

Chapter 2

Basics of Dispute Settlement and Review of Related Literature

2.1. Understanding on Rules and Procedures Governing the Settlement of Disputes- DSU

Article 1.1 of DSU stipulates that its rules and procedures apply to 'disputes brought pursuant to the consultation and dispute settlement provision of the Covered Agreements'.¹ The basis or cause of action for a WTO dispute must, therefore, be found in the 'Covered Agreements' listed in Appendix 1 to the DSU, namely, in the provisions on 'Consultation and Dispute Settlement', contained in those WTO Agreements. In other words, it is not the DSU, but rather the WTO Agreements, that contain the substantive rights and obligations of WTO members, which determines the possible grounds for a dispute. The DSU contain 27 Articles and 4 Appendices.

2.1.1. Dispute Settlement Provisions in the Covered Agreements

- a) Article XXII and XXIII of GATT 1994
- b) Article 19 of the Agreement on Agriculture
- c) Article 11 of the Agreement on the Application of Sanitary and Phyto sanitary measures
- d) Article 8.1 of the Agreement on Textile and Clothing
- e) Article 14 of the Agreement on Technical Barriers to Trade
- f) Article 8 of the agreement on Trade Related Investment Measures
- g) Article 17 of the Agreement on Implementation of Article VI of GATT 1994
- h) Article 19 of the Agreement on Implementation of Article VII of GATT 1994
- i) Articles 7 and 8 of the Agreement on pre-shipment Inspection
- j) Article 7 and 8 of the Agreement on Rules of Origin
- k) Article 6 of the Agreement on import licensing procedures
- l) Articles 4 and 30 of the Agreement on subsidies and countervailing measures
- m) Article 14 of the Agreement of safeguards

- n) Article XXII and XXIII of the General Agreement on Trade in Services
- o) Article 64 of the Agreement on Trade Related Aspects of intellectual property rights.

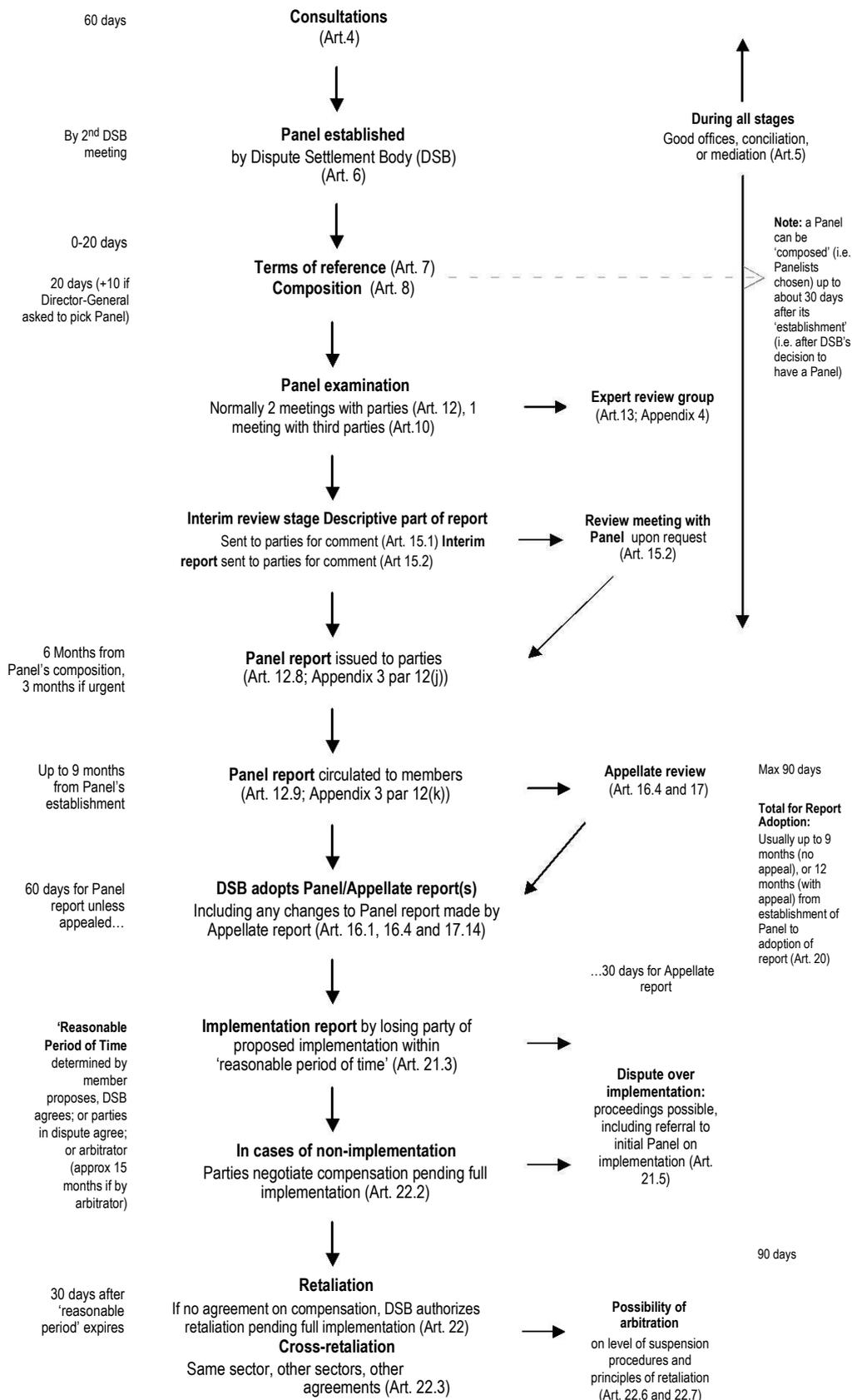
Many of the provisions are related to Articles XXII and XXIII of GATT 1994, or have been drafted using Articles XXII and XXIII as a source of reference. Obviously, a dispute can be, and often is, brought under more than one Covered Agreement. In such a case the question of the proper legal basis has to be assessed separately for the claims made under different Agreements. (*Source: Legal basis for a dispute, Dispute Settlement System Training Module: Chapter 4, WTO.org*)

2.2. Disputes Settlement Stages

The Dispute Settlement Body² is primarily responsible for settling trade disputes among the Member Countries. The DSU lays down the procedures and stages of resolving the disputes (Ref Chart 2.2.a.). The General Council, while handling the disputes, is called as the Disputes Settlement Body. The main stages of the dispute settlement process are Consultation, Panel Process, Appellate Panel Process, Implementation and Retaliation/Compensation.

A flow chart of the stage of the Dispute Settlement Process of the WTO DSB has been included in the following section (Figure No: 2.2. (a))

Figure No: 2.2. (a) Dispute Settlement Process (Source: wto.org)



These processes can be further detailed as follows:

2.2.1. Stage I - Mandatory Consultations

The basic style of functioning of the WTO DSB is to bring in mutually beneficial solutions to the disputes. Hence the first and foremost step prescribed to be followed by the concerned parties - the Complainant and the Respondent (Defendant) – is to sit together and discuss the possibilities of solving the dispute. This stage is insisted by the DSB immediately after the receipt of request for consultation from the complainant. The time frame stipulated for the consultation is not more than 60 days.³ Under no circumstances can the Consultation stage be evaded. Thus it is clear that the WTO principles strongly believe in mutual agreement than any other form of settlement.

2.2.2. Stage II - Panel Proceedings

The Panel proceedings are supposed to take the lengthier time period in the process of dispute settlement. This is because of the various procedures to be followed during the process. The WTO mandates a total time period of 6 months⁴ for completing the Panel process.

A Panel has to be established by the DSB by not later than its second meeting after the receipt of request for Panel establishment from the complainant. The Panel members are to be drawn from neutral countries i.e. countries other than the parties to the disputes. Any individual, who possesses the capacity of interpreting the WTO Agreements from the Member Countries, other than the countries who are parties to the disputes can be a Panel member. Panel composition is the preliminary stage in the Panel Proceedings. The next immediate stage is the Terms of Reference Composition⁵. Various Articles of the Agreements are to be quoted by the complainant(s) in support of their disputes. After this both parties are called separately for presenting their arguments and are asked to submit their written arguments thereafter. Provisions are made for the Panel to consult with experts for cases which involves scientific and highly technical issues. Both the parties are called for their cross arguments next. Once this process is completed, an Interim Review Report is circulated to the parties.

The parties are supposed to ask for clarifications, if any, on the Interim Report within two weeks of the issue of Interim Report. Thereafter the final Report of the Panel is issued to the parties and submitted to the DSB for adoption. The time span proposed

for this process is 3 weeks. The Panel Reports will be adopted automatically by the DSB unless stopped jointly by the parties to the disputes through a written request.

The adopted Panel Reports will be issued to all members of the WTO and will be published officially. The Panel Reports, once adopted, will have to be compulsorily implemented by the loser, if it does not wish to opt for Appellate Panel Proceedings.

2.2.3. Stage III - Appeals (Optional Otherwise Implementation/Retaliation)

Any of the disputing parties or even both sides can opt for Appeal Review. The Appellate Panel is a seven member team comprising experts in legal and international trade domains. Each member is appointed for a 4 years term. In principle, the Appellate Panel examines each case as a single body. But in practice, any three members of the Panel examine the case and finally release the Reports on behalf of Appellate Body on the assumption that the review has been done by the whole Panel. The Appellate Panel is supposed to review only the examination of law conducted by the Original Panel and it cannot re-examine existing evidence or examine new issues. Generally the Appellate Review should be concluded in 60 days with an absolute maximum of 90 days.⁶ The Appellate Panel can, uphold, modify or reverse the Original Panel's legal findings. The DSB accepts or rejects the Appellate Panel Reports within 30 days. The rejection of the Reports is possible only by consensus of the disputing parties.

2.2.4. Stage IV - Implementation

The whole system of dispute settlement will be effective only if it brings in prompt implementation of the DSB recommendations. WTO has devised mechanisms to continuously monitor the implementation process. The key to the implementation is the 'Principle of Transparency'⁷. The Trade Policy Review⁸ which is conducted on a regular basis visits the policy regime of each Member Country so as to see consistency of national policies with WTO guidelines- all areas in general and related to specific disputes in particular. The losing defendant has to bring the 'measures under dispute' to the 'satisfactory level' on the basis of the recommendations circulated by the DSB for each dispute. The DSU stresses on prompt compliance on the recommendations or rulings to ensure effective resolution of disputes so as to benefit all members. The 'intention to implement' is to be announced within 30 days of the adoption of the 'Reports.' If the implementation is immediately 'impractical' due to the complexity of the policy or due to the need for changing national laws, the complainant can request for a Reasonable Period of Time (RPT).⁹ The RPT may be

arrived at either by consensus of the parties or by the Arbitration (Article 21.3.C.). A general guideline to the Arbitrator in determining RPT is 'the RPT should not exceed 15 months period.' The RPT may not apply in all cases. For instance, for the prohibited subsidies cases, the Article 4.7 of the SCM Agreement¹⁰ 'recommends that the subsidizing Member withdraw the subsidy without delay and must specify the time period for this withdrawal'.¹¹ Records show that the RPT issued by Arbitrators to date have ranged from 6 to 15 months and those that have been agreed between the 'parties' have ranged from 4 to 18 months.¹²

2.2.5. Non-Implementation

When a complainant feels that the losing defendant has failed to bring the 'measures' into conformity with its obligations within the RPT, they can resort to temporary measures-either **compensation or suspension of obligations**.¹³ The compensation can be fixed through mutual agreements according to Article 22.2 of the DSU.

If the parties could not agree on the 'satisfactory compensation' within 20 days of the expiry of the RPT, the complainant may impose trade sanctions against the respondent with the permission of DSB. Technically this is called 'Suspending Concessions or other Obligations under Covered Agreements' (SCOO) (Article 22.2 of DSU).

Retaliation is the final and most serious consequence a non-implementing Member faces in the WTO Disputes Settlement System (Article 37 of the DSU). If the proposed form of retaliation is objected to by the parties, the level of suspension can be determined by the Arbitrator (Article 22.6 of DSU). Decision to execute retaliation is optional for the complainant even after the sanction is awarded by the Arbitrator under article 22.6 of the DSU. Thus the 'Authorization to Retaliate' can be used by a complainant as a tool for compelling further negotiations with the defendant.

2.2.6. Compliance Panel Procedure and Retaliation

After the expiry of the RPT, Article 21.5 of DSU provides for Compliance Panel proceedings to determine the evidences of failure to implement the DSB recommendations completely. A period of 90 days is available for the compliance Panel to conclude its work (possibility of Appeal is also considered additionally). However Article 22.6 of DSU mandates the authority to suspend obligations within 30 days of the expiry of the RPT if desired by the complainant. Hence there is a paradox existing regarding the 'sequencing' of these two provisions. In practice, the parties mutually arrive at decision regarding sequencing of these two processes- some go

for both the processes together and some others go for article 21.5 process first and then article 22.6 subsequently^{14&15}. The Balas text (The Balas text named after the then-Chair Ambassador Peter Balas of Hungary, contained a large number of issues, including, inter *alia* sequencing of retaliation and compliance procedures, remand authority for the Appellate Body, compensation for litigation costs, third party rights, consultation proceedings, as well as various elements of special and differential treatment for Developing Countries - The "Balas text" is annexed to WTO document TN/DS/9 and contains a procedure to overcome the "sequencing issue" which arose over ambiguities (or even contradictions, as some may argue) in Article 21.5/22 DSU - (Hauser and Zimmermann, 2003). The Balas Text resultant on recent rounds of negotiations provides that the parties may wait till the Compliance Panel to conclude its work and then initiate the Process of Retaliation.

2.3. Review of Literature

2.3.1. Trade Disputes- The Scenario

A trade dispute arises when a Member Government believes another member government is violating an 'Agreement' or a commitment that it has made in the WTO - Dispute Settlement Gateway.¹⁶ These trade disputes arise due to the non compliance of domestic trade policies of the member countries with the WTO Agreements. The trade transactions of whichever type and whichever party are accompanied by disputes. These sources disputes existed in the past, they are existing at present and will continue to exist in future. From the signing of the General Agreement on Tariff and Trade¹⁷ (GATT) in 1947 till the foundation of the WTO in 1994, there were 101 cases brought up by signatories.¹⁸ From the time of inception of the WTO till the formation of the database for this study in Jan 2009, 390 cases were brought to the WTO DSB.¹⁹

"International politics has become substantially legalized in recent years in areas as diverse as international trade and investment, regional integration, the protection of human rights and the environment, and international criminal law. For example, the creation of the World Trade Organization (WTO) in 1995 significantly increased the role of litigation-rather than diplomatic negotiations in settling trade disputes". (Gilligan, Johns and Rosendorff, 2010) A growing body of literature argues that democracies are more likely to comply with international agreements than authoritarian states. "However, substantial variation exists in the compliance behaviour of democracies. How can this variation be explained? The same mechanism that links regime type to

compliance, namely electoral competition, also explains variation in compliance among democracies. This is because the nature of electoral competition varies across democratic systems. An analysis of democratic GATT/WTO Member Countries from 1980 to 2003 reveals that governments elected via majoritarian electoral rules and/or single-member districts are more likely to violate GATT/WTO Agreements than those elected via proportional electoral rules and/or multi-member districts". (Rickard, 2010).

It has been discussed that "The WTO exists to facilitate diffuse everyday interaction in the trading system and not to issue liberalization edicts from Geneva. If democratic participation in a trading system ruled by law is the objective, dispute settlement is only one of the institutional forms available, and Geneva is only one of the institutional sites". (Wolfe, 2005) "Cooperation in arms, trade, and environmental regulation may begin with Agreements that require little enforcement, but continued progress seems likely to depend on coping with an environment where defection presents significant benefits". (Downs, Rocke, and Barsoom, 1996)

The crowning achievement of the World Trade Organization (WTO), some say, is its codified legal obligations and a dispute settlement system more active than any other international tribunal. "Economists who hold this view of the WTO want it to enforce free trade; Jurists want it to enforce a court-based international rule of law, and civil society worries that the WTO will actually succeed in meeting both objectives, with no regard for local democracy". (Wolfe, 2005) "As a consequence of these changes, WTO members and their commercial constituents increasingly perceive the WTO Dispute Settlement System as one that involves legal 'rights', as opposed to an extension of a diplomatic process for the negotiation and 'rebalancing' of reciprocal state-to-state trade concessions" (Shaffer, Mosoti, Qureshi, 2003). This organized system of dispute settlement provides more courage for the parties, both weaker and stronger, to bring in their case in front of the WTO DSB System. Wolfe observes that, "See you in Geneva' sees dispute settlement as the most important feature of the WTO because the rule of law as formal adjudication of explicit texts will ensure liberalization - economic efficiency trumps all other goals, and there is one uniquely right institutional path to that goal". (Wolfe, 2005) Jessica is of opinion that "one of the main reasons for the formation of international agreements and institutions is to put in place formal procedures that can facilitate dispute resolution". (Jessica 2005). "The creation of the WTO and accords such as the FTA, NAFTA and the GATT include dispute resolution processes precisely because it is widely recognized that the existence of rules and procedures does not end disputes tried to the theories and

practice of free trade". (Chad, Brown, 2002). Davey opined that an effective dispute settlement system is critical to the operation of the WTO. (Davey 2005 b) According to the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU)²⁰, it is a central element in providing security and predictability to the multi lateral trading system. (Article 3.2 of DSU)²¹

Barfield has mentioned two different schools of thought on the Organization. "Throughout the history of the post-War multilateral trading system, presided over first by the General Agreement on Tariffs and Trade and since 1995 by the new WTO, two distinct theories regarding the settlement of trade disputes have competed for dominance". (Barfield, Claude, 2002). These theories approached the system of dispute settlement from two different angles of conciliation and adjudication. "On one side are the 'pragmatists' who argue for a 'diplomatic' approach that stresses conciliation and problem solving over legal precision. This view of dispute resolution was generally espoused by Europeans; and as late as the 1980s, a Swiss GATT Director General stated: "GATT cannot be a world trade court. Conciliation is our priority: it is not our job to determine who is right and wrong." On the other side were the 'legalists' or 'rules-oriented' proponents who hold that legally binding rules will produce more certainty, predictability and fairness for all GATT/WTO Member States". (Barfield, Claude, 2002). This approach was mostly followed by the US trade policymakers and scholars.

2.3.2. Dispute Settlement Systems- GATT Vs WTO

"GATT dispute settlement has nonetheless enjoyed marked success". (Busch, 2000) "However GATT did not provide for any specific remedy procedures in cases of Member violations. As mentioned above, only a few paragraphs touched upon this subject, which were Articles XXII and XXIII". (Lee, 2011) "First codified in a small annex to the 1979 Understanding on Dispute Settlement on customary practices, and played out by different rules across the different Covered Agreements (notably the Tokyo Round codes), GATT Dispute Settlement lacked not only 'teeth', but a consistent set of rules more generally". (Petersmann, Pollack(eds), 2003)

WTO Dispute Settlement has its own objective. "It provides an orderly mechanism for deciding whether a Member has complied with its obligations under the Covered Agreements and an obligation, if a Member is found to be in breach, to 'bring the measure into conformity' with the relevant agreement, in effect to remove the offending measure. That is a process more akin to civil litigation in domestic systems,

not to a criminal law process where the objective is to identify a wrongdoer and provide for punishment for the wrong". (McRae, 2007)

2.3.3. Details of Cases Handled by the WTO DSB

Since the new Dispute Settlement System took effect in 1995, there has been relatively limited time for controversial 'legislative' decisions to be completed and published. "Nevertheless, some actions have already caused concern, even among supporters of the new system". (Barfield, 2001) Since inception in 1995, there has been increasing response on the part of the Member Countries in the utilization of dispute settlement facility of the WTO to get remedies on their trade disputes.

A year on year data analysis of the registration of cases with the system reveals that a total of 447 cases are brought to the WTO DSB (as on 30 August 2012). A peak load of 50 cases were handled by the DSB system in the year 1997 followed by 41 cases in the year 1998. The year 2011 recorded 8 cases which is the lowest number so far.

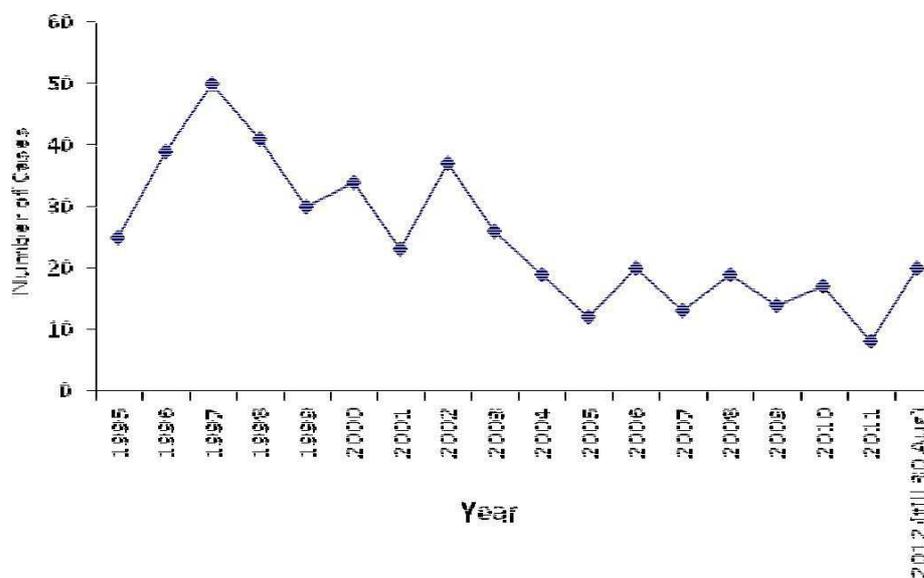
Table No: 2.3.3. (i) Table showing the Progression of Cases Filed with the WTO DSB

| YEAR | NUMBER OF CASES |
|-----------------------|-----------------|
| 1995 | 25 |
| 1996 | 39 |
| 1997 | 50 |
| 1998 | 41 |
| 1999 | 30 |
| 2000 | 34 |
| 2001 | 23 |
| 2002 | 37 |
| 2003 | 26 |
| 2004 | 19 |
| 2005 | 12 |
| 2006 | 20 |
| 2007 | 13 |
| 2008 | 19 |
| 2009 | 14 |
| 2010 | 17 |
| 2011 | 8 |
| 2012(till 30 August) | 20 |

Source: Sorted by the researcher by drawing data from the WTO Sources.
 (http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm)

The table showing the year on year progression of disputes registered with the WTO DSB has been graphically illustrated in the following figure.

Figure No: 2.3.3. (a) Trend in Cases Registered with WTO DSB



The growth in number of disputes may be due to the rise in GATT/WTO membership and highly increasing trade dependence. "Dispute initiation is also more likely (a) in retaliation for a prior dispute, (b) against states previously targeted by others, (c) between allies, (d) between recent opponents in a militarized interstate dispute (MID), and (e) between states lacking a preferential trade agreement (PTA)". (Reinhardt, 2000)

2.3.4. Previous Academic Approaches

Academic researches on the disputes handling of the WTO are mostly conducted in two different approaches. Majority of these studies were regarding comparisons of a few cases with respect to the set parameters. Another approach is the general enquiry on the systems and procedures of the WTO dispute settlement. "However, understanding the role of WTO dispute settlement as providing an avenue for Members who feel that their rights have been infringed is a fine way of viewing the system. A different way of viewing the WTO system is to see it as one that focuses on the behaviour of Members who have allegedly acted inconsistently with their obligations under the Covered Agreement". (McRae, 2007).

Zimmermann has analysed the WTO system from the point of progressive participation of the countries, Provisions, and Dispute Stages in general. The DSU review negotiations were also studied at some length. (Zimmermann, 2005)

It is a matter of fact that "the prime focus of academic commentary on the DSM remains on *how* it has been used, rather than *why* it has not been used. A majority of researchers working on the DSM do so from within the legal tradition and have studied it as a litigation process by analysing case law and the rulings. They implicitly regard the system as a success in allowing countries to settle their disagreements". (Alavi, 2007)

Following the arguments of Zimmermann, it can be understood that "whereas most of the literature on WTO dispute settlement originates from the legal discipline, the mechanism has also become the topic of a growing body of theoretical and empirical literature in Economics and Political Science". (Zimmermann, 2005)

"However, the DSM is also a political process, and cases have important economic impacts. Recently, lawyers have been joined by economists and political scientists in analysing the DSM. Unlike the lawyers, these last two groups are interested in determining the conditions under which countries participate in the DSM, and the costs and benefits of this participation". (Alavi, 2007)

“In the context of litigation at the WTO, the gains from settlement come from at least two sources. First, the litigation itself imposes costs on the parties; most obviously, the parties must pay their lawyers to prepare and argue the case and must pay their diplomats to prevent the dispute from harming relations with one another. Although states may not pay their lawyers (and do not pay their diplomats) more for bringing a case than they would in the absence of the case, there remains an opportunity cost associated with devoting those resources to litigation. A second, less obvious cost is the political cost of the case; an ongoing dispute may harm the relations between the states, which represents a loss in the form of reduced future benefits. Furthermore, some cases will represent a threat to the political standing of national leaders”. (Simmons, 2002)

Huges suggested 3 indicators to measure the success of the WTO dispute settlement system. “First, the WTO system represents a vast improvement over the GATT dispute settlement system. Secondly, the new system has produced a rich body of ever expanding jurisprudence, both with respect to procedural rules and the substantive obligations under the various WTO Agreements. Thirdly, there is broad-based confidence in the systems on the part of WTO members, as evidenced by its frequent use by Developed and Developing Country members”. (Huges, 2007)

2.3.5. Studies based on the Stages of Dispute Settlement

The WTO has devised a systematic approach in settling the disputes brought to the Organization. These procedures and systems are contained in the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU).²² There are basically four major stages in the settlement of disputes –Consultations, the Panel Process, the Appellate Process and Monitoring of Implementation.

2.3.5.1. Consultation

Davey, 2005(a) conducted a detailed study on the Dispute Settlement procedures with emphasis on the consultation process (which is the foremost stage) and implementation of the recommendations for the first ten years of functioning of the WTO (from 1995- to 2005). (*Note: the data range is from 1995 to 2002*) The study reveals that consultation process has worked effectively (107 cases were considered). The details of analysis are given in the table below:

Table No: 2.3.5.1. (i) Results of Consultation

| Sr. No | Type of settlement | Number of Cases |
|---------------|--|------------------------|
| a) | Settled or dropped after Panel established | 18 |
| b) | Settled, with notification to DSB | 26 |
| c) | Settled, without notification | 20 |
| d) | Dropped (for legal, political, commercial reasons) | 24 |
| e) | Dropped (trade remedy measure not imposed/removed/expired) | 15 |
| f) | Pending? | 4 |
| g) | Total | 107 |

Source: William Davey, 2005 (a)

Another aspect mentioned by Davey, 2005(a) is the details of dropped cases (24 cases - due to political reasons). The time span of settlement through consultation is a major focal point of the study in which 103 cases were considered. It was concluded with a note of satisfactory results on the adherence to the time span. Various aspects of implementation are studied in detail which indicated that “the implementation varies across Agreements – more satisfactory for some and not satisfactory for others”. (Davey 2005 a)

2.3.5.2. Panel and Appellate Panel Process

The second, third and fourth stages namely; Panel process, Appellate Panel process and implementation leaves huge responsibility on the shoulders of the DSB. Emenes states that “the move from the GATT to the WTO in 1995 was a significant change from a power and political based Panel Process to one that was more rule oriented”. (Emenes, 2006) “...the quasi-automaticity in the establishment of Panels as well as in the adoption of Panel and Appellate Body Reports was among the most-lauded elements. This quasi-automaticity removed blockage possibilities for losing defendants that had existed in dispute settlement under the old GATT”. (Zimmermann, 2005) “The capacity of Panels to assess both factual and expert evidence is an open question when considering the effectiveness of WTO Dispute Settlement. Attention has to be directed to a number of aspects of that process”. (McRae, 2007) “After all, every adjudication in some way or another, however minor, adds to the rights or diminishes the obligations of the winner, or diminishes the rights or adds to the obligations of the loser. By its nature, there is a zero-sum

element to every adjudication. For a WTO Panel or the Appellate Body to follow the literal interpretation would be to do nothing". (Bhala, 1999)

The undesired delays of the GATT dispute settlement process were long blamed as a flaw in the institutional design and a major goal of reforms establishing the WTO Dispute Settlement System was required to restructure the process. "Nonetheless, even with the automated adjudication of the WTO, foot-dragging is possible and many criticize the process as being too slow". (Davis, 2008) Importantly, the efficiency of WTO Panels can be evaluated first by identifying the time that the Panels take in practice to carry out their function and then comparing that with the applicable yardsticks in the DSU and other important features of WTO Dispute Settlement System. "A standard benchmark comprises the time elapsed between the date of composition of a Panel and the date on which the Panel issues its final Reports to the Parties". (Kennedy, 2011) In analyzing the DSB system, Kennedy further stated, "the starting point of the nine-month time frame in Article 12.9 of the DSU is curious, if it is intended to discipline the time that Panellists take to complete their work. The nine months begin to run from the date of establishment of the Panel, that is, before the Panellists are appointed. In contrast, the shorter general rule in Article 12.8 and the shorter special time frames for Panels under other WTO Agreements all commence from the point at which the Panel is composed and its terms of reference are established or agreed". (Kennedy, 2011)

One major complaint about the DSB system is the delay that is caused by the Original Panels in adjudication and circulation of reports to the parties. "The average time taken to issue Panel Reports has lengthened inexorably since the establishment of the WTO, but in recent years, it has arrowed upwards, even excluding the big five cases. This sharp increase offsets any time that might be saved by reforming other stages of the Dispute Settlement Understanding (DSU) procedures and, if it continues at its present rate, could undermine the effectiveness of the system". (Kennedy, 2011)

Many of the above references are either based upon a limited number of cases (*note most of the studies used databases till 2005*) or are focusing at a few aspects of the Panel process. Hence an exhaustive study on the Panel process with a wider scope of more number of cases was found necessary to draw inferences on the effectiveness of Panel Process of the WTO DSB.

The other part of the adjudication process i.e. Appellate Panel Stage has been found working to the satisfactory level especially in the matter of adherence to the time frame (60-90 days) and the interpretation of the Panel Reports. Stoler mentioned that “an important strength of the Panel process and Appellate Review is that the system has never failed to produce an outcome. It is widely discussed that a major weakness of the DSB process and Appellate Review is that things still take too long time”. (Stoler, 2006) It was felt that this aspect needs further study with a larger sample size (of cases).

2.3.5.2.1 Role of *Amicus Curie* in the Panel Process

A controversial issue has been whether Panels and the Appellate Body may accept and consider unsolicited submissions they receive from entities not a party or third party to the dispute. These submissions are commonly referred to as *amicus curiae* submissions. *Amicus curiae* means “friend of the court”. These submissions often come from non-governmental organizations, including industry associations, or university professors²³. According to the Appellate Body, the Panels’ comprehensive authority to seek information from any relevant source (Article 13 of the DSU) and to add to or depart from the Working Procedures in Appendix 3 to the DSU (Article 12.1 of the DSU) permits Panels to accept and consider or to reject information and advice, even if submitted in an unsolicited fashion.²⁴ The Appellate Body has confirmed this ruling several times, but the issue remains extremely contentious among WTO Members. Many Members are of the strong view that the DSU does not allow Panels to accept and consider non-requested *amicus curiae* submissions. They consider WTO disputes as procedures purely between Members and see no role whatsoever for non-parties, particularly non-governmental organizations.²⁵

To date, only a few Panels have in fact made use of their discretionary right to accept and consider unsolicited briefs. On the basis of the Appellate Body’s interpretation, Panels have no obligation whatsoever to accept and consider these briefs. Accordingly, interested entities, which are neither parties nor third parties to the dispute, have no legal right to be heard by a Panel.²⁶ *Amicus curiae* submissions have frequently been filed in Appellate Body Proceedings. When these briefs are attached to the submission of a participant (Appellant or Appellee), for instance as exhibits, the Appellate Body considers such material to be an integral part of the submission of that participant who also assumes responsibility for its content.²⁷

2.3.5.3. Implementation and Arbitration

Implementation has been a longstanding issue as far as the Dispute settlement System is concerned. As of December 2004, roughly 60% of Panel Reports requiring implementation had been implemented promptly - either within the original reasonable period of time for implementation or shortly thereafter". (Davey, 2005 a)

Even though the percentage of implementation has been increasing, there are a few cases which had been pending implementation for a long time. Davey has also remarked, "while the implementation record of the WTO dispute settlement system is fairly good, the problem of a few long standing problem cases of non-implementation suggests that proposals for improvements in the area of remedies for non-compliance should be considered seriously". (Davey, 2005 a) The study of Davey, 2005(a) is more concerned with the procedural issues and time frame. It was felt that along with these parameters, if the other problems caused to the implementation delay in form of the policy related aspects are studied and by including more cases, some improved inferences can be obtained.

The provisions for **Arbitration** are available with the DSB system which can be used in two places during the process. First one is for the determination of Reasonable Period of Time (RPT) when the parties are unable to arrive at a period of time for implementation mutually (Article 21.6). The second place is the determination of value of remedies to be imposed in order to retaliate (Article 22.3). "The length of time to resolve disputes through litigation, the costs involved, and the lack of flexibility has resulted in a trend towards using alternatives to litigation, including Arbitration". (Bohanes, Nottage, 2007) Arbitration is one of the preferred options in all the possible ways on the part of the parties to disputes. Further studies on the arbitration process may be useful in drawing conclusions on functioning and relevance of the same.

2.3.5.4. Compliance/Retaliation

Latif remarked, "The WTO (DSB) is also empowered to monitor the implementation to make sure that losing defendants carry out their obligations within a reasonable period of time, and this surveillance stage is the final phase of the WTO Dispute Settlement Process". (Latif, 2007)

"The WTO's Dispute Settlement Body, with its Panel and Appeal stages, functions much more like a court, part of the effort to create a system of dispute resolution more rule based than power based. Appellate body rulings are the final word in trade

disputes. Member States found to be in violation of one or more articles are expected to bring its legislation and actions into conformity with their WTO obligations. If an offending member fails to respond appropriately, the Dispute Settlement Body can authorize the injured Member to levy retaliatory tariffs". (Magder, 2006) "...the WTO provides for the withdrawal of inconsistent measures as the primary remedy. If a violating Member fails to withdraw its inconsistent measures, it may offer compensation as a secondary remedy. If neither remedy has been provided, a member state that prevails in a dispute may retaliate in the form of suspending concessions or other obligations as a last resort". (Lee, 2011)

The system of remedies in the WTO is superior to the former one (the GATT). "There was no specific provision on compensation under the General Agreement (GATT 1948 except in 1955 Report and the Annex to the 1979 Understanding Note". (Lee, 2011) "The most salient feature of Dispute Settlement in the World Trade Organization (WTO) is the possibility of authorizing a trade sanction against a scofflaw Member Government. This feature, however, is a mixed blessing. On the one hand, it fortifies WTO rules and promotes respect for them. On the other hand, it drains away the benefits of free trade and provokes 'sanction envy'". (Charnovitz, 2001) McRae narrates "When a Member fails to comply with a DSB ruling – fails to withdraw the offending measure – there is the possibility of seeking compensation or getting permission to retaliate by taking references from DSU Articles 21-22". (McRae, 2007)

"The remedy of retaliation (also known as "sanction") provides the complainant with the possibility of suspending the application of concessions or other obligations under the Covered Agreements on a discriminatory basis vis-a-vis the other Member subject to authorization by the DSB of such measures" (Article 3.7) – (Schropp, 2005) "The retaliation can be authorized to take place in any sector and is not limited to the area of dispute (GATT, 1994: Article 22, Paragraph 3). However, the suspension of concessions or other obligations is to be applied only until the measure found to be the violation has been removed". (Latif, 2007) "Countermeasures in the WTO are of a bilateral nature. They can be taken only by members that were complaining parties- not by third parties or, *a fortiori*, by members not involved in the disputes". (Pauwelyn, 2000)

2.3.6. Limitation of Remedies Under the WTO

Retaliation has a lot of limitations by nature. “On a general level, the suspensions of concessions or other obligations (SCOO) reduce the predictability of trade conditions which the WTO is normally set to preserve, as every concession and trade rule can be revoked as part of a SCOO. Moreover, Developing and small countries have difficulties in using the SCOO as they usually lack the market size to make a credible retaliatory threat”. (Zimmermann, 2005)

“Retaliation may also have a negative impact on third countries, for instance, if their industries supply inputs to industries in the defendant country”. (Zimmermann, 2005)
“Because imposing retaliation is based on a member’s economic power, retaliation by a relatively small country Member will not likely have a great impact on a large country member”. (Lee, 2011) “...compared to the GATT, the DSU regime has not increased the level of concessions that poorer complainants are able to elicit from defendants, even if it has improved matters for Developed Country complainants”. (Busch, Reinhardt, 2003) Initiating a case requires strong legal capability (resources) for the countries. It is notable that “Developing Countries are disadvantaged in achieving early settlement because of their limited legal capacity and not their inability to threaten retaliation (i.e., given their market share)”. (Busch, Reinhardt, 2003) “Apart from the fact that the procedure for triggering the retaliation process has ambiguities that need to be removed, the retaliation itself has some undesirable economic features”. (Anderson, 2002)

Davey departs from the above stated arguments and has said “It was found that in the last four or five years, Developing Countries have made increasing use of the system and have had considerable success in resolving disputes amongst themselves, as well as against Developed Countries. The operation of the system could be improved, however, from the perspective of Developing Countries, by reforms that provided more effective remedies for smaller countries and helped to defray the cost of WTO litigation”. (Davey, 2005, c)

“The problem of the WTO in the field of enforcement is a problem that is pervasive in international law. Other reasons can be cited for reluctance to use WTO Dispute Settlement. These include, cultural differences, the delay in getting a result, and the ineffectiveness of remedies if the offending Member fails to comply”. (McRae, 2007)

2.3.7. Major Recommendations by Earlier Authors for Improvement

There have been many discussions and suggestions to improve the Panel Process. One important suggestion is to constitute a permanent body of Panellists. This suggestion is based on the logic that as the Panel goes on handling more disputes better results may be produced. “But for all the debate over the need for a permanent body of Panellists, there is no empirical evidence that experience yields higher quality rulings that stand up better under Appellate Review”. (Busch, Pelc, 2009) Roesler has said “WTO Panels should respect the competence and discretionary powers of the political bodies established under the Agreements, and should not reverse their determinations. This indicates that there are areas where the Panel process (both Original and Appellate) needs more improvements”. (Roesler, 2000)

“Before reaching the last resort, the WTO should beef up its intermediate responses to a persistent failure to comply with WTO rules. The way to turn up the pressure is to draw on the power of domestic parliaments, courts, interest groups, and the media to influence a government to meet its WTO obligations. Because of its state-centric orientation, the WTO has done little so far to strengthen the culture of compliance”. (Charnovitz, 2002)

A major criticism against the operation of the DSB process is that it sacrifices the social and environmental calls in favour of providing more room for the trade volumes. When issues essentially of free trade, on one hand, and environmental regulation, on the other, have come into conflict, the GATT/WTO Dispute System has always found in favour of trade and against environmental regulation. “Consistently, the principle of freeing trade from regulations and restrictions has been found more important than restricting trade in the interests of environmental regulation. And this is the system the WTO proposes for settling the interminable controversies that necessarily arise from the tensions inherent in the principle of sustainable development! Trade and growth win every time—a “win-win” solution”. (Hartwick, Peet, 2003).

The WTO system appears to have certain systemic limitations. To mention a few are the time span allotted for the Panel Process, the need for the second time initiation of the request for Panel establishment, the lack of judicial power of enforceability of the Panel recommendations and the issue of sequencing the compliance and retaliation.

Latif, 2007 has pointed out certain limitations of the WTO DSB system in his study. It was found appropriate to discuss those findings here and hence the following excerpts related to this aspect are included.

It is important for the WTO to further improve its dispute settlement process. For instance, 'the fact that it may take a Panel six to nine months after its establishment to render a decision is of no great importance, if the decision would not be implemented until after two or three years' (Kessie, 2000: p 11). In any event, there is a demand to carry out two broad reforms, 'namely shortening the timeframe for the resolution of disputes and improving the effectiveness of the remedies that could be obtained under the system' (Kessie, 2000: p 17). However, the most significant flaw in the system, from an enforcement perspective, is that it is still reliant in important respects on the consent and initiative of the parties to the dispute (Qureshi, 1996: p107).

However, such seeking of consent cannot be evaded as the WTO system is basically built on the 'Agreements' drawn on the consensus of the Member Countries.

Second, the private sectors do not have formal standing in the dispute settlement system. Their activists have sought formal standing, whereby firms could bring complaints to the WTO, but they remain dissatisfied with the dispute settlement mechanisms, as only states have standing. (Sell, 2000: p 180)

The third element of weakening is that 'new dispute settlement procedures may not be strong enough to restrain countries from taking actions that fall outside the system rules, and hence the overall effect may simply be to create more conflict' (Whalley and Hamilton, 1996: p 130). For instance, Article 23 of the Dispute Settlement Procedure stipulates that states 'shall not make any unilateral determinations that treaty violations have occurred and are barred from imposing sanctions unless they are approved by the DSB' (Sell, 2000: p 181). However, whether Article 23 bars the USA from employing Section 301 actions remains to be clarified (Sell, 2000: p 181). 'The US private sector, backed by the government, argues that the 301 is not incompatible with the WTO, while the Europeans and Japanese maintain that the WTO now makes 301 illegal' (Sell, 2000: p 181). Thus, the USA's continued

use of section 301 measures 'may generate more open conflict within the system than there was previously, and weaken it' (Whalley and Hamilton, 1996: p 130).

Fourth, as a potential weakness, the WTO lacks resources such as manpower and budget (Kessie, 2000: p 10). The system feels overburdened with too many requests for the establishment of Panels (Kessie, 2000: p 10). The WTO Secretariat maintains a small staff, and to provide services to all the Panels and the Appellate Body 'places a lot of strain on it' (Kessie, 2000: p 10). Moreover, owing to the reluctance of members to increase funding for the Secretariat, it will be extremely difficult for the Secretariat to deal with the increasing number of cases (Kessie, 2000: p 11).

Finally, there is the problem of the exorbitant cost and high level of legal expertise required for bringing and defending cases before the DSU (Schott, 2000: p 31–2). This scenario has constrained many Developing Countries' participation in the WTO Dispute Settlement Mechanism as the cost is too high for them to bear and they may not have such high level of legal expertise. The DSU addresses this problem by requiring the WTO Secretariat to provide legal assistance to such countries and by conducting training courses that either include or are exclusively focused on dispute settlement (Davey, 2000: p 137). However, in order to increase participation from Developing Countries, a lot of practical measures need to be taken in this respect.

Shirzad, 2000 has suggested two important changes in the WTO DSB system in order to make it more user-friendly. It reads as "Changes should certainly be considered to the DSU that would allow the public to observe the operation of the process more closely. ...at minimum, non-confidential copies of the briefs of the parties and of the Panel Reports should be released to the public shortly after they are submitted. The issue of amicus briefs is one that must be considered carefully. Allowing the filing of briefs, with appropriate procedural limits so as not to strain the resources of parties and Panellists, would clearly be helpful for addressing political pressures facing the Developed Countries".

However these are welcome suggestions but may not be capable of bringing in required systemic improvements.

2.3.8. The WTO and Trade Policy

Another major aspect of the present study is the implications of the WTO DSB recommendations on the trade policy of the Member Countries.

“Democratically elected governments violate International Agreements when the electoral benefits of doing so outweigh the domestic and international costs”. (Rickard, 2010) “High transaction costs and the technical demands of compliance with WTO rules and agreements, in fact, demand institutional reform of national institutions. Simultaneously, sovereignty costs lead states to redefine their role in international organizations and in the global order more generally. Some governments have reasserted their authority by deploying innovative instruments of national policy to safeguard their domestic agendas. Both together-transaction costs and sovereignty costs-stimulate domestic institutional change with distinctive features such as policy-expert linkages and state-society consultations”. (Sinha, 2007)

The GATT, even though had a much longer period of existence than the WTO, resulted in very less policy amendment initiations on the part of the Contracting Parties. The potential impact of the GATT on domestic environmental regulations attracted almost no attention from the public or policy makers during the first four decades of the GATT's existence. “During this period, GATT dispute resolution Panels decided only three cases that involved trade-environment conflicts, one in 1982, one in 1987, and one in 1988 (Vogel, 1995)”- cited by Kelemen, 2001.

“The diversity of countries that negotiate commitments in the World Trade Organization (WTO), and the distinctions between their legal and constitutional systems, implies important differences in how agreements are approved, implemented, and enforced. Although consistency is among the desirable attributes to which the multilateral trading system should strive, it cannot be achieved at the expense of all other desiderata. Among the reasons for relaxation of this goal is the need to accommodate the different legal systems and levels of economic development among Member States, as well as the demands for flexibility in negotiations”. (Grasstek, Craig; Sauv , 2006)

A fine example of the policy initiations emanating from the WTO DSB recommendations can be noted in the following reading. “On January 2008, the EU implemented Economic Partnership Agreement (EPA) it negotiated with many African, Caribbean and Pacific (ACP) countries. All agricultural exports from ACP countries which have successfully concluded the negotiations are now allowed duty

free and quota free access to the bananas, sugar and rice"- (Anania, 2009). "Trade Agreements on the basis of reciprocity are instruments used by governments to achieve trade liberalization. The reciprocal exchange of market access rights which occurs through such agreements amounts to an international exchange of domestic political support between governments that helps policymakers to overcome the protectionist bias of uncoordinated trade policies". (Zimmermann, 2005)

"Although the DSU was meant to enshrine the rule of law in trade relations, the use and threat of economic sanctions reinforces the primacy of power". (Charnovitz, 2002) "Most Developing Countries resisted the profound transformation that came about with the WTO. Their negotiators had reservations about the capabilities of developing countries to introduce the necessary regulatory changes in order to comply with the demanding implementation requirements of the new WTO Agreements". (Lanoszka, 2003) Hence policy issues are more relevant to the Developing Countries as they are striving to obtain more and more benefits in the international trade arena.

"Though the Uruguay Round Agreements comprise multilateral trade rules of greater stringency, the majority of these and the relevant implementing legislation of the principal trading nations have limited these benefits to WTO members. This places LDCs that are presently not members of the WTO, at a disadvantage and generates new challenges for the policy makers in these countries". (Pant, 2003)

Studying about national climate policies and the WTO law, Susannedro, Trabold, Biermann, Bohm and Brohm concluded that "our main finding is that national policies whose aim is to reduce greenhouse gases can be brought into compliance with international trade law". (Susannedro, Trabold, Biermann, Bohm, Brohm, 2004)

Considering the retaliation and compensation and the implications of trade policies, Schropp and Simon concluded, "Making use of the fact that the true scope of nullification and impairment awards has never been legally exhausted in WTO arbitration, we suggest that by deliberately discriminating between the amount of compensation and that of retaliation, policymakers in violation of WTO Agreements can be induced to choose offering compensation to the injured party - an outcome that is economically and socially superior to embracing tariff retaliation." (Schropp, Simon, 2005)

"States increasingly incorporate alliance obligations into the design of Multilateral Trade Agreements to deter aggression. Regional Economic Institutions (REIs) are

such an example. This policy activity raises the question of whether REI military alliance obligations send signals and function as institutional constraints that deter aggression". (Powers, 2006) "The dispute settlement systems of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) have generally been viewed as relatively successful examples of state-to-state dispute settlement". (Davey, 2002) "Except for a recent slowdown which is yet too early to interpret, the mechanism has been used actively, and the perception by both practitioners and academic observers has generally been positive. Nevertheless, the intense use of the mechanism has also revealed certain problems in its practical application". (Zimmermann, 2005)

2.3.9. Conclusion

The review of available literature has identified the following aspects leading to the current study:

2.3.9.1. Most of the earlier studies are either based upon a limited number of cases (*note most of the studies used databases till 2005*) or are focusing at a few aspects of the Panel process. A study based on a large number of cases which were registered with the WTO DSB can provide a deep insight into the functioning of the WTO DSB system.

2.3.9.2. Unlike many of the earlier studies the WTO system and procedures, are studied here by including the variables like: the cases passing through various stages of disputes settlement, Consultations, Panel Process, Appellate Panel Process and Compliance/Retaliation; the elements of time in dispute settlement; patterns of adjudication; cases for which the losing defendant requested for a Reasonable Period of Time (RPT) and the process of arbitration

2.3.9.3. The study includes aspects such as various sectors of the economies that are basis of origin of disputes, various Agreements that are disputed frequently, the relationship between geographical regions and disputes, style of functioning of various stages of dispute settlement process, and the implication of the DSB rulings on the national trade policies of Member Countries.

Hence the various points of analysis and hypotheses are formulated in order to cover the above identified aspects.

