THE ROLE OF THE WORLD TRADE ORGANISATION IN RESOLVING TRADE DISPUTES UNDER INTERNATIONAL LAW

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DECLARATION

I, CHIOKE, ANGELA NGOZI 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 obtained from other literary publications have been duly acknowledged.

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CERTIFICATION

The Thesis titled **"The Role of the World Trade Organisation in Resolving Trade Disputes under International Law"** by **Mrs. CHIOKE ANGELA NGOZI** meets the regulations governing the award of the degree of Master 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 the **Almighty God**, the author and finisher of my faith, my sweet and caring husband, **Mr. Innocent Chioke** and my beautiful children, **Amaka, Chibuike, Oluchi, Chiagozie, Ogochukwu** and **Nnamdi**.

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ABSTRACT

In 1995, the World Trade Organisation (WTO) was established as the only international Organisation dealing with the global rules of trade between nations. Its primary function was to ensure that trade flows as smoothly, predictably and freely as possible. At the heart of the system are the WTO's Agreements, which are the legal rules for international commerce.

This study aims at appraising the role of the WTO in settling trade disputes. Specifically, this study would examine the WTO Dispute Settlement System, identify the objectives of the system and whether or not the system allows for the actualization of these objective. The study 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 historical record review and library research methods as well as interact with individuals and bodies concerned with international trade, as well as WTO bodies concerned with settling trade disputes, and personal observations.

Disputes in the WTO arise when one country adopts a trade policy measures or takes some actions that one or more members 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 realise the practical value of the commitments the signatories undertake in WTO agreements.

The central objective of the WTO dispute settlement system is to provide security and predictability to the multilateral trading 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.

This notwithstanding, the WTO dispute settlement system is beset with many problems, obstacles and challenges, which makes 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 WTO dispute settlement body should be adequately funded that would meet the increased work load 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 nowadays.

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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	Understanding on Rules and Procedures Governing the Settlement of Dispute
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 Tariff and Trade
GPA	Agreement on Government Procurement
IMF	International Monetary Fund
ITA	Agreement on Information Technology Equipment
ITC	International Trade Centre
ITO	International Trade Organisation
MFN	Most Favoured Nation
MTAs	Multilateral Trade Agreements
NTB	Non Tariff Barriers
PTAs	Plurilateral Trade Agreements
SCM	Agreement on Subsidies and Countervailing Measure
SPS	Agreement on the Application of Sanitary and Phytosanitary measure
TBT	Agreement on Technical Barrier to Trade
TCA	Agreement on Civil Aircraft

TPRM	Trade Policy Review Mechanism
TRIM	Agreement on Trade Related Investment Measure
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
US	United States of America
WTO	World Trade Organisation

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND TO THE STUDY:

The concept of International Trade has been of immense importance in the existence of the nations of the world because no nation is completely self-sufficient. In addition, the needs and wants of people in all parts of the world are better served by exchanging commodities and services[1]. Trade increases the standard of living for all countries. For some countries, foreign markets take 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 in 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 prevent the exploitation of the World's impoverished workers[3].

International trade has played a 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. 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 ranged far in Africa in search of gold, antimony and slaves. By 1700 B.C, the Cretans traded extensively by sea[4].

Each sovereign nation is free to establish laws, taxes and regulations governing its own 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 interfered with free trade. Some of these instruments include: import tariff, export taxes and subsidies, import quotas, voluntary export restraint, government procurement provisions, domestic content provisions, trade related investment measures and so on[5]. These measures interfered with free trade.

However, in the 19th century, there was an important change in government[6] policies towards trade, away from mercantile protectionism, all towards 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 limits 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 resulted in the formation of the General Agreement on Tariff and Trade (GATT).

The GATT incorporated a code of international trade rules, made provisions for multilateral trade negotiations, established a procedure for adjudicating trade grievances among members, and provided for the continuing review of actions by member countries. As a result of the reductions in tariff brought about by the implementation of GATT, coupled with improvements in transportation and communication at the time, foreign trade grew and by the 1970's, the value of total

world merchandise reached $300 billion a year and $50 billion to $60 billion annually for services[8].

Such increases indicated a greater international interdependence and a more complex international trade network encompassing not only final consumption goods, but also capital goods, intermediate goods, primary goods and 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 whole. It is a well known fact that while increased interdependence has many inherent benefits, it also brings with it greater adjustment requirements and greater needs for policy coordination among trading partners.

Consequently, in September 1986, new round of negotiation – the Uruguay Round began. Member nations 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 implementation of the NTB (Non tariff barriers) codes of the Tokyo Round)[9]. The round made certain achievements, which included the adoption of new procedure for the settlement of disputes and the creation of the World Trade Organisation (WTO).

Since the Marrakesh Agreement of 1994 entered into force on 1st January, 1995, the WTO now provides the principal forum for negotiations on multilateral trading relations among member states, and for the binding settlement of disputes arising under WTO agreements[10]. At the heart 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 policies within agreed limits to everybody's benefit.

The member nations, being convinced of the need to provide security and predictability to the multilateral trading system, preserve 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 settlements system, which is contained in the Understanding on Rules and Procedures governing the settlement of disputes (DSU).

1.2 SIGNIFICANCE OF THE STUDY:

Disputes in the WTO are essentially about broken promises. It arises 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 (be they tariff or non tariff barriers) declared a violation of WTO principles.

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 overemphasized. Dispute settlement 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 disputes.

Furthermore, as a result of the importance of a prompt settlement of trade disputes to the stability of the global economy, the role of WTO in resolving trade dispute must receive adequate attention if the goals of the WTO Dispute Settlement System are to be attained. The successful resolution of trade disputes by the WTO would add security 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 Dispute Settlement System.

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, its study in Nigeria and the world over, remains one of the most unexplored subjects among the general branches of International Law.

Certainly, however, the new dispute settlement system can only meet all 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 System, particularly, as no significant work has been done in the area under investigation. Undoubtedly, this study will serve as a significant contribution to knowledge.

1.3 OBJECTIVES OF THE RESEARCH:

The main purpose of this study is to appraise the role of the World Trade Organisation in resolving trade disputes under International Law.

Specifically, the aims of this study are as follows:

(a) to examine the WTO's system for settling trade disputes;

(b) to identify the objectives of the WTO's system for settling trade disputes and whether or not the system allows for the actualization of these objectives;

(c) to evaluate the performance of the WTO in relation to settling disputes;

(d) to make recommendations based on research findings as to how to make the system more effective and efficient.

1.4 METHODOLOGY OF RESEARCH:

In this study, historical record review and library research methods shall be employed. These approaches are necessitated by the desire to take a look at the historical evolution of the WTO and its Dispute Settlement System. Accordingly, the primary source of data shall include the Marakesh Agreement establishing the WTO, the WTO agreements, particularly the WTO Dispute Settlement Understanding (DSU) and Reports of cases handled by the WTO. Meanwhile, Law texts on the WTO and its dispute settlement system, WTO's Annual Reports, documentaries and other publications, articles and journals (published and unpublished) and official reports in this area shall be the secondary source of data.

In addition, the researcher shall also interact with individuals and bodies involved in international trade in this study. This approach, it is hoped will assist us to ascertain how far the WTO has lived up to its role of settling trade disputes under international law. Thus, this approach would include both oral and written interactions with the operators in the international market, the Federal Ministry of Commerce and Trade

dealing with international trade, as well as the WTO bodies, especially those concerned with settlement of trade disputes, and personal observations.

1.5 SCOPE OF THE RESEARCH:

The scope of this research covers the role of the World Trade Organisation in resolving trade dispute 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, Agreement on Agriculture and the Antidumping Agreement as well as compliance disputes under the DSU between 1995 and 2007 shall be highlighted. These discussions are necessary to enable us ascertain whether the WTO has performed its role efficiently and effectively.

1.6 LITTERATURE REVIEW:

The WTO came into being on 1st January 1995 when the Marrakesh Agreement of 1994 entered into force. The current 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.

The WTO is a young organization of barely ten years. This being so, much write ups and researches have not been done on the role of the WTO in settling trade disputes. Most write ups concerning the WTO dealt with the recital of the WTO Agreements.

The two books published by Oceana[11]: Raworth/Reif and Joseph Dennin are primarily a - necessarily - selective collection of the principal primary documents and summaries: GATT/WTO "Marraskesh" agreements, Understandings and Ministerial Decisions. The books provide an excellent access to primary WTO documents; the introduction and the commentary are, on the other hand, of little help. The second Oceana-book, however, also contains US implementing legislation and some agreements surprisingly not included in the first book.

However, several authors have of recent, specifically dealt with the WTO Dispute Settlement System. These include Ernst-Ulrich Petersmann[12], Chengwei, Liu[13], Palmeter and Mavroidis[14]. Chengwei, Liu's work is a systematically selected 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, function of panels, rules 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 book is not exhaustive, and dealt with only the issues in dispute settlement proceedings relating to Art. XXIII of the GATT 1994; Arts. 3, 4, 6, 7, 10, 11, 13, 21.5, 23, 26 of the DSU; Arts. 17.4, 17.5, 17.6 of the AD Agreement and Arts. 31, 32 of the Vienna Convention and so on. The book did not discuss the WTO system of settling disputes generally. It dealt on decided cases only.

Ernst-Ulrich Petersmann's work on the other hand is a primarily 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 modernisation 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 issue of compliance by sub national actors is raised, though not discussed in detail and the currently controversial issue of economic sanctions does not appear. 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 in favour of giving private companies judicial remedies. Helpful annexes 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.

Palmeter David and Petros C Mavroidis' book which appears to be the most current and detailed work on the WTO's Dispute Settlement System, in its first chapter, provides a historical introduction, starting with the failed attempts to create an International Trade Organization (ITO), moving on to the negotiation of GATT and finally to the WTO. The authors then examine in detail the jurisdiction of the Dispute Settlement Body under the DSU. In Chapter 3 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 4 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. The next chapter is devoted to special

rules and procedures for developing countries and under each of the Multilateral and Plurilateral Trade Agreements covered by the DSU. The appellate process is set out in Chapter 6, followed by a chapter on adoption and implementation of reports and another on remedies. Chapter 9 sums up some of the findings in a short conclusion.

What Palmeter and Mavroidis have achieved is the first 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. Palmeter and Mavroidis focus exclusively on the new system, without discussing in depth academic questions and policy issues related to international dispute settlement and the way these questions were solved (or not solved) in the DSU. This lack of in-depth discussions (exemplified by a chapter entitled `Conclusion', which is a mere two pages long) 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 treated in two paragraphs without quoting any literature for further reading (the bibliography is also very `concise'). The work is not a comprehensive and conclusive commentary on the law of the DSU. It falls short of adequately identifying and evaluating how effective and efficient the WTO dispute settlement system is.

Thus, the choice of this study is importantly to further explore present developments in the WTO Dispute Settlement System, try to 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 Dispute Settlement System.

1.7 LIMITATIONS OF THE STUDY:

The WTO came into existence on 1st January 1995 when the Marrakesh Agreement of 1994 came into force. Since then, it has administered the international trade agreements based on the General Agreement on Tariffs and Trade (GATT). Thus, while the WTO is still young, the multilateral trading system that was originally set under GATT of 1947 is well over 50 years old.

The WTO is a young organization of barely ten years. This being so, much write ups and researches have not been done on its dispute settlement system. Consequently, heavy reliance would be placed on the WTO agreements, especially the WTO Dispute Settlement Understanding. Understandably therefore, WTO reports on cases it has handled since it came into existence may be limited.

Moreover, most international trade today is carried on by private parties, mainly manufacturers, persons and firms specializing in buying and selling abroad. Disputes brought to the WTO are the result of the information provided by these persons, firms, industries or their associates to their governments on the difficulties being encountered in marketing their products in foreign markets. In essence, where these persons, firms or industries decide not to inform their governments of these difficulties, the government would not be aware of them. Consequently, the Dispute Settlement System will not be invoked. Thus, it would not be easy to evaluate the real situation of security and predictability in international trade. This study would base its evaluation of the performance of the WTO on the cases actually handled by it

Despite the foregoing, this study is a critical and systematic evaluation of the role of the World Trade Organisation in resolving trade disputes under international law. However, this study is not intended to be so exhaustive as to include a study of the role of the WTO in relation to its other mandates as contained in the WTO Agreement. It does not also discuss all aspects of the WTO dispute settlement system as it relates to the four annexes to the WTO Agreement. It deals only with issues in dispute settlement system of the WTO that are considered the more important in determining how efficient and effective the WTO has performed this task.

Consequently, the study is intended to be descriptive, prescriptive and positive rather than theoretical. Most of the analysis would benefit much from the provisions of the Dispute Settlement Understanding and the precise and logical rulings/recommendations by panels and the Appellate Body, administered by the DSB under the WTO jurisdiction.

1.8 ORGANIZATIONAL LAYOUT:

As a matter of convenience, the study has been broken down into six (6) chapters. Chapter One provides the general introduction on which the thesis is based. It deals with preliminary issues that will ensure the understanding of the entire work. These include among others, the objective, scope and limitations of the study, literature review and research methodology.

Chapter Two traces the historical development of the World Trade Organisation (WTO), the objectives, functions, structures, scope and status of the WTO are also considered as well as decision making in the WTO.

Chapter Three discusses dispute settlement in the World Trade Organisation. Accordingly, the historical development of the WTO Dispute Settlement System, functions, objectives, key features, substantive scope and importance of the system are highlighted. Also discussed under this chapter are the WTO Bodies involved in the dispute settlement process, the function and composition of the body and its rules of conduct.

Chapter Four considers the Trade Disputes within the Jurisdiction of the World Trade Organisation. Consequently, it deals with the legal basis for a dispute in the WTO Dispute Settlement System and the covered agreements. The possible objects of a complaint to the WTO dispute settlement system as well as domestic legislation as an object of a dispute are also discussed under this chapter.

Chapter Five discusses the Dispute Settlement Proceedings in the World Trade Organisation. Accordingly, the process/stages in settling dispute in the WTO dispute settlement system, the legal effect of Dispute Settlement Body's ruling/recommendation, participation in the proceedings and the legal issues arising in the proceedings are considered. Also highlighted in this chapter is the dispute settlement without recourse to adjudication, as well as developing world in the dispute settlement proceedings. It concludes with the discussion on the activities of the WTO Dispute Settlement System from 1995 – 2004.

Chapter Six is the concluding chapter. It summarizes the entire discussion made in the body of the work and brings out major recommendations for necessary reform.

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CHAPTER TWO

DEVELOPMENT OF THE WORLD TRADE ORGANISATION

2.1 INTRODUCTION:

The World Trade Organization (WTO) came into existence in 1995 as the successor to the General Agreement on Tariff and Trade (GATT), which has operated provisionally since 1947. It is concerned with world wide economic policy co-operation. Hence it provides a common institutional framework for the conduct of trade relations among its member states[1].

The Agreement establishing the WTO created a permanent forum for member governments to address issues affecting their multilateral trade relations as well as to supervise the implementations of the trade agreements negotiated in the Uruguay Round. Consequently, the WTO apart from being a permanent trade policy formulator which creates rules for world trade which are binding under International Law, is also a guardian of the agreements. Thus, the WTO oversees the implementation, administration and operation of the multilateral trade agreements (i.e. GATT, General Agreement on Trade in 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 (TCA) and Information Technology Equipment (ITA) which are effective at the plurilateral 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 customs 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.

The WTO operates 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 improved decision-making procedures. It has a legal personality and enjoys privileges and immunities similar to those of specialized agencies of the United Nations[2].

2.2 THE ESTABLISHMENT OF THE WORLD TRADE ORGANISATION:

One result 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 Second 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. Thus, a consensus emerged that there was a critical need for international cooperation in establishing discipline within economic relations in order to prevent a recurrence[3].

By 1944, representative countries attending the Breton Wood's Conference established the basic organizational setting for post war economy designed to further macro economic stability. Specifically, the frame work that arose created three organisations – The International Trade Organisation (ITO), the World Bank and the International Monetary Fund (IMF).[4]

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 organization 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 where 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 ITO charter[5].

By a Provisional Protocol signed on 30th October 1946 and effective from 1st January 1948, the signatory countries[6] 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 Agreement[7] remained the only multilateral instrument governing International trade.

An informal organization was 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[8]. At the eighth trade round – the Uruguay Round, which was the most extensive of all, 116 nations decided that its final act would further liberalise trade measure and establish a permanent structure - the WTO to manage international trading procedure and protocols. 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 WTO[9], which is a permanent organization 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 in 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[10]. Through these agreements, the WTO members operate a non-discriminatory trading system that spells out their rights and their obligations.

Thus the WTO exists to regulate international trade. Its key principle is non discrimination, ensuring that similar products from different countries must be treated the same way. As an international organization, the WTO has a sound and accountable legal basis because all WTO members have ratified the WTO Agreements. 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[11].

2.3 OBJECTIVES, FUNCTIONS AND STRUCTURES OF THE WORLD TRADE ORGANISATION

2.3.1 Objectives:

As can be seen from the foregoing, WTO is an international organization founded in 1995 to promote global trade in goods, services and intellectual property. It is an umbrella institution that is responsible for the functioning of the whole international trade system. Consequently, it is responsible for overseeing the application of the multilateral and the plurilateral Agreements that have been negotiated in the Uruguay Round and those that will be negotiated in the future.

Its basic objectives are similar to those of GATT, which has been subsumed into WTO. These objectives includes 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 in services; to the need to promote sustainable development and to protect and preserve the environment in a manner consistent with 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[12].

Consequently, the WTO's overriding objective is to help 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) Reviewing national trade policies

(e) Cooperating with other international organizations involved in global trade, commerce and economic policy making[13].

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, submit proposed amendments for the vote of members and approve the accession of new members[14].

Under Article III, the WTO is to oversee the application of the various WTO agreements and serve as the frame work for member governments to conduct their trade relations 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 objective of assisting developing countries in trade policy issues, developed member states of WTO have, as a matter of policy, being contributing to WTO technical assistance fund. 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[15]. Most African countries, as well as those from Asia and Latin America benefited from the assistance[16]. The WTO has rendered assistance to Togo, Kiribati, Democratic Republic of Congo, Tuvalin, Zambia, among others[17]. 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 (UNCTAD) and United Nations Development Programme (UNDP) [18].

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 (1995) [19].

Moreover, the WTO has not relented 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 the importation of bananas from its member States – former colonies in the Caribbean. United States based banana merchants, such as Chiquita and Dole, grew bananas 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[20]. 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[21].

2.3.2 Functions:

The WTO provides a forum for continuous negotiations among its member countries for the further liberalization of the trade in goods, and 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 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 far 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 thus 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[22]. The WTO also reviewed the trade policy of the United States in 1999[23].

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[24].

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 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.

2.3.3 Structures:

These functions of the WTO are carried out by its organs. The main organs of the WTO are a Ministerial Conference, a General Council, which also functions as the Dispute Settlement Body and Trade Policy Review Body; and councils for trade in goods, services and trade related aspects of intellectual property.

Under Article IV, the apex WTO body responsible for decision-making is the Ministerial Conference, which meets every two years. The Ministerial Conference consists of representatives of all WTO members and carries out WTO functions which include decisions on matters that WTO members may raise concerning a multilateral Trade Agreement. It is the final arbiter on all matters relating to any of the agreements. Since the establishment of WTO, five Ministerial Conferences have been held: the first in Singapore in December 1996, the second in Geneva in May 1998, the third in Seattle in November 1999, the fourth in Doha (Qatar) in November

2001, and the fifth in Cancun (Mexico) in September 2003. The sixth meeting is scheduled to hold in Hongkong by December, 2005[25].

The day to day work of the WTO is handled by the permanent bodies at the second level, the topmost being the General Council, which reports to the Ministerial Conference. During the two years between meetings, the functions of the Conference are performed by the General Council comprising of representatives of WTO member governments. The General Council meets as a Dispute Settlement Body when it considers complaints and takes necessary steps to settle disputes between member countries. It is also responsible for carrying out reviews of the trade policies of individual countries on the basis of the reports prepared by the WTO Secretariat[26].

Article V requires the General Council to make appropriate cooperative arrangements with other intergovernmental organisations that have responsibility related to those of the WTO. The Council may also consult and cooperate with non-governmental organizations with an interest in WTO matters.

The General Council is assisted in its work by three subsidiary Councils which oversee the functioning of the Multilateral Trade Agreements. These are the Council for Trade in Goods, which oversees the implementation and operation of the Agreements on trade in goods in Annex 1A (GATT 1994 and its associate Agreements); the Council for Trade in Services, which oversees the implementation and operation of General Agreements on Trade in Service (GATS) in Annex 1B; and the Council for Trade Related Aspects of Intellectual Property Rights which oversees the operation of the Agreement on Trade Related Aspects of Intellectual Property

Rights (TRIPS) in Annex 1C. Each of these councils may elect to establish subsidiary bodies[27].

Under Article IV:7, the Ministerial Conference is required to establish a Committee on Trade and Development, a Committee on Balance of Payments Restrictions, a Committee on Budget, Finance and Administration, and a Committee on Trade and Environment.

In addition, the various Plurilateral Trade Agreements (PTAs) may establish their own supervisory bodies. These bodies would be required to keep the General Council informed of their activities[28].

The administrative work is carried out by the WTO Secretariat headed by a Director-General who is appointed for four years. The Director General is selected by the Ministerial Conference. Secretariat personnel are to perform their duties pursuant to regulations issued by the conference. Like other multilateral organisations, the staff of the secretariat is required to be impartial and member governments may not seek to influence staff action[29].

From the foregoing, it can be seen that the structure of the WTO is intended to provide for more effective decision-making and a greater involvement of ministers in trade relations. However, whether the latter is a positive development is not entirely certain because these ministers are most often appointed based on political considerations rather than professional qualification.

2.4 SCOPE AND STATUS OF THE WORLD TRADE ORGANISATION:

Article II stipulates the scope of the WTO. It 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 18 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 "plurilateral 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 Diary 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 the four plurilateral 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 the 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 Review Mechanism (TPRM). The PTAs are set out in Annex 4.

Furthermore, Paragraph 4 of Article II 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 are legally distinct and contain different provisions. 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 instruments adopted under GATT 1947; the Understandings contained in Annex 1A of the WTO Agreement and the Marrakech 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 a 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 the 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 the WTO.

Under Paragraph 4, each member is also required to accord the WTO, its officials, and representatives from member governments the requisite privileges and

immunities similar to those stipulated in the 1947 U.N. Convention on the privileges and immunities of the specialized agencies.

Although the WTO shares many of the same goals as GATT, it is much more than just an extension of GATT – its scope is much broader and the nature of the organization is much different. GATT was a collection of trade rules bounded together by multilateral agreements but lacking a real institution foundation. The WTO on the other hand, 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, but also cover intellectual property and trade in services. Many of the GATT arrangements were plurilateral 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 settling disputes that is much less susceptible to blockage as was the GATT system[30].

2.5 DECISION MAKING IN THE WORLD TRADE ORGANISATION:

The procedures and rules for decision making on WTO matters are set forth in Articles IX and X of the WTO Agreement. In each area, WTO provisions maintain old GATT practice.

Article IX establishes rules for issuing waivers and definitive interpretations of the multilateral trade agreements. The WTO continues the longstanding GATT practice of attempting to reach such decisions by consensus. Consensus is deemed to have

been reached when, at the time a decision is being taken, not a single member country voices opposition to its adoption. However, as has been the rule under the GATT, a matter may be decided by vote in the absence of a consensus. Although GATT 1947 provides for the possibility of resolving matters through voting, there has not been a vote on a policy matter (other than a decision on grant of waiver or the terms of accession for a new contracting party) since 1959[31]. Likewise, despite these provisions, decisions on all important policy matters (like launching negotiations in areas not so far covered by the WTO legal instruments) are expected to continue to be taken by consensus.

If there is a vote, the matter will be decided by majority of the votes cast, unless the WTO Agreement or the relevant multilateral trade agreement or plurilateral trade agreement provides otherwise. As has been the case under the GATT 1947, each WTO member will have one vote. There is a special rule for the European Union (which is a WTO member in addition to its member countries) that ensures that the EU casts only as many votes as it has member countries who are members of the WTO.

The Ministerial Conference and the General Council are the sole WTO bodies empowered to issue authoritative, binding interpretations of the WTO Agreement and Multilateral Trade Agreements. The Conference and Council may not, however, use their authority to issue interpretations that would undermine the amendment provisions set out in Article X[32].

Interpretations may be adopted by a vote of three-quarters of WTO members, and must be based on a recommendation from the Council charged with overseeing the

relevant agreement. For example, the General Council may issue an interpretation of the Agreement on Safeguards only on the basis of a recommendation from the Council on Trade in Goods.

A member government requesting a waiver of a multilateral trade agreement provision must first submit the request to the council in charge of the agreement in question. The council has up to 90 days to consider the request and submit a report to the General Council.

If a member seeks the waiver of an obligation that is subject to a transition period, such as most of the obligations in the TRIPs Agreement, or is subject to staged implementation, such as certain tariff cuts, there must be a consensus to grant the waiver. Waivers for other types of obligations must be agreed to by three quarters of the members if a consensus is not reached within 90 days after the request is received.

A decision granting a waiver must include a statement of the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the termination date of the waiver. If a waiver is granted for more than one year, the General Council will conduct an annual review to determine whether the exceptional circumstances continue to apply and whether the country granted the waiver has met any terms and conditions the General Council attached to the waiver. On the basis of this review, the General Council may extend, modify, or terminate the waiver[33].

For instance, on 14th November 2001, the WTO members granted a waiver to European Union (EU), allowing it to give preferential market access for the African, Caribbean and Pacific (ACP) Group of countries. The waiver also covers EC – ACP banana trade with additional provision that third parties such as Latin and Central America banana exporting countries have the right to request arbitration prior to future EC banana tariff going into effect on 1 January, 2006. In addition, the approved waiver will be suspended if the EC fails to perpetuate the current market access for non ACP banana imports[34]. This waiver will be replaced by Free Trade Agreement between the EU and ACP countries in 2008 under the Cotonou Agreement[35].

Moreover, a second waiver on the compatibility of the transitional EC banana regime which began on 1 January 2002 as agreed in the bilateral Understandings between the EC and Ecuador and the United States, respectively, in order to settle the banana dispute between them at that time was granted to the EU until the end of 2005. Thereafter, a tariff only import regime will be implemented[36].

The WTO waiver provisions significantly improved upon the current GATT requirements for the grant of a waiver, and thereby enhance transparency in the operation of the waiver, and provide greater certainty regarding the duration and scope of the waiver. The consensus provision greatly increases the likelihood that important, but politically difficult obligations such as those in the TRIPs agreement will be implemented. Furthermore, the three-quarters majority vote requirement increases the number of members that must agree to the grant of any waiver.

The procedures for interpretations and waivers of the plurilateral trade agreements are governed by the provisions of that Agreement[37].

Under Article X, any member may propose that the Ministerial Conference considers amending the WTO Agreement or a multilateral Trade Agreement. In addition, each of the three subordinate Councils for trade in goods, services, and TRIPs may submit proposals to amend the multilateral trade agreement it oversees.

During the first 90 days that the Ministerial Conference considers a proposed amendment or any extended period the Conference decides, any decision by the Conference to submit the proposed amendment to the members for acceptance shall be taken by consensus. If the conference cannot reach a consensus during this period, two-thirds of the members may vote to submit the proposed amendment to the members for possible ratification.

Article X sets out rules concerning the manner in which certain types of amendments may enter into force and which members would be bound by those amendments[38]. For instance, certain provisions of the multilateral trade agreements may not be amended unless all WTO members agree, and such amendments do not enter into force for any member until all members have agreed to the amendment. These are Article IX (decision making) and X (amendment) of the WTO Agreement; Article I (Most Favoured Nation) and II (tariff bindings) of GATT 1994; Article II;1 (MFN) of the GATS; and Article IV (MFN) of the Agreement on TRIPs.

Two general rules apply in other cases. First, amendments affecting the rights and obligations of members become effective on ratification by two-thirds majority of

the WTO members, but only for those governments agreeing to the amendment. However, a three-fourths majority of the Ministerial Conference may decide that an amendment of this type is so important that members which refuse to accept it may need to withdraw from the WTO.

Second, if the Conference decides by a three-quarters vote that a proposed amendment will not affect members' rights and obligations, the amendment will become effective for all members when ratified by two-thirds of WTO governments.

Article X: 8 sets out special rules for amending the DSU and the TPRM. Any member may propose that the Ministerial Conference considers such an amendment. Conference decisions to approve amendments to the DSU may only be made by consensus. The Conference may amend the TPRM either by consensus or failing a consensus, by majority vote. A decision to amend the DSU or TPRM is effective for all WTO members.

The Ministerial Conference may add new PTAs to Annex 4 of the WTO Agreement only by consensus of all WTO members. On the other hand, if all members of a PTA request that the agreement be dropped from Annex 4, the General Council may decide to do so by consensus or majority vote. Amendments to any of the PTAs shall be governed by the provisions of that agreement[39].

In conclusion, it is submitted that it is clear from the foregoing that the WTO decision-making process utilizes consensus, at least initially, rather than voting. This continues the GATT process and seeks to ensure that all members' needs and interests receive attention and consideration. The rule of consensus prevents 'tyranny

of the majority' particularly where a sizeable section of opinion strongly opposes the decision being taken. When agreement cannot be reached via consensus, however, there is a voting procedure. In the voting procedure, decisions are based on a simple majority with every member country having one vote.

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CHAPTER THREE

DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANISATION

3.1 HISTORICAL DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM:

The WTO dispute settlement system 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 50 years on the basis of Articles XXII and XXIII of GATT 1947.

By the rudimentary rules of GATT 1947[1], 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 referred to the GATT council and became 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 juridical style of reasoning in their reports.

Several principles and practices that emerged in the GATT dispute settlement system were, over the years, codified and sometimes also modified in decisions and understandings of the member states of GATT 1947[2]. The most important of these decisions and understandings included the Decisions on Procedures under Article XXIII[3]; the Understanding on notification, consultation, dispute settlement and surveillance[4]; the decision on dispute settlement contained in the Ministerial Declaration of 29 November 1982[5]; the Decision on Dispute Settlement of 30th November 1984[6] .

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.

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 between 1947 and 1986[7]. One extensive academic study of the GATT dispute settlement system concluded that countries with legitimate complaints achieved complete satisfaction in some 60 percent of the cases and partial satisfaction in most of the rest[8]. Out of approximately 233 cases initiated under the system as at September 1988, panel or working party reports were completed in only 73 cases, others were either settled or withdrawn. Moreover, the compliance record of GATT panel

recommendations was very respectable in that of approximately 117 cases for which there are information, only about 8 to 10 have resulted in panel reports which have not been followed[9].

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 rule of positive consensus[10] 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 whose 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[11]. Without adoption, the report remained in limbo. It had no status in GATT but only expressed the views of three or five experts and the dispute remained unresolved.

Furthermore, in some instances were 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 its interests or launching two separate disputes under different agreements on the same matter. For instance, Article VI of GATT 1947 and the Tokyo Round SCM (Subsidies and Countervailing Measure) 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 dispute[12] 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[13].

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 1980s, 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[14].

For instance, in 1970s and 1980s, 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 Firm. 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, because Section 301 action

threatened to cut them off from the American market, foreign steel producers implemented voluntary restraint agreement[15].

As these inherent weaknesses in the GATT system led to increasing problems in the 1980s, 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[16]. 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 [17].

However, midway through the Uruguay Round negotiations, the negotiating member states 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 Procedues[18].

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 Agreement, sets out the 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 more than 50 trade disputes[19]. In fact, the most significant innovation of the DSU is that it eliminated the above highlighted inherent weaknesses 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.

3.2 FUNCTIONS, OBJECTIVES AND KEY FEATURES OF THE SYSTEM:

Over decades of years past, 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 myriad 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 objectives and key features. These functions, objectives and key features may be considered as follows:

3.2.1 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 system[20]. 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[21]. 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.

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 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 sactions[22].

(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 complainant 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 it 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[23].

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 must not change the WTO law that is applicable between the parties, and cannot add to or diminish the rights and obligations of the parties as provided in the covered agreements[24].

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 agreements 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.[25]

One might think that such an interpretation cannot occur in the WTO dispute settlement proceedings because Article IX.2 of the 1994 Marakesh Agreement Establishing the WTO vested exclusive authority to adopt interpretations of the WTO Agreement on the Ministerial conference and the General Council. 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 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 well-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 convention[26] 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 discerning the applicable customary rules[27].

According to Article 31 of the Convention, the WTO Agreements are to be interpreted according to the ordinary meaning of the words in the relevant provision, 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"[28]. According to another division of the Appellate Body, a treaty interpreter must begin with and focus upon the text of the particular provisions 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[29].

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 in situation where the result of such interpretation is ambiguous, obscure, manifestly absurd or unreasonable.

On the other hand, Article 33 of the convention made provision for interpretation of treaties authenticated in two or more languages. The WTO Agreement is authenticated in English, French and Spanish[30].

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 of those agreements in accordance with customary rules of interpretation of public international law.

3.2.2 Objective:

(a) Mutually Agreed solution as the preferred solution

Under the DSU[31], 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[32].

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 not to make rulings or to develop jurisprudence.

(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 DSU[33] 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 procedures and corresponding deadlines 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[34]. 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[35]. Consideration of disputes would even take lesser time in cases which the parties or panel or appellate body consider to be urgent, including those disputes that concern perishable goods[36].

(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[37]. In other words, member states 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 settling dispute whenever they seek redress against another member under the WTO Agreement[38]. Moreover, the complaining member should only take action based on the findings of an adopted panel or appellate body report or arbitration award and must respect the procedures stipulated in the DSU for the determination of the time for implementation, as well as impose counter measures only when authorized by the dispute settlement body[39].

3.2.3 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 fora 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 forums to settle trade disputes. In fact, according to a panel in US – Certain EC Products, the structure of Article 23 is that the first paragraph 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 DSU[40]. Thus it can be safely concluded that the ICJ do not have jurisdiction to entertain 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 ratified the WTO Agreements as a single undertaking[41] of which the DSU is a part. Therefore, all WTO members are subject to the dispute settlement system for all disputes arising under the WTO Agreements. Consequently, there is no 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 organizations, regional or local governments, non governmental organization, private individuals and companies are not entitled to initiate dispute settlement proceedings in the WTO[42].

However, these organizations and individuals can and often do exert influence on the government of a WTO member with respect to triggering of a dispute. Indeed, several WTO members have formally adopted internal legislation under which these organizations and individuals can petition their government to bring a WTO dispute[43].

From the foregoing, it is expected that the WTO dispute settlement procedure if operated effectively and efficiently, would assist in making the WTO agreements more effective, thereby adding an essential measure of predictability and effectiveness for the operation of the rule-oriented system in the otherwise relatively weak realm of international norms.

3.3 SUBSTANTIVE SCOPE AND IMPORTANCE OF THE SYSTEM:

3.3.1 Substantive Scope:

Article 1.1 of the DSU states thus:

> The rules and procedures of this understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this understanding (referred to in this understanding as the "covered agreements"). The rules and procedures of this understanding shall also apply to consultations and the settlement of disputes between members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this understanding as the "WTO Agreement") and of this understanding taken in isolation or in combination with any other covered agreement.

From the above provision, it is clear that the DSU applies to disputes brought under Appendix 1 to the DSU, that is the covered agreements, which are: the WTO Agreement, the multilateral Agreements on Trade in Goods in Annex 1A, the GATS in Annex 1B, the TRIPS Agreement in Annex 1C, the DSU and Annex 4 relating to the Plurilateral Trade Agreements.

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 setting out the terms for the application of the DSU to the individual agreement, including any special additional rules or procedures. Only the Committee on government procurement has taken such a decision[44].

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 2 to the DSU, which are relevant to the dispute [45]. These special or additional rules or procedures are specific rules designed to deal with the particularities of disputes under a specific covered agreement[46], and they take precedence over the rules of the DSU whenever there is a difference or conflict between them. Such difference or conflict exists where 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 provision would lead to a violation of the other provision. In such cases, the DSU rules would not apply[47].

Moreover, the DSU is applicable only to new requests for consultations made under the covered agreements on or after the entry into force of the WTO Agreement.

3.3.2 Importance:

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 obligations. Indeed, according to William J. Davey[48], 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 realise 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 determine the outcome.

Furthermore, as stated in Article 3.2 of the DSU, the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading 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 procedures, with a trend towards a more judicial form of process that allows for review of decisions through an Appellant Body decisions. Consequently, the DSU is in turn a key element of the legalisation of the world trade system agreed in the Uruguay Round through the establishment of the WTO and the re-enforcement of substantial rules of conduct[49].

3.4 LAWS APPLICABLE TO LEGAL INTERPRETATIONS OF WTO 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[50]. The general rules of interpretation as admitted by the Appellate Body[51] 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 interpretation of public international law which the WTO Dispute Settlement Body has 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 interpretation plays a role in the interpretation of the WTO agreements by the Dispute Settlement Body. Consequently, the Appellate Body in Indian – 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[52].

The principle of good faith has come into play in the interpretation of WTO agreements. Thus, in US-Shrimp[53], 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[54]. 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[55].

Article 32 of the Vienna Convention which allows a treaty interpreter to have recourse to 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 may be used as supplementary means of interpretation[56].

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 vital role in the interpretation of WTO agreements[57].

3.5 WTO BODIES 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 parties and third parties to a case[58], the DSB panels, the Appellate Body, the WTO secretariat, arbitrators, independent experts and several specialized institutions[59].

3.5.1 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[60]. It is only when the two sides cannot agree on the selection of panelist that the WTO director-general appoint panelists[61].

Anyone who is well 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 council 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[62]. 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 panelist positions filled by 30th June 1999 were filled by 93 different individuals[63]. Four individuals have served on four panels and nine individuals have served on three panels. While government officials filled most of these positions (114 positions), 29 positions were filled by academics and 8 positions were filled by former Secretariat officials[64].

Panelist for each case can be chosen from a permanent list of well-qualified candidates kept by the WTO secretariat[65]. To date, about one-third of the panel positions have been filled with persons on the indicative list. The 135 panelists have been filed with persons from a wide range of countries (38 in all), with Switzerland, New Zealand, Australia, Hong Kong/China, and European Union countries supplying the most[66]. 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[67].

The panelists serve in their individual capacities, not as representative of any government or organization and cannot receive instruction from any government[68]. It is specifically provided that panelists shall not be nationals of parties or third parties in the dispute except with the agreement of the parties to the dispute[69]. Moreover, in a dispute involving a developing country, one panelist must be from a developing country, if requested[70].

Under the DSU, panelist 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[71].

The WTO secretariat assists the panels on the legal, historical and procedural aspects of the dispute at issue and provides secretarial and technical support[72]. 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[73], bearing in mind that the panels are not permanent bodies.

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[74], and the other to the Legal Affairs Division.

3.5.2 APPELLATE BODY:

The Appellate Body was one of the major innovations of the Uruguay Round of multilateral trade negotiations[75]. It is the second and final 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[76]. The Appellate Body hears appeals of panel reports in divisions of three[77], 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[78]. 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[79].

The Appellate Body functions to correct possible legal errors committed by panels, and thereby provided consistency of decisions. Under the DSU, if a party files an appeal against a panel 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[80].

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 remand to a panel partly as a consequence, the Appellate Body has adopted the 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[81].

In 1995, the DSB established[82] the Appellate Body, and thereafter, appointed the first seven Appellate Body members[83] by consensus[84]. 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[85]. 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 membership of the WTO, and no member of the Appellate Body shall participate in the consideration of any dispute that would create a direct or indirect conflict of interest. In addition, all members of the Appellate Body must be available at all times and on short notice, and shall keep abreast of dispute settlement activities and other relevant activities of the WTO[86].

The members, in accordance with the working procedure[87] of the Appellate Body, elect one of them as chairman, who serves a term of one year or maximum of two years[88]. The chairman is responsible for the overall direction of the business of the Appellate body, especially with regards to its internal functioning[89].

The Appellate Body has an independent secretariat, which provides legal assistance and administrative support to it[90]. The secretariat is at Geneva in the

WTO headquarters. The panels and the Appellate Body hold their meeting in the secretariat.

3.5.3 THE DIRECTOR – GENERAL AND THE WTO SECRETARIAT

Under the DSU, the Director General[91] 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 offices, conciliation and mediation in order to help the parties resolve the dispute, before a request for panel is made[92].

The Director-General convenes the meetings of the DSB. Where the parties did not agree on the composition of the panel within 20 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 [93].

Moreover, where parties to a dispute did not agree on the period of 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 implementation[94] or to review the proposed suspension of obligations in the event of non-implementation[95] as the case may be.

The WTO secretariat performs certain important functions towards the smooth and effective operation of the dispute settlement system. The WTO secretariat assists parties in composing panels by proposing nominations for potential panelists to hear the dispute[96]. In addition, the WTO secretariat also assists the panels when composed[97] and provides administrative support to the DSB. It also assists members in respect of dispute settlement at their request, and provides additional legal advice and assistance to developing country members upon their request in matters relating to dispute settlement[98]. The secretariat conducts special training courses on the dispute settlement procedures and practice for interested members[99].

3.5.4 ARBITRATORS:

Under the DSU[100], 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[101]. 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[102]. 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[103]. In these two cases, arbitration is limited to clarifying specific

questions in the process of implementation, and the arbitral decision is binding on the parties.

3.5.5 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 technical advice from experts[104]. Moreover, some covered agreements[105] 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[106]. The DSU provides the rules for the establishment and procedures of expert review groups[107].

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, it, 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 the panelists and the parties. Finally, 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.

3.6 FUNCTIONS AND COMPOSITION OF THE WTO DISPUTE SETTLEMENT BODY (DSB):

The 1995 Marakesh Agreement Establishing the WTO vested the responsibility of administering the DSU on the General Council. On the other hand, the General Council discharges this responsibility through the DSB[108]. 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 said to be a political body.

The DSB administers the DSU and generally overseas the dispute settlement process. It establishes panels; adopts panel and appellate body reports; conducts surveillance of the implementation of its rulings/recommendations by the members concerned; and authorizes retaliation measures, such as the suspension

of concession, in the event that the member concerned does not implement the recommendations or rulings[109].

The DSB as a general rule, [110] takes decisions by consensus[111]. 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[112]. 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 reason, one speaks of the quasi-automaticity of these decisions in the DSB. This contrast sharply with the situation that prevailed under GATT 1947 where the establishment of panels, adoption of panel's report and authorization of retaliatory measures were on the basis of a positive consensus.

The DSB meets as often as necessary to meet with the time frames provided in the DSU[113] 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 DSB[114].

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[115].

With respect to the operations of the DSB, the rules of procedure for the sessions of the Ministerial Conference and meetings of the General Council[116] applies to the DSB, subject to few special rules on chairperson and other exceptions[117]. 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 member's permanent representative to the WTO and appointed by a consensus of the WTO[118] members. The chairperson of the DSB has mainly procedural functions,[119] in addition to several responsibilities in specific situations[120].

3.7 RULES OF CONDUCT OF THE DISPUTE SETTLEMENT BODY:

Persons/bodies involved in the dispute settlement process are under the DSU, subject to certain rules designed to ensure due process and unbiased decisions. The DSB has adopted rules of conduct for the DSU[121], which is designed to maintain the integrity, impartiality and confidentiality of the dispute settlement system[122].

These rules of conduct are applicable to all "covered persons", which are the panel members, Appellate Body members, experts assisting panels, arbitrators, members

of the Textile Monitoring Body, the WTO Secretariat staff and Appellate Body Secretariat staff[123].

Under the rules of conduct, these covered persons are required to be independent and impartial, to avoid direct or indirect conflict of interest, and to respect the confidentiality of the dispute settlement proceedings[124]. Consequently, such covered persons are required to disclose the existence or development of any interest, relationship or matter that he or she could reasonably be expected to know and that is likely to affect or give rise to justifiable doubts as to that person's independence or impartiality[125]. Such disclosure would include information on financial, professional and other active interests as well as considered statements of public opinion and employment or family interest[126]. Moreover, the DSU forbids private communications between individual parties and the panelist or members of the Appellate Body concerning matters under their consideration, except in the presence of the other party or parties[127].

Finally, the rules of conduct provide that in the event of a violation of these requirements by a covered person, the parties to the dispute shall have the right to challenge the participation of that person in the dispute settlement proceedings and to request the exclusion of that person from any further participation in the process[128].

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31. Article 3.7 of DSU.

32. Ibid, Article 11.

33. Ibid, Articles 3.3.

34. Ibid, Articles 4.3 and 6.1.

35. Ibid, Article 20.

36. Ibid, Articles 4.9 and 12.8.

37. Ibid, Article 23.

38. See Ibid, Article 23:1.

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

40. Single 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.

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

50. US –Standards for Reformulated and Conventional Gasoline, Appellate Body Report, op. cit. p. 17.

51. Japan – Alcoholic Beverages II, 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.

52. Indian –Patent Protection for Pharmaceutical and Agricultural Chemical Products, loc. Cit. para 45 – 46; See also Indian – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, Appellate Body Report, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:v, 1799, para 94.

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

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

55. Japan – Alcoholic Beverages II, Appellate Body Report, loc cit. pp. 12 – 13; See also Yearbook of the International Law Commission, Volume II, p. 222.

56. EC- Customs Classification of Certain Computer Equipment, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, paragraphs 93 – 95.

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

58. The involvement of WTO members governments, who are parties to the dispute as parties or third parties have been explained in the discussion on features of the Dispute Settlement System.

59. The exact task and roles of each of these bodies would be made clear in chapter 5 of this work.

60. Article 8.5 of the DSU.

61. Ibid, Article 8.7.

62. Ibid, Article 8.1.

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

64. Davey, William J., The WTO Dispute Settlement System in Trade, Environment and the Millennium 119, loc cit. chapter 5, at page 150.

65. Article 8.4 of the DSU

66. Switzerland – 18; Australia – 12; New Zealand – 12; Hong Kong/China – 9; Brazil – 7; South Africa – 6; Canada – 5; Czech Republic – 5; Norway – 5; Egypt – 4; Germany – 4; Sweden – 4; Belgium – 3; Colombia – 3; Finland – 3; Israel – 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.

67. Davey, William J., The WTO Dispute Settlement System in Trade, Environment and the Millennium 119, loc cit. chapter 5, at page 151..

68. Article 8.9 of the DSU.

69. Ibid, Article 8.3.

70. Ibid, Article 8.10.

71. Ibid, Articles 11 and 19.

72. Ibid, Article 27.1.

73. Ibid, Article 3.2.

74. For 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 subsides).

75. The 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.

76. Article 17.6 of DSU.

77. Ibid, Article 17.1.

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

79. Ibid, Rule 6(2).

80. Article 17.13 of DSU.

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

83. The first seven members of the Appellate Body were James Bacchus (USA), Christopher Beeby (New Zealand), Claus-Dieter Ehlermann (Germany), Florentino Feliciano (the Philippines), Said El Naggar (Egypt), Julio Lacarte–Muro (Uruguay), and Mitsuo Matsushita (Japan). Ehlermann, Feliciano, and Lacarte-Muro were deemed to have initial two-year terms and were reappointed to four-year terms on expiration of those initial terms. Only one reappointment is permitted (Article 17.2 of the DSU).

84. Article 2.14 of DSU

85. Ibid, Article 17.2

86. Ibid, Article 17.3

87. 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.

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

89. Rule 5(3) of the Working Procedures

90. Article 17.7 of DSU

91. Ibid, Article 5.6

92. Ibid, Article 24.1

93. Ibid, Article 8.7

94. Footnote 12 to Article 21.3 (c) of DSU

95. Article 8.6 of DSU

96. Ibid, Article 27.1

97. Ibid, Article 22.6

98. Ibid, Article 27.2

99. Ibid, Article 27.3

100. Ibid, Article 25

101 . Ibid, Articles 21 and 22

102. See Ibid, Article 21.3 (c)

103. Ibid, Article 22.6

104. Ibid, Article 13

105. Article 11.2 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

106. Article 13.2 of DSU

107. Appendix 4 of DSU

108. Article IV:3 of the 1995 Marrakech Agreement Establishing the WTO.

109. Article 2.1 of DSU

110. Ibid, Article 2.4

111. 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 objects to the proposed decision.

112. See Articles 6.1, 16.4,17.14 and 22.6 of DSU

113. Ibid, Article 2.3

114. Ibid, Article 27.1

115. Ibid, Article 2.1

116. WT/L/161, 25 July 1996

117. WT/DSB/9, 16 January 1997

118. Article IV. 3 of the 1995 Marrakech Agreement Establishing the WTO.

119. Examples of such procedural functions includes passing information to the members, charring the meeting, calling up and introducing the intension the agenda, giving floor to delegations wishing to speak, proposing and, if taken, announcing the requested decision, as well as being the addressee of the members communication to the DSB.

120. For example, Articles 1.2, 7.3, 12.10, 24.2, 8.7 and 17.9 of DSU

121. WT/DSB/RC/1, 11 December 1996

122. Preamble to the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, Paragraph 1.

123. Rule IV.1 of the DSU Rules of Conduct.

124. Ibid, Rules II and III

125. Ibid, Rules IV

126. Annex 2 to the Rules of conduct of the DSU, titled Illustrative list of information to be disclosed.

127. Article 18.1 of DSU

128. Rules VIII of the Rules of conduct of the DSU.

CHAPTER FOUR

TRADE DISPUTES WITHIN THE JURISDICTION OF THE WORLD TRADE ORGAINSATION

4.1 LEGAL BASIS FOR A DISPUTE IN THE WTO DISPUTE SETTLEMENT SYSTEM:

The WTO Agreements contain the substantive rights and obligations of the WTO members. 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 agreement[1]. In line with the foregoing, the basis or cause of action for a dispute under the WTO dispute settlement system must be found in the provisions on consultation and dispute settlement of these covered agreements.

Under the DSU,[2] the provisions on consultation and dispute settlement in the WTO Agreements are: Articles XXII 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 1`7.2 of the Agreement on the implementation of Article VI of GATT 1994[3]; Article 19.2 of the Agreement on Implementation of Article VII of GATT 1994[4]; Articles 7 and 8 of the Agreement on Pre-shipment Inspection; Articles 7 and 8 of the Agreement on Rules of Origin; Article 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; Articles XXII and XXIII of the General Agreement on Trade in Services; and Article 64 of the Agreement on Trade Related Aspects of Intellectual Property Rights.

It is worthy to note that GATT 1994 does not change the text 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[5]. Consequently, all the dispute settlement provisions listed above either rely on or have very similar provisions with Articles XXII and XXIII as a basis for dispute settlement[6].

However, where a dispute is brought under more than one covered agreement, the legal basis for the claims has to be assessed separately under the different agreements. This was the case in the European Communities (EU) – Bananas dispute[7], where the United States invoked the dispute settlement system against the EU banana regime under GATS 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[8]. Accordingly, Article XXIII.1 of GATT 1994 states thus:

> If any contracting party should consider that any benefit accruing to it directly or indirectly under this agreement is being nullified or impaired or that the attainment of any objective of the agreement is being impeded as the result of :

(a) the failure of another contracting party to carry out its obligations under this agreement; or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement; or

(c) the existence of any other situation;

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

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 complainant may rely. However, before a complainant 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 in question.

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

4.1.1 Violation Complaint:

Violation complaint occurs when a member state of WTO fails to carryout 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 complainant

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 system[9], and codified in the DSU[10], whenever an infringement of 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[11].

It is clear from the wordings of the sub-Article that the presumption it 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 to date. Thus, the GATT panels in the Italy - Agricultural Machinery Dispute[12] 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 (U.S) Dispute[13], 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.

In another case[14], the GATT panel rejected the claim that the GATT – inconsistent measure caused no or insignificant trade effects, and the argument 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 an irrefutable presumption[15], and the WTO dispute settlement body has adopted this reasoning[16].

In practice, once the WTO panels and Appellate Bodies have concluded that the Respondent violated a rule of a 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 paragraph on the issue of nullification or impairment, at the end of their report[17].

4.1.2 Non –Violation Complaint:

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 consistent with the agreement, but nevertheless frustrate one of its objectives or undermine trade commitments contained in the agreement. In fact, the benefit a member legitimately expects

from another member's commitment under the WTO Agreement can be frustrated by measures proscribed by the Agreement, as well as ones consistent with the Agreement. As a result, the non-violation complaint provides a means to redress the imbalance that occurs when a member frustrates another member's benefit by taking a measure that is consistent with the WTO Agreement.

According to a GATT panel in the European Economic Communities – Oilseeds I[18], the purpose of this remedy was to encourage member parties of GATT 1947 to make tariff concession. Therefore, the panel held that "when the value of a tariff concession has been impaired by a contracting party giving that 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[19]".

However, according to the WTO panel and Appellate Body, this remedy should be approached with caution and should remain an exceptional remedy[20], 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 exceptional circumstances[21].

According to the DSU[22], 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 benefits[23], for a non-violation complaint to succeed, the complainant must establish the existence of three conditions. The WTO panel in EC – Asbestos Dispute[24], 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 considered by working parties and panels. The claim succeeded in six of these cases[25], and the GATT Council adopted the report in three cases[26].

4.1.2 Situation Complaint:

The DSU specifically addresses situation complaint in terms of Article XXIII:1(c) of GATT 1994. The DSU[27] provides that a panel can only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under a 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 the DSU to present a detailed justification in support of any agreement with respect to this complaint[28].

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 12 April 1989[29] apply to the adoption of panel's report and

surveillance and implementation of recommendations 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[30].

Under GATT 1947, situation complaint was intended to address situations of macro economic emergency[31], and members relied on it to complain about withdrawn concessions, failed re-negotiations of tariff concessions and non-realised expectations on trade flows. However, none of these complaints resulted in a panel's ruling[32]. Consequently, GATT practice did not provide guidelines on the criteria for a legitimate situation complaint[33]. Moreover, this type of complaint has not been brought to the WTO dispute settlement system[34].

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 complainant would request the panel to find that there is non-violation nullification or impairment[35].

4.2 THE COVERED AGREEMENTS:

The agreements covered by the DSU can be broadly categorized into five[36], namely: GATT 1994, Multilateral Agreements on Trade in Goods, GATS, TRIPS and the WTO Agreement.

4.2.1 General Agreement on Tariff and Trade (GATT) 1994:

As already stated in this chapter, GATT 1994 contains consultation and dispute settlement provisions in Articles XXII and XXIII. Article XXII provides for consultations generally with respect to any matter affecting the operation of the agreement. On the other hand, Article XXIII provides for consultation and dispute settlement procedure where one member considers that another member is failing to carryout its obligations under the agreement.

Whereas Article XXIII:1 specifies the circumstances in which a WTO member is entitled to a remedy, Article XXIII:2 specifies the form of remedy that can be awarded to a successful complainant. However, the DSU now sets out in more details the remedies available to a successful complainant. Nonetheless, Article XXIII retains its significance chiefly for specifying the types of complaint that can be brought under GATT 1994.

In fact, Article XXIII covers either of the two situations – where benefits accruing to a member under GATT have been nullified or impaired or where attainment of any of the objectives of GATT has been impeded as a result of one of three reasons, to wit, the failure of a member to carryout its obligations, the application by a member of any measure whether or not it conflicts with the GATT, or the existence of any other situation. Of the six possible combinations, the vast majority of cases involve allegations of nullification or impairment arising from a failure of a member to carry out its obligations; a few cases involve allegations of nullification or impairment by a measure not in conflict with GATT; while no panel reports have been based on an impediment of the objectives of the GATT or on the existence of any other situation, although allegations thereof have

occasionally been made[37] Therefore, only the violation and non-violation complaints play practical roles in dispute settlement under GATT 1994.

4.2.2 Multilateral Agreements on Trade in Goods:

Most of the multilateral agreements on trade in goods[38]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 carryout obligations or of benefits accruing to a party, it means obligations or benefits accruing under the respective agreement in question.

However, although the SCM Agreement[39]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 benefit[40] in relation to the prohibited subsidies[41] Consequently, Article 3.8 of the DSU is not applicable to disputes brought under the SCM Agreement[42]

4.2.3 General Agreement on Trade in Service (GATS):

Articles XXII and XXIII of GATS[43]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, GATS[44]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 carryout obligation. Consequently, Article 3.8 of the DSU does not apply to complaints brought under GATS.

However, in relation to non-violation complaint, GATS made similar provision to that contained in Article XXIII:1(b) of GATT 1994. Therefore, a member can allege the nullification 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[45]

4.2.4 The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs):

The TRIPs Agreement[46]made reference to Article XXII and XXIII of GATT 1994. Consequently, one could safely conclude that the three types of complaint and the requirements for nullification or impairment of benefits, or the impediment of an 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.[47] 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[48].

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[49].

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[50]. However, the fifth session had been concluded and the Ministers did not receive any recommendation from the council. Moreover, the seventh session of the Ministerial Conference had been concluded in Hong Kong in 2005, and the Council did not send any recommendation to it[51].

4.2.5 The WTO Agreement:

The WTO Agreement does not contain specific provisions on consultations and dispute settlement to deal with matters arising under the WTO Agreement itself. However, it is one of the covered agreements under the DSU together with the DSU itself[52].

Furthermore, the second sentence of Article 1.1 of DSU specifically provides that the dispute settlement system applies to disputes under Article I to XVI of the WTO Agreement and the DSU. In line with the foregoing, Article XVI:4 has been a frequent basis for violation complaints, and breach of Article 23:1[53] of the DSU has been claimed in two cases[54].

4.3 POSSIBLE OBJECTS OF A COMPLAINT TO THE WTO DISPUTE SETTLEMEMT SYSTEM:

The different types of complaint available under the covered agreements having being 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[55]. 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:

4.3.1 Action and Inaction, binding and non-binding actions of members:

A provision that prohibits certain actions[56] can only be infringed by positive actions[57]. Therefore, inaction[58] cannot infringe such a provision[59]. According to a panel[60], the positive action in question could be a formal regulation. However, an informal instruction issued by the government of a member state, if it effectively carries out the prohibited act, would amount to a positive action[61].

On the other hand, where the provision of a covered agreement[62] 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 where a member has done nothing or where the laws passed and applied do not for some reasons meet the required standards.

The DSU[63] requires a complainant to identify in its request for the establishment of a panel, the specific "measures" at issue. In Guatemala – Cement I dispute[64], the Appellate Body stated that "measures" in Artilce 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.

4.3.2 Governmental Measures of Members:

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

In Japan – Film[65], 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 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 governments, not those of private parties. However, this notwithstanding, the panel was of the view that while this truth 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 judgements 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[66], and sufficient governmental involvement is the decisive criteria in determining when the private action would be deemed to be a governmental measure[67].

For government involvement to be sufficient, the private behaviour must have 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 obligations. On this basis, actions by private enterprises which limited exportation of semi-conductors from Japan were attributed to Japan[68].

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.

4.3.3 Measures Taken by Regional or Local Sub-divisions of a Member:

Under the traditional public international law, subjects of 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[69].

This principle applies in WTO system. Thus the DSU[70] 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 measure taken by the regional or local government, particular rules apply. As a result, where a regional or local authority of a member 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[71]. The Agreement on Technical Barriers to Trade (TBT) expressly provides that the acts of the non-governmental organizations of a member, which are regulated by the agreement, shall be attributed to the member[72].

4.3.4 Possibility of challenging Law as such:

Most often, complaints in the WTO are directed against specific administrative measures taken by the authorities of a member state pursuant to domestic laws. The WTO Agreement[73] stipulates that members must ensure that their laws, regulations and administrative procedures conform to their obligations under the WTO Agreements. However, most times, member's laws do violate their WTO obligation or otherwise nullify or impair benefits under the covered agreements. Therefore, members frequently bring complaint against a law as such, without waiting for the administrative application of that law[74].

In fact, the Appellate Body in US – 1916 Act[75], confirmed that prior to the entry into force of the WTO Agreement, it was firmly established that Article XXIII:1(a) of the GATT 1947 allowed a contracting party to challenge legislation as such, independently from the application of that legislation in specific instances. While the text of Article XXIII does not expressly address the matter, panels consistently considered that, under Article XXIII, they have the jurisdiction to deal with claims against legislation as such[76]. It is therefore beyond doubt that WTO members can challenge laws as such in the WTO dispute settlement system.

In examining such claims, panels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of GATT obligations can be found as such to be inconsistent with those obligations[77]. The Appellate Body of the WTO[78] had endorsed this distinction, which was developed by the GATT 1947 panels.

Therefore, only legislations that mandate a violation of the WTO obligations can be found as such to be inconsistent with those obligations. Those legislations that merely give the executive authority of a member state discretion to act inconsistently with the WTO obligations cannot be challenged as such; only the actual application of such legislation in a manner that is inconsistent with the WTO Agreement can be challenged.

Consequently, the Appellate Body[79] stated that where the exercise of discretionary powers is vested in the executive branch of a member, it can not be assumed that the member will fail to implement its obligations under the WTO Agreement in good faith.

However, a panel had insisted that whether or not the distinction would apply depends on the precise provision of the WTO Agreement in question and whether the provision precludes only mandatory laws, but also discretionary ones. In line with this statement, recently, the Appellate Body stated that it could not preclude the possibility that a member can violate its WTO obligation by enacting legislation granting discretion to its authorities to act in violation of its WTO obligations[80].

In relation to legislations that are not yet in force, but which have been adopted in their final form, several dispute settlement panels have found that challenging such legislations were not premature, since the entry into force of such legislations are automatic at a future date and did not depend on further legislative action. According to a panel, even though the legal effect of such a measure would only occur in the future, the measure already had an impact on the market participants engaging in international trade prior to its coming into force because these market participants typically plan their transaction ahead of time[81].

Finally, successfully challenging the law as such would address the entire legislation and would not be limited to an isolated case of application of such law, because in implementing the rulings/recommendation of the DSB, the Respondent would either modify or withdraw the inconsistent measure[82].

4.4 DOMESTIC LEGISLATION AS AN OBJECT OF A DISPUTE:

As has already been stated, domestic law is frequently an object of disputes before the WTO dispute settlement body. In such cases the complaint is directed at the existence of the law rather than a specific application of the law, and members can successfully challenge laws as such only if such laws are mandatory.

The DSB determines whether or not the domestic law conforms with the WTO agreement, and in so doing, several issues relating to the legislation in question must be reviewed. The most important of these issues is whether in the WTO sense, the legislation is mandatory or discretionary in providing for an act in contravention of the WTO Agreement.

In order to determine whether the domestic law is mandatory or discretionary, the panel takes consideration of several factors relating to the domestic legislation, which include the domestic legal framework of the member state, how the law in question operates together with other domestic legal provisions, the relationship between the different branches of government and how the authorities and courts interpret domestic laws.

It is trite that under domestic law, the determination of these factors would definitely be a question of law. However, whether such determination would amount to a question of law or fact at the WTO has not been finally decided. Thus, in India – Patent (U.S) dispute[83], the Appellate Body stated that it was the panel's duty to determine whether India's "administrative instructions" were in conformity with its obligations under the TRIPs Agreement, and for that purpose, entitled to seek a detailed understanding of the operation of the domestic provisions in question. Therefore, the Appellate Body concluded that it was also necessary for the Appellate Body to review the panel's examination of the same Indian domestic law[84].

Moreover, according to the Appellate Body in another case[85], a municipal law of the WTO members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. Such an assessment is a legal characterization by a panel, and a panel's assessment of municipal law as to its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU.

In contrast to the foregoing, the Panel in the US – Section 301 Trade Act dispute stated that it was called upon to establish the meaning of Sections 301 – 310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations[86]. By this approach, it would seem that the panel's establishment of these factual elements would be a question of fact.

It is clear from these cases that if the DSB feel that the determination of these factors in relation to a particular case amount to a legal question, the panel's decision in that case would be subject to Appellate Body review, and vice versa if DSB decides that it is a question of fact. Thus, the distinction between questions of law and questions of facts is relevant in determining the scope of the appellate review.

REFERENCES

1. Article 1.1 and Appendix 1 of the DSU.

2. Ibid, Article 4.11 and footnote 4.

3. Commonly called the Anti-Dumping Agreement.

4. Commonly called the Customs Valuation Agreement.

5. 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 herein.

6. This is the case for all the provisions listed above, except Article 8.10 of the Agreement on Textile and Clothing; Article 17 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.

7. European Communities (EC) – Banana III: Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Report, WT/DS27/AB/R,adopted 25 September 1997, DSR 1997: II, 591, Paragraphs 252 and 253.

8. Article 1.1 of the DSU.

9. Uruguayan Recourse to Article XXIII of GATT, Panel Report, adopted on 16th November 1962, BISD 11S/95, Paragraph 15.

10. Article 3.8 of the DSU.

11. United States – Wool Shirts and Blouses: Measure 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.

12. Italian Discrimination Against Imported Agricultural Machinery, Panel Report, adopted 23 October 1958, BISD 7S/60 Paragraphs 21 – 22; Canada – FIRA: Administration of the Foreign Investment Review Act, adopted 7 February 1984, BISD 30S/140, Paragraph 6.7.

13. Japan – Leather II (US), Panel on Japanese Measures on Imports of Leather, Panel Report adopted 15 May 1984, BISD 31S/94, Paragraphs 54 – 56.

14. United States – Superfund: Taxes on Petroleum and Certain Imported Substances (Superfund), Panel Report, adopted 17 June 1987, BISD 34S/136, Paragraph 5.1.9.

15. Ibid, paragraph 5.1.7.

16. European Communities – Banana III, op. cit. at 591, Paragraphs 252 and 253.

17. Source – World Trade Organisation, 2005 Press release of 16th September 2005, Press/416 obtained from www.wto.org.

18. European Economic Communities – Oilseeds I: Payment and Subsidies paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins, Panel Report, adopted on 25 January 1990, BISD 37S/86, Paragraph 144.

19. Ibid, Paragraphs 144 and 145.

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

21. Ibid, Paragraph 10.36.

22. Article 26.1(a) of DSU.

23. Note that Article 26.1 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-violating measure with "nullification or impairment of a benefit", as it typically happens in non-violation complaints.

24. EC – Asbestos: Measures Affecting Asbestos and Asbestos-containing Products, Panel Report WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, Paragraph 8.283.

25. Australia – Ammonium Sulphate: The Australian Subsidy on Ammonium Sulphate, Working Party Report adopted 3rd April 1950, BISD 11/188; Germany – Sardines: Treatment by Germany of Imports of Sardines, Working Party Report adopted 31 October 1952, BISD 1S/53; EC – Citrus, Panel Report, 7 February 1985, unadopted, L/5776; EEC – Canned Fruit: Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes, Panel Report, 20 February 1985, unadopted. L/5778; EEC – Oilseeds I, op. cit; EEC – Oilseeds II : Follow-up on the Panel Report "Payments and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins", Panel Report, 31 March 1992, BISD 39S/91.

26. GATT Analytical Index, 6th Edition, 1995, Pages 668 – 671.

27. See generally Article 26.2 of DSU.

28. Ibid, Article 26.2(a)

29. GATT Decision of 12th April 1989 on the rules and procedures governing dispute settlement under GATT, BISD 36S/ 61 – 67.

30. 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.I(c) of GATT 1994 and Article 26.2 of the DSU.

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

32. GATT Analytical Index, op. cit., Pages 668 – 671.

33. Ibid, page 671.

34. Source – World Trade Organisation, 2005 Press release of 16th September 2005, Press/416 obtained from www.wto.org.

35. Japan – Film, op cit. at 1179; EC – Asbestors, op.cit. page 135.

36. Article 1.1 and Appendix 1 of DSU.

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

38. See Annex 1A of the Marakesh Agreement of 1994, Establishing the WTO.

39. Article 30 of SCM Agreement.

40. Ibid, Article 4.

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

42. Not in the sense 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.

43. The GATS as contained in Annex 1B of the WTO Agreement.

44. Article XXIII.1 of GATS.

45. Ibid, Article XXIII.3

46. Article 64.1 of TRIPs.

47. Ibid, Article 64.2

48. Ibid, Article 64.3

49. WTO Press Release, op. cit. 16

50. Paragraph 11.1 of the Doha Decision on Implementation.

51. World Trade Organisation Council for TRIPs' Report (2005) IP/C/38 of 21st November 2005 (05-5485)

52. Article 1.1 and Appendix 1 of DSU

53. Article 23.1 of DSU requires member states of the WTO to have recourse to, and abide by the rules and procedures of the DSU when they seek redress of a violation of obligations or other covered agreements or an impediment to the attainment of any benefit of the covered agreement.

54. United States – Sections 301–310 of the Trade Act of 1974, Panel Report, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815; United States – Certain EC Products: Import Measures on Certain Products from the European Communities, Panel Report, WT/DS165/R, adopted 10 January 2001 as modified by the Appellate Body Report, WT/DS165/AB/R.

55. See Article 1.1 of DSU.

56. For instance, Article XI of GATT 1994, which prohibits among other things, exports restrictions.

57. Positive action here means for instance, in relation to Article XI of GATT 1994, passing and applying a law, regulation or decision impeding the exportation of goods to other WTO members or other forms of measures imposing restrictions.

58. Inaction means the failure to adopt such a law, regulation or decision

59. The failure to abrogate a law 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.

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

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

62. Examples 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 on safeguards on Consultation.

63. Article 6.2 of the DSU.

64. Guatemala – Cement I: Anti-Dumping Investigation Regarding Portland Cement From Mexico, Appellate Body Report, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767, footnote 47.

65. Japan – Film, op. cit, paragraph 10. 52

66. Japan – Semi Conductor, op. cit. paragraph 117; EEC – Desert Apples: Restrictions on Import of Desert Apples – complaint by Chile, Panel Report, adopted 22 June 1989, BISD 36S/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, 11.22 and 11.51.

67. Ibid, paragraph 10.56.

68. Japan – Semi Conductor, op. cit. paragraph 102.

69. Shaw, Malcolm. N., International law, 2nd Edition, (Cambridge: Grotius Publication Limited, 1986), page 126.

70. Article 22 of D+SU.

71. See ibid, Article 22.9; Article XXIV.12 of GATT 1994 and Article 1.3(a) of GATS.

72. Article 14 of the TBT Agreement.

73. Article XVI.4 of the WTO Agreement.

74. For instance, claims about taxes which discriminate against imports and contravene Article III.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.

75. United States – Anti-Dumping Act of 1916, Appellate Body Report, WT/DS 136/AB/R, WT/DS 162/AB/R, adopted 26 September 2000, DSR 2000: X, 4793, paragraphs 59 - 60, with references to GATT panel reports.

76. See for example, US – Superfund, Panel Report; United States- Section 337, Panel Report; Thailand – Cigarettes, panel report; US – Malt Beverages, Panel Report; and US – Tobacco, Panel Report. See also US – Wine and Grape Products, Panel Report, examining this issue in the context of a claim brought under the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT.

77. US – Wine and Grape Products, loc. Cit.

78. United States – Anti-Dumping Act of 1916, op. cit. Paragraph 88.

79. United States – Section 211 of Omnibus Appropriations Act of 1998, Appellate Body Report, WT/DS 176/AB/R, adopted 1 February 2002, paragraph 259.

80. United States – Sections 301 – 310 of the Trade Act of 1974, op. cit, paragraphs 7.53 – 7.54.

81. United States – Taxes on Petroleum and Certain Imported Substances, Panel Report, adopted 17 June 1987, BISD 34S/136, Paragraph 5.2.2.

82. See Article 3.7 of DSU.

83. India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998: I, 9.

84. Ibid, Paragraphs 66 and 68.

85. United States – Section 211 of the Omnibus Appropriation Act of 1998, op. cit. paragraph 105.

86. United States – Sections 301 – 310 of the Trade Act of 1974, op. cit., at page 815.

CHAPTER FIVE

DISPUTE SETTLEMENT PROCEEDINGS IN THE WORLD TRADE ORGANISATION

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

The WTO dispute settlement process involves three main stages. These stages are: consultation, adjudication - divided into Panel stage and Appellate Review, and implementation of rulings/recommendations.

5.1.1 Consultation:

A consultation between the parties is the first stage of the WTO dispute settlement process[1]. A party may request for consultations with another WTO member, if it believes that the other member has violated a WTO Agreement or otherwise nullified or impaired benefits accruing to it. The request for consultation formally initiates a dispute in the WTO and triggers the application of the DSU[2]. 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 solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered Agreement is clearly to be preferred[3]. 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[4].

Before initiating consultation, a member is obliged to exercise its judgement in deciding whether it considers that it would be fruitful to bring a case[5]. A request for consultation must be submitted in writing and must give the reasons for the request, including identification of the measure 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 proceeding.[6]

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[7]. In practice, the complaining member only sends one single text of its notification to the secretariat, specifying the other relevant councils or committees and the secretariat distributes the notice to the specified relevant bodies[8].

Moreover, the complainant must initiate the request under one or more of the respective consultations and dispute settlement provisions of the covered agreements[9]. If consultations are requested under Article XXII of GATT 1994 or the equivalent provisions of another covered Agreement[10], WTO members with a substantial trade interest may request to be joined in the consultations as 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[11]. 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[12]. Moreover, the Respondent must respond to the request within 10days after the date of its receipt, and shall enter into consultations in good faith within a period of not more than 30days after receipt of the request [13]. However, in cases of urgency, including those which concern perishable goods, the periods are 10days and 20days respectively[14]. If the Respondent fails to respond or enter into consultation within the stipulated periods, 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 of any member in any further proceedings.[15] In Korea – Alcoholic Beverages[16], 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 meaningful 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 proceedings between the parties remain confidential, a party does not breach any confidentiality by disclosing in the panel proceedings 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 consultations with Korea on this matter". [17] This position was adopted in several other disputes like Australia – Automotive Leather II[18] and EC – Bed Linen[19].

However, in the US – Underwear[20], 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 consequence to the later stages of the dispute[21].

The WTO secretariat is not involved in consultations, and the contents of consultations are not disclosed to any subsequent panel assigned to deal with the dispute[22]. 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 the consultations, if required, were in fact held[23].

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 lead 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 consultation process disposes of roughly one-half of the cases brought before the WTO[24].

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[25].

5.1.2 Panel Stage:

(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 60days of the receipt of its request for consultation by the Respondent, or earlier where the Respondent did not respond to the request for consultation or the consulting parties jointly consider that consultations have failed to settle the dispute [26].

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 the legal basis of the complaint[27]. 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 [28]. Second, it determines the standard terms of reference for the panel's examination of the matter [29]. 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 individual claim or having the panel decline to rule on certain aspects of the complaint. 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 specific measures at issue 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 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[30].

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[31], but this must be examined on a case by case basis[32]. Moreover, in 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[33].

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 [34].

Under the DSU, if 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 [35], unless there is a consensus at the DSB not to establish a panel [36]. Usually, this second meeting takes place one month later, but upon the complainant's request, the DSB 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 [37]. From the foregoing, it is clear that unless the complainant consents to delay, a panel will be established approximately 90 days of the request for consultation [38].

Under the DSU [39], 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 [40].The terms of reference of a panel is 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[41].

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 and to make written submissions to the panel, which would be reflected in the panel's report [42].

(b) Composition of Panel:

After the panel is established by the DSB, the three or five individuals [43] that would serve as the panelists would be selected in accordance with the DSU[44]. To accomplish the task, the WTO secretariat suggests the names of possible panelists to the parties to the dispute [45], from the indicative list kept by the secretariat [46], including other persons not in the indicative list in specific dispute. The parties to the dispute are allowed to reject the secretariat proposal only for compelling reasons [47], 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 [48].

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 [49], 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 [50]. Most importantly, panel should be composed of panelists that have the relevant specific expertise in the sector that is the subject of the dispute [51]

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 [52]. Accordingly, in US – Shrimp dispute [53], the DSB established one 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 panel, and the timetable for the panel process should be harmonized [54]. This was the case in EC – Hormones dispute [55], where the complaint of Canada [56] and that of the United States [57] were reviewed by two separate panels composed of the same individuals.

(c) <u>Panel Proceedings:</u>

Once a panel has been selected, it can start its work, and its first task is to meet with the parties to set out its working procedure [58] and time schedule [59]. 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[60].

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 preliminary 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 [61]. Thereafter, the third parties to the dispute if any, file their own submissions[62].

The DSU makes provision for the secretariat to receive these submissions and transmit them to the other parties to the dispute[63]. In practice however, the submissions are filed with the WTO Secretariat Dispute Settlement Registry[64], 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 [65].

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 the other parties to the dispute [66]. 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 [67].

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 [68]. 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 submission approximately four weeks after the first panel meeting. In the second written submission, 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 submissions 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 consults experts to advise it on technical and scientific issues[69], in which cases, it would hold a third meeting.

At the conclusion of the oral hearings, the panel in accordance with its mandate[70], 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 [71]. The panel's deliberations are confidential and its report is drafted in the absence of the parties [72].

Thereafter, the panel issues a draft of the "descriptive part of its report, which summarizes the arguments of the parties, and on which the parties may submit comments within two weeks of receiving same [73]. This 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 final 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 [74]. In fact, the panel findings are usually very detailed and specific, with long legal discussions [75]. Panelists have the right to express a separate opinion, in the panel report, but they must do so anonymously [76].

In violation complaints, where the panel concludes that the challenged measure is inconsistent with the covered agreement, its report would also contain a recommendation that the respondent should bring the challenged measure into conformity with WTO law, and may also suggest ways in which the Respondent could implement the recommendation [77]. In Brazil –Aircraft (Article 21.5 – Canada), relying on this provision, Canada requested that the panel suggest that

the parties develop mechanisms 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 relates to only what could be done to bring an inconsistent measure into conformity with WTO laws and does not address issues of surveillance of those steps[78].

However, in 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[79].

Moreover, where a panel concludes that a challenged subsidy is prohibited under the Subsidies 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[80].

The interim report becomes the final report unless one of the parties requests the panel to review precise aspects of the report [81]. 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 final report within two weeks after the date of the conclusion of the interim review. The final report must contain a reference to the arguments raised by the parties during the interim review[82].

If the panel was established to review multiple complaints on the same matter, the panel must submit separate report for the complainants if so requested by one of the parties involved in the dispute [83]. This was the case in the US – Offset Act (Byrd Amendment) dispute brought by Australia, Brazil, Chile, EC, India, Indonesia, Japan, Korea, Thailand, Canada and Mexico[84].

According to the DSU, the panel's final report should be issued to the parties six months after the composition of the panel [85]. The panel's report once translated [86], must also be circulated to all the WTO members within nine months of the establishment of the panel [87]. However, as at 1999, 27 WTO panels have issued their reports within 11.1 months. In the Brazil – Desiccated Coconut dispute[88], 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 failures to meet the nine month target have often involved cases where the panel consulted experts; where there were transactional delays; and where the cases were extraordinarily complex[89]. 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 - DRAMS[90] and EC –DRAMS[91] disputes, the separate panels requested by the Korean Government were established on 23 January, 2003, while the panel reports were adopted 20th July 2005 and 3rd August 2005 respectively.

(d) Adoption of Panel Report:

After the circulation of the panel's report, the DSB must adopt the report not earlier than 20 days and not later than 60 days [92] unless a party to the dispute formally notifies the DSB of its decision to appeal or there is a negative consensus at the DSB not to adopt it [93]. However, if SCM agreement is involved, the time limit is 30 days [94].

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 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 [95].

5.1.3 The 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 [96]. The Appellant must file simultaneously, a Notice of Appeal with the Appellate Body secretariat [97].

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[98]. These allegations of errors must relate to what the appellant wishes the Appellate Body to overturn. It could be a panel's conclusion with the supporting reasoning or an isolated legal finding forming part of the reasoning supporting a conclusion [99].

On what would constitute compliance with Rule 20(2) (d), the Appellate Body has held that merely identifying the panel findings 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 [100].

Nevertheless, the Notice of Appeal serves to give notice to the Appellee of the findings appealed against, so that it can prepare its defence [101]. Consequently, it must be clear from the notice, which panel findings or interpretations the Appellate Body is asked to review [102], as the Appellate Body would not review a finding that is not covered by the notice [103] or a claim of error that is not included [104] in the allegations 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 record[105] of the panel proceedings to the Appellate Body[106]. Thereafter, the three members (the division) that would decide the appeal would be selected without regard to their national origin[107]. The division would in turn elect one of them to be the presiding member[108].

Within 10 days from the date of filing the Notice of Appeal, the Appellant is expected to file its written submission [109] and serve other parties with it [110]. The written submission would contain the Appellant's legal arguments and the rulings it requests 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 [111], stating their own position and legal arguments [112].

Moreover, other parties to the dispute may join in the appeal on the basis of other alleged error of law in the panel report and legal interpretations as multiple appellants within 15 days of filing of the Notice of Appeal [113]. Such multiple appellants would also file their written submission specifying their own position and legal argument within 25 days of filing the Notice of Appeal [114].

Only the parties to the dispute have the right to appeal against panel report. Third parties cannot appeal against a panel report. However, such third parties can participate in the appeal as third participants. Moreover, third participant wishing to participate in the proceedings 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 its intention to appear at the oral hearing in writing, stating whether or not it intends to make an oral statement; or notify the secretariat in writing that it intends to appear at the oral hearing and may request to make an oral statement at the hearing[115].

Following the receipt of the submissions, the Appellant Body division holds an oral hearing approximately 30 to 40 days after the filing of the Notice of Appeal [116]. The oral hearing is not open to the public [117]. During the oral hearing, the participants and third participants make a brief opening statement, after which the division poses question to them. Thereafter, the division 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 [118]. However, only members of the division would decide the

appeal [119]. 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 [120]. In addition, where an individual member includes a separate opinion in the report, he must do so anonymously[121]. When completed, the report is signed by the members of the division and translated into the official languages of WTO.

All deliberations are confidential, and the drafting of the report is done in the absence of all participants in the appeal[122]. 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 obliged 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[123].

In its report, the Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel [124]. 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 interpretations that have been appealed[125]. 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 in detail the issues raised on appeal, conclusions, recommendations and suggestions [126].

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 [127], 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 [128].

In most appeals, the Appellate Body has circulated its report 90 days after the Notice of Appeal. Instances include US – Gambling[129], EC – Export Subsidies on Sugar[130], and Dominican Republic – Import and Sale of Cigarettes[131]. In these three cases, the Notices of Appeal were filed on January 7, 2005, January 13, 2005 and 24 January 2005 respectively, while the Appellate Body circulated their Reports on 7 April 2005, April 28, 2005 and 25 April 2005 respectively[132].

However, in few exceptional cases, the Appellate Body had with the agreement of the participants in the appeal, circulated their reports later than 90 days [133]. 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, 2005[134]. 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 the 90 days 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[135].

Under the SCM Agreement, the Appellate Body is required to issue its report during a shorter period of 30 days or at most 60 days [136], and the report must be adopted within 20 days of circulation of the report for disputes on prohibited and actionable subsides [137]. For instance, in US – Softwood Lumber V, the appeal was filed on 13th May 2004 and the Appellate Body Report was adopted on 31 August 2004[138]. However, the maximum of 60 days have been exceeded in two appeals, to wit, Brazil - Aircraft[139] and Canada – Aircraft[140].

Under the Working Procedures, an appellant can withdraw its appeal at anytime during the pendency of the Appeal[141]. 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 withdrawal[142]. In three occasions[143], 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 disputes [144] and the DSB is responsible for supervising the implementation of reports [145].

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/recommendations[146]. The 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 [147]. As aptly put by the Appellate Body in Canada – Pharmaceutical, reasonable period of time is available only if immediate compliance is impracticable [148].

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 withdrawal[149]. Consequently, in Brazil – Aircraft, the DSB gave Brazil a period of 90 days to bring its aircraft subsidies into compliance with the WTO law[150].

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

(a) Proposed by the member concerned and approved by consensus[151] 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[152]. 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 [153].

(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[154].

(c) Determination by arbitration[155], upon the request of a member[156], by individual arbitrator or group of arbitrators[157].

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 circumstances[158]. 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 sentence[159].

As rightly observed by the arbitrator in Korea – Alcoholic Beverages[160], 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 25th September 1997 to 1 January 1999[161]. Also, in Australia – Salmon, the

arbitrator determined the reasonable period of time for Australia to implement the rulings/recommendations of DSB to be eight months from the date of adoption of the Appellate Body and panel Reports by the DSB, that is from 6 November 1998[162].

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 [163], so as to give the implementing member the time it truly needs under its normal procedures, making use of any available feasibility[164], but not having to utilize an extra-ordinary legislative procedures[165]. Consequently, the arbitrators in most cases determined the reasonable period of time on the basis of the proposal made by the implementing member[166].

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 months[167].

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 least, ten days before each meeting, the implementing member is required to provide the DSB with a written status report of its progress in implementation [168]. In addition,

the DSB keeps the implementation of the report it has adopted under surveillance, until it is fully implemented[169].

Where the implementing member implemented the recommendations/rulings, but a disagreement arose between the parties on whether the implementation achieved full compliance with the recommendations, either of the parties can request for a panel, possibly, the original panel, to determine the issue within 90 days [170]. 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 DSB[171].

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[172].

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 agreements[173]. 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 member[174]. 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 system[175]. 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 impairment [176]and must be imposed in the same sector[177] in which the violation or nullification or impairment was found[178]. 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 [179].

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 [180]. If the parties did not agree on the proposed term of retaliation, arbitration may be requested to determine same[181].

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 DSU[182].

The arbitral decision is final and the DSB would authorize suspension of obligation if it is consistent with the arbitral decision. In several cases[183] in which suspension were authorized, the levels of suspension were determined by Arbitration[184].

The above stated procedures relating to temporarily measures do not apply in all cases. For instance, different rules apply in cases involving the SCM Agreement [185] and in situation complaints[186]. 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 procedures[187]. 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 - Aircraft[188]and Canada – Aircraft[189], Canada and Brazil agreed that the parties would not request authorization to suspend concessions until after circulation of Article 21.5 report.

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 members[190].

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 concerned[191], 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 dispute[192]. 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 [193].

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 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 [194]. 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 State's 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 in the previous report in support of the interpretation given to a WTO rule, which they consider to be persuasive [195].

Accordingly, the Appellate Body in the Japan – Alcoholic Beverages II[196] stated that the WTO panel reports and equally, adopted Appellate Body report[197] 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 question[198].

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 confidential[199], although members have the right to disclose their own submission to the public[200]. Consequently, non-participants do not contribute to the proceedings. This raises the issue of legal presentation and amices curiae submissions in the WTO dispute settlement system.

5.3.1 Legal Representation:

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 [201].

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 settlement [202].

Finally, the member who employs the services of the private legal counsel is responsible for them and must ensure that they respect the confidentially of the proceedings[203].

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, 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 consideration[204].

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 not[205].

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

it by the DSU[206], to accept and consider or to reject such non-requested amicus curiae submissions[207]. 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 proceedings[208]. Be that as it may, it is believed that the acceptance and consideration of amicus curiae submissions by panel and 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 Fund[209]. 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 submission[210]. However, if the Appellate Body received the amicus curiae submission directly from the non-participant, the Appellate Body would not consider it[211].

Notwithstanding this attitude of the Appellate Body, it has maintained that in line with the power vested on it by the DSU[212], it has the right to accept and consider any information, including unsolicited amicus curiae submission, which it considers important and useful in deciding an appeal[213].

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 submissions[214]. 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 discussed, concluded that it is not acceptable for the Appellate Body to accept and consider amicus curiae submission[215].

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 submission[216]. 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 submission[217].

5.4 LEGAL ISSUES ARISING IN THE PROCEEDINGS;

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

5.4.1 Rights to bring Claim/ Invoke Exceptions:

No provision of the DSU contains any explicit requirement that a complainant must have a legal right or interest in the claim it is pursing[218]. Thus, in the EC-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 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 indirectly[219].

This decision was adopted in Korea – Diary, when Korea argued that there is a requirement for an economic interest to bring a matter to the panel and that EC had failed to meet that requirement[220]. 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 members[221].

Furthermore, with regards to invocation of exceptions, any respondent that intends to rely on a WTO legal exception[222] 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 dispute [223].

5.4.2 Judicial Economy and Standard of Review:

A panel has the mandate to address the complainant'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 complainant, 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[224]. 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 parties[225].

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 parties[226] as well as the arguments made by the parties it was going to address in its analysis[227]. 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 jurisprudence[228].

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[229]. This happened in US – DRAMS[230] and US – Stainless Steel[231] where the respective panels, having found a violation of

Article II.2 and Article 2.4.1of the Anti-Dumping Agreement, respectively exercised judicial economy with respect to Articles I, X and X:3(a)of GATT 1994. In short, panels have the discretion to refuse to rule on these other claims[232], 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 claim[233].

However, the panel's discretion must be exercised in such a manner that is consistent with the objectives of the dispute settlement system[234] and the panel must address all those 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 member[235].

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 economy[236].

With regards to standard of review, Article 11 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 things[237], 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 justice[238].

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 review[239]. 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 itself[240]. However, only egregious errors constitute a failure to make an objective assessment of the facts[241].

With respect to the standard of review under the DSU, different standards of review apply to the Agreement on Textile and Clothing[242], safeguard measures[243], and the Anti-Dumping Agreement[244].

Finally, the panel must not consider evidence that are not in existence at the time the member state made its determination[245], 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 it[246].

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 it[247]. The standard of proof is that the complainant must establish a prima facie case, and the respondent must submit sufficient evidence to disprove the complainant's claim[248]. However, the evidence that would meet the standard of proof varies from measure to measure, provision to provision, and case to case [249].

These principles of burden of proof were adopted by the Appellate Body in EC – Hormones with relation to the Sanitary and Phytosanitary (SPS) Agreement[250], and in India – Patents (US) with respect to the TRIPS Agreement[251].

In Canada – Aircraft[252] 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 – Diary, 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 EC 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 thereof[253].

In short, the panel in Turkey - Textiles[254] 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;

(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 facie case before proceeding to examine the respondent's defence and evidence[255].

5.4.4 The Panel's Right To Seek Information:

Under the DSU[256], 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 [257]. 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 consultations[258].

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 so[259].

According to the Appellate Body in US – Shrimp, the word "seek" in the phrase should not be given an excessively formal and technical reading, and that given the breadth of a panel's mandate to seek information, the distinction between requested and non-requested information vanishes[260]. Consequently, the Appellate Body held that the panels have the authority to accept amicus curiae briefs[261].

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 appropriate[262].

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, in other words, under a duty and an obligation to respond promptly and fully to requests made by panels for information under Article 13.1 of the DSU[263].

5.5 DEVELOPING COUNTRIES IN THE PROCEEDINGS:

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 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 consultation[264]. 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[265].

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 panel[266].

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 work[267]. For instance, in the India – Quantitative Restrictions dispute[268], the panel upon India's request, granted an additional period of ten days to India to prepare its first written submission to the panel, despite the United State's 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 must explicitly indicate in their report the form in which these rules have been taken into account[269].

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 settlement[270].

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 matter[271]. 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[272].

Thus, in Indonesia – Autos (Article 21.3)[273], 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 implementation[274].

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 account, that would be qualitatively different for developed and for developing country members[275].

Fourth, under the DSU[276], 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[277].

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 secretariat[278].

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 law[279]. 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

are WTO members or accession candidate. Since July 2001, the Advisory Center has regularly represented developing country members in WTO disputes.

5.6 ACTIVITIES OF THE WTO DISPUTE SETTLEMENT SYSTEM: 1995 2007.

During the first twelve years of the application of the WTO dispute settlement system, that is, between January 1, 1995 and 7th August 2007, the DSB has received a total of 366 requests for consultation[280]. The annual number of requests for consultation increased sharply in the first three years after the mechanism had come into force. It peaked in 1997 with 50 requests, then fell to 40 in 1998 and, since then had fluctuated to an annual average of 30 complaints in the period from 2000 to 2003 and further to only 20 complaints in 2004, the lowest number since the inception of the new system[281].

Since the inception of the mechanism, up to 9th January 2007, the DSB has adopted 122 panel reports and 80 Appellate Body Reports[282]. As at 1st October 2004, 315 requests for consultation were filed. Out of these 315 requests, 138 are still on consultations stage, 71 were settled during consultation, while 24 disputes are still in the panel stage. 12 of these 95 panel reports circulated related to compliance dispute under Article 21.5 of the DSU[283]. It is clear from the foregoing that the number of panel reports is much lower than the number of consultation requests, and that the number of disputes settled during consultation, that is 71 out of 315 requests for consultation is high. This shows that mutually agreed solutions were found by the disputing countries in a considerable number of disputes prior to the circulation of the panel report.

Since the establishment of the WTO in January 1, 1995, the WTO Panels have covered a wide variety of products and issues, from desiccated coconut, footwear, shrimp and lamb meat to steel, semi-conductors, computer equipments and aircraft. The complaints have spanned various provisions of the WTO Agreements. In fact, the covered agreement most frequently invoked by complainants has been the GATT 1994 with about 240 disputes. In a distance second place with above 50 to 60 disputes each are the Agreements on Subsidy and Countervailing Measure (SCM), Agriculture and Anti-Dumping (AD).

By comparison, the Agreements on Trade in Services (GATS) and Trade Related Aspects of Intellectual Property Rights (TRIPS) have not yet been frequent subjects of WTO disputes and their importance in dispute settlement seems to be decreasing even further. For instance, out of the modest 25 complaints brought under the TRIPs, only about 5 were brought between 2000 and 2007[284]. However, one of the high profile disputes between the US and the EC on the one hand, and India on the other regarding Patent Protection of Pharmaceutical and Agricultural Chemical Products are among these five disputes[285].

Similarly, of the 14 complaints that have been brought under the GATS, only about five were lodged in the period 2000 to 2007. Here as well, the disputes included a prominent case of both political and economic importance, the US complaint against Mexican Measures Affecting Telecommunications[286].

In fact, the WTO dispute resolution mechanisms met an early test. The most notable characteristic of the mechanism in its early years was the large number of very controversial cases involving systematic issues. These cases include the

Banana case[287], the Hormones case[288], the Japan Film case[289], the Shrimp – Turtle case[290], the Helms- Burton case[291], the Turkey Textile case[292], the India Quantitative Restriction case[293], the Section 301 case[294] and the US – FSC case[295]. These cases all involved the US and/or EC[296], and involved very sensitive and controversial measures. However, the Dispute Settlement Body managed to handle them.

The most notorious of these cases, the Banana case involved complaints by Ecuador, Mexico, Honduras, Guatemala and the United States against the European Community's restrictions on importation, sale and distribution of Bananas. These countries alleged that EC was giving preferential treatment to the importation of bananas from its member-states' former colonies in the Caribbean. The DSB found that the complex discriminatory banana regime of the EC violated the WTO rules. Subsequent arbitration on the reasonable period of time for the implementation of the ruling of the DSB determined the period to be 15 months. The EC revised its banana regime, but further disputes arose as to the WTO – consistency of the new regime. The original panel was re-established to address these issues.

The US requested authorization from the DSB for the suspension of concessions to the EC in an amount of US $520 million on the basis that the EC had not complied with decisions. The EC requested arbitration on the level of suspension of concessions requested by the US, which the DSB referred to the original panel for arbitration. The request for the suspension of concession by the US was deferred by the DSB until the determination of the appropriate level for the suspension of concessions. The arbitrator determined the level of nullification

suffered by the US to be $191 million, an amount lesser than the amount proposed by the US. The DSB then authorized the US to suspend concessions to the EC for $191 million.

Meanwhile, prior to the DSB authorization, the US imposed preliminary measures on certain imports from the EC in anticipation of such authorization. The arbitrators who were unable to issue their report within the 60 days period envisaged by the DSU delayed the DSB authorization. The US action led to another panel in US – Certain EC Products[297] at the request of the EC. When the DSB authorization was received, the US had made its preliminary measure effective retrospectively adjusting it to reflect the lower amount. The panel found that the earlier US measure was seeking to redress a WTO violation and by putting into place that measure prior to the time of authorisation by the DSB, the US made a unilateral determination that the revised banana regime violated WTO rules, contrary to the DSU.

Another interesting case handled by the DSB and one in which Hong Kong had a third party interest was that of US – Shrimp, a complaint by India, Pakistan, Malaysia and Thailand against a ban by the US on importation of Shrimp from these countries. The dispute has often been portrayed as relating to the conflict between the objectives of trade liberalization and the preservation of the environment. However, the complaint was really not about whether turtles should be protected but rather, whether exporting countries should be made to adopt similar laws to that of the importing country under threat of losing market access to that country. The Appellate Body concluded that the US ban, while qualifying for provisional justification for a trade restriction under the recognized GATT

exception for the conservation of exhaustible natural resources, did not meet the requirements of the relevant provision. Thus, the DSB ruled that US attempts to protect endangered sea turtles from Shrimp nets violated WTO rules.

The EC – Hormones case is another controversial dispute handled by the DSB. In this case, two complaints were launched by the US and Canada against EC restriction on the importation of meat produced with the aid of growth hormones. DSB held that the EC ban on beef violated the WTO Agreement and EC was given 15 months – as the reasonable period of time to bring its food safety measures into compliance. When EC failed to do so, US and Canada were authorized to suspend tariff concessions equivalent to US $116 million and Canada $11 million respectively.

The US lost the film case and the EC lost the section 301 cases. The Herms-Burton case was settled on the day the first written submission was due to be received by the panel. The parties seem to have accepted the outcome of the shrimp case, Turkey - Textile, India -Quantitative Restriction and Banana case. US lost in the shrimp case but many environmentalists welcomed the Appellate Body Report[298]. The Banana case presented the most difficult implementation problem and the US-EU dispute over how to handle the controversy came close to destroying the system in its relative infancy[299].

On the other hand, the Hormones and the FSC cases have remained unimplemented and have led to the imposition of retaliatory measures. For instance, in relation to the FSC case, EC, which was victorious in the FSC case, was authorized to retaliate to the tune of $6 billion annually.

In recent times, the system has handled other controversial cases which involved challenges often by developing countries to certain policies of the US and the EC. For instance, India successfully challenged the EC'S GSP (General System of Preference) Scheme[300], a multiparty challenge to the EC Sugar Program[301], a Brazilian challenge to US Cotton Subsidies[302] and a challenge by the US and other countries to the EC's Biotech Approval Regime[303].

Of the 40 panel reports [304] issued after August 2000, 20 or slightly more than half were anti-dumping or countervailing cases, six were safeguard cases, six were GATT cases, two were Trips cases and there were also one each under the subsidies, rules of origin, TBT, SPS and Agriculture Agreement.

Of these forty (40) cases, twenty-six were appealed. Of the four GATT cases appealed, US – Certain Measures [305] and Korea – Beef [306] were fairly straight forward, while the Asbestos [307] case underlines the discretion that governments have when it comes to health and safety matters. In the GSP case [308], the Appellate Body decision allows a great deal of government discretion, such that it is unclear that it will ultimately have much impact on current GSP programs, even if they have to be formally restructured.

Notwithstanding the magnitude of cases handled by the DSB, with regards to the quality of the rulings of the Panels and Appellate Body, William J. Davey, felt that the 38 reports in the WTO cases that had been adopted as of August 2000[309], as well as the two TRIPS cases: Canada – Patent Term [310] and Havana-Club [311] adopted after August 2000, were unexceptional in result, so also was the Chile-

Price Band[312] decision under the Agricultural Agreement, and the US – Textiles under the Origin Agreements.

According to Mr. Davey, the SPS case: Japan – Apples[313] and the first Technical Barriers to Trade Agreement (TBT) case: EC – Sardines[314] were, in legal terms, generally reasoned appropriately although one may question whether the facts and expert opinions actually present in the cases were specific enough to support the ultimate results [315]. He went on to state that in relation to the trade remedy cases [316], US – Wheat Gluten [317], US – Lamb [318], US – Steel [319,] US – Yarn [320] and Argentina – Peach [321] remains problematic, and in these cases, the Appellate Body decisions are extremely intrusive into the discretion of national authorities and one wonders if any decision would ever be up held, citing the lamb's case as an example [322].

However, contrary to expectations and notwithstanding the quality or otherwise of Panels and Appellate Body reports, the reactions of member states to the rulings have been very impressive. For instance, in the U.S – Gasoline case[323], the U.S was imposing stricter rules on the chemical characteristics of imported gasoline than it imposed on domestically refined gasoline. On 23 January 1995, Venezuela complained to the DSB. The Panel, which was set up, decided against the U.S. The U.S. appealed. The appeal report upheld the decision of the panel. On 19 August 1997, the U.S. introduced a new regulation in line with the DSB's findings[324].

In fact, in the 71 WTO cases that have gone to a final judgement as at June 2003[325], there have been only 14 compliance disputes under Article 21.5 of the

DSU[326]. However, the DSB granted authorization to a complainant to suspend obligations only seven times[327]. Moreover, in the seven episodes where a suspension of obligation was authorized, the complaining government actually performed the act only in three instances, to wit: US in the Banana Case, US and Canada in the Hormones case.

The low usage of suspension of obligation shows that the rate of compliance with DSB rulings by WTO members is very high, and suspension of obligation becomes unnecessary. This provides evidence that the member states of the WTO accept the mechanism as a means of resolving their disputes, rather than taking unilateral action. This is true notwithstanding the fact that such compliance could stem from either law-abiding behaviour by governments or a willingness to take corrective action following a threat of suspension of obligation by the complaining government. For instance, the threat to seek a suspension of obligation had promoted compliance and settlement in Canada's complaint against Australia on Salmon[328].

Sometimes, complaining parties do not seek suspension of obligation because they see little benefits in invoking the remedy. This is what happened in the US complaint[329] against Mexico on High-Fructose Corn Syrup (HFCS)[330]. This brings to issue the efficacy of the remedy of suspension of obligation as the last resort in the WTO dispute settlement system.

While the dispute settlement system's record for dispute resolution is quite good, its performance in terms of promptness is not so impressive. The promptness of settlements when measured from the point of request for consultation is not

encouraging. Both Mr. Davey[331] and a recent statistics Compiled by Mexico[332], suggest that the average time from panel establishment to report adaptation was 15 to 16 months as opposed to the 12 months' goal in the DSU for appealed cases and 9 months for non-appealed cases. To this must also be added the reasonable time for implementation, which have averaged around 9 months.

For instance, in the Korea Dairy[333], the inconsistent safeguard measure was imposed on 7 March, 1997. Request for consultation was made on 12 August 1997, Appellate Body report was adopted on 12 January 2000 and the safeguard measure was removed on 20 May 2000, that is to say, the resolution of the dispute took over 3 years. Another instance is the Argentina – Footwear[334] which took 2years and 6 months to resolve. In fact, some cases took much longer period, like the EC banana case, where the report was adopted in 1997, and final settlement was reached only in 2001; Australia – Salmon case in which the initial panel request was made in early 1997, but acceptable implementation did not occur until 2000[335].

Although the activities of the WTO Dispute Settlement System has been described by scholars[336] as successful, it is beyond doubt that the dispute settlement mechanism as currently constituted under the DSU is hardly capable of effectively and efficiently resolving trade disputes under international law.

REFERENCES

1. Article 4 of DSU

2. Ibid, Article 3.7

3. Ibid, Article 4.5

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

5. Article 3.7 of DSU.

6. India – Patent (US): Patent Protection for Pharmaceutical and Agricultural Chemical Products, Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, paragraphs 92 to 94.

7. Article 4.4 of DSU

8. DSB, working practices 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, page 12.

9. Article 4.3 of the DSU

10. For the equivalent provisions, see ibid, footnote 4

11. Ibid, Article 4.11

12. Ibid, Article 4.2

13. Ibid, Article 4.3

14. Ibid, Article 4.8

15. Ibid, Article 4.6

16. Korea – Taxes on Alcoholic Beverages, Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3.

17. Ibid, paragraph 10.23.

18. Australia – Subsidies for Local producers and exporters of Automotive Leather Products II, brought by United States, Panel report, WT/DS126/R, adopted in February 2000, Paragraphs 9.32 – 9.34

19. EC – Anti – Dumping Duties on Imports of Cotton - Type Bed Linen from India, Appellate Body Report, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049, Paragraphs 6.32 – 6.35.

20. US – Restrictions on Imports of Cotton and Man-made Fibre Underwear, Appellate Body Report, WT/DS24/AB/R, adopted 25 February 1997:I, 11.

21. Ibid, Paragraphs 7.26 – 7.27.

22. Source – WTO press release of 16th September 2004, obtained from www.wto.org.

23. EC – Banana III: Regime for the Importation, Sale and Distribution of Bananas, Panel Report, WT/DS27/R, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 591, Paragraph 7.19. The issue was not appealed.

24. Davey, J. William, The WTO Dispute Settlement System in Trade, Environment and the Millennum, 119, Gory Sampson Ph. & W. Bradnee Chambers, 2nd Edition, (New York: United Nation's University Press, 1999) at page 148.

25. See generally Articles 5 and 25 of the DSU.

26. Ibid, Article 4.7 and 4.8

27. Ibid, Article 6.2

28. EC – Bananas III, Panel Report, op. cit, Paragraph 142.

29. Article 7.1 of the DSU

30. US – FSC: Tax Treatment for "Foreign Sales Corporations", Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619, paragraphs7.23 and 7.29.

31. EC – Banana III, Panel Report, op. cit Paragraph 141

32. Korea – Diary: Definitive Safeguard Measures on Imports of Certain Dairy Products, complaint by the European Communities, Appellate Body Report, WT/DS 98/AB/R, adopted 12 January 2000, DSR 2000:I, 3 at paragraph 127.

33. Ibid; Thailand – H-Beams: Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, Appellate Body Report, WT/DS 122/AB/R, adopted 5 April 2001, Paragraph 95.

34. EC – Banana III, Panel Report, op. cit, paragraph 143.

35. See Rule 3 of the Rules of Procedure of the DSB, WT/L/16, of 25th July 1996; and WT/DSB/9, January 16, 1997.

36. Article 6.1 of the DSU

37. Ibid, footnote 5 to Article 6.1

38. That is 60 days for consultation, 11 days to request that a request for establishment be included in DSB agenda, 15 days for the 2nd DSB meeting.

39. Article 7.1 and 7.2 of the DSU

40. Ibid, Article 7.3

41. India – Patent (US): Patent Protection for Pharmaceutical and Agricultural Chemical Products, Appellate Body Report, ST/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, Paragraph 92.

42. Article 10.2 of the DSU

43. Ibid, Article 8

44. See Ibid, Article 8.5, which provides for the possibility of using five panelists if the parties to the dispute agree within 10 days of the establishment of the panel.

45. Ibid, Article 8.6

46. Ibid, Article 8.4

47. Ibid, Article 8.6

48. Ibid, Article 8.7

49. Davey, J. William, The WTO Dispute Settlement System in Trade, Environment and the Millennium 119, op. cit at pages 149 and 150

50. Ibid, page 150

51. The Ministerial Decision on certain Dispute Settlement Procedures for the General Agreement on Trade in Services, adopted in Marrakesh on 15th April 1994, and paragraph 4 of GATs Annex on Financial Services.

52. Article 9.1 of DSU. This also applies if a third party initiates its own complaint regarding a measure that is already the subject of panel proceedings by virtue of Article 10.4 of the DSU.

53. Note by the Secretariat, US – Shrimp: Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS 58/9, 17, April 1997.

54. Article 9.3 of DSU

55. EC - Hormones: Measures Concerning Meat and Meat Products (Hormones), WT/DS 26/12 and WT/DS 48/13.

56. WT/DS 26

57. WT/DS 48

58. Appendix 3 of the DSU stipulates the standard working procedures. However, panel can revise such standard procedures after consultation with the parties pursuant to Article 12.1 and paragraph 11 of Appendix 3 of DSU.

59. Article 12.3 of the DSU.

60. India – Patent (US), op. cit. at paragraph 92.

61. Article 12.6 and Appendix 3 of the DSU.

62. Ibid, Articles 10.2 and 10.3

63. Ibid, Articles 12.6

64. In 2002, the Secretariat established a dispute settlement registry, which receives, and files the submissions and maintains the official record for every dispute at the panel stage.

65. Article 18.2 and Paragraph 3 of the Working Procedures in Appendix 3 of DSU.

66. Ibid, Paragraph 9 of Appendix 3.

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

68. Ibid, Paragraph 8 of Appendix 3

69. Article 13 of DSU

70. Ibid, Article 11

71. Ibid, Article 19.2

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

73. Ibid, Article 15.1 and Appendix 3

74. Ibid, Article 12.7

75. Ibid, Article 14.3

76. Belgian 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.

77. Article 19.1 of DSU.

78. Brazil – Aircraft (Article 21.5 – Canada): Export Financing Programe 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.

79. Article 26.1 (b) of DSU

80. Article 4.7 of the SCM Agreement

81. Article 15.2 of DSU

82. Ibid, Article 15.3

83. Ibid, Article 9.2.

84. US – Offset Act (Byrid Amendment): continued Dumping and subsidy offset Act of 2000, Appellate Body Report adopted 27 January 2003, WT/DS 217/AB/R, WT/DS 234/AB/R paragraphs 311 – 316.

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

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

87. Article 12.9 of DSU

88. 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.

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

90. 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.

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

92. Footnote 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 behold to discuss and adopt the Report.

93. Articles 16.1 and 16.4 of the DSU

94. Articles 4.8 and 7.6 of SCM Agreement

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

96. Article 16.4 of DSU

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

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

99. For example, in Japan-Alcoholic Beverages 11: Taxes on Alcoholic Beverages, Appellate Body Report, WT/DS 8/AB/R, WT/DS 10/AB/R, WT/DS 11/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.

100. US – Shrimp: Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, WT/DS 58/AB/R, adopted 6 November 1998, DSR 1998: VII, 2755, paragraph 95.

101. EC-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

102. Ibid, Paragraph 96

103. Ibid, Paragraph 152

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

105. By 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.

106. Ibid, Rule 25

107. Ibid, Rule 6 (1) and 2

108. Ibid, Rule 7 (2)

109. Ibid, Rule 21 (2)

110. Ibid, Rule 18 (2)

111. Ibid, Rule 22 (1)

112. Ibid, Rule 22 (2)

113. Ibid, Rule 23 (1)

114. Ibid, Rule 23 (3)

115. Ibid, Rule 24

116. Ibid, Rule 27 (1)

117. Article 17.10 of DSU

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

119. Article 17.1 of DSU

120. Rule 3 (2) of the working procedure

121. Article 17.11 of DSU

122. Ibid, Article 17.10

123. Canada – 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.

124. Article 17.13 of DSU

125. Ibid, Articles 17.6 and 17.2

126. Ibid, Articles 19 and 26

127. Ibid, Article 17.5

128. Ibid, Article 17.4

129. US – Gambling: Measures Affecting the Cross-Boarder Supply of Gambling and Betting Services, Appellate Body Report, WT/DS285/AB/R, adopted 20th April 2005.

130. EC- Export Subsidies on Sugar, Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005.

131. 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.

132. See 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.

133. US – 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/DS 138/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.

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

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

136. Article 4.9 of the SCM Agreement

137. Ibid, Articles 4.9 and 7.7.

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

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

140. Canada – Aircraft, Appellate Body Report, op. cit.

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

142. India – 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.

143. US – FSC: Tax Treatment for "Foreign Sales Corporation", Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619, Paragraph 4; US – Line Pipe: Definitive Safeguard Measures on Imports of 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/DS 231/AB/R, adopted 23 October 2002, paragraph 141.

144. Article 21.1 of DSU

145. Ibid, Article 2

146. Ibid, Article 19.1

147. Ibid, Article 21.3

148. Canada – Pharmaceutical Patents: Patent Protection of Pharmaceutical Products, - Arbitration under Article 21.3(c) of the DSU, Award of the Arbitrator, WT/DS 114/13, 18th August 2000, Paragraph 45.

149. See 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.

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

151. Article 2.4 of DSU

152. US – FSC, op. cit; US – Section 110 (5) of the US Copyright Act - Arbitration under Article 21.3 (c) of the DSU, Award of Arbitrator, WT/DS 160/14, 18th July 2001; US – 1916 Act, WT/DS 136/13, 18th July 2001.

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

154. US – 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.

155. Article 21.3 (c) and footnote 12 to Article 21 of DSU

156. For instance, in US – Line Pipe, op. cit, Korea requested for arbitration.

157. See footnote 13 to Article 21 of DSU

158. Ibid, Article 21.3 (c).

159. Canada – Pharmaceutical Patents; op. cit paragraph 45.

160. 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, 937at paragraph 45. See also Canada – Pharmaceutical Patents (Article 21.3(c), op. cit, at paragraph 41.

161. 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/DS27/15, Paragraphs 18 – 20.

162. 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.

163. 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.

164. 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 160(5) Copyright Act, 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.

165. Korea – Alcoholic Beverages, op. cit. paragraph 42.

166. Canada – Pharmaceutical Patents, op. cit, paragraph 43.

167. Article 21.4 of DSU

168. Ibid, Article 21.6

169. Ibid, Article 22.8

170. Ibid, Article 21.5

171. Canada – 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.

172. Article 22 of DSU

173. Ibid, Articles 22.1 and 22.2

174. Ibid, Articles 22.2 and 22.6

175. Ibid, Article 3.7

176. Ibid, Article 22.4.

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

178. Ibid, Article 22.3 (a)

179. Ibid, Articles 22.3 (b) and 22.3 (c)

180. Ibid, Article 22.6

181. Ibid, Article 22.7

182. US – 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: I, 373.

183. The cases include Canada – Aircraft, op. cit; Brazil – Aircraft, op. cit; EC-Banana III, op. cit; EC-Hormones, op. cit; US – FSC, op. cit.

184. For instance, in the EC-Banana III case, United States requested for US $520 million but the amount authorized was US $191 million. (WT/DS 27/AB/R), in EC-Hormones case, the amounts requested by U.S. and Canada were US $202 million and Can $75 million. The amounts authorized were US $116.8 million and Can $11.3 million (WT/DS 26/AB/R; WT/DS 48/AB/R) respectively

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

186. The 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.

187. For example, see, Canada – Dairy, WT/DS 103/ 14; and US – FSC, WT/DS 108/12

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

189. Canada – Aircraft, op. cit, Annex WT/DS70/9.

190. Article 21.1 of DSU

191. Ibid, Article 19.1

192. Ibid, Articles 3.7, 21.6 and 22.1

193. Ibid, Article 26.1 (b)

194. Ibid, Article 22.9.

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

196. Japan – Alcoholic Beverages II, Appellate Body Report, op. cit. at pages 107 – 108

197. 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.

198. Japan – Alcoholic Beverages II, Panel Report, WT/DS 8/R, WT/DS 11/R, adopted 1st November 1996, DSR 19960: 1, 125 at paragraph 6.10; Japan – Alcoholic Beverages II, Appellate Body Report, op. cit. at paragraph 108.

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

200. Ibid, Article 18.2 and paragraph 3.

201. EC – Banana III, Appellate Body Report, op. cit, paragraph 10

202. Ibid, paragraph 12

203. Thailand – H Beams, Appellate Body Report, op. cit, paragraph 68.

204. US – 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

205. US – Shrimp, Appellate Body Report, op. cit. Paragraph 108.

206. Article 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

207. US – Shrimp, op. cit, paragraphs 105 – 108.

208. 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.

209. 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.

210. US – Shrimp, Appellate Body Report, op. cit, paragraphs 89 and 91.

211. US – Lead and Bismuth II, Appellate Body Report, op. cit, paragraphs 40 – 41.

212. See Article 17.9 of DSU.

213. US – Lead Bismuth II, Appellate Body Report, op. cit, paragraph 43.

214. EC – Asbestos, Appellate Body Report, op. cit; paragraph 52 – 55.

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

216. EC – Sardines: Trade Description of Sardines, Appellate Body Report, WT/DS 231/AB/R, adopted 23 October 2002

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

218. EC – Banana III, op. cit, paragraph 132.

219. Ibid, paragraphs 135 – 138.

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

221. See for instance, US – Section 211 Omnibus Appropriations Act of 1998, Appellate Body Report, WT/DS 176/AB/R, adopted 1st February 2002, paragraphs 275 – 281, 309; US – Line pipe, op. cit, paragraphs 120 – 122, 130 – 133.

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

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

224. US – 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.

225. Ibid, paragraph 19.

226. India – Patent, Appellate Body Report, op. cit. paragraph 87.

227. EC – 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.

228. Ibid, Paragraph 136.

229. US – Wool Shirts and Blouses, Appellate Body Report, op. cit, page 323.

230. US – DRAMS, Panel Report, op. cit, paragraph 6.92

231. US – 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.

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

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

234. Article 3.7 of the DSU.

235. Australia – Salmon: Measure Affecting Importation of Salmon, Appellate Body Report, WT/DS 18/AB/R, adopted 6 November 1999, DSR 1999: 111, 116, Paragraph 223.

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

237. For 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.

238. Ibid, paragraphs 133, 135 and 138.

239. Ibid, paragraph 132.

240. EC – Poultry, Appellate Body Report, op. cit, Paragraph 133.

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

242. See 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.

243. For 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/DS 177/AB/R, at paragraphs 103 and 106.

244. 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 (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/DS 141/AB/R, adopted 12 March 2001 at paragraphs 63 – 65 and 85.

245. US – 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.

246. 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.

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

248. See Korea – Diary, Appellate Body Report, op. cit, paragraph 145; and US – Section 301 Trade Act, Appellate Body Report, op. cit., paragraph 7.14

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

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

251. India – Patent (US), Panel Report, op. cit., paragraphs 7.40.

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

253. Korea – Diary, Appellate Body Report, op. cit., paragraphs 137 – 138.

254. Turkey – Textiles: Restrictions on Imports of Textile 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, Paragraph 9.57. See also Argentina – Textiles and Apparel: Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, Panel Report, WT/DS56/AB/R and Corr. 1, adopted 22 April 1998, DSR 1998:III, 1003, paragraphs 6.34 – 6.40.

255. See Thailand – H-Beams, Appellate Body Report, op. cit. paragraph 134; Korea – Dairy, Appellate Body Report, op. cit. paragraph 145.

256. Article 13 of the DSU

257. US – Shrimp, Appellate Body Report, op. cit, at paragraphs 104 and 106.

258. EC – Hormones, Appellate Body Report, op. cit. at paragraph 148.

259. India – Quantitative Restrictions, Panel Report, op. cit. at paragraph 5.12 – 5.13.

260. US – Shrimp, Appellate Body Report, op. cit at paragraphs 107 – 110.

261. Ibid, paragraph 107.

262. Canada – Aircraft, Appellate Body Report, op. cit at paragraphs 185, 188, 189 and 198 – 203.

263. Ibid, paragraph 187.

264. Ibid, Article 4.10

265. Ibid, Article 12.10

266. Ibid, Article 8.10

267. Ibid, Article 12.10

268. India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, Panel Report, WT/DS 90/R, adopted 22 September 1999, DSR 1999: v, 1799, paragraph 5.10

269. Article 12.11 of DSU

270. Ibid, Article 21.2

271. Article 21.7 of the DSU

272. Ibid, Article 21.8

273. Indonesia – Autos: Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3 (c) of the DSU, Award of Arbitrator, WT/DS 54/15, WT/DS 55/14, WT/DS 59/13, WT/DS 64/12, 7 December 1998, DSR 1998: IX, 4029 paragraph 24.

274. For other instances of cases where Article 21.2 was applied, see Chile – Alcoholic Beverages: Taxes on Alcoholic Beverages, Arbitration under Article 21.3 (c) of the DSU, Award of Arbitrator, WT/DS 87/AB/R, WT/DS 110/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.

275. Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3 (c) of the DSU, Award of Arbitrator, WT/DS87/ARB/EC, at paragraph 38.

276. Ibid, Article 3.12

277. BISD 145/18

278. Article 27.2 of the DSU

279. Established by the Agreement – Establishing the Advisory Centre on WTO Law, signed by 29 members of the WTO in Seattle on 1 December 1999. 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 facts obtained from WTO press release of obtained at www.wto.org.

280. See WTO Document No. WT/DS/OV/22 and the WTO website – www.wto.org.

281. Ibid.

282. See World Trade Organisation, Appellate Body: Annual Report for 2006 WT/AB/7 of 23 January 2007 (111-2007), Annex 3,at page 33 and Annex 4:11, pages 36 – 46.

283. See generally, ibid, page 33

284. 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, pages 34 – 35.

285. India – Patent Protection for Pharmaceutical and Agricultural Chemical Projects, (brought by the US) WT/DS 50; India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (brought by the EC) WT/DS 79

286. Mexico – Measures Affecting Telecommunications Service, WT/DS 204 (brought by the US).

287. EC - Banana, WT/DS 27 brought by Ecuador, Guatemala, Honduran, Mexico, and the US).

288. WT/DS 26 – EC – Hormones (brought by the US)

289. WT/DS 44 – Japan – Film (brought by US)

290. WT/DS 58 – US – Shrimp (brought by India, Malaysia, Pakistan and Thailand)

291. The Helms-Burton case symbolized the EC's longstanding complaints about US unilateralism and attempts to apply us law extraterritorially. Us – helms-Burton Act, WT/DS 38, brought by EC.

292. Turkey – Restrictions on imports of Textile and clothing products, WT/DS 34; WT/DS 29, and WT/DS 47 bought by India; Hong Kong and China; and Thailand respectively.

293. India – Quantitative Restrictions on imports of Agricultural, Textile and Industrial Products, WT/DS 90, brought by US.

294. US – Section 301 Trade Act of 1974, WT/DS 152, brought by EC.

295. US – FSC: Tax Treatment for Foreign Sales Corporations, WT/DS 108 brought by EC.

296. The Turkey Textile case involved the EC – Turkish Customs Union and the EC tried to become a co-respondent in the case.

297. Heller, Ehrman, WTO Dispute Settlement Mechanism and the Emerging Jurisprudence, Asian Law and Practice, under News and Events; LLP, 2006 obtained Heller Ehrman LLP.

298. US – Import Measures on Certain Products from the European Communities, Panel Report, WT/DS165/AB/R and Add. 1, adopted 10 January 2001 as modified by the Appellate Body Report WT/DS165/AB/R.

299. For details, see WT/DSB/M/54, Minutes of the Meeting of the DSB held on 25, 28 and 29 January and 1st February 1999; WT/DSB/M/53, Minutes of the meeting held by the DSB on 12 January 1999; and WT/DSB/M/59.

300. EC – Tariff Preferences: Conditions for the Granting of Tariff Preferences to Developing Countries, Appellate Body Report, WT/DS 246/AB/R adopted 20 April 2004.

301. EC – Expert Subsidies on Sugar, Appellate Body Reports, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, brought by Australia, Brazil and Thailand.

302. US – Subsidies on Upland Cotton, Appellate Body Report, WT/DS 267/AB/R, adopted 21 March, brought by Brazil.

303. EC – Import Measures on Biotech Products, WT/DS 291, WT/DS 292, WT/DS 293 brought by US, Canada and Argentina respectively.

304. World Trade Organisation, Appellate Body Annual Report for 2005, loc. cit.

305. US – Import Measures on Certain Products from the EC, Appellate Body Report, WT/DS 165/AB/R, adopted 10 January 2002, DSR 2001: I, 272.

306. Korea – Beef : Measures Affecting Imports of fresh, Chilled and Frozen Beef, Appellate Body Report, WT/DS 169/AB/R adopted 10 January 2001, DSR 2001: I, 5.

307. EC – Asbestos: Measures Affecting Asbestos and Asbestos – Containing Products, Appellate Body Report, WT/DS 135/AB/R, adopted 5 April 2001, DSR 2001: VII, 3243.

308. EC – Tariff Preferences, op. cit.

309. Davey, J. William, Has the WTO Dispute Settlement System Exceeded Its Authority? in T. Cottier & P. Mavroidis (eds.), The Role of the Judge 43 – 80 (2003).

310. Canada – Patent Term: terms of Patent Protection, Appellate Body Report, WT/DS 170/AB/R, adopted 12 October 2000 DSR 2000: X, 5093.

311. US – Section 211 Omnibus Appropriations Act of 1998 (Havana Club), Appellate Body Report, WT/DS 176/AB/R, adopted 1 February 2002, DSR 20002: II, 589.

312. Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, Appellate Body Report, WT/DS 207/AB/R adopted 23 October 2002, DSR 2002: VIII, 3045.

313. Japan – Apples : Measures Affecting the Importation of Apples, Appellate Body Report, WT/DS 245/AB/R, adopted 10 December 2003.

314. EC – Sardines: Trade Description of Sardines, Appellate Body Report, WT/DS 231/AB/R adopted 23 October 2002, DSR 2002: VIII, 3359.

315. Davey, J. Willaim, The WTO Dispute Settlement System: The first Decade, unpublished preliminary draft, of May 20, 2004, page 5.

316. Trade Remedy Cases refers to cases on anti-dumping and safeguards.

317. US – Definitive Safeguard Measures on Imported Wheat Gluten from the European Communities, Appellate Body Report, WT/DS 166/AB/R adopted 19 January 2001, DSR 2001: II, 717.

318. US – Lamb Safeguard Measures on Import of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, Appellate Body Report, WT/DS 177/AB/R, WT/DS 178/AB/R adopted 16 May 2001; DSR 2001: IX, 4051.

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CHAPTER SIX

SUMMARY, RECOMMENDATION AND CONCLUSION

6.1 SUMMARY:

In January 1995, the WTO came into being as the international organization concerned with the promotion of global trade in goods, services and intellectual property[1]. 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[2]. 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[3], but if these are not successful, they may be adjudicated by panels and appealed to an Appellate Body[4]. 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[5]. 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[6].

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. If a case runs its full course to a first ruling, it

should not normally take more than about one year – 15 months if the case is appealed. Although much of the procedure resembles a court or tribunal, the preferred solution is for the parties to discuss their problems and settle the dispute by themselves.

The DSU, while preserving much of the legacy of Article XXII and XXIII of GATT 1947, also contains remarkable innovations that take the system into a more judicial, rule-oriented approach. It introduced an integrated dispute settlement that applies across all the various WTO Agreements as well as enables all the relevant provisions relating to a matter in issue between parties to a particular dispute to be considered at the same time by the same panel.

The DSB has the authority to establish panels, adopt panel and Appellate Body Reports, maintain surveillance of implementation of rulings and recommendations, and authorise suspension of concessions or other obligations. Government can participate in disputes either as a party or as a third party, and need not have an actual legal interest at stake, other than safeguarding the functioning of the system. One of the central provisions of the DSU, reaffirms that members are not permitted to take unilateral determinations of violations, or suspend concession.

The DSU ensures the primacy of WTO law over domestic law in all forms of dispute settlement. Even mutually agreed solutions and arbitration awards must be notified to the DSB and must be consistent with the WTO rules.

It is part of the functions of the WTO dispute settlement system to provide security and predictability to the multilateral trading system, preserve the rights and

obligations of members, as well as clarify the rights and obligations of members through interpretation.

In carrying out its mandate, the DSB has received 324 complaints as at 31st December 2004. It adopted 95 panel reports and 65 Appellate Body Reports during the said period. The DSB has covered a wide variety of products and issues spanning almost all aspects of the WTO Agreements and has authorized suspension of obligation in seven cases.

In fact, it has generally been accepted that the experience of WTO dispute settlement has been excellent[7]. The number of disputes alone 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[9]. 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[9].

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[10]; inadequate financial resources; the making of 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[11] as well as its ineffectiveness in bringing about implementation in some cases[12]; and the non-clarity in the relationship between Article 21.5 and Article 22 of the DSU, which created problem in the EC-Banana dispute.

Furthermore, the DSU as constituted also contains several weaknesses that have hindered the DSB in the performance of its duty. These weaknesses include the lack of provisional measures to protect the economic and trade interests of the successful complainant during the dispute settlement procedure and to compensate for the harm suffered during the time given to the respondent to implement the ruling or to reimburse for legal expenses.

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[13]. This avoids requiring the party to start the whole proceeding over as a result of these modifications[14].

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[15]. The center specialises in WTO law and provides legal services and training to developing countries. The center also represents developing countries throughout the dispute settlement proceedings at discounted rates, which vary depending on the level of economic development of the concerned country.

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[16]. However, the negotiations could not be concluded so far as several deadlines lapsed without tangible achievements[17]. The last deadline that was missed was the May 2004 deadline[18].

6.2 **RECOMMENDATONS:**

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:

6.2.1 Clarification of the Relationship between Article 21.5 and Article 22 of DSU

The time – frames specified in Articles 21.5 and 22 of the DSU do not seem to have been appropriately coordinated. This is otherwise known as the sequencing issue. This created acute problem in the past, especially in the EC-Banana dispute[19]. However, members have committed themselves to clarifying this stage of the process.

In fact, it is generally agreed in principle between members that if there is no dispute over whether or not implementation has occurred at the end of the reasonable period of time, then the prevailing party should be entitled to seek compensation or authorization to suspend concessions. Where, however, there is a dispute over whether or not implementation has occurred, it is necessary to first determine whether or not there has been implementation before moving to the issue of compensation and suspension of concession.

In the light of the above practice followed consistently by members since 1999, it would seem that members now broadly agree that completing Article 21.5 procedure

is a prerequisite for invoking Article 22 procedure where there is a disagreement among the parties about implementation.

It is therefore recommended that the language of the DSU should be clarified in line with this consistent practice followed by the members when dealing with this issue. This it is believed would ensure legal certainty and predictability of the system for its entire member.

6.2.2 More Effective Remedies

The first objective of the dispute settlement system 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[20]. 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[21].

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 is 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 [22]. The application of this last resort has also caused double injury to the winning member[23].

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[24].

6.2.3 Transparency and Access to the WTO 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[25] as well as the European Court of Human Rights.[26].

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[27].

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[28].

6.2.4 Reputation of Amices Curiae Submissions:

It would be recalled that the Appellate Body had, while interpreting the DSU, ruled that both the panel and Appellate Body could allow submissions of amices curiae briefs on a case-by-case basis[29].

However, there is need for proper regulation of the acceptance of amicus curiae submission that would generally apply in potentially all cases. Hence it is hereby recommended that the text of the DSU should include conditions for the acceptance of amicus curiae submissions, as well as the weight that should be attached to such submissions by the panel or Appellate Body.

6.2.5 Adequate Resources:

Inadequate funding has affected the effectiveness of the system in fulfilling its mandate. Although there has been an increase in secretariat resources devoted to

dispute settlement, that increase has not kept pace with the increase in the workload of the DSB, (from panel secretaries to legal officers, to translators).

For instance, the staff of the WTO Legal Affairs Division responsible for providing legal advice to panels has doubled since 1991, but the panels' workload has also increased much more. For example, between 1996 – 1998, panel findings have 1,379 that is, 394 pages per year. However, between January 1999 and 30 June 1999, that is, 6 months, the pages of the panels' findings were 563[30].

It is clear that the present level of funding of the system is poor and insufficient for its activities. It is therefore, recommended that members should devote more resources to the system to enable its undertake it work more efficiently and effectively.

6.2.6 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[31].

Furthermore, in recent times, the actual conduct of a dispute settlement procedure has became 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..

6.3 CONCLUSION:

In the current age of globalization, may 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 regards to this, the dispute settlement system plays the most critical role.

They system is the center piece of the WTO and can indeed be considered a giant leap in the field of public international law. Indeed, the DSU has been called a

"crown" "Jewel" and a "Core linchpin" of the multilateral trading system[32]. According to Hudec, by the system, the trading nations granted an unprecedented degree of power to a legal tribunal to enforce the obligations under the WTO Agreement[33]. The DSU has also been hailed as a model for other international organizations. In fact, Ali, states 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 organisation[34].

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[35]. 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 addition, the mechanism has been able to prohibit the members of the WTO from taking unilateral determination of disputes between them as was shown in the US: Certain EC Products Case[36]. 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.

In 1994 when the WTO dispute settlement came into force, it was widely praised as a decisive and historic improvement over the GATT procedures. Thus in 1997, Renato Ruggiero, the then Director General of the WTO, stated that the mechanism is the WTO's most individual contribution to the stability of the global economy[37].

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[38].

On the whole, it is indubitable that in order to carryout its mandate more effectively and efficiently, the DSB should be better funded and the panels professionalized. In addition, 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.

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