclusive Jurisdiction

By mandating recourse to the WTO system for resolving trade disputes as already stated, the DSU not only excludes unilateral actions but also precludes the members from using other for a for settling trade disputes arising from the WTO Agreements.

No dispute involving the WTO agreements has ever been taken to the international Court of Justice (ICJ). However, one may ask whether the court has jurisdiction over such a dispute or whether the DSU would be held to be exclusive. In answer to this question, Article 23.1 and 2(a) of the DSU expressly excludes the use of other forms to settle trade disputes. In fact, according to a panel in US – Certain EC Products, the structure of Article 23 is that the first paragraphs states the general prohibition or general obligation, that is, when members seek the redress of a WTO violation, they shall do so only through the DSU. This is a general obligation and any attempt to seek redress can take place only in the institutional framework of the WTO and pursuant to the rules and procedures of the DSU²⁰². Thus, it can be safely concluded that the ICJ do not have jurisdiction to certain disputes arising from WTO Agreements, and any party that takes such a dispute to the ICJ is in fact violating Article 23 of the DSU.

(b) Compulsory Nature

One of the important features of the WTO dispute settlement system is that, unlike other international dispute resolution, it is compulsory. All WTO members have signed and

²⁰⁰See Ibid, Article 23.1.

²⁰¹Ibid, Article 23.2(a), (b) and (c).

²⁰²Single Undertaking means that the WTO Agreements had to be signed in its totality (except) for agreements signed in Annex 4 known as Plurilateral Agreements). Signatories were not allowed to sign only individual parts of the entire package.

rectified the WTO Agreements as a single undertaking²⁰³ of which the DSU is part. Therefore, all WTO members are subject to the dispute settlement system for all disputes arising under the WTO Agreements. Consequently, there is the need for any member to accept the jurisdiction of the dispute settlement system in a separate declaration or agreement as the consent to accept the dispute settlement system is already contained in a member's accession to the WTO. As a result, every member enjoys assured access to the dispute settlement system and a responding member cannot escape the jurisdiction of the dispute settlement system.

(c) Participation in the Dispute Settlement System

Only member governments of WTO can participate in the dispute settlement process either as parties or as third parties. Consequently, the WTO Secretariat, WTO observer countries, other international Organisations, regional or local governments, non-governmental Organisation, private individuals and companies are not entitled to initiate dispute settlement proceedings in the WTO.²⁰⁴ With respect to Annex 4 – plurilateral agreements, the DSU is only applicable to those members which have become parties to the relevant plurilateral agreement and is subject to the adoption of a decision by the parties to each of these agreements settling out the terms for the application of the DSU to the individual agreement,²⁰⁵ including any special additional rules or procedures. Only the committee or government procurement has taken such a decision.²⁰⁶

However, the application of the DSU to these covered agreements is subject to the additional or special dispute settlement provisions of the covered agreements listed in Appendix

²⁰³United States – Certain EC Products: Import Measures on Certain Products from the European Communities, Appellate Body Report, WT/DS165/AB/R, adopted 10 January 2001.

²⁰⁴Source: Understanding the WTO: Settling Disputes – A Unique Contribution WTO Publication of 23rd April, 2004.

²⁰⁵For example Section 301 et. seg of the United States Trade Act or the Trade Barriers Regulation of the European Communities.

²⁰⁶World Trade Organisation, A Handbook on the WTO Dispute Settlement, System (Geneva; Cambridge University Press 2004), Chapter 1.

2 to the DSU, which are relevant to the dispute.²⁰⁷ These special or additional rules or procedures are specific rules designed to deal with the particularities of disputes under a specific covered agreement,²⁰⁸ and they take precedence over the rules of the DSU whenever there is a difference or conflict between them. Such difference or conflict exists when the provisions of the DSU and the special or additional rules and procedures of a covered agreement cannot be read as complementing each other, because they are mutually inconsistent, and adherence to one of the provisions would lead to a violation of the other provision. In such cases, the DSU rules would not apply.²⁰⁹

4.4 Scope and importance of the System

The importance of the dispute settlement system to the multilateral trading system cannot be over-emphasized, as an international agreement is not worth very much, if its obligations cannot be enforced when one of the signatories fails to comply with such obligation. Indeed, according to William J. Davey,²¹⁰ it would make little sense to spend years negotiating the detailed rules in international trade agreements if those rules could be ignored. Therefore, a system of rule enforcement is necessary. In the WTO, that function is performed by the DSU.

The system for settling disputes helps to realize the practical value of the commitments, which the WTO member countries undertake in the WTO Agreement. It also gives the member countries right of redress when infringements occur, thereby helping to prevent the detrimental effect of unresolved international trade conflicts and to mitigate the imbalance between the stronger and weaker players by having their disputes settled on the basis of rules rather than having power to determine the outcome.

Furthermore, as stated in Article 3.2 of the DSU, the dispute settlement system of the WTO is central element in providing security and predictability to the multilateral trading

²⁰⁷ Article 1.2 of DSU.

²⁰⁸ See Appendix 2 to the DSU, which listed the particular agreements and the specific Articles in the agreements providing for the special or additional rules or procedures for dispute settlement.

²⁰⁹ Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico, Appellate Body Report DSR 1998: IX, 3767 paragraphs 65 and 66.

²¹⁰ Davey, W J., The WTO Dispute Settlement in Trade, Environment and the Millennium 119, loc cit. Chapter 5, at page 145.

system. In the commercial world, such security and predictability are viewed as fundamental prerequisites to conducting business internationally.

More importantly, the DSU provides an integrated dispute settlement system with much broader jurisdiction and less scope for rule shopping or the so called forum shopping. While the traditional panel system of settling dispute within the GATT remains the central feature of this system, the new mechanism indicates a distinctive trend towards judicialising the system with a change from power oriented diplomatic methods of dispute settlement to rule-oriented legal ones.

Hence, the emphasis of the DSU is upon rule oriented rather than power-oriented interpretation and application of the WTO dispute settlement procedure, with a trend towards a more judicial form of process that allows for review of decisions through an Appellate Body decisions. Consequently, the DSU is in turn a view element of the legislation of the World Trade system agreed in the Uruguay Round through the establishment of the WTO and the re-enforcement of substantial rules of conflict conduct.²¹¹

4.5 APPLICABLE LAWS TO LEGAL INTERPRETATIONS OF WORLD TRADE ORGANISATION AGREEMENTS WITHIN THE SYSTEM

Legal interpretations in the WTO Dispute Settlement System must be considered in the context of the general rules of international law regarding interpretation of treaties, as according to the Appellate Body, the WTO laws are not to be read in clinical isolation from public international law.²¹² The general rules of interpretation as admitted by the Appellate Body²¹³ are contained in Article 31 of the Vienna Convention and had attained the status of a rule of customary or general international law. As such, it forms part of the customary rules of

²¹¹Chengwei, L, WTO Dispute Settlement Mechanism – An Analysis of the DSU in Positivism (Northampton, MA: Edward Elgar Pub. 1999 – 2005) Chapter 1.

²¹²US-Standards for Reformulated and Conventional Gasoline, Appellate Body Report, Op. Cit. pg 17.

²¹³Japan-Alcoholic Beverages 11, Appellate Body Report, Op. Cit. pp 10 – 12; see also Indian-Patent Protection for Pharmaceutical and Agricultural Chemical Products, Appellate Body Report, WT DS50/AB/R, adopted 16th January, 1998 DSR 1998:1, 9, para. 46.

interpretation of public international law which the WTO Dispute Settlement Body had been directed to apply by Article 3.2 of the DSU.

According to Article 31 of the Vienna Convention, the principles of treaty interpretation include: ordinary meaning of words of the treaty given in the context and in the light of its object and purpose; any agreement or instrument relating to the treaty which was made and accepted by the parties in connection with the conclusion of the treaty; subsequent agreement between the parties regarding the interpretation of the treaty; subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and other relevant rules of international law. In addition, the treaty must be interpreted in good faith.

Each of these principles of interpretations plays a role in the interpretation of the WTO agreements by the Dispute Settlement Body. Consequently, the Appellate Body in India – Patents (US) emphasized that the duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties, and this should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention.²¹⁴

The principle of good faith has come into play in the interpretation of WTO agreements. Thus, in *US-Shrimp*,²¹⁵ the Appellate Body held that the Chapeau of Article XX of GATT 1994 was but one expression of good faith and also reflected the notion of *abus de droit*²¹⁶. The subsequent actual practice of WTO member states also played a role in the interpretation of WTO agreements. To be binding, however, the practice must have been a concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.²¹⁷

²¹⁴Indian-Patent Protection for Pharmaceutical and Agricultural Chemical Products, Loc. Cit. para. 45 – 46; see also Indian-Quantitative Restriction on Imports of Agricultural, Textile and Industrial Products, Appellate Body Report, WT/DS/91/AB/R, adopted 22 September 1999, DSR 1999:V, 1799, para. 94.

²¹⁵United States – Shrimp: Import Prohibition of Certain Shrimp and Shrimp Products, Op. Cit. paragraph 158.

²¹⁶Cheng, B., General Principles of Law as applied by International Courts and Tribunals, (Slevens and Sons, Ltd., 1953, Chapter 4, in particular, p. 125.

²¹⁷Japan-Alcoholic Beverages II, Appellate Body Report, Loc Cit. pp 12 – 13; see also Yearbook of the International Law Commission, Volume II, p. 222.

Article 32 of the Vienna Convention which allows a treaty interpreter to have recourse to the supplementary means of interpretation, which include the preparatory work of the treaty and the circumstances of its conclusion have also been applied in interpreting WTO agreements. Consequently, the Appellate Body stated that the classification practice of the European Communities and the classification of LAN equipment by United States during the Uruguay Round are part of the circumstances of the conclusion of the WTO agreement and must be used as a supplementary means of interpretation.²¹⁸

Finally, the corollaries of the general rule of interpretation of treaties like the principles of; effective treaty interpretation – which stipulates that interpretation must give meaning and effect to all the terms of a treaty; presumption against conflict; state responsibility; legitimate expectations; and non-retroactivity of treaties plays a vital role in the interpretation of WTO agreements.²¹⁹

4.6 WORLD TRADE ORGANISATION AGENCIES INVOLVED IN THE DISPUTE SETTLEMENT PROCESS

The DSU besides judicialising and codifying former GATT practice has an institutional dimension. It establishes a Dispute Settlement Body (DSB) to administer the rules and procedures for panel proceedings, for appeal against panel decisions to the standing Appellate Body and for adopting panel and Appellate Body reports.

The dispute settlement process involves the practice and third parties to a case,²²⁰ the DSB panels, the Appellate Body, the WTO secretariat, arbitrators, independent experts and several specialized institutions.²²¹

²¹⁸EC-Customs, Classification of Certain Computer Equipment, Appellate Body Report, WT/DS62/AB/R, WT/DS68/AB/R, adopted 22 June, DSR 1998: V, 1851, paragraph 93 – 95.

²¹⁹For the application of these principles, see generally, World Trade Organisation, WTO Analytical Index: Dispute Settlement Understanding Geneva: WTO Publication 2003) paragraphs 29 – 45.

²²⁰The Involvement of WTO Members Governments, who are parties to the dispute as parties or third parties have explained in the discussion on feature as the Dispute Settlement System.

²²¹The exact task and roles of these bodies would be made clear in Chapter 5 of this work.

4.6.1 Panels

Panels, like tribunals, are quasi-judicial bodies, but unlike in a normal tribunal, the panelists are usually chosen in consultation with the countries in dispute and consist of three and possibly five experts selected on an adhoc basis.²²² It is only when the two sides cannot agree on the selection of panelist that the WTO director-general appoints panelists.²²³

Anyone who is qualified and independent can serve as a panelist. Under the DSU, a person is well qualified if he/she has served on or presented a case to a panel, or has served as a representative of a member or of a contracting party to GATT 1947; or as a representative to the court or committee of any covered agreement or its predecessor agreement; or has worked in the secretariat, taught or published on international trade law or policy; or has served as a senior trade policy official of a member state.²²⁴ These criteria could be roughly summarized as establishing three categories of panelists; government officials (current or former), former secretariat officials, and academics. The 135 WTO Panelists positions (filled by 30th June 1999) were filled by 93 different individuals²²⁵. Four individuals have served on four panels and nine individuals have served on three panels. While government officials filled most of these positions (UN positions), 29 positions were filled by academics and positions were filled by former secretariat officials.²²⁶

Panelist for each case can be chosen from a permanent list of well-qualified candidates kept by the WTO Secretariat.²²⁷ To date, about one-third of the panel positions have been filled within the indicative list. The 135 panelists have been filled with persons from a wide range of countries (38 in all) with Switzerland, New Zealand, Australia, Hong Kong/China, and European

²²² Article 8.5 of the DSU.

²²³ Ibid, Article 8.7.

²²⁴ Ibid, Article 8.1.

²²⁵ Some individuals are counted in more than one category in light of their experience.

²²⁶ Davey, W J., The WTO Dispute Settlement System in Trade, Environment and the Millennium 119 Loc. Cit. Chapter 5, of page 150.

²²⁷ Article 8.4 of the DSU.

Union supplying the most.²²⁸ More than one-half of the WTO panelists selected to date had served on a previous GATT or WTO panel at the time of their selection.²²⁹

The panelists served in their individual capacities, not as representatives of any government or Organisation and cannot receive instruction from any government.²³⁰ It is specifically provided that panelists shall not be individuals of parties or third parties in the dispute except with the agreement of the parties to the dispute.²³¹ Moreover, in a dispute involving a developing country, one panelist must be from a developing country of requested.²³²

Under the DSU, panelists composed for a specific dispute must review the case and submit a report to the DSB. The panel must also, where it finds, that the claims of the complainant are well founded and that there have been breaches, of WTO obligations, by a member, make a recommendation for implementation by the respondent.²³³

The WTO Secretariat assists the panels on the legal, historical and procedural aspects of the dispute at issue and provides secretariat and technical support.²³⁴ Thus, the WTO secretariat handles the logistical arrangements of the panelists, provides legal support by advising them on the legal issues arising in a dispute, including the jurisprudence of past panels and the appellate body. By undertaking this task, the WTO Secretariat serves as the institutional memory to provide continuity and consistency between panels, necessary to achieve the DSU objective of providing security and predictability to the multilateral trading system,²³⁵ bearing in mind that the panels are not permanent bodies.

²²⁸Switzerland – 18; Australia – 12; New Zealand – 12; Hong Kong/China – 9; Brazil – 7; South Africa – 6; Canada – 5; Czech Republic – 5; Norway – 5; Egypt 3; Mexico – 3; Poland – 3; Thailand – 3; Chile – 2; India – 2; Japan – 2; Singapore – 2; United States – 2; and one each from Argentina, Austria, Bulgaria, Costa Rica, France, Hungary, Iceland, Korea, the Netherlands, the Philippines, Slovenia, Uruguay and Venezuela.

²²⁹Davey, W J., The WTO Dispute Settlement System in Trade, Environment and the Millennium 119Loc Cot. Chapter 5, at page 151.

²³⁰Article 8.9 of the DSU.

²³¹Ibid, Article 8.3.

²³²Ibid, Article 8.10.

²³³Ibid, Articles 11 and 19.

²³⁴Ibid, Articles 27.1.

²³⁵Ibid, Article 3.2.

The secretariat staff assisting a panel usually consists of at least a secretary and a legal officer, one of who must belong to the division of the secretariat responsible for the covered agreement invoked,²³⁶ and the other to the Legal Affairs Division.

4.6.2 Appellate Body

The Appellate Body was one of the major innovations of the Uruguay Round of unilateral trade negotiations.²³⁷ It is the second and first stage in the adjudication part of the dispute.

The Appellate Body, unlike the panels is a permanent body. It consists of seven members entrusted with the task of reviewing the legal aspects of the reports issued by panels.²³⁸ The Appellate Body hears appeals of panel reports in divisions of three,²³⁹ although its rules provide for the division hearing a case to exchange views with the other four Appellate Body members before the division finalizes its report.²⁴⁰ The members of the division that hears a particular appeal are selected by a secret procedure that is based on randomness, unpredictability, and the opportunity for all members to serve without regard to national origin.²⁴¹

The Appellate Body²⁴² functions to correct possible legal errors committed by panels, and thereby provided consistency of decisions.²⁴³ Under the DSU²⁴⁴, if a party files an appeal against a panel,²⁴⁵ a direct or indirect conflict of interest.²⁴⁶ In addition, all members of the Appellate

²³⁶For example, the Services Division for GATT's disputes, the intellectual property division for TRIPS disputes, the Agricultural and Commodities Division for disputes on the Agreement on Agriculture and the Sanitary and Phytosanitary Agreement. The staff of Rules Division assists Panels dealing with disputes on trade remedies (antidroping and subsidies).

²³⁷The Appellate Body is established and regulated by Article 17 of the DSU. Its working procedures, which it is authorized to draw up itself in consultation with the Chairperson of the DSB and the Director-General, are contained in WT/AB/WP/1.

²³⁸Article 17.6 DSU.

²³⁹Ibid, Article 17.1.

²⁴⁰Rule 4(3) of the Appellate Body Working Procedures.

²⁴¹Ibid, Rule 6(2).

²⁴²Article 17.13 of DSU.

²⁴³See for example, Canada – Certain Measure Affecting Periodicals, Appellate Body Report adopted on 30th July, 1997 WT/DS31/AB/R.

²⁴⁴Decision Establishing the Appellate Body, Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995, WT/DSB/1, dated 19 June, 1995.

²⁴⁵The first seven members of the Appellate Body were James Bachus (USA), Christopher Beeby (New Zealand), Claus-Dieter Ehlermann (Germany), Florentino Feliciano (The Philippines), Said El-Naggar (Egypt), Julio Lacarte-Miro were deemed to have

Body must be available at all times and on short notice,²⁴⁷ and shall keep abreast of dispute settlement activities and other relevant activities of the WTO²⁴⁸.

The members, in accordance with the working procedure²⁴⁹ of the Appellate Body, elect one of them as Chairman, who serves a term of one year or maximum of two years.²⁵⁰ The Chairman is responsible for the overall direction of the business of the Appellate Body, especially with regards to its internal functioning.²⁵¹

The Appellate Body has an independent secretariat, which provides legal assistance and administrative support to it.²⁵² The Secretariat is at Geneva in the WTO headquarters. The panels and the Appellate Body hold their meetings in the Secretariat.

4.6.3 The Director-General and the WTO Secretariat

Under the DSU, the Director General²⁵³ of the WTO may, acting in an ex officio capacity, offer good offices, conciliation or mediation in order to assist members to settle a dispute. Moreover, where in a dispute involving a least-developed country member, a satisfactory solution was not found during consultation, the Director-General would, upon the request by the least-developed country member, offer his or her good report, the Appellate Body's task is limited to reviewing the challenged legal issues, and it may uphold, reverse or modify the panel's findings.²⁵⁴

initial two year terms and were re-appointed to four year terms on expiration of these initial terms. Only one re-appointment is permitted. (Article 17.2 of the DSU).

²⁴⁶ Article 2.14 of DSU.

²⁴⁷ Ibid, Article 17.2.

²⁴⁸ Ibid, Article 17.3.

²⁴⁹ The Working Procedure of the Appellate Body was made by the members of the Body under the power conferred on them by Article 17.9 of the DSU.

²⁵⁰ Rule 5 of the Working Procedures for the Appellate Body Review WT/AB/WP/17 dated 1st May, 2003.

²⁵¹ Rule 5(3) of the Working Procedure.

²⁵² Article 17.7 of DSU.

²⁵³ Ibid, Article 5.6.

²⁵⁴ Ibid, Article 24.1.

However, the Appellate Body has taken a broad view of its power to review panel decisions. Consequently, although the DSU did not discuss the possibility of a reward to a panel partly as a consequence, the Appellate Body has adopted to practice, where possible, of completing the analysis of particular issues in order to resolve cases where it has significantly modified a panel's reasoning. This avoids requiring a party to start the whole proceeding over as a result of those modifications.²⁵⁵

In 1995, the DSB established²⁵⁶ the Appellate Body, and thereafter, appointed the first seven Appellate Body members²⁵⁷ by consensus.²⁵⁸ The members of the Appellate Body are appointed for a term of four years and each member is entitled to be reappointed for one more term.²⁵⁹ Thus, each member can serve for a maximum of eight years.

According to the DSU, the Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally and unaffiliated with any government. The membership of the Appellate Body shall be broadly representative of the membership of two of the WTO, and no member of the Appellate Body shall participate in the consideration of any dispute that would create offices, conciliation and mediation in order to help the parties resolve the dispute, before a request for panel is made.²⁶⁰

The Director-General convenes the meetings of the DSB, when the parties did not agree on the composition of the panel within 21 days of its establishment, the Director-General, upon the request of either of the party to the dispute and in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, appoints the members of the panel.²⁶¹

²⁵⁵Ibid, Article 8.7.

²⁵⁶Footnote 12 to Article 12.3(1) of DSU.

²⁵⁷Article 8.6 of DSU

²⁵⁸Ibid, Article 27.1.

²⁵⁹Ibid, Article 22.6.

²⁶⁰Ibid, Article 27.2.

²⁶¹Ibid, Article 27.3.

Moreover, where parties to a dispute did not agree on the period implementation and on the arbitrator, or where the original panelists that decided a dispute are not available, the Director-General would respectively appoint arbitrators to determine the reasonable period for implementation²⁶² or to review the proposed suspension of obligations in the event of non-implementation²⁶³ as the case may be.

4.6.4 Arbitrators

Under the DSU,²⁶⁴ as an alternative to resolving dispute by panels or appellate body, arbitrators either as individuals or group can be called to adjudicate certain questions at several stages of the dispute settlement process. The results of arbitration are not appealable but can only be enforced through the DSU.²⁶⁵ However, arbitration under Article 26 has rarely been used.

There are two other circumstances where arbitrators can be appointed under the DSU. First, after the adoption of panel's or Appellate Body's report by the DSB, an arbitrator may be appointed to determine the reasonable period of time to be granted to the respondent to implement the panel's or Appellate Body's recommendation.²⁶⁶ Second, where a party subject to retaliation objects to the level or the nature of the suspension of obligation, such party may request for arbitration.²⁶⁷ In these cases, arbitration is limited to clarifying specific questions in the process of implementation, and the arbitral decision is binding on the parties.

4.6.5 Experts

As already stated, panels are experts in international trade but not necessarily in scientific and technical fields. Most often, disputes involve complex factual questions that are technical or scientific in nature. In such cases, the DSU authorizes the panels to seek information and

²⁶²Ibid, Article 25.

²⁶³Ibid, Articles 21 and n22.

²⁶⁴See Ibid, Article 21.3(1).

²⁶⁵Ibid, Article 22.6.

²⁶⁶Ibid, Article 27.1.

²⁶⁷Ibid, Article 22.6.

technical advice from experts.²⁶⁸ Moreover, some covered agreements²⁶⁹ require panels to seek the opinion of experts when they deal with questions falling under them.

Whenever it becomes necessary in the exercise of panel's duties to consult an expert, the panel can consult individual experts or appoint an expert review group to prepare an advisory report.²⁷⁰ The DSU provides the rules for the establishment and procedures for expert review groups.²⁷¹

In Appendix 4 of the DSU, the expert review groups are under the panel's authority. Moreover, the panel determines the terms of reference and working procedures for the expert review groups. Consequently, the expert review groups report to the panel and exercise only advisory roles. The ultimate decision on the legal questions and the establishment of facts based on the expert opinion remains the function of the panel.

Members of an expert review group serve in their individual capacity and not as government representatives. In addition, the members of the expert review group, receives no instruction from any government in respect of the matters before them and membership is restricted to persons of professional standing and experience in the field in question.

However, whenever a panel decides to consult individual experts, in consultation with the parties to the dispute, selects the experts, gives them a list of questions which the experts individually responds to in writing. Thereafter, the panel convenes a special meeting with the experts, in which the questions and other issues arising from them are discussed with panelists and the parties. Firstly, the panel states both the written response of the experts to its questions as well as the discussions at the meeting with the panel in its report.

4.7 Composition of the Dispute Settlement Body (DSB)

The 1995 Marrakesh Agreement establishing the WTO vested the responsibility of administering the DSU on the General Council. On the other hand, the General Council changes

²⁶⁸Ibid, Article 27.2.

²⁶⁹Ibid, Article 27.3.

²⁷⁰Ibid, Article 25.

²⁷¹Ibid, Articles 21 and 22.

this responsibility through the DSB.²⁷² The DSB, like the General Council, consists of representatives of all members of the WTO. Being governmental representatives, the members of the DSB receive instructions from their respective governments on the positions to take and the statements to make in the DSB. This being the case, the DSB is hard to be a political body.

The DSB administers the DSU and generally oversees the disputes settlement process. It establishes panels; adopts panel and appellate body reports; conducts surveillance of the implementation of its ruling/recommendations by the members concerned; and authorizes retaliation on measures, such as the suspension of concession, in the event that the member concerned does not implement the recommendations or rulings.²⁷³

The DSB as a general rule,²⁷⁴ takes decisions by consensus.²⁷⁵ However, when the DSB establishes panels, adopts panel and appellate body reports, or authorizes retaliation, the DSB must approve the decision unless there is a consensus against it.²⁷⁶ Thus, in these cases, the DSB must automatically decide to take the action, unless there is a consensus not to do so.

This special decision making procedure is commonly referred to as “negative” or “reverse” consensus. Moreover, one member can prevent a reverse consensus being taken against any decision of the DSB by merely insisting that the decision be approved, and no member, including the affected or interested parties is excluded from participating in the decision making. This means that any member intending to block any decision of the DSB in these matters has to persuade all other WTO members, including the adversary party in the case to join its opposition or at least to stay passive. Therefore, a negative consensus is largely a theoretical possibility, and for this reasons, one speaks of the quasi-automaticity of these decisions in the DSB. This contrasts sharply with the situation that prevailed under GATT 1947 where the establishment of

²⁷²See Ibid, Article 21.3(1).

²⁷³Ibid, Article 22.6.

²⁷⁴Ibid, Article 13.

²⁷⁵Article 1.2 of the Agreement on Sanitary and Phytosanitary Measures; Article 14.2 and Annex 2 of the Agreement on Technical Barriers to Trade; Article 19.3, 19.4 and Annex 2 of the Agreement on Implementation of Article VII of GATT 1994.

²⁷⁶Article 13.2 of DSU.

panels, adoptions of panel's report and authorization of retaliation measures were on the basis of a positive consensus.

The DSB meets as often as necessary to meet the time frames provided in the DSU²⁷⁷ for taking certain actions. However, the DSB usually has one regular meeting monthly, but the Director-General can, upon the request of a member, convene additional special meetings of the DSB. The staff of the WTO Secretariat renders administrative assistance to the DSB²⁷⁸.

The DSU provides that whenever the DSB administers disputes arising from the plurilateral trade agreements, only members that are parties to that agreement may participate in decisions or actions taken by the DSB in relation thereof.²⁷⁹

With respect to the operations of the DSB, the rules of procedure for the sessions of the Ministerial Conference and Meetings of the General Council²⁸⁰ apply to the DSB, subject to few special rules on chairperson and other exceptions²⁸¹. The DSB in compliance with the WTO Agreement has its own chairperson, who is usually one of the Geneva-based ambassadors, that is, a chief of mission of a members' permanent representative to the WTO and appointed by a consensus of the WTO,²⁸² in addition to several responsibilities in specific situations.²⁸³

²⁷⁷ Appendix 4 of DSU.

²⁷⁸ Article IV:3 of the 1995 Marrakesh Agreement.

²⁷⁹ Article 2.1 of DSU.

²⁸⁰ Ibid, Article 2.4.

²⁸¹ Footnote 1 to Article 2.4 of the DSU which defined consensus as being achieved if no WTO member present at the meeting when the decision is taken, formally object to the proposed decision.

²⁸² See Articles 6.1, 16, 4, 17, 14 and 22.6 of DSU.

²⁸³ Ibid, Article 2.3.

CHAPTER FIVE

DISPUTE SETTLEMENT PROCEEDINGS IN THE WORLD TRADE ORGANIZATION

5.0 Introduction

Unlike the original 1947 General Agreement on Tariffs and Trade (GATT), the 1994 Agreement establishing the World Trade Organization (WTO Agreement)²⁸⁴ covers a wider range of trade. It extends beyond goods and now embraces services, intellectual property, procurement, investment and agriculture. Moreover, the new trade regime is no longer a collection of ad-hoc agreements, panel reports and understanding of the parties. All trade obligations are subsumed under the umbrella of the WTO, of which all parties are members. Member states have accepted the obligations contained in all the WTO covered agreements: they cannot pick and choose.

The WTO Agreement also ushers his new decision-making by the parties and in the resolution of disputes. Under the Dispute Settlement Understanding DSU.²⁸⁵ A Dispute Settlement Body consisting of Dispute Panels and an Appellate Body how adjudicates trade disputes between the parties. A WTO member may invoke the compulsory jurisdiction of the Dispute Settlement Body by requesting the establishment of a panel to settle a dispute.²⁸⁶ There is then a right to appeal the Panel's decision.²⁸⁷ Cases which go to the Appellate Body involve legal questions arising out of the WTO agreements, and some raise important law issues.

As international relations have become increasingly dominated by economic factors, the WTO system has moved away from its former, more power-oriented diplomatic approach to trade relations, and embraced rule oriented approaches and impartial dispute settlement.²⁸⁸ Addressing the need for fairness in international economic relations, dispute panels provide a

²⁸⁴ Agreements Establishing the World Trade Organization in Trust Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (1994) 33 I.L.M. 1125.

²⁸⁵ Annex 2 to the WTO Agreement (1994) 33 I.L.M. 1226 (hereinafter DSU).

²⁸⁶ Article 6.

²⁸⁷ Ibid.

²⁸⁸ Petersmann E. U.: The GATT/WTO Dispute Settlement System (Kluwer Law International, London: 1997) at 64.

forum for the airing of disputes regardless of a party's economic power or influence. Developing countries are giving an opportunity to challenge the trade measures of economically strong states that normally dominate international negotiations and multilateral decision-making. Installing an equitable dispute resolution mechanism within the trading regime entrenches the legitimacy of the regime itself and provides a better incentive to comply with international trading obligations. The global acceptance of a compulsory dispute settlement system as part of the WTO Agreements lends credence to developments in international trade law and elevates the importance of public international law generally.

5.1 THE STAGES FOR SETTLING DISPUTES IN THE WTO DISPUTE SETTLEMENT SYSTEM

The advent of the WTO dispute resolution system suggests that the process of settling trade disputes has become judicialised. There is still a significant role for diplomacy and non-legal argument in this system. Trade policy specialists and economists resent the litigation mindset and feel a loss of power and control to a different discipline. In fact, the move to a more “judicial” or “rule-oriented” approach preceded the emergence of the WTO,²⁸⁹ and has been extended.

The DSU furthers the role of legal adjudication in international trade law by creating a permanent appellate tribunal. This reflects the need to create a neutral arbiter of trade disputes, primarily based on the legal interpretation of the WTO Agreements. Fair decisions would lead to solutions that are mutually acceptable to the parties, while the remaining consistent with WTO Agreements²⁹⁰ Disputes under GATT 1947 system necessitated the Panel preferring one party's

²⁸⁹Jackson, J *The World Trading System* (MIT Press: Boston, 1989) at 85. See also R. E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem, N.H.: Butterworths 1993), D.P. Slegler and S.M. Hainsworth, “New Directions in International Trade Law: WTO Dispute Settlement”, J. Cameron and K. Campbell, *Dispute Settlement in the WTO* (Cameron May: London 1998), G.D. Aldonas, “The World Trade Organization: Revolution in International Trade Dispute Settlements” (1995) 3 *Dispute Resolution Journal* 73 at 79.

²⁹⁰DSU, Article 3:7.

interpretation of the WTO Agreement over the others. At the same time, a losing party could block decisions because consensus was required for adoption. This led to a disproportionate number of decisions that were never adopted. Lacking a consensus, the legality or enforceability of a decision was questionable at best. In turn, Panels may have been influenced by the objective of reaching a mutually acceptable solution when drafting their rulings.

Instead of writing reports that are designed to achieve a consensus among WTO members, Panels are now liberated from the need to satisfy all parties and can concentrate on the merits of the dispute and the unencumbered application of the facts to WTO law. This change is attributable to the negative consensus rule under the DSU where Panel and Appellate Body reports are automatically binding, subject to a negative role by the parties in the Dispute Settlement Body. By automatic adoption, parties “have substituted legal legitimacy for political legitimacy in the dispute settlement process”.²⁹¹ This innovation in multilateral decision-making is lauded by one commentator as the “most important change in the jurisprudence of the global economy in the second half of the twentieth century.”²⁹²

The WTO dispute settlement process involves four main stages. These stages are outlined hereunder:

- (a) Consultation;
- (b) Panel Stage;
- (c) Appellate Stage; and
- (d) Implementation of Ruling/Recommendations.

5.1.1 The Consultation

A consultation between the parties is the first stage of the WTO dispute settlement process.²⁹³ A party may request for consultation with another WTO member, if it believes that the other member has violated a WTO Agreement or otherwise nullified or impaired benefits

²⁹¹Chua, A “The Prudential Effect of WTO Panel and Appellate Body Reports” (1998) I.L.J., I.L., 45 at 46.

²⁹²Nicholas, D “GATT Doctrine” (1962), 2 J. of International Law, 379 at 380.

²⁹³Article 4 of DSU.

accruing to it. The request for consultation formally initiates a dispute in the WTO and triggers the application of the DSU.²⁹⁴ Therefore, such request informs the entire membership of the WTO of the initiation of a WTO dispute.

The DSU provides that the aim of the dispute settlement mechanism is to secure positive situation to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered Agreement is clearly to be preferred.²⁹⁵ Accordingly, the aim of the consultation stage is to enable the parties to the dispute understand better the factual situation and the legal claims in respect of the dispute and resolve the dispute without resorting to adjudication.²⁹⁶

Before initiating consultation, a member is obliged to exercise its judgment in deciding whether it considers that it would be fruitful to bring a case.²⁹⁷ A request for consultation must be submitted in writing and must give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint. Thus, the Appellate Body noted in *India-Patents (US)* that all parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly, for the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings.²⁹⁸

The request for consultation, although addressed to the Respondent, must also be notified to the DSB and all relevant Councils and Committee overseeing the agreement in question.²⁹⁹ In practice, the complaining member only sends one single text of its notification to the Secretariat,

²⁹⁴ *Ibid*, Article 3.7.

²⁹⁵ *Ibid*, Article 4.5.

²⁹⁶ However, the parties to a dispute can depart from the requirement of consultations through mutual agreement under Article 25.2 of DSU, if they resort to arbitration as an alternative means of dispute settlement.

²⁹⁷ Article 3.7 of DSU.

²⁹⁸ Indian – Patent (U.S.): Patent protection for Pharmaceutical and Agricultural Chemical Products, Appellate Body Report, WT/DS50/ AB/4R, adopted 16 January 1998, DSR 1998:1, 9 paragraphs 92 – 94.

²⁹⁹ Article 4.4 of DSU.

specifying the other relevant Councils or Committees and the Secretariat distributes the notices to the specified relevant bodies.³⁰⁰

Moreover, the complaint must initiate the request under one or more of the respective consultations and dispute settlement provisions of the covered agreements.³⁰¹ If consultations are requested under Article XXII of GATT 1994 or the equivalent provisions of another covered agreement,³⁰² WTO members with a substantial trade interest may request to be joined in the consultations on third parties by notifying the consulting member and the DSB of its desire within 10 days of the circulation of the request for consultation. If the Respondent agrees that the claim of substantial interest is well-founded, such member shall be joined as a third party.³⁰³ However, where consultation is requested under Article XXIII, GATT 1994 or the corresponding provisions in other covered Agreements, there is no provision for other WTO members to join in the dispute as third parties.

The Respondent must accord a sympathetic consideration to, and afford adequate opportunity for consultation.³⁰⁴ Moreover the Respondent must respond to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of not more than 30 days after receipt of the request.³⁰⁵ However, the cases of urgency, including those which concern perishable goods, the periods are 10 days and 20 days respectively.³⁰⁶ If the Respondent fails to respond or enter into consultation within the stipulated period, the complainant may proceed directly to request for the establishment of Panel.

Typically, consultations are held in Geneva and involve capital based officials, as well as local delegates. Moreover, consultations shall be confidential and without prejudice to the rights

³⁰⁰DSB, Working Minutes Concerning Dispute Settlement Procedures, WT/DSP/16, 6 June 1996, page 2 and DSB, Minutes of the DSB Meeting of July 19, 1995. WT/DSB/M/6/pg12.

³⁰¹Article 4.3 of the DSU.

³⁰²For the equivalent provisions, see *ibid*, footnote 4.

³⁰³*Ibid*, Article 4.11

³⁰⁴*Ibid*, Article 4.2

³⁰⁵*Ibid*, Article 4.3

³⁰⁶*Ibid*, Article 4.8

of any member in any further proceedings.³⁰⁷ In *Korea – Alcoholic Beverages*,³⁰⁸ Korea argued before the Panel that the complainants (United States and European Community) breached the confidentiality requirement of Article 4.6 of the DSU by making reference in their submissions, to information supplied by Korea during consultations. The Panel in a finding not reviewed by the Appellate Body, held that although confidentiality in the consultations between parties to a dispute is essential if the parties are to be free to engage in meaning consultations. However, it extends only to requiring the parties to the consultations not to disclose any information obtained in the consultations to any parties that were not involved in those consultations. Moreover, bearing in mind that panel proceeding between the parties remain confidential, a party does not breach any confidentiality by discharging in the panel proceeding information obtained during consultations. The Panel therefore found that there had been no breach of confidentiality by the complainants in respect of information that they became aware of during the consultation with Korea on this matter³⁰⁹. This condition was adopted in several other disputes like *Australia – Automotive Leather*³¹⁰ and *EC – Bed Linen*.³¹¹

However, in the *US – Underwear*,³¹² the Panel, declined to admit evidentiary material submitted by Costa Rica, the complaining party, pertaining to settlement offers made by the United States during consultations. The Panel held that such offers are of no legal consequences to the later stages of the dispute.³¹³

³⁰⁷ Ibid, Article 4.6

³⁰⁸ *Korea – Texas on Alcoholic Beverages*, Appellate.

³⁰⁹ Ibid, paragraph 10.23.

³¹⁰ Ibid, Article 6.2

³¹¹ *EC – Banana III*, Panel Report, Op.Cit, paragraph k12.

³¹² Article 7.1 of the DSU.

³¹³ *US – FSC: Tax Treatment for “Foreign Sales Corporation”*, Appellate Body Report, WT/DS100/AB/R, adopted 20 March, 2000, DS R 2000:111, 1619, paragraphs 7.23 & 7.29.

The WTO Secretariat is not involved in consultations, and the contents of the consultations are not disclosed to any subsequent Panel assigned to deal with the dispute.³¹⁴ Accordingly, the Panel in EC – Banana III, stated that consultations are a matter reserved for the parties. The Dispute Settlement Body is not involved; no Panel is involved; and the consultations are held in the absence of the Secretariat. While a mutually agreed solution is to be preferred, in some cases, it is our view that the function of a Panel is only to ascertain that consultations, if required, were in fact held.³¹⁵

The DSU has no rules on the manner in which consultations are to be conducted. It thereby left it at the discretion of the parties to the dispute. However, notwithstanding this fact, consultations had led to the settlement or apparent abandonment of cases in respect of a significant number of consultation requests. For example, of the 138 consultations request made prior to 30th June, 1998, slightly more than one-half had not been brought before a Panel as at 30th June, 1999. Although, some of these cases eventually ended up before a Panel, this statistics suggests that the consultations process disposes of wrongly one-half of the cases brought before the WTO.³¹⁶

Finally, even when consultations have failed to resolve a dispute, it always remains possible for the parties to find a mutually agreed solution at any later stage of the proceedings.³¹⁷

5.1.2 Panel Stages

(a) Establishment of Panel

If consultations fail to resolve the dispute, the complainant may request the DSB to establish panel to adjudicate it. The complainant can make this request within 60 days of the receipt of its request for consultation by the Respondent, or earlier where the

³¹⁴EC – Banana III, Panel Report, Op. Cit paragraph 14.

³¹⁵Korea – Dairy: Definitive Safeguard Measures in Imports of Certain Dairy Products, Complaint by the European Communities, Appellate Body Report, WT/DS/98/AB/R, adopted 12 January, 2000. DSR 2000:1, 3 at paragraph 127.

³¹⁶Ibid; Thailand – H-Beam: Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, Appellate Body Report, WT/DS122/AB/R, adopted 5 April, 2001, paragraph 95.

³¹⁷EC – Banana III, Panel Report, Op. Cit, paragraph 143.

Respondent did not respond to the request for consultation or the consulting parties jointly consider that consultations have failed to settle the dispute.³¹⁸

The request for establishment of a panel initiates the adjudication phase, and the adjudicative stage is intended to resolve a legal dispute. Accordingly, the request must be in writing, addressed to the Chairman of the DSB and indicate whether consultations were held. The request must in addition, identify the specific measures at issue as well as provide a brief but sufficiently clear summary of legal basis of the complaint.³¹⁹ In fact, the content of the request for the establishment of a panel is very important.

First, it informs the Respondent and other WTO members of the basis of the complaint.³²⁰ Second, it determines the standard terms of reference for the Panel's examination of the matter.³²¹ In other words, it defines and limits the scope of the dispute, and thereby the jurisdiction of the Panel, in that the Panel will review only the issues identified in the request and in the light of the provisions cited in it.

Consequently, the Complainant must sufficiently specify the legal claims, not the arguments in the request to avoid having the Respondent raise a preliminary objection against the individual claim or having the Panel decline to rule on certain aspects of the complaints. For instance, in *US – Tax Treatment for Foreign Sales Corporations*, the United States argued that the European Communities request for the establishment of a Panel failed to identify the specific measures at issues because the EC did not identify the specific products in question as the nature of export subsidy obligations imposed by the agreement on Agriculture differ depending on the products at issue and commitments

³¹⁸Ibid, Article 10.2 and Paragraph 6 of Appendix 3.

³¹⁹Ibid, Paragraph 8 of Appendix 3

³²⁰Article 13 of DSU

³²¹Ibid, Article II

made by the United States thereunder. However, the Panel found that the request for the establishment satisfied the requirements of Article 6.2 of the DSU.³²²

Be that as it may, the Appellate Body have held that the mere listing of the Articles of the Agreement allegedly breached, may in particular circumstances of the case, be sufficient specification of the claim,³²³ but this must be examined on a case by case basis.³²⁴ Moreover, the several cases where the Respondent raised preliminary objections, the Panel and Appellate Body had asked whether the alleged lack of clarity in the Panel request, prejudiced the ability of the Respondent to defend itself. This happened in Thailand H-Beam dispute and the Appellate Body held that the alleged lack of clarity in the Panel request did not prejudice Thailand's ability to defend the action.³²⁵ Furthermore, if the initial request does not specify a particular claim, the Complainant's argument in the written submissions or oral statement to the Panel cannot subsequently cure the request, as was the case in EC – Banana III.³²⁶

Under the DSU, it requested by the Complainant the DSB shall establish a panel not later than the second meeting at which the request for a panel appears on its agenda,³²⁷ unless there is a consensus at the DSB not to establish a panel.⁷⁶ Usually, the second meeting takes place one month later, but upon the Complainant's request, the DSSB would hold the meeting within 15 days of the request, provided that the Complainant gives at least 10 days advance notice of the meeting to the DSB.³²⁸ From the foregoing, it is clear that

³²²Ibid, Article 19.2

³²³Ibid, Article 14.1 and 14.2; Paragraph 3 of Appendix 3.

³²⁴Ibid, Article 15.1 and Appendix 3

³²⁵Ibid, Article 12.7

³²⁶Ibid, Article 14.3

³²⁷Belgian Family Allowances, Panel Report, Paragraph 8, where it was stated that in the early days of GATT 1947, panel conclusions were not always as specific and did not always express clear legal results as is the case today; thus, the dispute settlement of the WTO has moved from diplomatic forum to a more judicial or juridical system.

³²⁸Article 19.1 of DSU.

unless the Complainant consents to delay, a panel will be established approximately 90 days of the request for consultation.³²⁹

Under the DSB,³³⁰ panels have standard terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel. In such case, any member may raise any point relating to the terms of reference agreed upon in the DSB.³³¹ The terms of reference of a panel are very important. According to the Appellate Body in *India – Patents*, the jurisdiction of a panel is established by that panel's terms of reference, and a panel may consider only those claims that it has the authority to consider under its terms of reference.³³²

Moreover, other WTO members who have substantial interest in a matter before a panel can become third parties in the dispute by notifying the DSB of their interest. In addition, such third parties have the opportunity to be heard by the panel's report.³³³

(b) Composition of Panel

It should be noted that after the Panel is established by the DSB, the three or five individuals³³⁴ that would serve as the panelists would be selected in accordance with the DSU.³³⁵ To accomplish the task, the WTO Secretariats suggests the names of possible panelists to the parties to the dispute,³³⁶ from the indicative list kept by the

³²⁹Brazil – Aircraft (Article 21.5 – Canada): Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU, Panel Report, WT/DS46/RW, adopted 4 August 2000, as modified by Appellate Body Report WT/DS46/AB/RW, DSR 2000:IX, 4093 at paragraph 7.3; Canada – Aircraft (Article 21.5 – Brazil): Measures Affecting the Export of Civilian Aircraft – Recourse to Article 21.5 of the DSU, Panel Report, WT/DS70/RW, adopted 4 August 2000, as modified by Appellate Body Report, WT/DS70/AB/RW, DSR 2000:IX, 4315, paragraph 6.4; Guatemala – Cement II: Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico, Panel Report, WT/DS156/R, adopted on 24 October 2000.

³³⁰ Article 26.1(b) of DSU

³³¹ Article 4.7 of the SCM Agreement

³³² Article 15.2 of DSU

³³³ *Ibid*, Article 15.3

³³⁴ *Ibid*, Article 9.2.

³³⁵ US - Offset Act (Byrd Amendment): Continued Dumping and Subsidy Offset Act of 2000, Appellate Body Report adopted 27 January 2003, WT/DS 217/AB/R, WT/DS 234/A13/R paragraphs 311 – 316.

³³⁶ Article 12.8 of the DSU. The time limit in case of urgency is three months.

Secretariat,³³⁷ including other persons not in the indicative list on specific dispute. The parties to the dispute are allowed to reject the Secretariat proposal only for compelling reasons,³³⁸ but in practice the parties have freedom to object since their agreement to the composition of the panel is necessary except where the Director-General of the WTO is requested to appoint the panel.³³⁹

In practice, it has become more common for the Director-General to appoint panel because the parties have frequently objected to the Secretariat nomination of panelists,³⁴⁰ and the Director-General is required to appoint the panel within 10 days of the request by either of the disputing parties. As at June 1999, the Director-General appointed 16 of the 45 panels that had been composed.³⁴¹ Most importantly, panel should be composed of panelists that have the relevant specific expertise in the sector that is the subject of the dispute.³⁴² In cases where more than one member requested for the establishment of a panel in relation to the same matter, a single panel may be established where possible to deal with the rights of all the members concerned.³⁴³

Accordingly, in *US – Shrimp Dispute*,³⁴⁴ the DSB established a single Panel to deal with the dispute relating to joint request of Malaysia and Thailand, and the separate requests of Pakistan and India.

³³⁷By the concluding paragraph of the 1994 Marrakesh Agreement establishing the WTO, the three official languages of the WTO are English, French and Spanish.

³³⁸Article 12.9 of DSU

³³⁹*Brazil – Desiccated Coconut: Measures Affecting Desiccated Coconut*, Panel Report, WT/DS22/R, adopted 20 March 1997, as modified by Appellate Body Report, WT/DS22/AB/R, DSR 1997: I. 167.

³⁴⁰Davey, J. William, *The WTO Dispute Settlement System in Trade, Environment and the Millennium 119*, op. cit, at page 153.

³⁴¹*US – DRAMS Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, Panel Report, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report, WT/DS296/AB/R.

³⁴²*EC – DRAMS: Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, Panel Report, WT/DS299/R, adopted 3 August 2005.

³⁴³Footnote 7 to Article 16.4 of DSU, which provides that if a meeting of the DSB is not scheduled during this period, such a meeting must be held to discuss and adopt the Report.

³⁴⁴Articles 16.1 and 16.4 of the DSU

However, where it is not possible to establish a single panel to deal with the dispute relating to joint request of Malaysia and Thailand, and the separate requests of Pakistan and India.

However, where it is not possible to establish a single panel, more than one panel would be established, but the same persons would, if possible, serve as panelists on each of the separate panels, and the time table for the panel process should be harmonized.³⁴⁵ This was the case in EC – Hormones Dispute,³⁴⁶ where the complaint of Canada³⁴⁷ and that of the United States³⁴⁸ were reviewed by two separate panels composed of the same individuals.

(c) Panel proceedings

Once a panel has been selected, it can start its work and its first task is to meet with parties to set out its working procedure³⁴⁹ and time table.³⁵⁰ By Article 12.1 of the DSU, panels shall follow the working procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute. Acting under this provision, the Panel in India – Patent (US) decided at the outset of the first substantive meeting that all legal claims would be considered if they were made prior to the end of that meeting. However, the Appellate Body found that the decision was not consistent with the letter and the spirit of the DSU, and that the provision does not give a panel the authority either to disregard or to modify other explicit provisions of the DSU.³⁵¹

³⁴⁵ Articles 4.8 and 7.6 of SCM Agreement

³⁴⁶ In the history of the WTO, only in one case was a panel report not adopted for this reason, that is the – Banana III (Article 21.5 – EC), Panel Report WT/DS 27/RW/EEC and Corr. 1, 12 April 1999, DSR 1999 11, 783.

³⁴⁷ Article 16.4 of DSU

³⁴⁸ Rule 20 (1) of the Working Procedures for Appellate Review, WT/AB/WP/7 dated 1st May 2003.

³⁴⁹ Ibid, Rule 20(2) (d). Rule 20(2) (a) - (c) stipulates other formalities that the notice of appeal should contain.

³⁵⁰ For example, in Japan-Alcoholic Beverage II: Taxes on Alcoholic Beverage, Appellate Body Report, WT/DS8/AB/R, WT/DS 10/AB/R, WT/DS11/AB/R adopted 1 November 1996, DSR 1996: 1, 97 at page 99 – 100, where the allegation was that the panel erred in its interpretation of Article III:2 of GATT 1994; by finding that the likeness can be determined purely on the basis of physical characteristics, consumer uses and tariff classification.

³⁵¹ US – Shrimp: Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998: VII, 2755, paragraph 95.

According to Appendix 3, there shall be two meetings between the panel and the parties to discuss the substantive issues in the case. The substantive process starts with the exchange of submissions between the parties on the preliminary issue raised by the Respondent if any. Where no preliminaries issues are raised; the parties exchange the first set of written submission, starting with the Complainant. The Respondent replies to the Complainant's submission within two or three weeks after receipt of the Complainant's submission.³⁵² Thereafter, the third parties to the dispute if any, file their submissions.³⁵³ The DSU makes provision for the Secretariat to receive these submissions and transmit them to the other parties to the dispute.³⁵⁴ In practice however, the submissions are filed with the WTO Secretariat Dispute Settlement Registry,³⁵⁵ whereas other parties and third parties (if any) are directly served with the copies. Submissions are kept confidential, but the parties are free to disclose their own submissions to the public.³⁵⁶ After the exchange of the first written submissions, the panel convenes the first oral hearing of the dispute, otherwise known as the first substantive meeting. At this meeting, the parties present their views on the dispute orally, mostly on the basis of a prepared statement also distributed in writing to the panel and to other parties to the dispute.³⁵⁷ This oral hearing is similar to an oral hearing before a domestic court but is not public and is recorded on tapes. The panel hears the third parties oral views in a special third party session, after hearing the complainant(s) and the Respondent.³⁵⁸

³⁵²EC-Bananas III: Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Report, WT/DS27/AB/R, adopted 25 September 1997, DSR 1999 II, 783 at paragraph 152

³⁵³Ibid, Paragraph 96

³⁵⁴Ibid, Paragraph 152

³⁵⁵US – Countervailing Measures Concerning Certain EC Products, Appellate Body Report, adopted 8 January 2001, WT/DS 212/AB/R, paragraphs 72 – 75

³⁵⁶By Rule 25 (2) of the Working Procedure for the Appellate Review, the Panel record includes the written submissions of the parties to the Panel proceedings, their oral statements, their written response to questions, exhibits introduced as evidence, the interim report, the interim review comments and the tapes of the substantive meetings.

³⁵⁷Ibid, Rule 25

³⁵⁸Ibid, Rule 6 (1) and 2

After the oral submissions, the parties are invited to respond orally to written question from the panel as well as from the other parties in order to clarify all legal and factual issues relating to the dispute.³⁵⁹ Notwithstanding the oral discussions on the question, the parties are usually requested within a deadline of several days, after the conclusion of the first meeting, to submit written answers to the panel and other parties' questions.

The parties to the dispute simultaneously exchange written rebuttals also called second written submissions approximately four weeks after the first panel meeting. In the second written submissions, the parties respond to each other's first written submissions and oral statements made at the first meeting. These rebuttal submissions are not sent to third parties.

The panel holds the second substantive meeting with the parties after receipt of the second written submission of the parties, that is, the complainant and the Respondent. In the meeting, the parties make oral statements on the factual and legal arguments and respond to further questions from the panel and the other parties orally and later in writing. Sometimes, a panel may need to consult experts to advise if on technical and scientific issues,³⁶⁰ in which cases, it would hold a third meeting.

At the conclusion of the oral hearings, the panel in accordance with its mandate,³⁶¹ under the DSU, goes into internal deliberations to review the matter and reach conclusions on the outcome of the dispute by applying existing WTO laws to the facts of the dispute.³⁶² The panel's deliberations are confidential and its report is drafted in the absence of the parties.³⁶³

Thereafter, the panel issues a draft of the "descriptive parts of its report, which summarize the arguments of the parties, and on which the parties may submit comments

³⁵⁹Ibid, Rule 7 (2)

³⁶⁰Ibid, Rule 21 (2)

³⁶¹Ibid, Rule 18 (2)

³⁶²Ibid, Rule 22 (1)

³⁶³Ibid, Rule 22 (2)

within two weeks of receiving same.³⁶⁴ Thus gives the parties the opportunity to ensure that all their key arguments are reflected in the descriptive part and to rectify errors and perceived imprecision.

Following the receipt of the parties' comments, the panel issues its "interim report" two to four weeks after the receipt of the comments on the descriptive. The interim report contains the revised descriptive part, the findings, the conclusions and the recommendations, and as the case may be suggestions for implementation.

The finding of the panel, which contains the panel's reasoning to support its first conclusion as to whether to uphold or reject the complainant's claim, is a comprehensive discussion of the applicable law in light of the facts established by the panel on the basis of the evidence before it and in the light of the arguments submitted by the parties.³⁶⁵ In fact the panel findings are usually very detailed and specific with long legal discussions.³⁶⁶ Panelists have the rights to express a separate opinion, in the panel report, but they must do so anonymously.³⁶⁷

In violation complaints, where the panel concludes that the challenge measure is inconsistent with the covered agreement, its report would also contain a recommendation that the Respondent should bring the challenged measures into conformity with WTO law, and may also suggest ways in which the Respondent could implement the recommendation.³⁶⁸ In *Brazil – Aircraft (Article 21.5 Canada)*, relying on this provision, Canada requested that the panel suggest that the parties develop mechanism that would allow Canada to verify compliance with the original recommendation of the DSB, but the panel refused on the ground that Article 19.1 relate to only what could be done to bring

³⁶⁴Ibid, Rule 23(1)

³⁶⁵Ibid, Rule 23(3)

³⁶⁶Ibid, Rule 24

³⁶⁷Ibid, Rule 27(1)

³⁶⁸Article 17.10 of DSU

an inconsistent measure into conformity with WTO laws and does not address issues of surveillance of these steps.³⁶⁹

However, the case of non-violation complaint, if the panel concludes that the challenged measure nullified or impaired benefits accruing to the complainant or impeded an objective of the covered agreement, the panel recommends that the Respondent make an adjustment that is mutually satisfactory to the parties.³⁷⁰

Moreover, where a panel concludes that a challenged subsidy is prohibited under the Sabardies and Countervailing Measures (SCM) Agreement, it must recommend that the subsidizing member withdraws the subsidy without delay and must specify the time period for this withdrawal.³⁷¹

The interim report becomes the first report unless one of the parties request the Panel to review precise aspects of the report.³⁷² The period of the interim review must not exceed two weeks and the Panel may hold additional meeting with the parties to hear their views on those precise aspects of the interim report, if so requested by either of the parties to the dispute. In the light of the comments received, the panel issues its first report within two weeks after the date of the conclusion of the interim review. The first report must contain a reference to the arguments raised by the parties during the interim review.³⁷³

If the panel was established to review multiple complaints on the same matter, the panel must submit separate report for the complaints if so requested by one of the parties involved in the dispute.³⁷⁴ This was the case in the US – Offset Act (Byrd Amendment)

³⁶⁹Rule 4(1) of working procedures for the Appellate Review

³⁷⁰Article 17.1 of DSU

³⁷¹Rule 3(2) of the working procedure

³⁷²Article 17.11 of DSU

³⁷³Ibid, Article 17.10

³⁷⁴Canada–Aircraft: Measures Affecting the Export of Civilian Aircraft, Appellate Body Report, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, Paragraphs 144 to 146.

dispute brought by Australia, Brazil, Chile, EC, India, Indonesia, Japan, Korea, Thailand, Canada and Mexico.³⁷⁵

According to the DSU, the Panel's final report should be issued to the parties six months after the composition of the Panel.³⁷⁶ The Panel's report once translated,³⁷⁷ must be circulated to all the WTO members within nine months of the establishment of the Panel.³⁷⁸ However, as at 1999, 27 WTO Panels have issued their reports within 11.1 months. In the Brazil–Desiccated Coconut dispute,³⁷⁹ Panel was established at the request of Philippines in March 1996, and the Panel report was adopted in March 1997 that is approximately 12 months after the establishment of the Panel.

The features to meet the nine months target have often involved cases where the Panel consulted experts; where there were transactional delays; and where the cases were extraordinarily complex.³⁸⁰ There was an increase in the median time of one month since August 1998, suggesting that the timely performance of the Panels has been declining. For instance, in US – DRAMS³⁸¹ and EC – DRAMS³⁸² disputes, the separate panels requested by the Korean Government were established on 23 January, 2003, which the Panel reports were adopted 20 July, 2005 and 3rd August, 2005 respectively.

(d) Adoption of Panel Report

³⁷⁵ Article 17.13 of DSU

³⁷⁶ Ibid, Articles 17.6 and 17.2

³⁷⁷ Ibid, Articles 19 and 26

³⁷⁸ Ibid, Article 17.5

³⁷⁹ Ibid, Article 17.4

³⁸⁰ US – Gambling: Measures Affecting the Cross-Boarder Supply of Gambling and Betting Services, Appellate Body Report, WT/DS 285/AB/R, adopted 20th April 2005.

³⁸¹ EC-Export Subsidies on Sugar, Appellate Body Report, WT/DS 265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005.

³⁸² Dominican Republic – Import and Sale of Cigarettes: Measures Affecting the Importation and Internal Sale of Cigarettes, Appellate Body Report, WT/DS302/AB/R, adopted 19 May 2005.

After the circulation of the Panel's report, the DSB must adopt the report not earlier than 20 days and not later than 60 days³⁸³ unless a party to the dispute formally notifies the DSB of the decision to appeal or there is a negative consensus at the DSB not to adopt it.³⁸⁴ However, if SCM agreement is involved, the time limit is 30 days.

To be adopted in a DSB meeting, the Panel's report must be placed on the agenda of the DSB meeting, and only WTO members can request items to be placed in the agenda of an upcoming DSB meeting. Consequently, if no member places the panel report on the agenda of the DSB meeting, the report would not be adopted. Such panel report would be in limbo and not binding on either of the parties to the dispute until the necessary step is taken by a WTO member.³⁸⁵

5.1.3 Appellate Stage

A party to a dispute initiates the appellate process by notifying the DSB of its decision to appeal before the DSB adopts the Panel report.³⁸⁶ The Appellant must file simultaneously, a Notice of Appeal with the Appellate Body Secretariat.³⁸⁷

According to the Working Procedure, a Notice of Appeal shall contain a brief statement of the nature of the Appeal, including the allegations of errors in issues of law covered in the Panel report and legal interpretations developed by the Panel.³⁸⁸ These allegations of errors must relate to what the appellant wishes the Appellate Body to overturn. It could be a Panel's

³⁸³See generally, World Trade Organisation, Appellate Body Annual Report for 2005, WT/AB/5 of 25 January 2006 (06—0324), Tables 2 and 4, at pages 15, 17 and 18.

³⁸⁴US – Lead and Bismuth II: Imposition of Countervailing Duties on Certain Hot – Rolled Lead and Bismuth Carbon Steel Products originating in the United Kingdom, Appellate Body Report, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000: v, 2601, Paragraph 8; EC – Asbestos: Measures Affecting Asbestos and Asbestos-Containing Products, Appellate Body Report, WT/DS 135/AB/R adopted 5 April 2001, paragraph 8; Thailand-H-Beams, op. cit, paragraph 7.

³⁸⁵US - Upland Cotton: Subsidies on Upland Cotton, Appellate Body Report, WT/DS267/AB/R, adopted 21 March 2005.

³⁸⁶Ibid, Paragraph 8. See also, World Trade Organisation, Appellate Body Annual Report, op. cit. at page 23.

³⁸⁷Article 4.9 of the SCM Agreement

³⁸⁸Ibid, Articles 4.9 and 7.7.

conclusion with the supporting reasoning or an isolated legal finding forming part of the reasoning supporting a conclusion.³⁸⁹

On what would constitute compliance with Rule 20(2)(d), the Appellate Body has held that merely identifying the Panel finding or legal interpretations that the Appellant believes were erroneous is sufficient since the Notice of Appeal is not designed to be a summary or outline of the argument of the Appellant, which are to be set out in the Appellant's submission, rather than in its Notice of Appeal.³⁹⁰

Nevertheless, the Notice of Appeal serves to give notice to the Appellee of the findings appealed against, so that it can prepare its defence.³⁹¹ Consequently, it must be clear from the notice, which panel findings or interpretations the Appellate Body is asked to review;³⁹² as the Appellate Body would not review a finding that is not covered by the notice³⁹³ or claim of error that is not included³⁹⁴ in the allegation of error set out in the Notice of Appeal.

Upon the filing of the Notice of Appeal, the WTO Director-General would transmit the complete record³⁹⁵ of the Panel proceedings to the Appellate Body.³⁹⁶ Thereafter, the three members (the division) that would decide the appeal would be selected without regard to their national origin.³⁹⁷ The division would in turn elect one of them to be the presiding member.³⁹⁸

³⁸⁹US - Softwood Lumber V: Final Dumping Determination of Softwood Lumber from Canada, Appellate Body Report, WT/DS264/AB/R, adopted 31 August, 2004.

³⁹⁰Brazil - Aircraft: Export Financing Programme for Aircraft, Appellate Body Report, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999: 111, 1161.

³⁹¹Canada - Aircraft, Appellate Body Report, op. cit.

³⁹²Rule 30 of the Working Procedures for the Appellate Review.

³⁹³India - Autos: Measures Affecting the Automotive Sector, Appellate Body Report, WT/DS 146/AB/R, WT/DS 175/AB/R, adopted 5 April 2002, paragraphs 14 – 18.

³⁹⁴US-FSC: Tax Treatment for "Foreign Sales Corporation", Appellate Body Report, WT/DS/08IAB/R, adopted 20 March 2000, DSR 2000:III, 1619, Paragraph 4; US-Line Pipe: Definitive Circular Welded Carbon Quality Line Pipe from Korea, Appellate Body Report, WT/DS 202/AB/R, adopted 8 March 2002 paragraph 13; EC - Sardines: Trade Description of Sardines, Appellate Body Report WT/DS231/AB/R, adopted 23 October 2002, paragraph 141.

³⁹⁵Article 21.1 of DSU

³⁹⁶*Ibid*, Article 2

³⁹⁷*Ibid*, Article 19.1

³⁹⁸*Ibid*, Article 21.3

Within 10 days from the date of filing the Notice of Appeal, the Appellate is expected to file its written submission³⁹⁹ and serve other parties with it.⁴⁰⁰ The written submission would contain the Appellant's legal arguments and the rulings it required the Appellate Body to make in respect of the contested Panel findings. The Appellees that wish to respond to the appellant's written submission are expected to file their own written submission,⁴⁰¹ stating their own position and legal arguments.⁴⁰²

Moreover, other parties to the dispute may join in the appeal in the appeal on the basis of other alleged error of law in the Panel report and legal interpretation as multiple appellants within 15 days of filing of the Notice of Appeal.⁴⁰³ Such multiple appellants would also file their written submission specifying their own position and legal arguments within 25 days of filing the Notice of Appeal.⁴⁰⁴

Only the parties to the dispute have the right of appeal against panel report. Third parties cannot appeal against a panel report. However, such third parties can participate. Moreover, third participant wishing to participate in the proceeding may, either file a written submission stating its intention to participate in the appeal, as well as its legal argument and position, or within 25 days of the filing of the Notice of Appeal, notify the Secretariat of the intention to appear at the oral hearing in writing, stating whether or not it intends to make an oral statement, or notify the

³⁹⁹Canada – Pharmaceutical Patents: Patent Protection of Pharmaceutical Products - Arbitration under Article 21.3(c) of the DSU, Award of the Arbitrator, WT/DS114/13, 18th August 2000, paragraph 45.

⁴⁰⁰See Article 4.7 of SCM Agreement. Also, Article 26.2 of the DSU implicitly excludes the application of the reasonable period of time in situation complaints. Moreover, according to the view of some members and trade law experts, Article 8.2 and 8.3 of the Agreement on Safeguards also provides for a procedure partially departing from Article 21.3 of the DSU, thereby bypassing the reasonable period of time.

⁴⁰¹Brazil – Aircraft, Panel Report, op. cit. page 3327.

⁴⁰²Article 2.4 of DSU

⁴⁰³US-FSC, op. cit; US – Section 100(5) of the US Copyright Act – Arbitration under Article 21.3 (c) of the DSU, Award of Arbitrator, WT/DS160/14, 18th July 2001; US - 1916 Act, WT/DS136/13, 18th July 2001.

⁴⁰⁴Canada - Pharmaceutical Patents, op. cit, Paragraph 47; quoted with approval in US - 1916 Act, op. cit, paragraph 32.

Secretariat in writing that it intends to appeal at the oral hearing and may request to make an oral statement at the hearing.⁴⁰⁵

Following the receipt of the submissions, the Appellant Body division holds an oral hearing approximately 30 – 40 days after the filing of the Notice of Appeal.⁴⁰⁶ The oral hearing is not given to the public.⁴⁰⁷ During the oral hearing, the participants and third participants alike make a brief opening statement, after which the division poses question to them. Thereafter, the decision exchanges views with the other four members of the Appellate Body not in the division. This exchange of views is intended to ensure consistency and coherence in the jurisprudence of the Appellate Body.⁴⁰⁸ However, only members of the division would decide the appeal.⁴⁰⁹ Following the exchange of views with the other Appellate Body members, the division concludes its deliberation and drafts its report.

The Appellate Body is enjoined to take their decision by consensus, but where this fails, they would take decision by majority vote.⁴¹⁰ In addition, where an individual member includes a separate opinion in the report, he must do so anonymously.⁴¹¹ When completed, the report is signed by the members of the division and translated into the official language of WTO.

All deliberations are confidential, and the drafting of the report is done in the absence of all participants in the appeal.⁴¹² To buttress this point, the Appellate Body in *Canada – Aircraft*, stated that the provisions of Article 17.10 and 18.2 apply to all members of the WTO, and oblige

⁴⁰⁵US - Line Pipe, op. cit; US - Softwood Lumber V, op. cit; and Dominican Republic - Import and Sale of Cigarette, op. cit. In these cases, the parties reached an agreement on the reasonable period of time before the arbitrator had issued an award, so it became unnecessary for the arbitrators to issue an award. Consequently, the arbitrators issued short reports setting out the procedural history of the arbitration and noting that the matter had been resolved by the parties.

⁴⁰⁶ Article 21.3 (e) and footnote 12 to Article 21 of DSU

⁴⁰⁷ For instance, in US - Line Pipe, op. cit, Korea requested for arbitration.

⁴⁰⁸ See footnote 13 to Article 21 of DSU

⁴⁰⁹ *Ibid*, Article 21.3 (c).

⁴¹⁰ Canada - Pharmaceutical Patents op. cit paragraph 45.

⁴¹¹ Korea - Taxes on Alcoholic Beverages - Arbitration under Article 21.3(c) of the DSU, Award of the Arbitrator, WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937 at paragraph 45. See also Canada - Pharmaceutical Patents (Article 21.3(c)) op. cit, at paragraph 41.

⁴¹² EC - Banana III: Regime for the Importation, Sale and Distribution of Bananas - Arbitration under Article 21.3(c) of the DSU, Award of Arbitrator, WT/DS27/1 5, Paragraphs 18 - 20.

them to maintain the confidentiality of any submissions or information submitted or received, in an Appellate Body proceeding. Moreover, those provisions oblige members to ensure that such confidentiality is fully respected by any person that a member selects to act as its representative, Counsel or Consultant.⁴¹³

In its report, the Appellate Body may uphold, modify or reverse the legal findings and conclusions of the Panel.⁴¹⁴ In addition, the Appellate Body usually declares a Panel's legal finding which it has reversed or modified as moot and having no legal effect. However, the DSU does not discuss the possibility of the Appellate Body remanding the dispute to a panel.

The division must address each of the legal issues and panel interpretation that have been appealed.⁴¹⁵ Thus, whereas the descriptive part of the Appellate report contains the background of the dispute, arguments of the participants and third participants, the finding section addresses the detail the issues raised on appeal, conclusions, recommendations and suggestions.⁴¹⁶

The Appellate Body is required to issue its report within 60 days or at most 90 days from the date of filing the Notice of Appeal,⁴¹⁷ and its report should be automatically adopted by the DSB within 30 days of the circulation of the report to WTO members, unless there is a consensus not to adopt the report.⁴¹⁸

⁴¹³ Australia – Salmon: Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU, Award of Arbitrator, WT/DS18/15, Paragraphs 38 - 39.

⁴¹⁴ EC-Hormones: Measures Concerning Meat and Meat Products -Arbitration under Article 21.3(c) of the DSU, Award of the Arbitrator, WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833 at paragraph 26, quoted with approval in Indonesia - Autos: Certain Measures Affecting the Automobile Industry - Arbitration under Article 21.3 (c) of DSU, Award of Arbitration, WT/DS 54/15, WT/DS 55/14, WT/DS 59/13, WT/DS 64/12, 7 December 1998, DSR 1996: IX 4029 paragraph 22; Korea - Alcoholic Beverages: Taxes on Alcoholic Beverages - Arbitration under Article 21.3 (c) of DSU, Award of Arbitration, WT/DS 75/16, WT/DS 84/14, 4 June 1999, DSR 1999: 11,937 paragraphs 37; Canada - Pharmaceutical Patents, op. cit, paragraph 47; US - 1916 Act, op. cit, paragraph 32.

⁴¹⁵ Canada - Autos : Certain Measures Affecting the Automotive industry, Arbitration under Article 21.3(c) of DSU, Award of Arbitration, WT/DS 139/12, WT/DS 142/12, 4 October 2000, DSR 2000 X, 5079, paragraph 47; US - Section op. cit paragraph 39; US - 1916 Act, op. cit paragraph 39, Canada - Patent Term: Term of Patent Protection - Arbitration under Article 21.3 (1) of DSU, WT/DS 170/10, 28 February 2001, paragraph 647.

⁴¹⁶ Korea - Alcoholic Beverages, op. cit. paragraph 42.

⁴¹⁷ Canada - Pharmaceutical Patents, op. cit, paragraph 43.

⁴¹⁸ Article 21.4 of DSU

In most appeals, the Appellate Body has circulated its report 90 days after the Notice of Appeal. Instances include US – Gambling, EC – Export Subsidies on Sugar,⁴¹⁹ and Dominican Republic – Import & Sale of Cigarette.⁴²⁰ In these three cases, the Notice of Appeal were filed on January 7, 2005, January 13, 2005 and January 24, 2005 respectively, while the Appellate Body circulated their Reports on April 7, 2005, April 28, 2005 and April 25, 2005 respectively.⁴²¹

However, in few exceptional cases, the Appellate Body had with the agreement of participants in the appeal, circulated their reports later than 90 days.⁴²² For instance, in US – Upland Cotton, the Notice of Appeal was filed by US on 18th October, 2004, while the Appellate Body circulated their report on the dispute on March 3, 2005⁴²³ Here, Brazil and the United States agreed in writing after consultation with the Appellate Body via the Appellate Body Secretariat that it would not be possible for the Appellate Body to circulate its Report within 90 day time limit because of the numerous and complex issues that arose in the appeal, which increased the burden on the Appellate Body and the WTO translation services. Therefore, they agreed to accept Appellate Body Report circulated not later than 3 March, 2005 as one circulated pursuant to Article 17.5 of the DSU.⁴²⁴

Under the SCM Agreement, the Appellate Body is required to issue its report during a period of 30 days or at least 60 days,⁴²⁵ and the report must be adopted within 20 days of circulation of the report for disputes on prohibited and actionably subsidies.⁴²⁶ For instance, in US – Softwood Lumber V, the appeal was filed on the 13th May, 2004 and the Appellate Body

⁴¹⁹Ibid, Article 21.6

⁴²⁰Ibid, Article 22.8

⁴²¹Ibid, Article 21.5

⁴²²Canada - Aircraft (Article 21.5 – Brazil), Appellate Body Report, op. cit paragraphs 37, 40 - 42; United States - Shrimp (Article 21.5 - Malaysia), Appellate Body Report. WT/DS58/AB/RW, adopted 21 November 2001, paragraphs 85 - 87.

⁴²³Article 22 of DSU

⁴²⁴Ibid, Articles 22.1 and 22.2

⁴²⁵Ibid, Articles 22.2 and 22.6

⁴²⁶Ibid, Article 3.7

Report was adopted on 31 August, 2004⁴²⁷ However, the maximum of 60 days have been exceeded in two appeals, to wit, Brazil – Aircraft⁴²⁸ and Canada – Aircraft.⁴²⁹

Under the Working Procedures, an appellant can withdraw its appeal at anytime during the pendency of the Appeal⁴³⁰. A withdrawal terminates the appeal, and in such cases, the Appellate Body would normally set out the procedural history of the appeal and conclude that it had completed its work in view of the withdrawal⁴³¹. On three occasions⁴³², the appellants have re-filed an appeal shortly after withdrawing the appeal they earlier filed. In EC – Sardines, the withdrawal by European communities was in response to Peru’s challenge of the Notice of Appeal as being insufficiently clear.

5.1.4 Implementation Stage

This is the final phase of the WTO dispute settlement process, which is designed to ensure that the recommendations and rulings of panels or Appellate Body, once adopted by the DSB, are implemented by the losing member. The prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure the effective resolution of disputes⁴³³ and the DSB is responsible for supervising the implementation of reports.⁴³⁴

Although the panel or Appellate Body may suggest means of implementation, it is left for the losing WTO member to determine how to implement the rulings/ recommendations⁴³⁵. The

⁴²⁷Ibid, Article 22.4

⁴²⁸Ibid, Article 22.3(f) stipulates the sectors in which each WTO Agreement falls with respect to the suspension of obligation.

⁴²⁹Ibid, Article 22.3 (a)

⁴³⁰Ibid, Articles 22.3 (b) and 22.3 (c)

⁴³¹Ibid, Article 22.6

⁴³²Ibid, Article 22.7

⁴³³US - Certain EC Products: Import Measures on Certain Products from the EC, Panel Report, WT/DS165/R, adopted 10 January 2001 as modified by Appellate Body Report, WT/DS165/AB/R, DSR 2001:1,373.

⁴³⁴The cases include Canada - Aircraft, op. cit; Brazil - Aircraft, op. cit; EC-BananaIII, op. cit; EC-Hormones, op. cit; US - FSC, op. cit.

⁴³⁵For instance, in the EC-Banana III case, United States requested for US \$520 million but the amount authorized was US \$191 million. (WT/DS27/AB/R), in EC-Hormones case, the amounts requested by U.S. and Canada were US \$202 million and Can \$75million. The amounts authorized were US \$116.8 million and Can \$11.3 million (WT/DS26/AB/R; WT/DS48/AB/R) respectively

losing member is obliged to inform the DSB at a meeting held within 30 days of the adoption of the panel or Appellate Body report, of its intention in relation to the implementation of the rulings/recommendations. If it is impracticable to comply immediately with the recommendations/rulings, the member concerned shall have a reasonable period of time for implementation. As aptly put by the Appellate Body in *Canada Pharmaceutical*, reasonable period of time is available only if immediate compliance is impracticable.⁴³⁶

However, reasonable period of time does not apply in all cases. For instance, in the event of prohibited subsidies the panel must recommend that the subsidizing member withdraws the subsidy without delay and must specify the time period for the withdrawal⁴³⁷. Consequently, in *Brazil – Aircraft*, the DSB gave Brazil a period of 90 days to bring its aircraft subsidies into compliance with the WTO law.⁴³⁸

The reasonable period of time can be determined in one of three ways, to wit:

- (a) Proposed by the member concerned and approved by consensus⁴³⁹ of the DSB. This has never happened, but the DSB did in some cases, approved request by the implementing member for extension of reasonable period of time awarded by arbitrators. This occurred in *US – FSC*, *US – Section 110 (5) of the US Copyright Act* and *US – 1916 Act*⁴⁴⁰. However, according to the Appellate Body, the implementing member bears the burden of proving that the proposed period of implementation constitutes a reasonable period of time.⁴⁴¹

⁴³⁶For the rules, see Articles 4.10, 4.11, 7.9 and 7.10 of the SCM Agreement.

⁴³⁷The GATT Dispute Settlement Rules and Procedures contained in the Decision of 12 April 1989, BISD 36 S/61–67 applies to the adoption, surveillance and implementation of recommendations and ruling in situation complaints.

⁴³⁸For example, see, *Canada - Dairy*, WT/DS 103/14; and *US -FSC*, WT/DS108/12

⁴³⁹*Brazil – Aircraft*, op. cit, Annex WT/DS46/13.

⁴⁴⁰*Canada-Aircraft* op. cit, Annex WT/DS70/9.

⁴⁴¹Article 21.1 of DSU

(b) Mutual agreement of the parties to the dispute within 45 days of the adoption of the report; as was the case in *US — Line Pipe*, *US – Softwood Lumber V* and *Dominican Republic – Import and Sale of Cigarettes*⁴⁴².

(c) Determination by arbitration⁴⁴³, upon the request of a member⁴⁴⁴, by individual arbitrator or group of arbitrators.⁴⁴⁵

The guideline for the arbitrators is that the reasonable period of time shall not exceed 15 months from the date of adoption of the report, subject to particular circumstances⁴⁴⁶. Thus the Arbitrator in *Canada — Pharmaceutical Patents* (Article 21.3) stressed this point when he stated that the 15 months period is a guideline, and not an average, or usual period. It is expressed also as a maximum period, subject only to any particular circumstances mentioned in the second sentence⁴⁴⁷.

As rightly observed by the arbitrator in *Korea — Alcoholic Beverages*⁴⁴⁸, the mandate of arbitrators in this case relates exclusively to the determination of the reasonable period of time for implementation under Article 21.3 (a) of the DSU. It does not extend to suggesting ways and means of implementing the recommendations/rulings of the DSB.

Accordingly the arbitrator in *EC- Banana III*, determined the reasonable period of time for EC to implement the recommendations and rulings of DSB to be from September 1997 to 1 January 1999⁴⁴⁹. Also, in *Australia – Salmon*, the arbitrator determined the reasonable period of time for Australia to implement the rulings/ recommendations of DSB to be

⁴⁴²Ibid, Article 19.1

⁴⁴³Ibid, Articles 3.7, 21.6 and 22.1

⁴⁴⁴Ibid, Article 26.1(b)

⁴⁴⁵Ibid, Article 22.9.

⁴⁴⁶This would be in line with the key objective of the dispute settlement system as stipulated in Article 3.2 of the DSU.

⁴⁴⁷*Japan - Alcoholic Beverages II*, Appellate Body Report, op. cit. at pages 107- 108

⁴⁴⁸*US Shrimp: Recourse to Article 21.5 of the DSU by Malaysia*, Appellate Body Report, WT/DS 58/AB/RW, adopted 21 November, 2001 at paragraph 109.

⁴⁴⁹*Japan - Alcoholic Beverages II*, Panel Report, WT/DS8/R, WT/DS11/R, adopted 1st November 1996, DSR 1996: 1, 125at paragraph 6.10; *Japan - Alcoholic Beverages II*, Appellate Body Report, op. cit. at paragraph 108.

eight months from the date of adoption of the Appellate Body and panel Reports by the DSB, that is from 6 November 1998⁴⁵⁰.

In line with the principle of prompt compliance as enshrined in Article 21.1 of the DSU, arbitrators have held that the reasonable period of time should be the shortest period possible within the concerned members legal system to implement the recommendations and rulings of the DSB,⁴⁵¹ so as to give the implementing member the time it truly needs under its normal procedures, making use of any available feasibility⁴⁵², but not having to utilize an extra-ordinary legislative procedures⁴⁵³. Consequently, the arbitrators in most cases determined the reasonable period of time on the basis of the proposal made by the implementing member⁴⁵⁴.

According to the DSU, unless the parties to the dispute agree otherwise, or the panel or Appellate Body extended its time for providing its report, the period from the establishment of panel and the determination of the reasonable period of time shall not exceed 15 months provided that if the parties agree that there is exceptional circumstance, the period shall not exceed 18 months⁴⁵⁵.

Six months after the determination of the reasonable period of time, the issue of implementation would be placed on the Agenda of the DSB meetings, and at 'east, ten days before each meeting, the implementing member is required to provide the DSB with a written status report of its progress in implementation.⁴⁵⁶ In addition, the DSB keeps the implementation of the report it has adopted under surveillance, until it is fully implemented⁴⁵⁷.

Where the implementing member implemented the recommendations/rulings, but a disagreement arose between the parties on whether the implementation achieved full compliance

⁴⁵⁰See Articles 4.6, 14.1, 18.2, 17.10 and paragraph 3 of the Working Procedure in Appendix 3 of the DSU.

⁴⁵¹Ibid, Article 18.2 and paragraph 3.

⁴⁵²EC - Banana III, Appellate Body Report, op. cit, paragraph 10

⁴⁵³Ibid, paragraph 1.2

⁴⁵⁴Thailand - H Beams, Appellate Body Report, op. cit, paragraph 68.

⁴⁵⁵US - Shrimp, Panel Report, WT/DS58/R and Corr. 1, adopted 6 November 1998, as modified by Appellate Body Report, WT/DS58/ AB/R, DSR 1998: VII, 2755 at Paragraph 7.8

⁴⁵⁶US - Shrimp, Appellate Body Report, op. cit. Paragraph 108.

⁴⁵⁷Article 13 of DSU which permitted it to seek information from any relevant source; Article 12.1 allowed the panel to add to or depart from its Working Procedure contained in Appendix 3

with the recommendations, either of the parties can request for a panel, possibly, the original panel, to determine the issue within 90 days.⁴⁵⁸ This is known as compliance panel procedure. As was stated in *Canada Aircraft* as well as in *US — Shrimp*, the compliance panel must consider the new measure taken to comply in its totality, including its consistency with the covered agreement concerned, and not only the recommendations and rulings of the DSB⁴⁵⁹.

If the losing party fails to achieve full implementation of the report within the reasonable period of time, the prevailing complainant may resort to temporary measures, to wit, compensation or suspension of WTO obligations owed to the losing party, although the full implementation of the rulings/recommendations is preferred.⁴⁶⁰

In this case, the implementing members would enter into negotiations with the complaining party, with a view to agreeing to mutually acceptable compensation that is consistent with the covered agreements⁴⁶¹. However, if the parties fail to agree within 20 days of the expiry of the reasonable period of time, the complaining party may request the DSB to authorize it to suspend concessions owed to the non-implementing member⁴⁶². This is otherwise known as retaliation.

Retaliation is the final and most serious consequence a non-implementing member would face in the WTO dispute settlement system⁴⁶³. Retaliation requires the prior approval of the DSB, and is applied selectively by one member against another. The level of retaliation must be equivalent to the level of nullification or impairment⁴⁶⁴ and must be imposed in the same sector⁴⁶⁵

⁴⁵⁸ *US - Shrimp*, op. cit, paragraphs 105 - 108.

⁴⁵⁹ Minutes of the General Council meeting of 22 November 2000, WT/GC/M/60; as well as Minutes of the DSB meetings in which the DSB adopted the respective panel and Appellate Body Report in dispute where such arose. For instance in the *US-Shrimp* dispute.

⁴⁶⁰ *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Panel Report, WT/DS90/R, adopted 22 September 1999, as upheld by the Appellate Body Report, WT/DS90/AB/R, DSR 1999 : v, 1799.

⁴⁶¹ *US - Shrimp*, Appellate Body Report, op. cit, paragraphs 89 and 91.

⁴⁶² *US - Lead and Bismuth II*, Appellate Body Report, op. cit, paragraphs 40 - 41.

⁴⁶³ See Article 17.9 of DSU.

⁴⁶⁴ *US - Lead Bismuth II*, Appellate Body Report, op. cit, paragraph 43.

in which the violation or nullification or impairment was found⁴⁶⁶. However, the complainant can impose sanctions in a different sector under the same agreement or in a different agreement where it is impracticable or ineffective to remain within the same sector or agreement.⁴⁶⁷

Furthermore, the DSB authorization is automatic and must come within 30 days of the expiry of the reasonable period of time, unless there is a consensus to reject the request.⁴⁶⁸ If the parties did not agree on the proposed term of retaliation, arbitration may be requested to determine same⁴⁶⁹.

The arbitrators must determine the question within 60 days of the expiry of the reasonable period of time, and during the course of arbitration, the complainant must not suspend the obligation. Contrary to this provision, the US, prior to DSB authorisation in EC — Banana dispute imposed preliminary measures on certain imports from EC in anticipation of such authorisation. This action of the US led to another dispute in which the panel condemned the US action as amounting to unilateral determination contrary to the DSU⁴⁷⁰.

The arbitral decision is final and the DSB would authorize suspension of obligation if it is consistent with the arbitral decision. In several cases⁴⁷¹ in which suspension were authorized, the levels of suspension were determined by Arbitration.⁴⁷²

The above stated procedures relating to temporarily measures do not apply in all cases. For instance, different rules apply in cases involving the SCM Agreement⁴⁷³ and in situation

⁴⁶⁵EC – Asbestos, Body Report 1 op. cit; paragraph 52 – 55

⁴⁶⁶General Council, minutes of the meeting of 22 November 2000, WT/GC/M/60.

⁴⁶⁷EC - Sardines: Trade Description of Sardines, Appellate Body Report, WT/DS231/AB/R, adopted 23 October 2002

⁴⁶⁸Mexico - Tax Measures on Soft Drinks and Other Beverage Appellate Body Report, WT/DS308/AB/R, adopted on March 14, 2006, paragraph 8

⁴⁶⁹EC - Banana III, op. cit, paragraph 132.

⁴⁷⁰Ibid, paragraphs 135 - 138.

⁴⁷¹Korea - Dairy: Definitive Safeguard Measure on Imports of Certain Dairy Products, Panel Report, WT/DS98/R and Corr. 1, adopted 12 January 2000, DSR 2000:1, 3 at paragraph 7.13.

⁴⁷²See for instance, US - Section 211 Omnibus Appropriations Act of 1998, Appellate Body Report, WT/DS176/AB/R, adopted 1 February 2002, paragraphs 275 - 281, 309; US - Line pipe, op. cit, paragraphs 120 - 122, 130 - 133.

⁴⁷³Examples of such exceptions include Article XX of GATT 1994, and Article 5.7 of the Agreement on Sanitary and Phytosanitary Measures (SPS).

complaints⁴⁷⁴. As regards non-violation complaints, compensation can constitute full compliance to a panel Appellate Body recommendations and therefore not a temporary relief in such cases.

Worthy of note is the fact that the above-described rules relating to retaliation works without problem where it is agreed that there had been no implementation at all. However, where there is a disagreement on whether or not there has been a satisfactory implementation, a problem arises as to which of the procedures in Articles 21.5 and 22.2 of the DSU has priority. In other words, should the complainant refer the disagreement to a panel or request the DSB to authorize suspension of concessions. The panel has 90 days to issue its report, while the DSB must authorize suspension of concession within 30 days after the expiration of the reasonable period of time. The compliance panel procedure would normally not be completed within 30 days of the expiration of the reasonable period of time.

Consequently, a number of questions arise. The questions are: should the procedures be followed simultaneously; or must the Article 21.5 procedure precede the Article 22.2 procedure? On the other hand, should Article 22.2 procedure be suspended until the completion of Article 21.5 procedure? Would the right to authorization by the DSB in the absence of a consensus not to authorize still apply? These issues are not clearly dealt with in the DSU and came to head in the EC-Banana III dispute.

In subsequent cases the parties have usually reached an adhoc agreement on the application of the procedures⁴⁷⁵. In some cases, they initiated the two simultaneously and they suspend Article 22.2 procedures until completion of Article 21.5 procedure. In others they apply Article 21.5 before resorting to Article 22.2 procedure. For instance, in Brazil - Aircraft⁴⁷⁶ and Canada — Aircraft⁴⁷⁶, Canada and Brazil agreed that the parties would not request authorization to suspend concessions until after circulation of Article 21.5 report.

⁴⁷⁴See US - Shrimp, Appellate Body Report, op. cit, paragraphs 725 and 146; and EC - Hormones, Appellate Body Report, op. cit, paragraphs 120 - 125.

⁴⁷⁵US-Wool Shirts and Blouses: Measures Affecting Imports of Woven Wool Shirts and Blouses from India, Panel Report, WT/DS 33/R and Corr. 1, as modified by Appellate Body Report WT/DS33/AB/R, adopted 23 May 1997, DSR 1997: 1,323, Paragraphs 18- 19.

⁴⁷⁶*Ibid*, paragraph 19.

5.2 LEGAL EFFECTS OF DISPUTE SETTLEMENT BODY'S RULING/RECOMMENDATION

According to Article 3.7 of the DSU, in the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measure concerned if these are found to be inconsistent with the provisions of any of the covered agreement. In addition, the prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure the effective resolution of disputes to the benefit of all members⁴⁷⁷.

Bearing in mind that in every successful violation complaint, the panel or Appellate Body has found an inconsistency with the WTO law and recommends in its conclusion that the member concerned should bring its measure in conformity with the WTO Agreement concerned⁴⁷⁸, the only permanent resolution to the dispute is for the losing party to bring its measure into conformity with the relevant covered agreement, compensation and suspension of concession, being only temporary remedies that fall short of resolving the dispute⁴⁷⁹. In relation to a successful non-violation complaint, the DSU provides that there is no obligation to withdraw the WTO consistent measure that resulted in nullification or impairment of benefit. Thus, the panel or Appellate Body only recommends that the member concerned make a mutually satisfactory adjustment.⁴⁸⁰

After the adoption of a panel or Appellate Body's report, the conclusions and recommendations contained in that report become binding on the parties to the dispute. Consequently, in a successful violation complaint the recommendation for the respondent to bring its measure into conformity with the WTO Agreement contained in an adopted panel or

US - Lead and Bismuth II, Appellate Body Report, op. cit, paragraphs 71 and 73; Canada - Autos, Appellate Body Report, op. cit, paragraph 117.

⁴⁷⁷India - Patent, Appellate Body Report, op. cit, paragraph 87.

⁴⁷⁸EC - Poultry: Measures Affecting the Importation of Certain Poultry Products, Appellate Body Report, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998 : V. 2031, Paragraph 133 and 135.

⁴⁷⁹Ibid, Paragraph 136.

⁴⁸⁰US -- Wool Shirts and Blouses, Appellate Body Report, op. cit, page 323.

Appellate Body report is binding upon the respondent. Moreover, the adopted panel or Appellate Body report in a successful non-violation complaint is also binding on the respondent with regards to the panel or the Appellate Body's conclusion as to whether or not a benefit accruing to the complainant under a covered agreement has been nullified or impaired. In addition, the adopted report is also binding on the complainant, especially with respect to those cases where all the claims of the complainant did not succeed.

However, in a successful violation complaint where the measure in question was taken by regional or local government/authorities within the territory of the losing member, the implementation obligation of such member is limited to such reasonable measures as are available to it to ensure observance of the WTO Agreement.⁴⁸¹ This exception relates only to the member's implementation obligations in so far as the achievement of conformity with the WTO Agreement by withdrawing the inconsistent measure is concerned. The provisions relating to compensation and the suspension of obligations fully apply in cases where it has not been possible to secure such observance. This provision would normally be relevant where the domestic laws of the member limit the central government powers over the regional or local levels of government.

This situation is peculiar to member states of WTO who operate federal system of government. For instance, by Section 102(b) and (c) of the United States' Uruguay Round Agreements Act, where the law of a state or locality is inconsistent with US's WTO obligation, the Federal Government can only bring a suit against such state or locality to declare its law invalid because of its inconsistency with a WTO agreement.

The rule of *stare decisis* does not apply in the WTO dispute settlement system. Therefore the adopted reports of panels and the Appellate Body are not binding precedents for subsequent dispute, even though the same question of WTO law arose. However, it is very likely that the panel or the Appellate Body in a subsequent case will repeat or follow the reasoning developed

⁴⁸¹US - DRAMS Panel Report, op. cit, paragraph 6.92

in the previous report in support of the interpretation given to a WTO rule, which they consider to be persuasive.⁴⁸²

Accordingly, the Appellate Body in the Japan – Alcoholic Beverages II⁴⁸³ stated that the WTO panel reports and equally, adopted Appellate Body report⁴⁸⁴ create legitimate expectations among WTO members, and, therefore, should be taken into account where they are relevant to any dispute.

On the other hand, an un-adopted panel/Appellate Body's report has no formal legal status in the WTO dispute settlement system. However, the reasoning contained in it can provide a useful guidance to a panel or Appellate Body in a subsequent case involving the same legal question⁴⁸⁵.

5.3 PARTICIPATION IN THE PROCEEDINGS

As already stated in this work, only WTO member governments can participate either as parties or third parties in the WTO dispute settlement proceedings. Moreover, the entire procedure, starting from consultations to the Appellate review, apart from the stage of the circulation of panel report to the WTO members is confidential⁴⁸⁶, although members have the right to disclose their own submission to the public⁴⁸⁷. Consequently, non-participants do not contribute to the proceedings. This raises, the issue of legal presentation and amicus curiae submissions in the WTO dispute settlement system.

5.3.1 Legal Representation

⁴⁸²US - Stainless Steel: Definitive Safeguard Measures on Imports of Certain Steel Products, Panel Report, WT/DS251/R, adopted 10 December 2003, DSR 2003 VII, 3117, Paragraph 6.55.

⁴⁸³Canada - Autos, Appellate Body Report, op. cit, paragraphs 116 - 117.

⁴⁸⁴Article 3.7 of the DSU.

⁴⁸⁵Australia - Salmon: Measure Affecting Importation of Salmon, Appellate Body Report, WT/DS18/AB/R, adopted 6 November 1999, DSR 1999: 111, 116, Paragraph 223.

⁴⁸⁶US - Lead and Bismuth II, Appellate Body Report, op. cit, paragraphs 71 and 73.

⁴⁸⁷For the meaning of objective assessment in relation to the establishment of the facts of the case, see EC - Hormones, Appellate Body Report, op. cit, paragraph 117.

The DSU did not address the issue on whether a party can be represented by legal counsel or only by its government officials in the panel's meetings and oral hearing of the Appellate Body. This issue confronted the DSB and in the EC Banana III dispute, one party challenged the rights of parties and third parties to have independent private legal counsel as their representatives. Although the Appellate Body invoked the practice under GATT 1947 to deny such possibility, it clearly stated that nothing in the WTO Agreements or general international law prevents a WTO member from determining for itself the composition of its delegation in the proceedings.⁴⁸⁸

Currently, private legal counsel appears as part of parties and third parties delegation and present arguments on their behalf in panel and Appellate Body proceedings. This is quite important to developing country members who can now actively participate in dispute settlement proceedings even though they lack human resources with specific expertise in WTO dispute settlement⁴⁸⁹,

Finally, the member who employs the services of the 'private legal counsel is responsible for them and must ensure that they respect the confidentiality of the proceedings⁴⁹⁰.

5.3.2 Amicus Curiae Submissions

The issue that arises here is whether panels and Appellate Body can accept and consider unsolicited submissions received from entities not a party or third party to the dispute. These submissions are usually made by non-governmental organizations. To further complicate matters, both the DSU and the working procedure for Appellate Review did not address the issue specifically.

In the US – Shrimp case the panel received briefs from three non-governmental organizations. The complaining parties in the dispute (Malaysia, India, Pakistan and Thailand) requested the panel not to consider the contents of the briefs submitted by the organizations,

⁴⁸⁸Ibid, paragraphs 133, 135 and 138.

⁴⁸⁹Ibid, paragraph 132.

⁴⁹⁰EC - Poultry. Appellate Body Report, op. cit, Paragraph 133.

while US urged the panel to take into account any relevant information in the two briefs it acknowledged receiving. The panel found that accepting non-requested submissions from non-governmental sources would be incompatible with the provision of the DSU and informed the parties that it did not intend to take the documents into consideration⁴⁹¹.

However, the Appellate Body subsequently held that given the breadth of a panel's mandate to seek information under Article 13 of DSU, a panel has the authority either to accept and consider or to reject information and advice submitted to it, whether requested by the panel or not⁴⁹².

Thus, with regards to panel procedures, the Appellate Body has, on several occasions confirmed that the panel is permitted, by virtue of the powers vested on by the DSU,⁴⁹³ to accept and consider or to reject such non-requested amicus curiae submissions⁴⁹⁴. Notwithstanding this position of the Appellate Body, many WTO members are of the strong view that the DSU does not permit panel to accept and consider such unsolicited amicus curiae submission. According to them, dispute settlements are purely between members and they do not see any role for non-parties especially non-governmental organizations in the proceedings⁴⁹⁵. Be that as it may, it is believed that the acceptance and consideration of amicus curiae submissions by panel and

⁴⁹¹Japan – Agricultural Products II, Appellate Body Report, Paragraphs 127 - 130.

⁴⁹²See US - Underwear: Restrictions on Imports of Cotton and Man-made Fibre Underwear, Panel Report, WT/DS24/R, as upheld by the Appellate Body Report, WT/DS24/AB/R, adopted 25 February 1997. DSR A997: I, 11 at paragraphs 7.10 and 7.12 - 7.13.

⁴⁹³For the Standard of Review applicable to safeguard measures, see Adopted pursuant to Article XIX of GATT 1994 and the Agreement on safeguards; Argentina - Footwear (EC): Safeguard Measures on Imports of Footwear, Appellate Body Report, WT/DS 121/AB/R, adopted 12 January 2000, DSR 2000: 1, 515, paragraph 121; and US-Lamb: Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, Appellate Body Report, WT/DS177/AB/R, at paragraphs 103 and 106.

⁴⁹⁴For detailed discussion on the standard of review applicable to Anti - Dumping Agreement, see Article 1 7.6 of the Anti-Dumping Agreement; Ibid, Article 17.6(ii); US – Hot Rolled Steel: Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan, Appellate Body Report, WT/DS184/AB/R, adopted 23 August, at paragraphs 57-62,172; EC-Bed Linen: Anti-Dumping Duties on Import of Cotton - Type Bed Linen from India, Appellate Body Report, WT/DS141/AB/R, adopted 12 March 2001 at paragraphs 63 - 65 and 85.

⁴⁹⁵US-Cotton Yarn: Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan, Appellate Body Report; WT/DS 192/AB/R, adopted 5 November 2001 at paragraphs 73 and 78.

Appellate Body would have a sound basis in the legal framework of the WTO dispute settlement system as well as conform to trends in the general practice of international courts and tribunals.

In fact, only a few panels have made use of their discretionary right to accept and consider unsolicited amicus curiae submissions. This was the case in India — Quantitative Restrictions where the panel accepted the submissions of the International Monetary Fund⁴⁹⁶. Consequently, interested entities that are not parties or third parties to a dispute have no legal right to be heard by a panel.

On the other hand, the Appellate Body has frequently received amicus curiae submissions. If the submission is attached to a participant's written submission, the Appellate Body considers it as an integral part of the participant's submission, and the participant assumes responsibility for the content of the amicus curiae submission⁴⁹⁷. However, if the Appellate Body received the amicus curiae submission directly from the non-participant, the Appellate Body would not consider it⁴⁹⁸.

Notwithstanding this attitude of the Appellate Body, has maintained that in line with the power vested on it by the DSU⁴⁹⁹, it has the right to accept and consider any information, including unsolicited amicus curiae submission, which it considers important and useful in deciding an appeal⁵⁰⁰.

Accordingly, the Appellate Body adopted additional procedure in the EC Asbestos dispute by requiring all the entities that intended to file amicus curiae submission to apply for leave to file them. However, the Appellate Body denied all the applicants leave to file the submissions⁵⁰¹. Expectedly, most WTO members condemned the Appellate Body's adoption of additional procedure, and in a special meeting of the General Council where the issue was

⁴⁹⁶ US-Shrimp, op. cit, paragraphs 105-108

⁴⁹⁷ Minutes of the General Council meeting of 22 November 2000, WT/GC/M/60

⁴⁹⁸ India- Quantitative Restrictions on Imports of agricultural, Textile and Industrial Products, Panel Report, WT/DS90/R, 22 September 1999.

⁴⁹⁹ US-Shrimp Appellate Body Report, Op. cit, paragraphs 89 and 91

⁵⁰⁰ US-Lead and Bismouth II, Appellate Body Report, op. cit, paragraph 43

⁵⁰¹ EC-Asbestos, Appellate Body Report, op. cit, 52-55

discussed, concluded that it is not acceptable for the Appellate Body to accept and consider amicus curiae submission⁵⁰².

Be that as it may, in 2002, the Appellate Body received an amicus curiae submission on the ground that it was entitled to accept such submissions but it did not believe that it was required to consider the content of the submission⁵⁰³. Moreover, recently in 2006, the Appellate Body received amicus curiae from Camara Nacional de las Industrias Azucarera Y Alcoholera (National Chamber of Sugar and Alcoholic Industries) of Mexico. However, the Appellate Body did not find it necessary to take the brief into account in resolving the issues raised in the appeal, and has never considered any such submitted amicus curiae submission⁵⁰⁴.

5.4 LEGAL ISSUES ARISING IN THE PROCEEDINGS

Several legal issues arise in the WTO dispute settlement proceedings. They include:

5.4.1 Right to Bring Claim

No provision of the DSU contains any explicit requirement that a complainant must have a legal right or interest in the claim it is pursuing⁵⁰⁵. Thus, in the BC- Banana III dispute, the European Communities challenged the standing of the United States to bring a violation complaint under GATT 1994, and argued that a complaining party must normally have a legal right or interest in the claim it is pursuing. In relation to this issue, the Appellate Body stated that no provision of the DSU contains any such explicit requirement and held that a member has broad discretion in deciding whether to bring a case against another member under the DSU. In addition, the Appellate Body stated that US being a producer of bananas, a potential export interest by US cannot be excluded. It therefore agreed with the panel that with the increased interdependence of the global economy, members have a greater stake in enforcing WTO rules

⁵⁰² General Council Meeting, minutes of the meeting of 22 November 2000, WT/GC/M/60

⁵⁰³ EC-Sardines: Trade Description of sardines, Appellate Body Report, WT/DS/231/AB/R, adopted 23 October 2002

⁵⁰⁴ Mexico- Tax Measures on Soft Drinks and Other Beverages, Appellate Body Report, WT/DS308/AB/R, adopted March, 14 2006, paragraph 8

⁵⁰⁵ EC-Banana III, op. cit, paragraph 132

than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly⁵⁰⁶.

This decision was adopted in Korea – Dairy, when Korea argued that there is a requirement for an economic interest to bring a matter to the panel and that BC had failed to meet that requirement⁵⁰⁷. Indeed, WTO members have been allowed to bring complaints against the violation of WTO Agreements even though such violations were to the detriment of other members⁵⁰⁸.

Furthermore, with regards to invocation of exceptions, any respondent that intends to rely on a WTO legal exception⁵⁰⁹ to the obligations, a violation of which the complainant has claimed, must expressly invoke such an exception, otherwise, the panel or Appellate Body would not apply the exception to the dispute⁵¹⁰.

5.4.2 Judicial Economy and Standard of Review

A panel has the mandate to address the complaint's entire claim. However, in cases of multiple complaints relating to the same measure, a panel need not address all the legal claims made by the complaint, but should address only the ones that are necessary to resolve the matter at issue in the dispute. Thus, in US – Wool Shirts and Blouses, the panel decided to address only the legal issues it thinks are needed in order to make such findings as will assist the DSB in making recommendations or in giving rulings with respect to India's claims in the dispute.⁵¹¹ The Appellate Body upheld the panel's findings and rejected India's argument that Pursuant to Article 3.2, panels' were obliged to address all legal claims raised by the parties⁵¹².

⁵⁰⁶Ibid paragraphs 135-138

⁵⁰⁷Korea-Dairy: Definitive Safeguard Measure on Imports of Certain Dairy products, Panel Report, WT/DS98/R adopted 12 January 2000, DSR 2000:I, 3 at paragraph 7.13

⁵⁰⁸US-Section 211 Omnibus Appropriations Act of 1998, Appellate Body Report, WT/DS176/AB/R adopted 1 January 2002, paragraphs 275-281

⁵⁰⁹Examples of such exceptions include Article xx of GATT 1994, and Article 5.7 of the agreement on Sanitary and Phytosanitary Measures (SPS).

⁵¹⁰US-Shrimp Appellate Body Report, op. cit, paragraphs 725 and 146.

⁵¹¹US-Wool and Blouses: Measures Affecting Imports of Woven Wool Shirts and Blouses from India, Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997, paragraphs 18-19

⁵¹²Ibid paragraph 19

In fact, according to the Appellate Body, a panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties⁵¹³ as well as the arguments made by the parties it was going to address in its analysis⁵¹⁴. Thus, in EC – Poultry, the Appellate Body rejected Brazil’s argument that the Panel had not made an objective assessment of the matter before it because the panel had failed to consider various arguments made by Brazil regarding GATT/WTO jurisprudence⁵¹⁵.

Furthermore, where a panel has already found a measure inconsistent with one of the provisions of the covered agreements invoked by the complainant, there is no need to consider whether the same measure is also consistent with other provisions invoked in the complaint.⁵¹⁶ This happened in US – DRAMS⁵¹⁷ and US – Stainless Steel⁵¹⁸ where the respective panels, having found a violation of Article II.2 and Article 2.4.1 of the Anti-Dumping Agreement, respectively exercised judicial economy with respect to Articles 1, X and X:3(a) of GATT. 1994. In short, panels have the discretion to refuse to rule on these other claim⁵¹⁹, but should do so explicitly. Thus the Appellate Body in Canada Autos, admonished the Panel for not stating explicitly that it was exercising judicial economy, when it did not address a particular claim⁵²⁰.

However, the panel’s discretion must be exercised in such a manner that is consistent with the objectives of the dispute settlement system⁵²¹ and the panel must address all those

⁵¹³India-Patent, Appellate Body Report, op. cit paragraph 87

⁵¹⁴EC-Poultry Measures Affecting the Importation of certain Poultry Products, Appellate body Report, WT/DS69/AB/R, adopted 23 July 1998, paragraph 133 and 135

⁵¹⁵ Ibid paragraph 136

⁵¹⁶US-Wool Shirts and Blouses, Appellate Body Report, op. cit, page 323

⁵¹⁷US-DRAMS, Panel Report, op. cit, paragraph 6.92

⁵¹⁸US-stainless Steel: Definitive Safeguard Measures on Imports of Certain Steel products, Panel Reports, WT/DS/251/R, adopted 10 December 2003, DSR 2003: VII, 3117, paragraph 6.55

⁵¹⁹US-Lead and Bismuth II, Appellate Body report, op. cit, paragraph 117

⁵²⁰Canada-Autos, Appellate Body report, op. cit, paragraphs 116-117

⁵²¹Article 3.7 DSU

claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings as to allow for prompt compliance by the losing member⁵²².

Notwithstanding the foregoing, there is no obligation on a panel to exercise judicial economy. In *US Lead and Bismuth II*, the Appellate Body while rejecting US argument that the Panel was required to exercise judicial economy and address only the issues necessary for resolving the dispute at hand, emphasized that the exercise of judicial economy was within the discretion of a panel, and a panel was never required to exercise judicial autonomy⁵²³.

With regards to standard of review, Article II of the DSU stipulates that a panel must 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 the relevant covered agreement, 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.

According to the Appellate Body in *EC – Hormones*, the duty to make an objective assessment of the fact is, among other things⁵²⁴, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. Consequently, the deliberate disregard of or refusal to consider, or distortion of or misrepresentation of the evidence in their ordinary signification in judicial and quasi-judicial processes imply not simply an error of judgment in the appreciation of evidence, but rather an egregious error that calls into question the good faith of a panel and a claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree denied the party submitting the evidence fundamental fairness or what in many jurisdictions is known as due process of law or natural justice⁵²⁵.

⁵²² *Australian – Salmon: Measure Affecting Importation of Salmon*, Appellate Body Report, WT/DS18/AB/R, adopted 6 November 1999, DSR 1999: 111,116 Paragraph 223.

⁵²³ *US – Lead and Bismuth II*, Appellate Body Report, op. cit, paragraphs 71 and 73

⁵²⁴ For the meaning of objective assessment in relation to the establishment of the facts of the case, see appellate Body Report, op. cit, paragraph 117

⁵²⁵ *Ibid*, paragraphs 133, 135 and 138

The issue of a panel making an objective assessment of the matter before it is a legal question that falls within the scope of an appellate review⁵²⁶. In fact, an allegation that a panel has failed to conduct an objective assessment of the matter before it is a very serious allegation which goes to the very core of the integrity of the WTO dispute settlement process itself⁵²⁷. However, only egregious errors constitute a failure to make an objective assessment of the facts⁵²⁸.

With respect to the standard of review under the DSU, different standards of review apply to the Agreement on Textile and Clothing⁵²⁹, safeguard measures⁵³⁰, and the Anti-Dumping Agreement⁵³¹.

Finally, the panel must not consider evidence that are not in existence at the time the member state made its determination⁵³², and it is expected that the national authorities of the member state must ascertain and evaluate relevant information notwithstanding that an interested party at the national proceedings relied upon it⁵³³.

5.4.3 Burden of Proof

The Appellate Body has, (since the DSU did not address the issue of burden of proof), endorsed the well-known rule that the party who asserts the affirmative of a particular fact – claim or defence must prove it⁵³⁴. The standard of proof is that the complainant must establish a

⁵²⁶ Ibid, paragraph 132

⁵²⁷ EC-Poultry, Appellate Body Report, op. cit, paragraph 133

⁵²⁸ Japan – Agricultural Products II, Appellate Body report, paragraph 127-130

⁵²⁹ US-Underwear: Restrictions on Imports of Cotton and Man-made Fibre Underwear, Panel Report, WT/DS24/R, upheld by Appellate Body Report, WT/DS24/AB/R, adopted 25 February 1997, DSR A997:I, 11 at paragraphs 7.10 and 7.12-7.13

⁵³⁰ For the Standard review applicable to Safeguard measures, see Adopted pursuant to article XIX of GATT 1994 and the agreement on safeguards; Argentina – Footwear (EC): safeguard Measure on Imports of Footwear, Appellate Body Report, WT/DS 121/AB/R, adopted 12 January 2000, DSR 2000: 1, 515, paragraphs 121.

⁵³¹ For detailed discussion on the Standard of review applicable to Anti-Dumping Agreement, See Article 17.6 of the Anti-Dumping Agreement ; ibid, Article 17.6

⁵³² US – Cotton Yarn: Transitional Safeguard Measures on combed Yarn from Pakistan, Appellate Body Report; WT/DS/AB/R, adopted 5 November 2001 at paragraphs 73 and 78.

⁵³³ US – Wheat Gluten: definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Appellate Body Report, WT/DS 166/AB/r adopted 19th January 2001 at paragraph 55

⁵³⁴ US – Wool Shirts and Blouses, Appellate Body Report, op. cit, at page 1

prima facie case, and the respondent must submit sufficient evidence to disprove the complainant's claim⁵³⁵. However, the evidence that would meet the standard of proof varies from measure to measure, provision to provision, and case to case.⁵³⁶

These principles of burden of proof were adopted by the Appellate Body in *EC – Hormones* with relation to the Sanitary and Phytosanitary (SPS) Agreement⁵³⁷, and in *India Patents (US)* with respect to the TRIPS Agreement⁵³⁸.

In *Canada – Aircraft*⁵³⁹ the Appellate Body defined a prima facie case to be a case which, in the absence of effective refutation by the defending party requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case.

In addition, the panel should look at all the evidence presented by the parties in deciding whether or not the complaining party has proved a prima facie case. Accordingly, the Appellate Body in *Korea – Dairy*, rejected Korea's argument that the panel should have looked solely at the evidence submitted by the EC as the complaining party to determine whether the BC had met its burden of proof of making a prima facie case and held that in determining whether a prima facie case has been made, the panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof⁵⁴⁰.

In short, the panel in *Turkey - Textiles*⁵⁴¹ summed up the rules on burden of proof under WTO jurisprudence as follows:

- (a) It is for the complaining party to establish the violation it alleges;

⁵³⁵*Korea – Dairy*, Appellate Body Report, op. cit., paragraph 145; and US Section 301 Trade Act, Appellate Body Report, op. cit., paragraph 7.14

⁵³⁶*EC – Hormones*, Appellate Body Report, op. cit. paragraphs 98, 102 and 104

⁵³⁷*Indian – Patent (US)*, Panel Report, op. cit., paragraphs 7.14

⁵³⁸*Canada – Aircraft*, Appellate Body Report, op. cit., paragraph 192

⁵³⁹*Korea – Dairy*, Appellate Body Report, op. cit., paragraphs 137 - 138

⁵⁴⁰*Turkey – Textiles: Restrictions on Imports of textiles and Clothing Products*, Panel Report, WT/DS34/R as upheld by Appellate body Report, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999: VI, 2345, paragraphs 9.57

⁵⁴¹*Thailand – H-Beams*, Appellate Body Report, op. cit., paragraph 134

- (b) It is for the party invoking an exception or an affirmative defence to, prove that the conditions contained therein are met; and
- (c) It is for the party asserting a fact to prove it.

Finally, the Appellate Body-has on several occasions, held that a panel was not obliged to make an explicit finding that a party has met its burden of proof of making a prima fade case before proceeding to examine the respondent’s defence and evidence.⁵⁴²

5.4.4 The Panel’s Right To Seek Information

Under the DSU⁵⁴³, a panel has the right to seek for information from any individual or body it deems appropriate. The exercise of this broad right is left at the discretion of the panel.⁵⁴⁴ For instance, in EC- Hormones, the Appellate Body examined the EC’s challenge of the panel’s selection and use of experts and stated that a panel has the discretion to decide whether to seek advice from individual scientific experts or from a group of such experts, and may in the former case, establish ad hoc rules for such consultations⁵⁴⁵.

Thus, the panel in India — Quantitative Restrictions, acting under this provision consulted with the IMF on India’s balance-of-payments situation and the Appellate Body held that Article 13.1 of the DSU entitles the panel to do so⁵⁴⁶.

According to the Appellate Body in US — Shrimp, the word “seek” in the phrase should not be given an excessively formal and technical heading, and that given the breadth of a panel’s mandate to seek information, the distinction between requested and non-requested information vanishes⁵⁴⁷. Consequently, the Appellate Body held that the panels have the authority to accept amicus curiae briefs⁵⁴⁸.

⁵⁴²Article 13 of the DSU

⁵⁴³US – Shrimp, Appellate body Report, op. cit., at paragraph 104 and 106

⁵⁴⁴EC – Hormones, Appellate Body Report, op. cit., at paragraph 148

⁵⁴⁵India – Quantitative Restrictions, Panel Report, op. cit., at paragraphs 5.12 – 5.13

⁵⁴⁶US – Shrimp, Appellate Body Report, op cit., at paragraphs 107- 110

⁵⁴⁷Ibid, paragraph 107

⁵⁴⁸Canada – Aircraft, Appellate body Report, op. cit., at paragraphs 188, 189 and 198-203

This right includes the panel’s right to request and obtain information from members parties to the dispute and members are under legal obligation to supply the requested information. With regard to the right of the panel to request information from members parties to a dispute, the Appellate Body stated, in *Canada – Aircraft* thus:

“It is clear from the language of Article 13 that the discretionary authority of a panel may be exercised to request and obtain information, not just from any individual or body within the jurisdiction of a member of the WTO, but also from any member, including a fortiori a member who is a party to a dispute before a panel. This is made crystal clear by the third sentence of Article 13.1, which states: A member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate⁵⁴⁹”.

Moreover, where a member fails to supply the requested information the factual matter in doubt would be interpreted to the disadvantage of that member. Hence the Appellate Body went on to state that the word “should” in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in normative, rather than a merely exhortative sense. Members are under a duty and an obligation to respond promptly and fully to requests made by panels for information under Article 13.1 of the DSU⁵⁵⁰.

Developing and least developed country members of the WTO face considerable burdens while trying to avail themselves of the benefits of the dispute settlement system. For instance, most developing and least developed countries often do not have a sufficient number of

⁵⁴⁹Ibid, paragraph 187

⁵⁵⁰Ibid, Article 4.10

specialized human resources who are experts in the intricacies of the substance of the WTO law or the dispute settlement procedure.

However, the DSU recognizes the peculiar situation of the developing and least – developed country member, and has created rules of special and differential treatment to address the situation. Consequently, the DSU made available to developing and least developed country members’ additional or privileged procedures and legal assistance in relation to disputes involving them.

First, members should give special attention to the particular problems and interests of developing country during consultation⁵⁵¹. Where consultation involves a measure taken by a developing country member, the parties may agree to extend the regular period of consultation, and the chairman of the DSB can extend the period of consultation, if after the relevant periods has elapsed, the parties consulting cannot agree that consultation has been concluded⁵⁵².

Second, at the panel stage, where the dispute is between a developing country member and a developed country member, the DSB must, at the request of the developing country member, include at least one panelist from a developing country member in the panel⁵⁵³.

Moreover, the panel must accord a developing country member who is a respondent sufficient time to prepare and present its defence. However, this must not affect the overall time period for the panel to complete its work⁵⁵⁴. For instance, in the India — Quantitative Restrictions dispute⁵⁵⁵, the panel upon India’s request, granted an additional period often days to India to prepare its first written submission to the panel, despite the United States’ objection.

In addition to the foregoing, where a developing country member party to a dispute raises rules on special and differential treatment of the DSU or other covered agreements, the panel

⁵⁵¹Ibid, Article 12.10

⁵⁵²Ibid, Article 8.10

⁵⁵³Ibid, Article 12. 0

⁵⁵⁴India – Quantitative Restrictions on Imports of Agricultural and Industrial Products, Panel Report, WT/DS90/R, adopted 22 September 1999, DSR; v, 1799, paragraph 5.10

⁵⁵⁵Article 12.11 of DSU

must explicitly indicate in their report the form in which these rules have been taken into account⁵⁵⁶.

Third, at the implementation stage, the DSU mandates that particular attention should be paid to matters affecting the interests of developing country members with respect to measures which have been subject to dispute settlement⁵⁵⁷.

The DSU also mandates the DSB to consider what further and appropriate action it might take in addition to surveillance and status reports, if a developing country member has raised the matter⁵⁵⁸. Moreover, in considering what appropriate action to take in a case brought by a developing country member, the DSB should take into account not only the trade coverage of the measure complained of, but also its impact on the economy of the developing country member concerned⁵⁵⁹.

Thus, in *Indonesia Autos* (Article 21.3)⁵⁶⁰ the Arbitrator, in determining the reasonable period of time pursuant to Article 21.3(c) of the DSU, took into account not only Indonesia's status as a developing country in determining the reasonable period of time, but also the fact that it is a developing country that is currently in a dire economic and financial situation. As a result, the Arbitrator explicitly granted an additional period of six months to Indonesia for implementation⁵⁶¹.

However, as stated by the Arbitrator in *Chile – Alcoholic Beverages*, taking into account the interests of developing countries in determining the reasonable period of time pursuant to Article 21.3(c), should not result in different kinds of considerations that may be taken into

⁵⁵⁶ *Ibid*, article 21.2

⁵⁵⁷ Article 12.7 of the DSU

⁵⁵⁸ *Ibid*, Article 21.8

⁵⁵⁹ Indonesia – Autos: Certain measures Affecting the Automobile Industry – Arbitration under Article 21.3 (c) of the DSU, Award of Arbitrator, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998:IX, 4029 paragraph 24.

⁵⁶⁰ Instances of cases where Article 21.2 was applied.. Chile – Alcoholic Beverages: Taxes on Alcoholic Beverages, Arbitration under Article 21.3 (c) of the DSU, Award of Arbitrator, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:1, 281 paragraph 45; Argentina – Hides and Leather: Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3 (c) of the DSU, Award of the Arbitrator, WT/DS/155/10, 31 August, 2001

⁵⁶¹ Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3 (c) of the DSU, Award of Arbitrator, WT/DS87/ARB/EC, at paragraph 38

account, that would be qualitatively different for developed and for developing country members⁵⁶².

Fourth, under the DSU⁵⁶³, if a developing country member brings a complaint against a developed country member, the complaining developing country member has the discretionary right to invoke, as an alternative to Article 4, 5, 6 and 12 of the DSU, the accelerated procedures of the Decision of 5 April 1966,⁵⁶⁴.

Fifth, Article 24 of the DSU made specific provisions relating to proceedings involving least-developed country member. According to the Article, particular consideration must be given to the special situation of the least – developed country member at all stages of the dispute settlement proceedings and other members must exercise due restraint in asking for compensation or seeking authorization to suspend obligation against such members.

Sixth, although the WTO secretariat assists all members in respect of dispute settlement at their request, the DSU provides for additional legal advice and assistance to be given to developing country members. To this end, the secretariat shall make available a qualified expert from the WTO technical corporation services to any developing country member which so requests. These experts must assist the developing country member in a manner ensuring the continued impartiality of the secretariat⁵⁶⁵.

Finally, developing and least developed country members of the WTO can receive effective assistance in dispute settlement from the recently established Advisory Centre on WTO law⁵⁶⁶. The Advisory Centre provides legal services by representing the country before Panel or Appellate Body at a discounted fee or by offering legal advice and training to developing and least developed countries that

⁵⁶² Ibid, Article 3.12

⁵⁶³ BISD 145/18

⁵⁶⁴ Article 27.2 of the DSU

⁵⁶⁵ Established by the Agreement – Establishing the Advisory Centre on WTO Law, signed by 29 members of the TO in Seattle on 1 December 199. The Agreement entered into force on 15 June 2001 and the official opening of the Advisory Centre in Geneva took place on 15 June 2001 .

⁵⁶⁶ See WTO Document No. WT/DS/OV/22

CHAPTER SIX

SUMMARY AND CONCLUSION

6.1 Summary

In January 1995, the WTO came into being as the international organization concerned with the promotion of global trade. Crucially, the WTO provides for the effective enforcement of its rules and agreements through a dispute settlement system, the results of which are binding on all parties. This dispute settlement system is one of the great strengths of the WTO. It is created by the DSU and administered by the DSB.

Disputes between members arising under the Multilateral Trade Agreements (covered Agreements) are first remitted to consultations, but if these are not successful, they may be adjudicated by panels and appealed to an Appellate Body. A significant development that brings additional certainty and predictability to the system is the establishment of the Appellate Body, as a quasi-permanent, standing tribunal. Rulings are automatically adopted unless there is a concession to reject a ruling. The parties must implement the decisions within a reasonable period of time, normally not more than fifteen months from the date of the adoption of a panel or Appellate Body Report. However, in the event of non-compliance with the decision of the DSB, a member can be subjected to sanctions in the form of compensation and suspension of concession.

The DSU emphasizes that prompt settlement of disputes is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and timetables to be followed in resolving disputes.

The number of disputes settled by the Dispute settlement Body is testimony to the success of the system: A notable development has been the increased propensity for parties to reach mutually agreed solutions. During the period from 1995 to 30 June 2003, of the 295 disputes submitted, the DSB established only 110 panels. This shows that about 185 disputes were settled without going to adjudication. This outcome is a strong endorsement of the system.

There has also been a greater involvement of smaller and developing countries in disputes. This shows that they are taking their rights and obligations seriously and are enjoying the benefits of the system, which accords the smallest members the same weight as the larger trading nations. Developing countries as a group have registered 124 of the 295 disputes brought by 30th June 2003 with India, Brazil, Mexico and Thailand playing the most active roles.

In its endeavour to fulfill its mandate, the WTO dispute settlement mechanism has encountered a number of problems, obstacles and challenges. These have hindered its effort in effectively and efficiently resolving trade disputes between states. These include the inability of the DSB to meet the deadlines specified by the DSU, the suspension of obligation as the final remedy in the WTO dispute settlement, bearing in mind that in the event of non-implementation, it is not all members that have the ability to resort to the suspension of obligations as a remedy as well as its ineffectiveness in bringing about implementation in some cases.

Another weakness in the DSU is the lack of remand procedure for Appellate Body. The DSU does not give the Appellate Body power to remand disputes to panels. However, the DSB has resolved this problem by adopting a practice whereby the Appellate Body does a complete analysis of particular issues in order to resolve cases where it has significantly modified a panel's reasoning. This avoids requiring the party to start the whole proceeding over as a result of these modifications.

Finally, developing countries wishing to participate in the system have encountered problems in the early years of the system. These problems arise from the fact that these countries do not have the required human resources and financial empowerment to take up cases under the system. However, these problems have been resolved by the establishment of the Advisory Centre on WTO Law.

Notwithstanding the extent of the problems, obstacles and challenges as well as the weaknesses of the DSU, it is important to note that they are not necessarily insurmountable. Given the outstanding problems, and challenges that are associated with the task of resolving

trade disputes among nations, a lot more efforts should be channeled toward creating a better enabling environment for the DSU to operate effectively. In fact, the WTO member states realizing the flaws in the DSU and the problems and challenges faced by the DSB in undertaking its task, had since 1997 entered into negotiations to review and reform the DSU. However, the negotiations could not be concluded so far as several deadlines lapsed without tangible achievements.

6.2 Findings

The importance and relevance of the dispute settlement to the rule-based multilateral trading system cannot be overemphasized. Indeed, there is no doubt that an effective and accessible dispute settlement mechanism is essential for the success of the multilateral trading system to ensure certainty, predictability and respect for the system. Below are some of the findings from the research.

1. Challenges of accessing Dispute Settlement Body's Benefits by Developing and least Developed States

Developing and least developed member countries of the WTO especially Africa face considerable burdens while trying to avail themselves of the benefits of the Dispute Settlement system. For instance, most developing and least developed countries often do not have sufficient number of specialized human resources who are experts in the intricacies of the substance of the WTO law or the dispute settlement procedure.

2. More effective Remedies

The traditional obstacles for trade in goods and services which is a challenge before the DSB are effective remedies. More specifically, new trade barriers based on rules and principles have emerged on a larger scale, which for example concern consumer protection, protection of patents and brands, education and qualification requirements for suppliers of services, environment

protection, labour protection, etc. In the event of any dispute arising therefrom, the DSB should have more effective remedies aside trade sanctions.

3. Transparency and Access to the Dispute Settlement System of the World Trade Organisation

The WTO dispute settlement system differs from the international practice on this issue. The proceedings before the Panel or Appellate Body are not open to the public for attendance. Third parties do not have the right to decide on whether or not their interventions should take place in open or closed session. It should be noted that the main aim of the mechanism is to secure positive solution to a dispute.

4. Professionalization of Panel

There is a growing need for the professionalization of the Panel of the DSB. The cases and the total duration of the cases are increasing, but it has proved more difficult to find qualified personnel to adjudicate on the disputes before the DSB.

6.3 Recommendations

The importance and relevance of the dispute settlement to the rule-based multilateral trading system cannot be overemphasized. Indeed, there is no doubt that an effective and accessible dispute settlement mechanism is essential for the success of the multilateral trading system to ensure certainty, predictability and respect for the system.

Consequently, it is paramount for the WTO to have an effective and efficient mechanism for resolving trade disputes among its members. The following recommendations are respectfully offered in order to make the DSU of the WTO effective and efficient in resolving trade disputes between the member states:

1. Challenges of Accessing Dispute Settlement Body's Benefits by Developing and least Developed States

The DSU should recognize the peculiar situation of the developing and least – developed member countries in Africa and create rules of special and differential treatment to address the

situation. The African continent trades and will continue to engage in trade in goods and services at the international market and yet her activities before the DSB are least recorded. The DSU should make available to developing and least developed country members' additional or privileged procedures and legal assistance in relation to disputes involving them and other developed member states.

First, members should give special attention to the particular problems and interests of developing country during consultation. Where consultation involves a measure taken by a developing country member, the parties may agree to extend the regular period of consultation, and the chairman of the DSB can extend the period of consultation, if after the relevant periods has elapsed, the parties consulting cannot agree that consultation has been concluded.

Secondly, at the panel stage, where the dispute is between a developing country member and a developed country member, the DSB should, at the request of the developing country member. The panel should accord a developing country member who is a respondent sufficient time to prepare and present its defence. In addition to the foregoing, where a developing country member party to a dispute raises rules on special and differential treatment of the DSU or other covered agreements, the panel must explicitly indicate in their report the form in which these rules have been taken into account.

Third, at the implementation stage, the DSU should mandate that particular attention should be paid to matters affecting the interests of developing country members with respect to measures which have been subject to dispute settlement. It should also mandate the DSB to consider what further and appropriate action it might take in addition to surveillance and status reports, if a developing country member has raised any issue relating thereto. Moreover, in considering what appropriate action to take in a case brought by a developing country member, the DSB should take into account not only the trade coverage of the measure complained of, but also its impact on the economy of the developing country member concerned.

Also, developing and least developed country members of the WTO should have unhindered to effective assistance in dispute settlement from the recently established Advisory

Centre on WTO law. The Advisory Centre provides legal services by representing the country before Panel or Appellate Body at a discounted fee or by offering legal advice and training to developing and least developed countries that

2. More effective Remedies

The first objective of the Dispute Settlement Body in the absence of a mutually agreed solution to a dispute is to secure the withdrawal of WTO – inconsistent measures. However, where immediate compliance is impossible, the DSU gives preference to temporary compensation over suspension of concession or other obligations. Hence, it is logical that trade compensation should always be preferred to suspension of concession or other obligations – which is the last resort instrument.

However, the reality is that compensation is currently not a realistic option before the application of trade sanctions. In fact, the structure of the DSU is such that members are induced to request suspension of concessions first.

The last resort remedy of the dispute settlement mechanism runs against a basic and a foundational principle of the WTO, that is, predictability of the trading system, and free trade. In addition, the remedy has been ineffective in bringing about the rebalancing of concession that was upset by the violation of WTO obligation by the losing member, and compliance with the concerned DSB ruling which are the main aims of the WTO remedies. The application of this last resort has also caused double injury to the winning member.

As a result of the foregoing, it is hereby recommended that as an alternative to trade sanction, monetary fine should be imposed on the losing member. The monetary fine should be equivalent to the level of nullification or impairment suffered by the winning party. In addition, provisional measures in terms of cost and damages should be awarded to the winning party to compensate for the legal expenses suffered in prosecuting the case, as well as damages suffered while the dispute was pending before the DSB. This it is believed would prove prompt implementation of DSB rulings.

It is also recommended that a member who fails to comply with the ruling of the DSB should be prohibited from invoking the jurisdiction of the DSU, until such a member complies with the ruling. After all, how can a member seek assistance from an institution whose decision and authority it challenges by non-compliance with the ruling? It is believed that this remedy would provide an incentive to the member to comply with the ruling but should not be so onerous as to provide it an incentive to break away from the international trade regime.

3. Transparency and Access to the World Trade Organization's Dispute Settlement System

Dispute settlement mechanisms established under international public law normally provide for public access to their proceedings. This is the case for the International Court of Justice as well as the European Court of Human Rights.

However, the WTO dispute settlement system differs from the international practice on this issue. Thus, it is hereby recommended that the text of the DSU should be modified as to provide sufficient flexibility for parties to decide whether certain part of the proceedings before the panel or Appellate Body should be open to the public for attendance. Third parties should also have the right to decide whether their interventions should take place in open or closed session, bearing in mind that the main aim of the mechanism is to secure positive solution to a dispute.

In doing this however, the Panel or Appellate Body should be able to impose limited and justified restrictions on the opening of the proceedings, especially when dealing with business confidential information.

4. Professionalization of Panel

There is a growing quantitative discrepancy between the need for panelists and the availability of adhoc panelists. The cases and the total duration of the cases are increasing, but it has proved more difficulty to find qualified panelists who are not nationals of members involved in the dispute either as a complainant, defendant or a third party.

Thus there has been an increasing delay in the selection of panelists, and an increasing recourse to the Director General of the WTO for appointment of panelists. For instance, the average time for the composition of the nine panels that worked by mid-January 2004 was 68 days instead of 20 – 30 days target set by the DSU.

Furthermore, in recent times, the actual conduct of a dispute settlement procedure has become much more sophisticated as a result of the increased complexity of the substance of the cases brought before the panels. This has indeed increased the workload of the panels that have to conduct an assessment of these complex disputes and the actual consideration of these cases put greater strain on panelist selected on an adhoc basis.

As a result of the foregoing, it is hereby recommended that the system should adopt permanent panelists, similar to the Appellate Body. Adopting permanent panelists, it is believed would reduce the total time frame of the dispute settlement procedure; the workload of the Appellate Body and costs for all the parties as well as enable the DSB meet up with the deadlines specified by the DSU.

It is further suggested that the DSB of the World Trade Organisation can be decentralized for effectiveness. By this, the member states are able to reach out and settle trade dispute within the region amicably and within the shortest possible time.

It is further that the World Trade Organisation can effectively set up Arbitrators amongst the member countries where there is a dispute without waiting for the DSB to form a quorum and deliberate on such dispute. Arbitrators can settle such dispute within a short interval thereby fostering trade relationship among member states.

On a final note, the entire DSB of the World Trade Organisation needs a total overhauling of the system to enable third world countries to be a part of the system.

6.3 Conclusion

In the current age of globalization, many factors foster international cooperation, and states increasingly realize that by establishing international organization that have some power of

governance and coercion, or by entering into international agreements that would curb their own behaviour, they can be better off. No organization has gone as far in this direction as the WTO.

The WTO, in addition to the large subjects covered by the WTO agreement, has created institutional base to fulfill its mission, and in regard to this, the dispute settlement system plays the most critical role. The system is the center piece of the WTO and can indeed be considered a giant leap in the field of public international law.

The trading nations granted an unprecedented degree of power to a legal tribunal to enforce the obligations under the WTO Agreement. The DSU is a model for other international organizations. In fact, it is observed that the WTO mechanism with courts, compulsory jurisdiction, appellate procedures and legally binding rulings, defines a model for amicable resolution of disputes between members that could also be adopted by other international organization

The first ten years of dispute settlement practice under the DSU have confirmed the usefulness of the system. The mechanism has been used actively, and the perception by both practitioners and academic observers has generally been positive. Nevertheless, the intense use of the mechanism has also revealed certain problems in its practical application.

Indeed, the system has in handling the numerous disputes that were brought before it by members, been able to clarify and preserve the rights and obligation of the WTO members through the rulings of the panels and the Appellate Body.

In relation to providing predictability and security to the unilateral trading system, the mechanism has been able to achieve this with the exception of the few cases where the DSB authorized trade sanctions.

Furthermore, it has been claimed that the establishment of the dispute settlement system was likely to be seen in the future as one of the most important and perhaps even watershed developments of international economic relations of the twentieth century.

On the whole, it is indubitable that in order to carry out its mandate more effectively and efficiently, the text of the DSU should be amended to correct the flaws identified by members

during its practical application. The system requires more realistic financial empowerment in order to enable it meet its need of staff, equipment, and other facilities that would enhance its effectiveness and efficiency.

BIBLIOGRAPHY

A. BOOKS

- Appleyard, R. Dennis/Field, J.Alfred, 1997, International Economics,3rdEdition, Irwin/Mcgraw-Hill.
- Chegwei, Liu, 2004, WTO Dispute Settlement Mechanism – An Analysis of the DSU in Positivism. Columbia Law Library Press.
- Curzon, Gerald and Victoria Curzon, 1976,The Management of Trade Relations in the GATT, in Andrew Schronfield, Ed., International Economic Relations of the Western World, 1959 - 1971 (Oxford: Oxford University Press, 1991)
- Davey, J. William, 2003 Has the WTO Dispute Settlement System Exceeded Its Authority? In T Cottier& P. Mavroidis (eds.), The Role of the Judge 43 – 80
- Davey, William J., 1999 The WTO Dispute Settlement System in Trade, Environment and the Millennium 119 (Gory P. Sampson & W. Bradnee Chambers Eds. Tokyo, New York, United Nation’s University Press.
- Davey, J. William, 2004, The WTO Dispute Settlement System: The first Decade, unpublished preliminary draft, of May 20, 2004:
- Dennis, Joseph F/McKenna & Cuneo, 1997 Law & Practice of the World Trade Organisation. Statement of Administrative Action: The World Trade Organisation Agreement and the Uruguay Round Agreements Act, New York : Oceana Publications, Inc. Booklet 12
- Dennis, Joseph F./McKenna &Guneo, 1998, Law and Practice of the World Trade Organization, Statement of Agreements Administrative Action: The WTO Agreement and the Uruguay Round Act, (New York: Oceana Oceana Publications Inc:) Booklet 1, Released 98 – 8 (General Editor McKenna & Cuneo) written by Linda C. Reif

- Ernst-Ulrich Petersmann, 1997, *The GATT/WTO Dispute Settlement System*, International Law, International Organisations and Dispute Settlement, (London: Kluwer Law International)
- Hudec, Robert E., 1993, *Enforcing International Trade Law*, (Salem, NH: Butterworth Legal Publishers.)
- Jackson, J.H, *World Trade and the Law of GATT*, 1969, (Virginia, USA: The Bobbs-Merrill Co. Inc.
- Wang, G. 1988, *International Trade Order*, Beijing: Publishing House of Law.
- Wang, G. 1993, *International Monetary and Financial Law*, (Hong Kong: Wide Angle Press,)
- Jackson, John H., *Designing and Implementing Effective Dispute Settlement Procedures – WTO Dispute Settlement*, in: Anne O. Krueger Edition, *The WTO as an International Institution*, (Chicago and London: The University of Chicago Press)
- Jackson, John H., 1991, *The World Trading System: Law and Policy of International Economic Relations*, (London: The MIT Press)
- Malonis, Jane A, 2000, *Encyclopedia of Business*, 2nd Edition (London: Gale Group,)
- Moens, Gabriel/Gillies, Peter, 2000, *International Trade and Business: Law, Policy and Ethics*, (London: Cavendish Publishing Pty Limited)
- Nolan, Cathal J, 2000, *The Greenwood Encyclopedia of International Relations*, (London: Greenwood Publishing)
- Palmeter, David and Petros C. Mavroidis, 1999, *Dispute Settlement in the World Trade Organization – Practice and Procedure*. (The Hague, London, Boston: Kluwer Law International,)
- Philip Raworth/Linda Reif, 1995, *The Law of the WTO, Final Text of the GATT Uruguay Round Agreements*, (New York: Oceana 1995) and Joseph Dennis, *Law & Practice of the World Trade Organization*, 2 Volumes, (New York: Oceana).

Sharp, Ansel/Register, Charles/Grimes, Paul, 2005, *Economics of Social Issues*, 15th Edition, (New York: McGraw – Hill/Irwin,)

Samuelson, Paul A./Nordhaus, William, 1985, *Economics*, 12th Edition (New York: McGraw – Hill Book Co.,)

Standard Educational Corporation, *New Standard Encyclopedia*, (Chicago), Vol. 7

Shaw, Malcolm, N., *International Law*, 1986, 2nd Edition, (Cambridge: Grotius Publication Limited,)

Trebilock and Howse, 1990, *The Regulation of International Trade*, 2nd Edition, (London,)

The World Book Encyclopedia, (Chicago, USA: World Book Inc. 2001) Vol.10.

The New Encyclopedia Americana, International Edition, (USA: Grolier Incorporated, 1985) Vol. 26

World Trade Organization, *A Handbook on the WTO Dispute Settlement System* (Geneva; Cambridge University Press 2004)

B. ARTICLES IN JOURNAL PUBLICATION

Ali, Asim Imdad, *Non-Compliance and Ultimate Remedies under the WTO Dispute Settlement System*, An Article in the *Journal of Public and International Affairs*, (U.K: The Trustees of Princeton University, 2003), Volume 14

Grasoley, *Retaliation for Mexico's HFCS Tax Possible if Issues are not Resolved Soon*, Zelaya-Quesada, Myrna 2002, an Article in *BNA International Trade Reporter*, Vol. 19 No. 7.

International Centre for Trade and Sustainable Development (ICTSD), *Committee on Trade and Development Discusses Assistance for Developing Countries* an Article

- published in Bridges Weekly Trade News Digest Volume 5 No. 20 of 29th May 2001.
- International Centre for Trade and Sustainable Development (ICTSD), *DSU Review:Members Discuss May Proposal, Dispute Settlement Data*,An Article published in Bridges Weekly Trade News Digest, Vol. 8, No. 41, 1 December 2004.
- International Centre for Trade and Sustainable Development (ICTSD), *EC – ACP Cotonou Waiver Finally Granted*, an Article published in Bridges Weekly Trade News Digest Volume 5 No. 39 of 15th November 2001.
- International Centre for Trade and Sustainable Development (ICTSD), *2nd Waive on the Compatibility of the Transitional EC Banana Regime begins 1 January, 2002*, an Article published in Bridges Weekly Trade News Digest, Vol. 5, No. 30 of October 2001.
- International Centre for Trade and Sustainable Development (ICTSD),*WTO to holdNGO Symposium on Issues Confronting the World Trading System*, an Article published in Bridges Weekly Trade News Digest Volume 5 No. 19 of 22nd May 2001.
- Ladan, MuhammedTawfiq; *The Role of the World Trade Organization in ResolvingConflicts Between Free Trade and Environmental Protections: An Appraisal*; An Article presented to the Journal of Business Administration, ABU (Zaria - 2004)
- Pruzin, Dan, *Australia, Canada Settle Dispute Over Salmon Import Restrictions*;AnArticle in BNA International Trade Reporter 2000, Vol. 17 No. 21 at Page 813.

Zimmermann, Thomas A., *WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation*, an Article Published in *Aussenwirtschaft – the Swiss Review of International Economic Relations*, Vol. 60 (2005), No. 1.

C. THESIS

Zimmermann, Thomas A. What Direction Should The DSU Take? Negotiations and Proposals to Review and Reform the WTO Dispute Settlement Understanding, Doctoral Thesis No. 2919, (2004a) University of St. Gallen, Bamberg: Difo-Druck.

D. JOURNALS/NEWSLETTERS AND PRESS RELEASE

Davey, William J. “Dispute Settlement in GATT”, *Fordham Journal of International Law* (11(1), 1987, 51

Heller, Ehrman, WTO Dispute Settlement Mechanism and the Emerging Jurisprudence, *Asian Law and Practice, under News and Events*; LLP, 2006 obtained Heller Ehrman LLP.

Corporate Publishers, Trading into the Future, a Monthly Magazine (Geneva: WTO, 1998)

GATT Analytical Index, 6th Edition, 1995.

WTO Publication, Understanding the WTO Settling Disputes – A Unique Contribution, 23rd April, 2004 obtained from

WTO Document No. WT/DS/OV/22 and the WTO Website – *A Paper submitted by Mexico to the DSU Negotiations*, Circulated as JOB (03)208, 10th November, 2003.

World Trade Organization, *Press Release of 23rd April, 2004 obtained from WTO Press Release of 16th September, 2004.*

World Trade Organization, *2005 Press Release of 16th September 2005, Press/416 obtained from The Australian Foreign Ministry Press Released obtained from*

E. LECTURES/WORKSHOP AND SEMINAR PAPERS

Abdultahman, M. Shalghen, Lybian Arab Jamahiriya – Statement by Secretary of the General People’s Committee for Foreign Liaison and International Cooperation at the International Conference on Financing for Development, Monterrey, Mexico, delivered on 22nd March, 2002.

Bhala, Raj, The Myth about Stare Decisis and International Trade Law (Part one of a Trilogy), *American University International Law Review 14, page 856.*

GATT Negotiations Essential to Maintain Strong Multilateral Trading System, *IMF Survey*, December 12, 1998.

Hudec, Robert E., The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure in: Jagdish Bhagwati and Mathias Hirsh Edition, *The Uruguay Round and Beyond – Essay in Honour of Author Dunkel, Berlin et al: Springer*

United Nations Committee on Trade and Development (UNCTAD)/WTO, Business and the Multilateral Trading System: Agreement on Textiles and Clothing, a One-day Seminar, presented at International Trade Centre, Presenter’s Brief 15, obtained

F. DECISIONS AND REPORTS

GATT *Decision on Dispute Settlement Contained in the Ministerial Declaration of 29 November, 1982*, BISD 29S/13 (1982)

GATT *Decision on Dispute Settlement* of 30th November 1984, BISD 31S/9

GATT *Decision on Procedures under Article XXIII, BISD 14S/18* decided on 5th April 1966.

GATT *Montreal Mid-Term 1989 Decision of 12 April 1989 on Improvement to the GATT Dispute Settlement Rules and Procedures*, BISD 365/61.

GATT Understanding on Notification, Consultation, Dispute Settlement and Surveillance, 26S BISD 210 (1980), adopted on 28th November 1979

Trade Policy Review Body's Report, *Review of the United States TPRB's Evaluation*, Press/TPRB/49 of 12th November, 1996.

Trade Policy Review Body's Report, *Review of the Republic of Guinea TPRB's Evaluation*, Press/TPRB/253 of 12th and 14th October 2005.

Trade Policy Review Body's Report, *Review of the United States TPRB's Evaluation*, Press/TPRB/110 of 15th July 1999.

World Trade Organization, *Appellate Body Annual Report for 2006, WT/AB/7 of 23 January 2007* (111 – 2007), Tables 2 and 4 at pages 15, 17 and 18.

CORRECTED – NATH.

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UNDER INTERNATIONAL LAW: WORLD TRADE ORGANISATION IN
PERSPECTIVE.**

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ABSTRACT

The World Trade Organization (WTO) was established with the primary function of ensuring the smooth and free flow of trade and services. At the heart of the WTO, is the Dispute Settlement System that ensures that disputes are resolved as soon as possible. This research aims at analyzing the role of the WTO and its Dispute Settlement body in settling trade disputes. This research would specifically examine the WTO Dispute Settlement System; identify the objectives of the system and whether or not the system allows for the actualization of these objectives. The research would also evaluate its performance and make recommendations based on research findings on how the system can be made more effective. In undertaking this task, the researcher would employ the doctrinal research method. Trade disputes in the WTO usually arise when all country adopts a trade policy measure or measures or take some actions that one or more members of the WTO considers to be inconsistent with the obligations set out in the WTO agreements. Settling trade disputes in a timely and structured manner is important in order to realize the practical value of the commitments of the member states. The central objective of the WTO Dispute Settlement System is to provide security and predictability to the multilateral trade system. In addition, the system is to preserve and clarify the rights and obligations of the members under the WTO Agreements, as well as ensure that disputes are settled promptly and members are prohibited from unilateral determination of their disputes. In carrying out its mandate, the WTO Dispute Settlement System has decided several disputes among member nations of the WTO, covering diverse areas of the WTO agreements. In fact, the performance of the WTO Dispute Settlement System has been generally described as successful. Despite this, the Dispute Settlement System has many challenges, obstacles and problems, which make it impossible for it to achieve its objectives. Thus, the objectives of the system have not been satisfactorily met due to implementation problems, inadequate funding, lack of transparency and access to the system, ad hoc nature of panels, as well as lacunas in the DSU. Considering the importance of the WTO's role of settling trade disputes to the stability of the global economy, adequate attention should be given to the system. Accordingly, the DSB should be adequately

funded that would meet the increased workload of the DSB. The lacunas in the DSU should be corrected and the system made more transparent and accessible to the public. Furthermore, the system should adopt adequate panelist that can meet the increased complexity of the substance of cases presented before panels.

DECLARATION

I, **Daniel Paul Ugwu**, hereby declare that the information contained in this thesis is my work and that it has not been presented in any form for any award elsewhere. Information contained from other literary publications have been duly acknowledged.

UGWU, DANIEL PAUL

DATE

DEDICATION

This work is dedicated to God, the Author and Completer of my faith, my sweet, caring and beautiful wife, Pastor Mary DanPaul Fredericks and my beautiful children, Danielle Mary-Grace Charisa, Davina Debra Paula and Derrick David Charis Dan Paul Jnr.

LIST OF ABBREVIATIONS

ACP	-	African, Caribbean and Pacific Group.
AD	-	Agreement on Anti-Dumping Measures.
BC	-	Before Christ.
DSB	-	Dispute Settlement Body.
DSU	-	Dispute Settlement Understanding.
EC	-	European Communities.
ECOSOC	-	United Nations Economic and Social Council.
EEC	-	European Economic Communities.
EU	-	European Union.
GATS	-	General Agreement on Trade in Services.
GATT	-	General Agreement on Trade and Tariff.
GPA	-	Agreement on Government Procurement.
IMF	-	International Monetary Fund.
ITA	-	Agreement on Information Technology Equipment.
ITC	-	International Trade Centre.
ITO	-	International Trade Organization.
MFN	-	Most Favoured Nation.
MTA's	-	Multilateral Trade Agreements.
NTB	-	Non-Tariff Barriers.
PTA's	-	Plurilateral Trade Agreements.
SCM	-	Agreement on Subsidies & Countervailing Measures.
PS	-	Agreement on the Application of Sanitary and Phytosanitary Measures.
TBT	-	Agreement on Technical Barrier to Trade.
TCA	-	Agreement on Civil Aircraft.

TPRIM	-	Trade Policy Review Mechanism.
TRIM	-	Agreement on Trade Related Investment Measures.
TRIPS	-	Agreement on Trade-Related Aspects of Intellectual Property Rights.
UN	-	United Nations.
UNCTAD	-	United Nations Conference on Trade & Development.
UNDP	-	United Nations Development Programme.
US	-	United States of America.
WTO	-	World Trade Organization.

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