CHAPTER – I

INTRODUCTION

1.1. Background
1.2. Dispute Settlement and Statement of the Problem
1.3. Dispute Settlement Understanding (DSU)
1.4. The Importance of the Implementation of Rules and Recommendations
1.5. Dispute Settlement System and Developing Countries
1.6. Review of Literature
1.7. Research Hypothesis
1.8. Scope and Research Questions
1.9. Objectives of the Study
1.10. Research Methodology
1.11. Method of Quotation
1.12. Structure of the Thesis
CHAPTER – I
INTRODUCTION

1.1. Background

In the 1940s, with the demolition of the imperialistic system, there was a strong initiative for restoration of the war-torn economies of the west countries. The significant outcome after the end of the Second World War is two side global politics and the global economy. The outcomes manifested in three features:

First, the global geopolitical and economic order reformed or reordered into bipolar system as, USSR and USA; this system represents in two different systems of market economy and centrally planned economies.

Second, after the World War II, the colonial regimes declined and fell, thus leading to the emergence of sovereign developing economies with the rise of the idea of “development economies” as an important concept. Several international measures were undertaken to liberalize trade and payments between nations; initiated by US, these plans envisaged close economic cooperation of all nations in the field of international trade and payment.

Third, the international efforts for initiating of rebuilding the international trade system were taken up with full vigor. In 1944 the conference on economic matters held in Bretton Woods, agreed to establish the institutions such as International Bank for Reconstructions and Development (IBRD), International Monetary Fund (IMF); the third institution called the International Trade Organization (ITO) was sought to be set-up to handle the trade side of international cooperation. However, ultimately the ITO could not come into existence due to the refusal of the US Congress in 1950 to ratify the treaty for the establishment of the (ITO). These
institutions would be responsible for the reformation of the world economy through multilateral trade negotiations with the idea of cooperation for great benefit of all nations through collective understanding and cooperative initiative.

The World Trade Organization came into existence on 1st January 1995, replacing the 46 year old GATT. So the WTO has taken charge of administering the new global trade rules, agreed in the Uruguay Round. The World Trade Organization (WTO) is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.¹

The Dispute Settlement System is a significant improvement over the GATT. It constitutes a central element in providing security and predictability to the multilateral trading system through prompt settlement of trade dispute which is essential to the effective functioning of WTO.²

At the heart of the system, identified as the multilateral trading system, are WTO’s agreements, negotiated and signed by a majority of the world’s trading countries, and ratified in their parliaments. These agreements are the legal ground-rules for international commerce. Essentially, they are contracts, guaranteeing member countries important trade rights. They also bind governments to keep their trade policies within agreed limits to everybody’s benefit. The aims of agreements are to help producers of goods and services, exporters, and importers to conduct their business.³

From the time when the WTO was initiated, the world has witnessed a quick growth in international commercial activity, accordingly a great increase in the

¹ http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm, visited in 15.01.2012.
volume of international trade. Therefore, the WTO is considered as the most
important international organization. On 10th February 2011, the Membership of the
WTO was (153) Members; the majority of the members were from developing and
least-developed countries.\(^4\)

The new dispute settlement system of the WTO has received 436 trade
disputes\(^5\), and all appeals in the WTO on 05th October 2011 as: Appellate Body
Reports 105 reports, Appellate Body Reports other than those arising from Reports of
Panels established pursuant to DSU Article 21.5, 81 reports\(^6\), and Appellate Body
Reports arising from Reports of Panels established pursuant to DSU Article 21.5, 21
reports. Such reports provide for greater stability and predictability in global
commercial exchanges.\(^7\) The passage of fifteen years is not a long period of time
conclusively to evaluate the performance of WTO for or against its stated objectives.
In fact, the WTO 1995 was not created as a completely new organization; its
organization has a long history behind it in the form of the General Agreement on
Tariffs and Trade (GATT) 1947. The GATT was reincarnated as the WTO in January
1995. It had expanded on clearer objectives.

1.2. Dispute Settlement and Statement of the Problem

For deep understanding of the World Trade Organization (WTO) and dispute
settlement, a brief view of dispute settlement in general is justified. Historically, the

\(^4\) 16th December 2011: Ministerial Conference approves Russia’s WTO membership, and also 17th
December 2011: WTO membership of Montenegro and Samoa approved. See also

\(^5\) 16th December 2011: Ministerial Conference approves Russia’s WTO membership, and also 17th
December 2011: WTO membership of Montenegro and Samoa approved. See also

\(^6\) On 12 April 2012, India requested consultations with the US under the dispute settlement system
concerning the latter’s countervailing duties on certain steel products from India. See

\(^7\) Panels established pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing
the Settlement of Disputes (the “DSU”) relate to “disagreement[s] as to the existence or consistency
with a covered agreement of measures taken to comply with the recommendations and rulings” of the
Dispute Settlement Body (the “DSB”)

settlements of disputes between States have followed in different ways. The United Nations charter requires that all Members of UN settle their international disputes by peaceful means in such a manner that international peace, security and justice, are not endangered. Moreover, the UN Charter for pacific settlement of disputes further states that disputes between states may be settled ‘by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice’.

The dispute settlement system of the WTO is widely considered as one of the multilateral trade orders. The WTO Understanding on Rules and Procedures Governing the settlement of dispute significantly strengthen the GATT dispute settlement procedures.

The WTO dispute settlement system plays a central role in clarifying and enforcing the legal obligations contained in the various WTO Agreements.

The dispute settlement system of the WTO is quasi-judicial; independent and autonomous bodies are responsible for the adjudication of all disputes subject to the overall authority of the Dispute Settlement Body (DSB); therefore, the adjudicating bodies are Panel and Appellate Body, those bodies operating under its authority are accepted by all the WTO Members by ratification of the WTO agreements. So, the WTO Members have an obligation of participating in the WTO dispute settlement procedures in case of any complaint which is brought before the Dispute Settlement Body against any other member. The result of the Uruguay Round of multilateral negotiations 1985-1995 comprised of agreement covering many different sectors of

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9 Article 2.3 of the UN Charter.
10 Article 33.1 of the UN Charter.
11 P. Gallagher, Guide To The WTO And Developing Countries, 185 (2000).
international trade. The whole commitments made under WTO agreements must be implemented by the Member States of the WTO.\textsuperscript{13} The best international agreement is not worth very much if its obligations cannot be enforced when one of the signatory fails to comply with such obligations.

It is also noticed that the heaviest users of the WTO dispute settlement system have been the USA and the European Union. 174 complaints have involved either the USA or the European Union as a complaining party, which constitutes 43.3\% of the total complaints. Similarly, 175 complaints have involved either the USA or the European Union as the responding party, comprising 43.8\% of the total complaints. Furthermore, 50 disputes have been directly between the USA and the European Union.

Many cases do not go through all stages of the process, which means to initiate cases from consultations to panel stage and the Appellate Body to compliance reviews and final stage to authorisations of suspension. But in some disputes, it's not necessary to resort to retaliations in the case of non-compliance because most disputes are resolved at earlier stages.

The statistics show that the numbers of complaints brought by the USA and the European Union have declined in recent years, and that other WTO Members have been consistently active in WTO disputes.\textsuperscript{14}

It is noticed that there was a large increase in the number of complaints filed over the first four years of the WTO, with a decrease of over the next couple of years. After remaining level for a while, there has been a decline over the past three years.

\textsuperscript{13} Article VIII.1 and VIII.2 of the DSU. And the, D. Sengupta et el, WTO AN INDIAN PERSPECTIVE ON EMERGING ISSUES, 507 (2006).
\textsuperscript{14} All the tables and statistics are mentioned in the chapter eight “Evaluation of the Dispute Settlement System".
The most use of the system by the USA and the European Union highlights the fact that high income countries are the primary users of the dispute settlement system and the developing countries (upper middle income) consider the second user dispute settlement system.\textsuperscript{15} However, countries with lower incomes do use the system as well, and this usage has increased in recent years.\textsuperscript{16}

The purpose of this thesis is to study and examine and evaluate the nature of the dispute settlement processes of the World Trade Organization examining the WTO as an extension of its predecessor, the General Agreement on Tariffs and Trade (GATT).

The research is to help to understand the purpose of the dispute settlement system and the role it plays in controlling of the international trade dispute. Moreover, to understand what is going on? When government takes a case to the WTO? And what is the result?

In this research many cases of the disputes decided in the course of the dispute settlement processes are debated and analysed.

1.3. Dispute Settlement Understanding (DSU)

The current dispute settlement system was created as part of the WTO agreement during the Uruguay Round. It is embodied in the understanding of Rules and procedures governing the settlement of disputes. The understanding seeks to limit unilateral determination that trade rules have been violated by affirming that members shall not themselves make determination that a violation has occurred, and instead prompt the use of the WTO dispute settlement rules and procedures for seeking

\textsuperscript{15} The income classifications are based on the World Bank’s classification methodology, as detailed on the World Bank’s web site: <http://www.worldbank.org/data/countryclass/countryclass.html.}

redress. The understanding makes special provision for protection of the interests of both developing countries and least-developed countries. The DSU provides a number of special provisions setting out particular procedures, time frames and legal advice and assistance for the dispute settlement involving the developing countries and the least-developed countries. The DSU also provides special provisions such as asking compensation, seeking authorization for retaliation.\(^{17}\)

The WTO dispute settlement understanding incorporates major improvement over the GATT dispute settlement procedures. The first and perhaps most significant consensus are no longer required to proceed in disputes. A consensus is no longer required to halt the proceeding at any stage of formal dispute settlement procedures. This change greatly enhances the confidence of all trading nations, large or small, in the multilateral trading system since the potential for procedure blockage is removed.

1.4. The Importance of the Implementation of Rules and Recommendations

The credibility of the dispute settlement machinery of the WTO depends to a large extent on the prompt implementation of the rules and recommendations of the Dispute Settlement Body. The question arises, how are the DSB rules and recommendations enforced?

WTO rules are enforced through a WTO specific Dispute settlement system: this system is governed by the WTO DSU, one of the cornerstones of the 1994 Marrakesh Agreement Establishing the WTO.\(^{18}\)

\(^{17}\) Arts: 3.12, 4.10, 8.10, 12.10-11, 21.2.7, 24.1-2, 27.2 of the DSU.
If the WTO's dispute settlement understanding (DSU) arguably is the most significant achievement of the Uruguay Round, its provisions concerning adoption and implementation of reports are the most significant parts of the DSU.\textsuperscript{19}

The remedies available under the dispute settlement system, particularly the DSU are considered as one of the remarkable innovations of the Uruguay Round. The DSU is an antidote to the procedural deficiencies of Article XXII and XXIII of the GATT.\textsuperscript{20}

In the GATT 1947, when they seek adoption and implementation of report, a consensus in favour of the report was required for its adoption. Dissatisfied party could block consensus and prevent adoption of report. But in the WTO’s DSU, reports are adopted unless there is “negative consensus” not to do.\textsuperscript{21}

The final stage of the WTO dispute settlement process is the surveillance of Implementation stage.\textsuperscript{22} This is aimed to ensure that DSB rules and recommendations are implemented. If a panel finds that an agreement has been violated, it typically recommends that the defaulting WTO member concerned bring the offending measure into conformity with its WTO obligations.\textsuperscript{23} Panels may propose ways of implementation, but they rarely do.

Therefore, at the DSB meeting held within thirty days of the adoption of the panel or Appellate Body report, the Member concerned must inform the DSB of its intentions in respect of the implementation of the recommendations and ruling.\textsuperscript{24}

\textsuperscript{19} D. Palmet and P. C. Mavroidis, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION PRACTICES AND PROCEDURE, 86 (2nd edn2004).
\textsuperscript{21} Art.16.4.of the DSU.
\textsuperscript{22} Art.21 of the DSU.
\textsuperscript{23} Art.19.1 of the DSU.
\textsuperscript{24} Art. 21.3 of the DSU.
When a Panel or the Appellate Body concludes that a measure is inconsistent with the WTO agreements, it recommends that the offending measure should be brought into conformity. If the offending Member cannot comply with the recommendation immediately, it will have a 'reasonable period of time to do so' under Article 21.3 of the WTO DSU.\(^\text{25}\)

For the effective implementation of the dispute settlement system, the Dispute Settlement Body keeps implementation process under their surveillance; furthermore, the DSU emphasis on the implementation processes shall be on "prompt compliance" to make sure effective and actual implementations that benefit all WTO's Members.

The existence of this implementation issue does not mean that the WTO dispute settlement mechanism is altogether imperfect. The Members' repeated ignoring of recommendations and rulings of the DSB, threaten the justification of the WTO as responsible for solving trade disputes.

According to the present state of implementation as measured of resolutions in WTO dispute settlement, the record of implementation is relatively good, but there are problems raised. The problems could be solved by the modification of the remedies provided for in WTO dispute settlement so that some suggestions like (a) money payments could be substituted for the right to suspend concessions, (b) such payments or suspension of concessions could be calculated on a retrospective basis, and (c) such payments or suspension of concessions could be increased periodically over time in the event of continued non-implementation.

1.5. Dispute Settlement System and Developing Countries

The Uruguay Round was completed in December 1993, its results are embodied in nearly 30 legal agreements and a large number of supplementary decisions, all signed in April 1994 by over 100 countries. Since then the total number of countries which have signed the agreement, and which are therefore members of the WTO, has reached 137; about two-thirds of these members are developing countries with nearly 30 of these classified developed countries in the World. The WTO membership reached 153 Members on 10th February 2011.\(^{26}\)

It is clear that in a global trading system that brings together the poorest and richest countries in the world, there have to be special provisions to help to ensure that all countries are able to benefit by the agreement they have signed.

The Dispute Settlement Mechanism under the World Trade Organization has been heralded as the anchor of the rule-based multilateral trading system embodied in the Uruguay Round Agreements. While this mechanism has gained some credibility among developing countries, it has not reversed the situation in which some developed countries are the major users of the system. This point is to be noted for further improvement in the Dispute Settlement Understanding (DSU) to ensure that the developing countries derive greater advantage from the system and do not find it prejudicial to their interests.

The developing countries are facing a number of problems related to:

- The cost of access to the dispute settlement process;
- Issues of implementation of decisions and compensation; and

\(^{26}\text{http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. Visited on 15.01.2012.}\)
• The effective implementation of provisions regarding special and different treatment in favour of developing countries.

Generally, in comparison to a developed country, the developing countries humbly export limited value and volume of exports, especially to the United States and EC.

For the reason, that developing countries are less active traders, they are less likely to be repeat players in WTO litigation. Because of their less repeated recourse to and use of the WTO system, their incapacity to benefit from international trade, which negatively reflect imbalances in the development of legal means, when required, for dispute settlement.

Moreover, the cost of litigation is very high also, thus decreasing developing countries motivations to actively participate in WTO's law system.

Developing countries lack legal professionals in the area of WTO law, because they are not developing specialist lawyers in the field of WTO system. On the other side, in developed country in response to growing demand, particularly the number of law professors in the United States that teach WTO law has increased dramatically.

In the case of developing country bringing case to WTO' DSB and resulting in the lack of national legal expertise, requires hiring legal experts to defend their rights before panel and appellate body. Therefore, the increase of the high cost of litigations, that requires necessity for teaching WTO system to prepare law specialists, for developing countries to distinguish between right and obligations and any violation.

This is needed, to reduce the high cost of litigations, and to have more incentive in active participation of WTO dispute settlement system.
1.6. Review of Literature

Since the establishment of General Agreement on Trade and Tariff (GATT) 1947, which was in force till it was replaced with the establishment called World Trade Organization (WTO) 1995, many authors, jurists have written different books, articles regarding old and new trade system especially on the topic dispute settlement system from different views.

Petros C. Mavroidis, and Alan O, Syke have viewed in their text book “The WTO and International Trade Law/Dispute Settlement” that the WTO dispute settlement system, commands a great deal of attention from both the academics and practitioners.

Ernst-Urich in his book entitled “GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement” comments that from the beginning of the GATT and WTO dispute settlement systems have become the most frequently used international mechanisms for the settlement of trade disputes among governments.

Gregory Shaffer in his book “Frontiers of Economics and Globalizations” raises an interesting question about the developing countries using dispute settlement system: why it matters, the barriers posed. He examines the barriers posed for smaller and poorer World Trade Organization (WTO) members to challenge trade barriers under the WTO's dispute settlement understanding. It first addresses the implications of the judicialization of the WTO's dispute settlement system. It next examines reasons why participation in the WTO's dispute settlement system matters. It then summarizes the results of studies of the system's use and, in light of these findings, posits explanations for smaller developing countries' lack of engagement.

Dispute Settlement at the WTO: The Developing Country Experience edited by Gregory C. Shaffer and Ricardo Meléndez-Ortiz, the book provides a bottom-up assessment of WTO dispute settlement and the related challenges, experiences and strategies of nine individual developing countries in Africa, Asia, and South America.


Rufus H. Yerxa, S. Bruce Wilson – “Key issues in WTO dispute settlement: the first ten years”, 2005 – this book examines the operation of the WTO dispute settlement system during the WTO's first ten years.

Pater Gallagher, “Guide to dispute settlement” has written his guide to provide a better understanding of how developing countries, who represent a majority of the members of the World Trade Organization (WTO), work with the WTO and with Uruguay Round agreements. It is clear in global trading that brings together the poorest and richest countries in the world that there have to be special provisions to help and to ensure that all the countries are able to benefit from the agreements they have signed.

Sherzod Shadikhodjaev, “Retaliation in the WTO dispute settlement system” 2009. In sum, this book is designed to examine the way the WTO retaliation system works and explore possible improvements.
1.7. Research Hypothesis

Each Institutional entity has an orderly legal system, which is to organize and manage activities of the Institutions and to commit itself to such system. Dispute settlement mechanism in the WTO is the central and the safety valve of the organization, facilitating resolution of the disputes arising among the WTO's Members.

In this thesis, the research proposes that the dispute settlement process, in particular the enforcement mechanism is not effective in ensuring compliance with recommendations and rulings. This is especially when the complainant is a developing or least- developed country. In other words the dispute resolution system found in WTO, DSU pose significant difficulties in the implementation of rules and recommendations.

The developing and the least developed countries cannot utilize dispute settlement system and special and differential treatment granted for them.

Moreover, the failure of enforcement mechanism has to take into account the interests of developing and least developed countries. This calls for reforming of the system with a view to provide tangible and sufficient remedies.

1.8. Scope and Research Questions

The research area under the study is a vast area. Therefore the research will generally emphasise on dispute settlement mechanisms and emphasis on implementation of recommendations and rulings and how these mechanisms can be improved. However, the developing and least developed countries can also have effective remedies, and resolve the problems faced by them under the WTO's dispute settlement system.
This research on dispute settlement 'mechanism' and the challenges faced by the developing countries in the enforcement of DSB recommendations and rulings is significant particularly where more developing countries are actively participating in the WTO dispute settlement system as complainants, defendants and third parties. These problems call for efficient reforms in order that all the WTO members equally utilize the WTO system.

The Research Questions are as Follows:

1. What is the purpose of the Dispute Settlement? And what are the major stages?

2. What does this study show about the overall efficacy of the dispute resolution process of the WTO? Can the process be improved?

3. How can the developing countries and the least developed countries have a greater participation in the WTO dispute settlement processes?

4. Can dispute settlement procedures be improved for benefiting developing and least developed countries?

1.9. Objectives of the Study

This thesis has the following objectives:

- To trace the historical evolution of the dispute settlement system.
- To critically analyse the dispute settlement processes within the WTO system.
- To examine the working procedures of appellate body review and the legal framework of implementation and enforcement of DSB recommendations and rulings.
- To evaluate the special and differential treatment granted for developing and least developed countries, and focus to create new strategy for strengthening the dispute settlement system.
- To make recommendations for the DSU reform in relation to the dispute settlement mechanism, in particular implementation and enforcement system of the DSB rulings and recommendations.

1.10. Research Methodology

Data and information for the research have been collected from both primary and secondary sources, from various libraries, websites, law institutions, and various publications of World Trade Organization.

Executive reference is made on all available literatures in the form of text books, commentaries, WTO publication, research articles and treaties. The research methodology follows the descriptive, analytical, and case law study method.

I have followed the doctrinal research methodology, research through critical analysis of dispute settlement system under GATT and WTO agreements and subject matters relating to it. Based on the critical analysis of the dispute settlement processes, necessary suggestions are made for the existing system.

1.11. Method of Quotation

The manner of citation has been employed as following:

1) Books, name of author (s), title of the book, page, edition number (end), and year.

II) Articles, author name(s), title of article, Vol. No, journal name, volume, page number, and year of publication.


III) Title: The title of the book should be small capitals. The title should be followed by a comma and a space.

IV) Editor’s name: the name of editor/ editors should be included after page number, the name of editor should be precede by parentheses and followed by ‘ed’ or ‘eds’ in the case of multiple editors.

V) Translator’s name: the name of Translator / Translators should be included after page number, the name of Translator should be precede by parentheses and followed by ‘tr’ or ‘trs’. in the case of multiple Translators.27

V) Internet resources, full URL and date of visit.

1.12. Structure of the Thesis

The thesis consists of nine chapters as:

Chapter One deals with the setting of the thesis. The importance of study comes from the vital role for settling disputes arising between WTO Member states under dispute settlement system. The WTO dispute settlement system, which came into operation in 1995, was innovative. This chapter provides the importance of area of research, objective of the thesis, research methodology. The research hypothesis is drawn based on the research problems.

27 NLS GUIDE TO UNIFORM LEGAL CITATION, Simpler is better, complied by: Uniform Citation Style Guide Committee, National Law School of India University, Bangalore (2009).
Chapter Two deals with the historical development of the GATT/WTO and its importance, with principles and objectives of GATT/ WTO. This chapter explains the GATT Rounds; since the inceptions of GATT, eight rounds of negotiations were held, the negotiation aimed to reduce tariff and non-tariff barriers in the trade of goods. This chapter also deals with diverse points relating to GATT/WTO regime.

Chapter Three is regarding dispute settlement system; This chapter deals with different sections with the discussion and analysis, beginning with the dispute settlement under the WTO, and explains historical development for dispute settlement system under the GATT 1947 and under the WTO 1995, by showing their nature and character and also discussed the roles of arbitrator in the dispute settlement system and explanation of the rules of conduct and finally the conclusion.

Chapter Four deals with the alternative means for settling the disputes Consultation, Good office, Conciliation and Mediation. This chapter deals with different sections through discussion, analysis and illustration of different cases. First in the consultation stage highlights on objectives and the importance of consultations.

Chapter Five deals with Penal stage, in fact the panel procedures are considered as unique features in the dispute settlement system, such as limited time frame in order to perform its functions, as formulation of panel and other procedures up to issuance of their reports.

The purpose of this chapter is to examine the nature of the panel processes of the World Trade Organization and what active roles were played to settle disputes. This chapter deals with the different stages of panel with providing discussion, analyses with cases and to provide an important proposal for improvement of panel proceeding.
Chapter Six deals with appellate body stage and implementation of recommendations and rulings. To consider the success of the dispute settlement system of the World Trade Organization (WTO), it is essential to evaluate whether WTO Members promptly take up the actions required to bring themselves into compliance with WTO obligations, as those obligations have been clear or explained in the dispute settlement reports issued by panels and the Appellate Body.

Chapter Seven deals with the dispute settlement system involving the developing and the least developed countries. In this chapter research examined the position of the developing and the LDCs in dispute settlement system, and discusses the problems which are faced by them, thus influence on active participation in dispute settlement system and other WTO activities. With the focus on the Special and Differential Treatment granted for them, here is provided an important proposal for improving their role.

Chapter Eight deals with the evaluation of the dispute settlement system. In this chapter, there is an attempt for re-evaluation of the dispute settlement system. Consequently, there are some initial findings based on the WTO Dispute Settlement information, through showing the different stages with the tables which is depending on the WTO's report and statistical releases annually. Along with some case study, this illustrates the type of problems that emerge.

In Chapter Nine, the researcher addressed all the research questions and subjected the hypothesis to critical analysis and draws conclusions. Based on the conclusions and inadequacy in the present system, the researcher has suggested certain recommendations for the reform and improvement of the WTO dispute settlement system.