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CHAPTER – III

DISPUTE SETTLEMENT SYSTEM

3.1. Introduction

The dispute settlement system of the GATT is widely considered as one of the multilateral trade systems. The WTO Understanding on Rule 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 adjudication of all disputes subject to the overall authority of the Dispute Settlement Body (DSB), therefore the adjudicating bodies such as Panel and Appellate Body, those bodies operating under its authority accepted by all WTO Members by ratification of the WTO treaty. So, the WTO Members are obligatory in participation of the WTO dispute settlement procedures in the case of any complaint brought before 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 international trade. The whole commitments made under WTO agreements must be implemented by the Member States of the WTO. 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 obligation.

1 P. Gallagher, GUIDE TO THE WTO AND DEVELOPING COUNTRIES, 185 (2000).
3 Article VIII.1 and VIII.2 of the DSU. And the, D. Sengupta et. al, WTO AN INDIA PERSPECTIVE ON EMERGING ISSUES, 507 (2006).
Reforming the WTO dispute settlement system which began in 1997 in response to a decision that has been adopted at the Marrakech Ministerial Conference by which Members agreed to review the DSU within four years. The DSU Review began in 1998, the efforts to strengthen this system by the improvement of the DSU also comes through the Ministerial Meeting in Doha in September 2001, for the reviewing process of DSU as one of the Doha work programme and to negotiate these improvement. The Ministerial Meeting declarations regarding these subject reaffirm in the paragraph 30 state that: “we agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as any additional proposals by members. And aim to agree on improvements and clarification not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter”.

However, the process of DSU reviewing is still going on. DSU reform will have implications for developing countries. Thus, it is probable that negotiations concerning other agreements e.g. Intellectual Property Rights, Textiles, Agriculture, will remain more important.

The fact that Members of the WTO established the current dispute settlement system during the Uruguay Round of Multilateral Trade Negotiation underscores the high importance that they attach to compliance by all Members with their obligations under the WTO Agreement. The DSU emphasizes the importance of consultation in securing dispute resolution, requiring a member to enter into consultations within 30 days of request for consultation from another member. If after 60 days from the request for consultations there is no settlement, the complaining party may move

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1 Ministerial Declaration adopted 14 November 2001, WTO Documents WT/MIN (01)/DEC/1.
directly to request the establishment of a panel. The parties also may voluntarily agree to follow alternative means of dispute settlement, including good office, conciliation, mediation and arbitration. When the case involves developing countries or least developed countries as the party before DSB, there are special provisions stipulated in the DSU rules which grant it special positions with more understanding for their interests, therefore the DSU should provide more availability more flexibility towards it. It is clear through DSU Articles by grants developing countries to recourse to the good offices of Directors General and a panel procedure with the time limits. Moreover in the stage of consultations, the Member should give developing countries special attention to the particular problems for their interests. The panel will accord sufficient time for the developing countries member to prepare and present its argumentation, with providing legal advice and assistance by the qualified legal expert from the WTO Technical Cooperation Services.

In this chapter research will deal with different sections with the discussion and analysis, starting with the dispute settlement under the WTO, and explain historical development for dispute settlement system under the GATT 1947 and under the WTO 1995, by display of the nature and character all of them. After that explanation the most important aspects of WTO’s work in dispute settlement system which is embodied in the understanding on rules and procedures governing the settlement of dispute by explaining the jurisdiction and legal basis of dispute settlement system, dispute settlement understanding and the nature of them (DSS-DSU), follow that clarify the procedures of dispute settlement understanding, with the mentioned of the WTO bodies involved in the dispute settlement system.

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7 Article 5.1 of the DSU.
8 Article 4.10 of the DSU.
Moreover, briefly discussing the role of arbitrator in the dispute settlement system and explain the rule of conduct and finally the conclusion.

3.2. Historical Development of Dispute Settlement System under GATT and WTO

The WTO dispute settlement system is often praised as one of the most important innovation of the Uruguay Round. That should not, however, be misunderstood to mean that the WTO dispute settlement system was a total innovation and that the previous multilateral trading system based on GATT 1947 did not have dispute settlement system. On the contrary, there was a dispute settlement system under GATT 1947 that evolved quite remarkably over nearly 50 years on the basis of Articles XXII and XXIII of GATT 1947. Several of the principles and practices evolved in the GATT dispute settlement System were, codified in decisions and understanding of the contracting parties to GATT 1947. The current WTO system builds on and adheres to the principles for the management of disputes applied under Article 3.1 of the DSU. Of course, the Uruguay Round brought important modification and elaboration to the pervious system. In this section research will trace the historical development dispute settlement system from GATT 1947 up to WTO 1994.

3.2.1. The Concept of Dispute Settlement

Historically disputes between states were resolved 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 and security, and justice, are not endangered. Moreover, Article 33.1 of the UN Charter for pacific

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10 Article 2.3 of the UN Charter.
settlement of dispute it further is stated 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 which came into existence on 1st Jan 1995, is a result of fifty years of experience in the resolutions of trade dispute in the previous GATT 1947 practices, that which the WTO's DSU states: Members affirm their adherence to the management of disputes heretofore applied under Article XXII and XXIII of the GATT 1947, and the rules and procedures as further elaborated and modified herein.11

The GATT dispute settlement system evolved between the late 1940s and the early 1990s, from a system that was primarily a system of dispute settlement through diplomatic negotiations into system of dispute settlement through adjudication. The WTO system is a further step in the evolution of international trade dispute settlement. The WTO dispute settlement system, which has been in operation since 1st Jan 1995 and in 12th April 2012, a total of 436 disputes have been brought to the WTO system for resolution.12

The dispute settlement system of the WTO is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). With certain exceptions, the DSU is uniformly applicable to differences that arise in the context of all WTO agreements. The Special or Additional Rules and Procedures are contained in the Covered Agreements.13

The more effective and reliable dispute settlement system; the WTO has put in place the most widely representative multilateral and the only compulsory third party

11 Article 3.1 of the DSU.
13 http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#intro. Visited on 05-05-2010
The WTO provides a strengthened and expanded framework for international trade. This would be worth little without an effective dispute settlement system to enforce rights and obligations. Therefore, the WTO dispute settlement is considered as a cornerstone in the multilateral trading system. In the negotiations leading to the establishment of the WTO dispute settlement mechanism, the debate focused on whether a negotiation approach would be superior to a more legalistic, rule-oriented approach. For better or worse, the judicialized, rule-oriented approach to dispute resolution has prevailed at the WTO.

3.2.2. Dispute Settlement System under GATT 1947

GATT 1947 had only two provisions dealing with dispute settlement, namely Article XXII and XXIII. However, Articles XXII and XXIII did not contain any specific procedures to be followed by disputing parties or even the Contracting Parties

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14 www.org.net, DS-5-DSB-WTO DS.
in resolving a dispute. Some formalities were added later on in subsequent negotiation rounds and Ministerial Conferences.\textsuperscript{17}

The phrase ‘nullification of benefits’ the dispute settlement in GATT 1947 was suffering from the natural mechanism of not contemplating a formal dispute settlement body. The Article XXIII was formally constituting contracting parties as a dispute settlement authority, but the legal nature of GATT, that any decision to modify, amend or adoption of reports, that required the approval of the parties. That meant the practice of a losing party in a dispute not only could refuse to agree and block the adoption of an adverse panel or establishment panel or adoption reports altogether. Panel reports, which were contrary to the contracting parties, were certainly blocked. So, in course of development of settlement of dispute machinery from 1947 to 1992, the losing member finally accepted the results of an adverse panel report in around 90 per cent of dispute cases.\textsuperscript{18}

The GATT 1947 contracting parties codified and sometimes modified the decision procedures and dispute settlement practices. The most important decision before Uruguay round of decisions and understanding were:

- The Decision of 5\textsuperscript{th} April 1966 on procedures under Article XXIII;
- The Understanding on Notification, consultation, Dispute Settlement and surveillance, adopted on 28\textsuperscript{th} November 1979;
- The Decision on dispute settlement, containing the Ministerial Declaration of 29\textsuperscript{th} November 1982.
- The Decision on Dispute Settlement of 30\textsuperscript{th} November 1984.\textsuperscript{19}

\textsuperscript{17} D. Sengupta et al, WTO AN INDIAN PERSPECTIVE ON EMERGING ISSUES, 526 (2006).
\textsuperscript{18} A. K. Koul, GUIDE TO THE WTO AND GATT ECONOMICS, LAW AND POLITICS, 44(2005).
\textsuperscript{19} WTO Publication, A HAND BOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, 13(2004).
In the GATT 1947 dispute settlement, system had shortcomings in that decisions were taken by the GATT council by consensus. The practice meant that the target of complaint could delay or block the operation of the dispute settlement process at several distinct stages.

The term of "consensus", mean that contracting parties should give positive consensus, with no objection against any decisions; in other words, the defendant party could block any decision in at any stage i.e. establishment of the panel or adoption of the panel report, authorization of countermeasures against defendant members. If parties allowed the adoption of the report, it could reject to implement the rules and recommendations and not suffer any consequences under GATT rules since it could block authorization of sanctions against it.

Thus, the GATT 1947 dispute settlement system brought about solutions satisfying the parties in a large majority of the cases; certainly, there were a significant number of disputes that were never brought before the GATT because the complainant suspected that the respondent would exercise its veto. Hence, the risk of a veto also weakened the GATT dispute settlement system. Finally, there was deterioration of the system in the 1980s as contracting parties increasingly blocked the establishment of panels and adoption of panel reports.\(^{20}\)

The GATT dispute settlement system became apparently unable to conduct argumentative cases, since it was supposed that one or other party would block adoption of the panel report. This meant that disputes that should have been considered in system were not brought to it because of a belief that no affirmative result could be attained.\(^{21}\)

\(^{20}\) Ibid. 14.
3.2.3. Dispute Settlement System under WTO

The WTO dispute settlement system, which came into operation in 1995, was innovative. It is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).\textsuperscript{22} The key objective of the DSS under WTO to prompt settlement of dispute between WTO Members concerning their rights and obligations under covered agreements, by securing the security and predictability of DSS through satisfactory settlement of disputes.\textsuperscript{23}

The DSU contains 27 Articles totaling 143 paragraphs plus four appendices. It is perhaps the most significant achievement of the Uruguay Round negotiations, often being referred to as jewel in the crown of WTO. The explanatory role of the WTO dispute settlement system is made explicit in Article 3 (2) of the DSU which provides that the system serve to ‘clarify the provision of the WTO Agreements in accordance with the customary rule of interpretation of public international law’.

The evolution of the DSS came into existence through different stages of negotiations. The Tokyo Round during the Seventies was a more sweeping attempt to extend and improve the system. It was conducted between 1973 and 1979 and with 102 participating countries, in the Tokyo Round “codes” dispute settlement contained code specific dispute settlement procedures applicable only to the signatories of code and only with regard to specific subject matters.

The structural weaknesses of old GATT DSS were significant even though many disputes were ultimately resolved. As noted in the late 1980s when the Uruguay Round was ongoing, the situation deteriorated, especially in politically sensitive areas or because of some contracting parties attempted to achieve trade-offs between

\textsuperscript{22} Annex 2 to the Agreement Establishing the World Trade Organization.
\textsuperscript{23} Article III.2 of the DSU.
ongoing dispute settlement and matters being negotiated. This, resulted in decreasing confidence in the contracting parties in the ability of the GATT dispute settlement system to resolve the difficult cases. Therefore, the contracting parties GATT 1947, both developing and developed countries, felt that the system needed improving and strengthening. So, the negotiations on dispute settlement were included and given high priority on the agenda of the Uruguay Round negotiations.²⁴

The limited achievement of the Tokyo Round, irrespective of the achievement of the tariff reduction result, was a sign of difficult times to come. For the reasons mentioned above and others, factors convinced GATT Members that a new effort to reinforce and extend the multilateral system should be attempted; indeed those efforts resulted in Uruguay Round.

The DSU as a part of the Uruguay Round introduced a significant strengthened dispute settlement system. It provided more detailed procedures for the various stages of dispute, including specific time frames. The DSU also contains many deadlines to ensure prompt settlement of disputes. All provisions under the DSU are represented by Dispute Settlement Body (DSB). The DSB plays a very crucial role in WTO dispute settlement system particularly in ensuring implementation and enforcement of its rulings and recommendations. It is made up of all the representatives of every WTO Member and it deals with disputes arising under any of the WTO Agreements, and it does so in accordance with the provisions of the DSU.

Therefore this research will discuss the DSU in the following sections by clarification of the legal nature and jurisdiction upon WTO Member states.

3.3. Dispute Settlement Understanding (DSU)

An important aspect of the WTO’s work is dispute settlement. Trade relations often involve conflicting interests, contracts and agreements, including those negotiated in the WTO system and often need interpreting. The harmonious way to settle these differences are through some neutral procedure based on agreed legal foundation. This purpose is behind the dispute settlement process written into the WTO agreements. The current dispute settlement system was created as part of the WTO agreement during the Uruguay Round. It is embodied in the understanding on Rules and procedures governing the settlement of dispute. The understanding seeks to limit unilateral determination that trade rule have been violated by affirming that member shall not themselves make determination that a violation has occurred, and instead prompt the use of the WTO dispute settlement rules and procedures to seek redress. The understanding also makes special provision for protection of the interest of both developing and least developed countries. The DSU provides a number of the special provisions setting out particular procedures, time frames and legal advice and assistance for dispute settlement involving developing countries and least-developed countries, the DSU provides also special provisions as asking compensation, seeking authorization for retaliation. The WTO dispute settlement understanding incorporate major improvement in 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

26 Articles 3:12, 4:10, 8:10, 12:10.11, 21:2.7, 24:1.2, 27:2 of the DSU
or small, in the multilateral trading system since the potential for procedures blockage is removed. 27

3.3.1. The Jurisdiction and Legal Basis for Dispute Settlement System

The WTO dispute settlement system has jurisdiction over any difference that may arise between Member countries; beyond the provisions of any of the "Covered Agreements" provided for in Appendix 1 of the DSU. That is to say that a dispute based on the violation of WTO rules can only be dealt with by the multilateral forum, rather than by regional dispute settlement mechanisms.

3.3.1.1. The Jurisdiction of Dispute Settlement System

Members can take recourse to the dispute settlement process for matters falling within the purview of WTO 1994 and other agreements on goods, the General Agreement on Trade in Service, the Agreement on TRIPs, the pluri-lateral agreements insofar as those agreements prescribed it the Dispute Settlement Understanding and the WTO agreements itself within the WTO character stands the preamble and the body of the WTO agreement. 28 The charter is confined to institutional measures, but it explicitly outlines four important Annexes. The different annexes have different purposes and different legal impacts. Annexe 1 contains the Multilateral Agreement, which are all mandatory in the sense that these texts impose binding obligation on all Members of the WTO. Annexe 2 consists of dispute settlement rules; which are obligatory upon all Members. Annexe 3 establishes the Trade Policy Review Mechanism (TPRM), by which the WTO will review overall the trade policy of each Member on a periodic and regular basis and report on those policies. Finally, the

Annexe 4 contains four agreements that are optional and termed as plural-lateral agreements.\textsuperscript{29}

By mandatory recourse to multilateral system of the WTO for the settlement of dispute, Article XXIII of the DSU not only excludes the use of other fora for the resolution of WTO disputes, the DSU emphasize on the member shall have recourse to, and abide by, the rules and procedures of this understanding. It is clear; through the case of \textit{US – Certain EC Products}, the Panel considered the EC argument that the United States unilaterally imposed trade sanctions and thereby violated Article 23 of the \textit{DSU}.\textsuperscript{30} The Panel, in a finding not directly reviewed by the Appellate Body, held that both paragraphs of Article 23 provide a prohibition on “unilateral redress”, but this prohibition is more directly provided for under the second paragraph of Article 23. The content of Article 23 paragraph 1 talking about general prohibition, when the Member seeks to redress a WTO violation, they shall do and obligation to recourse through the DSU, that any attempt to seek redress can take place only in the institutional framework of the WTO and guided by the rules and procedures of the DSU. Moreover, the paragraph 2 of Article 23 has specific prohibition against unilateral redress in the WTO sectors is more directly provided for in the second paragraph of Article 23. From the ordinary meaning of the paragraph 1 of Article 23, therefore, the Panel on \textit{US – Certain EC Products} also agreed with the EC that Article 23.2 contains specific examples of conduct inconsistent with the rules of the \textit{DSU}, but held that the first analytical step necessarily was to determine before turning to Article 23.2 whether the measure at issue falls under the scope of Article 23.1:

\textsuperscript{30} Panel Report on \textit{US – Certain EC Products}, Paras 6.19–6.20. This was upheld by the Appellate Body at Para. 111.
"We also agree with the US – Section 301 Trade Act Panel Report that Article 23.2 contains "egregious examples of conduct that contradict the rules of the DSU" and which constitute more specific forms of unilateral actions, otherwise generally prohibited by Article 23.1 of the DSU.\textsuperscript{32}

3.3.1.2. The Nature of Jurisdiction of Dispute Settlement System

The WTO dispute settlement system has jurisdiction over any disputes arising between WTO Members under the covered agreements. The DSU states that, 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".\textsuperscript{33}

The dispute settlement system is compulsory; all WTO Members subject to follow it, for all disputes arising under the WTO agreements. The consent to accept the jurisdiction of the WTO dispute settlement system is already contained in a Member's accession to the WTO.\textsuperscript{34} The compulsory jurisdiction states: "when Member seeks the redress of violation of obligations or other nullification or impairment of benefit under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this understanding".\textsuperscript{35} Under this Article, a complaining party is obliged to bring any dispute arising under the covered agreements to the WTO dispute settlement system, and also the responding party has no choice but to accept the jurisdiction of the WTO dispute settlement system, according to Article 23. We conclude the scope or jurisdiction of paragraph 1 more

\textsuperscript{32} Panel Report on US – Section 301 Trade Act, Para. 7.45.
\textsuperscript{33} Panel Report on US – Section 301 Trade Act, Para. 7.81.
\textsuperscript{34} Article 1.1 of the DSU.
\textsuperscript{35} A HAND BOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, 8 (2004).
\textsuperscript{36} Article 23.1 of the DSU.
generally than paragraph 2 that was specified by the fact that “benefits have been nullified or impaired” but in paragraph 1 it is stated the party seek redress of violation of “obligation or other nullification or impairment of benefits”. It covers much more than the ones specifically mentioned in Article 23.2.

For deeper understanding of the jurisdiction of DSU, the Article 23 of the DSU emphasize on the Member shall have recourse to, and abide by, the rules and procedures stipulated in the DSU, therefore the words “recourse to and abide by” the Panel Report held in the US-Section301 Act, the Article 23.1 of the DSU prescribes a general duty of a dual nature, First, it imposes on all Members to ‘have recourse to’ the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. Thus, the Member has to have recourse to the DSU dispute settlement system to the exclusion of any other system or any unilateral determination of WTO rights and obligations.36

It is clear with the DSU statement “if the complaining party so requests, a panel shall be established at the least at the DSB meeting following that at which the request first appears as an item in the DSB’s agenda, unless at that meeting the DSB decided by consensus not to establish a panel.37

The jurisdiction of dispute settlement system shall be exclusive on it, that Members shall thus have recourse to the WTO dispute settlement system to the exclusion of any other system. For that WTO’s DSU stipulated, Members are prohibited from making a determination to the effect that a violation occurred that benefit have been nullified or impaired, or the attainment of any objective of the

36 Panel Report on US – Section 301 Trade Act, Para. 7.43
37 Article 6.1 of the DSU.
covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of the DSU.\textsuperscript{38}

The exclusive jurisdiction emphasize on it in the panel in \textit{US-Section 301 Trade Act}, ruled that Article 23.1 of the DSU imposes on all Member to “have recourse to” the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Member has to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations.

This is what one calls “exclusive dispute resolution clause”, is important new element in Members rights and obligations under the DSU.\textsuperscript{39}

The WTO as an international organization does not exercise jurisdiction in the way that any state does; for state, we would have divided jurisdiction in terms of jurisdiction to legislate or to make applicable law, jurisdiction to adjudicate and jurisdiction to force. But in the case of the WTO dispute settlement we will focus on jurisdiction to adjudicate, including jurisdiction to apply law. The power of the bodies formed under the DSU emanates from the language of treaty; the WTO agreements include the DSU. However, the specified jurisdiction they only here power accorded them by the treaty that created them. The main functions of the DSU are not to exercise power per se, but to preserve the rights and obligations of Members and to clarify the existing provisions of the WTO Agreements. The jurisdiction is not only to make law or to add or to subtract from the rights and duties of Members. Thus, it is no task of the panels or appellate Body to adopt interpretation within the meaning of Article IX:2 of the WTO Agreement, therefore it’s clear that in order to clarify WTO

\textsuperscript{38} Article 23.2 of the DSU.

\textsuperscript{39} Panel Report on US – Certain EC Products, Paras.7.43.
law, its unavoidable that panels or Appellate Body interpret WTO Agreements in accordance with the customary rules of interpretation of public international law.\textsuperscript{40}

In the WTO there are number of bodies, and those bodies have jurisdiction according to the WTO Agreements; those bodies as (I) dispute Settlement Body (DSB), (II) dispute settlement panels established by DSB to examine the matters referred to the DSB by state complainant, (III) a standing Appellate Body to hear appeal from panel report, and (IV) arbitrator that may be apprised of particular issues under circumstances specified in the DSU. It is important point that decisions by the panels or Appellate Body are not binding per se definitive, but rather only acquired legal effect upon adoption by the DSB.

3.4. Dispute Settlement Understanding Procedures

The WTO Dispute Settlement Understanding (DSU) incorporates major improvements in GATT dispute settlement procedures. The first, and perhaps most significant, consensus is no longer required to continue in disputes. A consensus decision is now only required to stop or halt the proceedings at any stage of the formal dispute settlement procedures. This change greatly enhances the confidence of all trading nations, large or small, in the multilateral trading system as the potential for procedural blockage is removed.

However, in order to ensure that this automaticity comes with a greater confidence in the results of the dispute settlement system, a new element is the independent review by an appellate body before a panel's recommendations become legally binding. Another change is the introduction of more precise and shorter time limits for each stage of the procedures. One of the central provisions of the Understanding on Dispute Settlement is that unilateral action is forbidden. WTO

members are required to use the multilateral dispute settlement rules and procedures of the WTO to resolve all disputes.\(^\text{41}\)

Indeed the WTO dispute settlement system plays a central role in clarifying the various WTO agreements. The WTO dispute system codified in the Understanding on Rules and Procedures Governing the Settlement of disputes which was the most important agreement negotiated during the Uruguay Round.\(^\text{42}\)

In this section, research will give a brief description of the WTO dispute settlement process under the WTO bodies. Article 3 of the DSU set out the general provision which summary mainly the objectives of the dispute settlement mechanism as enshrined in the DSU.

Briefly, the WTO dispute settlement proceeding has four separate stages which can be distinguished as Consultations, Panel proceeding, Appellate Body and an Implementations and enforcement of the recommendations of Panel and Appellate Body. Under the DSU, the dispute settlement proceeding start with consultation stage between the parties of dispute.\(^\text{43}\) The consultation stage, it enables the dispute parties to understand better the factual situation and the legal claim in respect of the dispute.\(^\text{44}\)

The consultations provide or allow the parties of dispute to resolve the matter without recourse to further proceeding; a member may request consultations when it considers another member to have infringed upon the obligations assumed under a Covered Agreement. The responding Member is required to accord sympathetic considerations to, and afford adequate opportunity for consultations.\(^\text{45}\) The request

\(^{41}\) See http://www. WTO.org.net, WTO Dispute Settlement. Visited on 30-06-2010.
\(^{43}\) Article 4 of the DSU.
\(^{45}\) Article 4.2 of the DSU.
must be submitted in written form and should identify the measures at issue with the legal basis for the complaint. 46

The period for consultation is within 60 days, which the complaining parties and responding parties are required to seek agreed solution for their dispute. If the consultation fails to produce agreed solution for dispute, they can also ask the WTO director-general to mediate or try to help in any other ways: good offices, conciliation and mediation are undertaken voluntarily if the parties to the dispute so agree. No requirements on form, time, or procedure for them exist. 47

Consultation and dispute settlement should be such that they are consistent with covered agreements and do not nullify or impair any benefits of members or the objectives of the agreements.

If the respondent fails to respond within ten days or enter into consultations within thirty days, the complaint may proceed directly to request the establishment of a panel. The DSB will usually establish the Panel at the meeting at which the panel request first appeared on the DSB’s agenda. The complaining Member, whom a case has been brought can block the creation of a panel once, but when the DSB meets for a second time, the appointment can no longer be blocked, unless there is a consensus against appointing the panel. All Parties are involved in selection of the Panel from a list of qualified persons. 48

The panel shall submit its findings in the form of written report to the DSB. 49

As a general rule, it shall not exceed six months from the formation of the panel to

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46 Article 4.4 of the DSU.
47 Article 5 of the DSU.
49 Article 12.7 of the DSU.
submission of the report to the DSB. In interim review stage the panel submits an interim report to the parties.

The panel shall hold a further meeting with the parties, if the parties present written comments. If no comments are provided by the parties within the comment period, the report shall be the final report and circulated promptly to the members. Within sixty days after the report is circulated to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

Once a panel issued its report, the reports or any part of it may be appealed by either party to a standing Appellate Body, so the appeals have to be based on points of law such as legal interpretation: they cannot request reexamination of existing evidence or examination of new evidence. The Appellate Body has 90 days to issue its own reports. The Appellate Body may uphold, modify or reverse the legal finding and conclusions of the panel. In the following chapters' research will discuss those procedures broadly with illustration with cases in the different dispute settlement procedures.

3.5. WTO Bodies Involved In the Dispute Settlement System

The dispute settlement processes involve the parties of dispute and third parties to a case, the Dispute Settlement Body, panels, the Appellate Body, the WTO Secretariat, arbitrators. Perhaps the most important function of the WTO is its dispute settlement role. The rules are administered by the Dispute Settlement Body (DSB). The DSU provides the primary legal means of settling trade related conflicts in the

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50 Article 12.8 of the DSU.
51 Article 15.2 of the DSU.
52 Ibid.
53 Article 16.4 of the DSU.
WTO. Settlement of disputes is the responsibility of the Dispute Settlement Body that is composed of all Members of the WTO. In the event of arising any dispute between two Members, the DSB initially attempts to solve the problem through consultation, mediation and conciliation; thereafter, the Dispute Settlement Body (DSB) has the sole authority to establish panels of experts to consider the case, and to accept or reject the panels’ findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.\(^5^5\)

In the next sections research will discuss the following:

- Dispute Settlement Body
- Panels
- Experts
- The role of WTO secretariat with panel stage
- Appellate Body

### 3.5.1. Dispute Settlement Body (DSB)

The Dispute Settlement Body is the General Council, the supreme decision-making body of the WTO in the absence of the Ministerial Conference, which convenes to discharge the responsibilities provided for in the Dispute Settlement Understanding (DSU). The DSB developed working practices in order to handle practical matters such as submissions of notifications and circulation of dispute settlement documents at times when legal deadlines might fall on a WTO non-working day. However, it is important to note that the DSB’s main role is to provide a

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framework to enable WTO members to express their views and to provide their comments on the legal interpretation reasoning of panel and the Appellate Body.

The DSB is responsible for the application of the DSU, in other words it oversees the entire dispute settlement procedure. It has the authority to set up panels, adopt panel and Appellate Body Reports, monitor the application of recommendations and authorize retaliatory measures when a Member fails to comply with rulings. The DSB usually meets once a month and the Director-General may convene extraordinary meetings at the request of Members. The staff of the WTO Secretariat provides administrative support to the DSB. As a general rule, the DSB makes decisions by consensus. However, when the DSB sets up panels, adopts reports or authorizes retaliation, the decision is automatically considered to be adopted, unless there is a consensus to the contrary 'a negative consensus'.\(^{56}\) The DSB is, in effect, a session of the General Council of the WTO: that is, all of the representatives of the WTO Member governments, usually at ambassadorial level, meeting together. It decides the outcome of a trade dispute on the recommendation of a dispute settlement and on a report from the Appellate Body of WTO, which may have amended the Panel recommendation if a party chose to appeal. In brief, the Dispute Settlement Body has the power to:

I. Appoint Panelists and adopt terms of reference for panels

II. Adopt or reject a recommendation of a panel or the Appellate Body

III. Maintain surveillance of the implementation of recommendations

IV. Appoint arbitrators to make recommendations on the reasonable period of time

V. Appoint a second, “implementations” panel to make recommendation on measures to restore conformity with the agreements

\(^{56}\) Article 7.1 of the DSU.
VI. Authorize the suspension of concessions or obligations.\textsuperscript{57}

The DSB provides a strong institutional mechanism for the parties to the dispute to resolve their trade differences. The role of the DSB is vital at various stages of the process. In area such as implementation, but there is need for the role of the DSB to be strengthened.

3.5.2. Establishment of Panels

After the period of consultations if the case is not resolved the complaining party can request the DSB to establish a panel. The three panelists generally are chosen from among former representatives or exceptionally five among the WTO or former government representatives, this means that there is no permanent panel at WTO; a different panel is composed for each dispute. Anyone who is qualified and independent can serve as panelist. Panel establishment should take 20-30 days; following that panel is directed to examine the case referred by the DSB in the light of the provisions of the GATT and to present findings on the case to the DSB that will help the DSB make its recommendations.\textsuperscript{58} The person who is appointed as a panelist serve independently and in an individual capacity, and not as a government representative or as representative of any organization.\textsuperscript{59}

The panel composed for a specific dispute must review the factual and legal aspect of the case and submit report to the DSB with the conclusion that the claims are well founded and measures or actions are inconsistent with WTO Agreement. In the case of the panel finding a claim of breach by a Member of WTO obligation, it makes recommendation for implementation by respondent.\textsuperscript{60}

\textsuperscript{57} P. Gallagher, GUIDE TO THE DISPUTE SETTLEMENT, 44(2002).
\textsuperscript{58} Article 7.1 of the DSU.
\textsuperscript{59} Article VIII.9 of the DSU.
\textsuperscript{60} Article VVI and IXX of the DSU.
In the following chapters research will discuss the details of panels with all cases during panel procedures.

3.5.2.1. Experts

The panelists are experts exclusively in field of international trade, sometimes that require expert’s opinions regarding scientific field. So, the DSU grants panels right to seek technical information from experts as stipulated “each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that matter. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate”.61 Under the Article 13.1 right to seek information and technical advice from any individual or body, of EC – Hormones,62 the Appellate Body examined the European Communities’ 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. The Appellate Body states that:

“Both Article 11.2 of the SPS Agreement and Article 13 of the DSU enable panels to seek information and advice as they deem appropriate in a particular case. We find that in disputes involving scientific or technical issues, neither Article 11.2 of the SPS Agreement, nor Article 13 of the DSU prevents panels from consulting with individual experts. Rather, both the SPS Agreement and the DSU leave to the sound discretion of a panel determination of whether the establishment of an expert review group is necessary or appropriate”.

61 Article 13.1 of the DSU.
62 (DS26, DS48) EC – HORMONES, United States, Canada and European Communities – Measures Concerning Meat and Meat Products
The rules and procedures set forth in Appendix 4 of the DSU apply in situations in which expert review groups have been established. However, this is not the situation in this particular case. Consequently, once the panel has decided to request the opinion of individual scientific experts, there is no legal obstacle to the panel drawing up, in consultation with the parties to the dispute, ad hoc rules for those particular proceedings.\(^{63}\)

Disputes often involve complex factual questions of technical or scientific nature for instance when the existence or degree of risk related to a certain product is subject of contention between the parties. These issues frequently play a central role in WTO dispute settlement proceedings. When the panel considers it necessary to consult expert in order to discharge its duty to make objective assessment of the fact, it may consult either an individual expert or an opinion of expert group to prepare an advisory report.\(^{64}\)

In *US - Shrimp*,\(^{65}\) the Panel received a brief from three non-governmental organizations.

The complaining parties in the dispute requested the Panel not to consider the contents of the briefs submitted by the organizations while the United States urged the Panel to take into account any relevant information in the two briefs that the Panel acknowledged receiving, so the Panel found that “accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied.”\(^{66}\) Moreover, the Appellate Body also held in this point that accepting non-requested information from non-


\(^{64}\) Art 13.2 of the DSU.

\(^{65}\) WTO/DSS8 United State of America- Import of certain Shrimp and Shrimp Product (Complainants: India, Malaysia, Pakistan; and Thailand) 8 October 1996.

\(^{66}\) Panel Report on Mexico – Telecos, Para. 8.3.
governmental sources was not incompatible with the provisions of the DSU, but in other side, the Appellate Body emphasize on the comprehensive nature for the Panel authority seeking information states:

"The comprehensive nature of the authority of a panel to 'seek' information and technical advice from 'any individual or body' it may consider appropriate, or from 'any relevant source', should be underscored. This authority embraces more than merely the choice and evaluation of the source of the information or advice which it may seek. A panel's authority includes the authority to decide not to seek such information or advice at all. We consider that a panel also has the authority to accept or reject any information or advice, which it may have sought and received, or to make some other appropriate disposition thereof. It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case".  

3.5.2.2. The Role of WTO Secretariat with Panel Stage

The WTO secretariat is responsible for the administrative aspect of the Dispute Settlement Procedures, as well as for assistance panels on legal and procedural aspects of the dispute at issue. The WTO secretariat deals with panel logistical arrangement, i.e. organizing the panelist travel to Geneva where panel meeting take place and preparing the letters inviting the parties to the meeting with the panel receiving the submission and forwarding them to the panelist, moreover providing them with legal assistance by advising him on legal issues arising in a dispute including the jurisprudence of past Panel and Appellate Body, because panels are not permanent bodies, the secretariat as the institutional memory to provide some

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68 Article XXVII.1 of the DSU.
continuity and consistency between panels which is necessary to achieve the DSU objective of providing security and predictability to multilateral trading system.\(^{69}\) The staff of the WTO Secretariat, assists Members in respect of dispute settlement at their request, it also provides additional legal advice and assistance to developing countries in matters relating to dispute settlement within the parameters of impartiality.\(^{70}\) For achieving of their purpose, the institute for training and Technical Cooperation, a division in the WTO Secretaries, currently employs one full time official and one permanent part time basis, two independent consultants. All those experts must assist the developing countries Members in the way that respects the continuous impartiality of the secretariat.\(^{71}\) The WTO Secretariat runs the technical cooperation activities in Geneva and sometimes the course is held in the capitals of Members by conducting special training courses concerning the dispute settlement system.\(^{72}\)

3.5.3. Appellate Body

The establishment of the WTO Appellate Body in 1995 was one of the major reforms brought about by negotiation of the Understanding on Rules and Procedures Governing the settlement the dispute (the DSU). One important reason for the creation of the appellate Body is more automatic nature of the adoption of panel reports since the inception of the DSU. The Appellate Body is permanent body which consists of seven persons three serve at time of hearing any appeal. Members are appointed by the DSB for four year terms and may be reappointed once again.

The Appellate Body protects the interest of Member by insuring that the automatic dispute settlement system does not produce unsound decision that could

\(^{69}\) Article III.2 of the DSU.
\(^{70}\) Article 27.2 of the DSU.
\(^{71}\) Ibid.
\(^{72}\) WTO Publication, A HAND BOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, 144 (2004). Also see, Article 27.3of the DSU.
upset the balance of rights and obligations under the agreements or affect the reasoning of future panels or the exception of Members implementing the agreements. It is entrusted with the task of reviewing the legal aspects of the reports issued by panel. The Appellate Body is the second and final stage in the adjudicatory part of the dispute settlement system; however the issues of law includes not only panel's legal interpretation of WTO provision, but also the contact of its processes under the procedural requirements of the DSU.

In general the Panel and Appellate Body have illuminated the meaning of WTO Law and their jurisprudence has entered other field of international economic law.

So, the Appellate Body, for example reviews claims that the panel failed to make an objective assessment of the facts under Article 11 of the DSU. According to Article 17.6: scope of appellate review, the mandate of Appellate Body is limited on issue of law and legal interpretations. In the case of Canada - Periodicals, and United State the complainant, the Appellate Body made reference to the limits of its mandate under Articles 17.6 and 17.13 are as follows:

"We are mindful of the limitation of our mandate in Articles 17.6 and 17.13 of the DSU. According to Article 17.6, an appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel".

3.6. Arbitration

In addition to panel and Appellate Body, arbitration plays an important role in the WTO dispute settlement system. Arbitrators either an individual or group, can be

73 P. Gallagher, GUIDE TO THE DISPUTE SETTLEMENT, 36(2002).
74 Isabelle V. Damme, TREATY INTERPRETATION BY THE WTO APPELLATE BODY, 3 (2009).
75 Ibid.
called to adjudicate certain questions at several stages of the dispute settlement process.\textsuperscript{77} Members may seek arbitration within the WTO as an alternative means of dispute settlement to facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.\textsuperscript{78} The Arbitrators observed that such recourse is not subject to multilateral control and that, accordingly, it is incumbent on the arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system. The Arbitrators carefully examined the claims, arguments and evidence submitted by the parties in light of the rules on burden of proof applicable in the context of arbitrations under Article 22.6 of the DSU, as instructed by the parties and the arbitrations as stipulated in the agreed procedures submitted by the parties.\textsuperscript{79}

Arbitration calls for the specific situation or for the questions, i.e. after the DSB adopted Panel, Appellate Body reports, that require from losing Member to implement the rule and recommendations.\textsuperscript{80} It’s also a call for the matters of retaliation by request arbitration to limit the level of suspension of obligation.\textsuperscript{81} These two forms of arbitration aim to clarifying very specific questions in the process of implementation, thus, the finding or decisions are to be binding for the parties.\textsuperscript{82} The parties must reach mutual agreement to arbitration and the procedures to be followed. Agreed arbitration must be notified to all Members prior to the beginning of the arbitration process. The parties to the proceeding must agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where in any member may raise any point

\textsuperscript{77} WTO PUBLICATION, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, 24(2004).
\textsuperscript{78} See, Art. 25, 1 of the DSU.
\textsuperscript{79} Award of the Arbitrators on US – Section 110(5) Copyright Act (Article 25.3), Para. 4.4.
\textsuperscript{80} Article 21.3(c) of the DSU.
\textsuperscript{81} Article 22.6 of the DSU.
\textsuperscript{82} WTO Publication, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, 26(2004).
relating thereto. Moreover, the arbitration result is not appealable but can be enforced through the DSU.

3.7. Rules of Conduct

The NAFTA Code of conduct served as the basis for the proposal for a WTO code of conduct for individuals involved in WTO dispute settlement. The proposal was submitted by US to the GATT contracting parties on 9th November 1994. Under the DSU, the players in a dispute settlement process are subject to certain rules designed to ensure due process and unbiased decisions. The DSU Rules of conduct cover three groups; (1) panelist, experts and arbitrator. (2) Appellate Body member and its support staff; and (3) WTO Secretariat staff. Those covered persons are required to be independent with integrity and impartial to avoid direct or indirect conflict of interest and to maintain confidentiality.

The 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, e.g. Information on financial, professional and other active interest.

In the case of violation of any requirements by the covered person, it gives the parties to the dispute a right to challenge the participation of that person in the dispute settlement proceeding and request the exclusion of that person from any further

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83 Art 25.3 of the DSU.
85 NAFTA abbreviation of “North American Free Trade Agreement”.
participation in the process. In the case of secretariat staff, the challenge is addressed to General-director.

3.8. Conclusion

The WTO dispute settlement system is based on the dispute settlement system of the GATT 1947. That system has shown remarkable success in many aspects. As mentioned above, the DSB is central in the whole dispute settlement process and provides a strong institutional mechanism for the parties to the dispute to resolve their trade differences. The role of DSB differs at various stage and processes. There is strong desire to strengthen DSS continuously through different proposals for improving this system. Request for reforming the WTO dispute settlement system began in 1997 in response to a decision that has been adopted at the Marrakech Ministerial Conference by which Members agreed to review the DSU within four years. The DSU Review began in 1998. In the Doha Ministerial Declaration in November 2001, emphasize on “We agree to negotiations on improvements and clarifications of the DSU. The negotiations should be based on the work thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter”.

In fact, the dispute settlements are a continuous experiment conducted in a context where solutions have to be found. The dispute settlement system is developing and will continue to progress in future.