CHAPTER – IV

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CHAPTER – IV

ALTERNATIVE MEANS FOR SETTLING DISPUTES

CONSULTATION, GOOD OFFICE, CONCILIATION AND

MEDIATION

4.1. General Introduction

Suitable ways of settling international disputes are necessary to address two fundamental problems of international law. The need to prevent escalation of conflicts between states into breaches of the peace, and that of making available procedures for the interpretation and application of rules of international law.

The numerous international dispute settlement treaties concluded since 1899 and 1907 Hague Conventions for the Pacific Settlement of Disputes distinguish between a number of political and legal procedures.

The WTO dispute settlement system is a rules-based system as opposed to negotiation, conciliation and mediation type of dispute resolution mechanism. The system includes procedural steps that can be initiated by any WTO Member dissatisfied with other Member is measures considered inconsistent with any provision of the WTO Agreements. But under the World Trade Organization, dispute settlement procedures provide for almost all political or diplomatic and legal methods of dispute settlement, and can be divided into four principal stages: consultations, the panel process, the Appellate Body, and implementation. In the first stage of consultations, the aims of the WTO dispute settlement mechanism are “to secure a positive solution to a dispute”. Developing a mutually acceptable solution consistent

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with WTO provisions. To obtain positive solution for the problems between members who are encouraged through the dispute settlement process.²

There are two main ways to settle a dispute (1) by the way of bilateral consultation, when the parties reach an agreed solution, and (2) through adjudication, by adoption and implementation panel and Appellate body reports, which are binding upon the parties once adopted by the DSB.³

In this chapter, research will deal with different sections through discussion, analysis and illustration of different cases. With each section:

First in the consultation stage which highlights on the objective and the importance of consultations; and

Second it will deal with procedures of consultations through clarifying how to make formal request for consultations and talking about disclosure of information.

Third deals with different sections as:

• Participation of third party in the consultations;

• Confidentiality during consultation stages;

• Consultations in good faith;

• Adequacy and result of consultation;

• Good office, conciliation and mediations;

Finally, research provides proposals in strengthening Good office, conciliation and mediations, and conclusion.

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4.2. Consultation Phase

At first view, it appears that the Member states have understood the DSU rules to mean that consultations are compulsory, and that no panel may be established without some form of negotiation. Under Article 4, reveals that there is no provision which specifically requires that a consultation must precede the establishment of a panel.4

4.2.1. Introduction

The aim of the WTO dispute settlement system is to secure a positive solution to disputes. A solution mutually acceptable to the parties to the dispute and consistent with the covered agreement is clearly to be preferred. In the absence of mutually agreed solution, the first objective of DSB is usually to secure the withdrawal of the measures which is impracticable. The parties concerned should enter into negotiations on compensations where this has not been agreed. A party to the dispute may suspend the application of concessions or other obligations under the covered agreement to the other party concerned subject to authorization by the Dispute Settlement Body of such measures.5 There are different ways to settlement of disputes, first way by adoption of panel report without appeal, and in the case of adoption appeal adoption of Appellate Body Report as modified or upheld by ABR. Second way for settlement of dispute is by bilateral settlement between the parties of dispute and final way by use of WTO DSS by using different process, starting by consultation, panel process and appellate process.6

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4 Article 4(2), "Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations...."
6 Ibid.
4.2.2. Objectives and importance of consultations

4.2.2.1. Objectives of consultations

The preferred objective of the DSU is for the Members concerned to settle the dispute between them in a manner that is consistent with the WTO agreements. Consultations give the parties opportunity to discuss the matter and to find a satisfactory solution without resorting to litigation. Only after such mandatory consultations have failed to produce a satisfactory solution within 60 days, may the complainant request adjudication by panel.

Consultation also allowed parties to clarify the facts of the matter and the claims of the complainant. It becomes possible to dispel misunderstanding as to the actual nature of the measures at issue. The consultation remains possible for the parties to find a mutually agreed solution at any later stage of proceedings.

4.2.2.2. Importance of consultations

The importance of consultations is clear in case of The Panel on Brazil - Desiccated Coconut and Philippines which considered the importance of consultations in the dispute settlement process and indicated that the Members' duty to consult is absolute and cannot be subject to the prior imposition of any terms and conditions by a Member. The Philippines' request concerns a matter in which this Panel views with the utmost seriousness. Compliance with the fundamental obligation of WTO Members to enter into consultations where a request is made under the DSU is vital to the operation of the dispute settlement system. The consultation considered as pre-litigation initiative with a filing of a "Request for Consultations" is elaborated further by the Panel Report on Brazil - Desiccated Coconut, Para. 287. See also, WTO analytical index-guide to WTO law and practices.
the official beginning of the dispute within WTO and brings the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) into play. Consultations provide parties with the opportunity to debate the issue and find a satisfactory solution without resorting to litigation.\(^{11}\)

The GATT 1947 practices consider the consultation phase as testimony to the important role of consultations in dispute settlement.

When a dispute arises between WTO member countries, the complaining party may request that the other nation(s) enter into consultations to attempt to resolve the dispute. Consultations are required to be active for a period of 60 days before the complaining party can request the formation of a panel to resolve the dispute. The Appellate Body stresses the importance of consultations in WTO dispute settlement as follows: “through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the difference between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Art.3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define the benefits to complaining and responding parties, as well as third parties and to the dispute settlement system as a whole”. Consultations enable the dispute parties to understand better the factual situation and legal claims in respect of the dispute such as understanding may allow them to resolve the matter without future proceeding. The consultation can serve as an informal pre-trial discovery mechanism. Starting consultations, when WTO Members consider that a benefit accruing under WTO agreement is impaired or nullified by any violation taken by another WTO Member

\(^{11}\) http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#intro.visited on 15-08-2010.
may request consultation with other member. The WTO member is required to accord sympathetic consideration to, and afford adequate opportunity for consultation.\footnote{12} Requests for consultation giving the reasons for the request must be in writing and should be informed to the DSB and the relevant councils and committees by the member requesting consultations.

For the conduct of consultations, parties have broad discretion as regards the manner in which consultations are to be conducted; the DSU provides rules for consultations by pursuant to Articles 22 or 23 or the corresponding provisions in other covered agreements. The consultation process is essentially a political-diplomatic process, without prejudice to the right of any Member in future legal proceedings.\footnote{13}

The Member to which a request for consultation is made must reply to the request within 10 days of the date of receipt, and enter into the consultation within the period not more than 30 days. If the Member does not respond within ten days after receipt of the request or does not enter into consultations within a period of not more than thirty days, then the Member who requested the consultations may proceed directly to request the establishment of panel. As the appellate body noted in \textit{Mexico-Corn syrup} case, in such a case the respondent, by its own conduct, relinquishes the potential benefits that could be derived from consultations. The Member requesting consultation is free to choose either type of consultations. Only in the consultations pursuant to Article 22 can a Member other than the consulting Members be allowed to participate in the consultations. A Member who considers that, it has a substantial trade interest may notify the consulting Members and the DSB of such interest within

\footnote{12} Article 4.4 of the DSU.  
\footnote{13} Article 4.6 of the DSU.
ten days after the date of the circulation of the request for consultations. But if the consultations are conducted pursuant to Article 23, or corresponding provision, it is not possible for any other Member to join in the consultations.

In fact, respondents have argued that the consultations held had not been adequate or meaningful or that the complainant had not engaged in good faith. In the case of Korea - Alcoholic beverages, the panel ruled that it was not for the Panel to assess the adequacy of consultations. Consultations are matters reserved for the parties and nobody but the parties are to be involved in the consultations; what takes place in these consultations is not the concern of panels. Panel only ascertain whether consultations were held or at least were requested.

When the consultations are successful and lead to mutually agreed solutions to the dispute, these solutions must be notified to the DSB and other relevant WTO bodies. The mutually agreed solutions should be consistent with the WTO law.

Consultations are often an effective means of dispute resolution in the WTO. The instruments of adjudication and enforcement in the dispute settlement system are by no means always necessary. The consultations are the key non-judicial or diplomatic feature of the dispute settlement system of the WTO.

4.2.3. Procedures of Consultations

The WTO dispute settlement process starts when a WTO Member government formally requests WTO consultations with another Member actually, informal consultation may already have occurred between the complaining parties and

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14 Article 4.11 of the DSU.
15 Panel Report, Korea - Alcoholic Beverages, Prar.10.19.
responding parties. When the formal request is made only after the parties states by themselves are satisfied that informal consultation is not productive.

The parties to the dispute before taking any actions have to talk with each other to see if they can settle their disputes by themselves by way of "consultations".

The aim of consultation is to explore the nature of complaint by exchanging information in a confidential and bilateral way to help arrive at agreed solutions.\(^{19}\)

The consultations are also considered as a good chance to find out the responding party’s potential defence.

**4.2.3.1. Formal Request for Consultation**

Formal request for consultation shall be in writing and shall be served on the DSB and other relevant councils and committees. The request should specify the Articles of the relevant WTO agreement on which consultation is sought.\(^{20}\)

The complaining party should give the reasons for the request including identification of the measures at an issue and an indication of legal basis for the complaint.\(^{21}\)

During the consultation, the parties to dispute shall act in accordance with the provisions of covered agreements before resorting to further action, the parties should attempt to obtain satisfactory adjustment of conflict. Consultations also provide the defending party notice of the measures at issue and claims raised by the complainants without recourse to panel proceedings.

\(^{19}\) (WT/DS27) European Communities — Regime for the Importation, Sale and Distribution of Bananas (Complainants: Ecuador; Guatemala; Honduras; Mexico; United States of America) 5 February 1996.

\(^{20}\) Art. 4 of the DSU.

\(^{21}\) Art. 4.5 of the DSU.
4.2.3.2. Time Frame for Consultation

The WTO dispute settlement system has time frames for settling any disputes through the DSU procedures. For consultation stage, Article 4.3 gives limited time, starting by replying to the request made by other party or parties within 10 days after the date of receipt of request and shall enter into consultation in the period not more than 30 days from the date of receipt of the request but if not, Members may proceed directly to request the establishment of panel. When the parties of dispute failed to settle it within 60 days after the date of receipt of the consultation, the complaining Member can also request the establishment of panel. There are some suggestions for amending the period of consultation to be more flexible. There are also good reasons for introducing more flexibility, the proposal by EC to replace, in paragraph 7 of Article 4 of the DSU, at the end of the paragraph states, where one or more parties is a developing country Member, the time period established in paragraph 7 of Article 4 shall, if the parties agree, be extended by up to 30 days. Other parties to the dispute shall accord sympathetic consideration to a request by a developing country's member for such an extension.

This recognition of right to request a panel after 30 days of consultations would not impede continuation of consultation beyond these 30 days of period. By empowering the complaining country to request a panel, subsequent consultations could become politically more important and facilitate agreed dispute settlements.

Therefore, developing country insists that the consultation period of 30 days must be extended at the request of a developing country Member. Consultations typically take place in Geneva and are confidential which also means that the WTO

22 Art. 4.7 of the DSU.
Secretariat is not involved. So, the procedures start with the first stage for settlement of dispute by consultation which begins with a request for consultation taken into account separately.

4.2.3.3 Disclosure of Information

The disclosure of information during the consultations stage explained through *India-patent and US*, the US argued that if India had disclosed, during consultations, the existence of certain administrative instructions, the United States would have included in its request for establishment of a Panel a claim under Article 63 of the *TRIPS Agreement*. With respect to disclosure of information during consultations, the Appellate Body noted that:

“All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. For the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings. If, in the aftermath of consultations, any party believes that all the pertinent facts relating to a claim are, for any reason, not before the panel, then that party should ask the panel in that case to engage in additional fact-finding”.

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24 Article 4.2 of the DSU.
25 Appellate Body Report on India – Patents (US), Para. 94.
4.3. Number of consultations

Table 4.1: Number of consultations

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<td>6</td>
</tr>
<tr>
<td>2012</td>
<td>9</td>
</tr>
</tbody>
</table>

To date in the WTO, 436 disputes have been brought to the WTO; requests for consultations have been accepted, in 142 case. It should be emphasized, however, that seven of those requests were submitted by multiple complainants. So, in cases where requests involve multiple complainants, each one of them will be considered to have submitted an individual request, and this brings the total number of requests for consultations to 453, as is shown in Table 4.1.

The number of new disputes in 2010, at 17 cases, was slightly higher than the 14 requests for consultations notified in 2009. And the number of new disputes in 2011, 6 cases and in 12th April 2012, 9 cases. However, the number of new disputes in recent years is well down from the early years of the decade. In April 2012, 436 disputes had been filed since the WTO’s creation in 1995.26

4.3.1. Participation of Third Party in the Consultation Stage

Third parties have only limited rights at the consultation stage. If the request for consultation is based on Article XXII of WTO 1994, a Member with 'substantial trade interest' can within ten days after the circulation of the request for consultations

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notify the consulting Members and the DSB of its desire to participate in the consultations.27

A WTO Member who is neither the complainant nor the respondent may be interested in the matter which the parties to a dispute are discussing in their consultations.

There are different reasons for participation in consultations e.g. the WTO Member has a trade interest or feels similarly aggrieved by the challenged measures or there are benefits from those measures; also the Member has an interest in being present at discussion on any mutually agreeable solution because such a solution may affect its interests.28 Participation of the Member as third party during consultation process does not provide that Member with any automatic right of participation as third party in the panel process.29

If the Member country considers that it has substantial trade interest in the consultation, it may notify the consulting countries and the DSB, within 10 days after the date of the circulation of the request for consultations of its desire to join in the consultation and after that request for consultation was addressed, agreed that the claim of substantial interest is well founded. If that request for joining in the consultation is not accepted, the applicant Member countries may request consultation of their own.30

For illustration the EC rejected Japan’s request to join in the consultations in United State Import Measures on certain product from the European Communities

27 Art. 4.11 of the DSU.
30 Art. 4.11 of the DSU.
case, and the US rejected India's request to join in the consultation in 'US countervailing Duties on certain corrosion-Resistant Carbon Steel flat products from Germany.' The countries made 143 requests to participate in the consultations, which amount to 48% of the total 259 requests. In case of participation of the third party, that participation affect on the confidentiality of information from Consultations stage as some parties argue. They object for participation of third party as mentioned above in the Panel on Mexico – Corn Syrup considered, the effect of third party participation when referring to consultations and concluded that, the requirement to maintain the confidentiality of consultations is not violated by the inclusion of information obtained during consultations in the written submission of a party provided to a third party in the subsequent panel proceeding even if that third party did not participate in the consultations. The Panel emphasizing on the point of participation of the third party in consultation.

"We therefore conclude that the requirement to maintain the confidentiality of consultations is not violated by the inclusion of information obtained during consultations in the written submission of a party provided to a third party in the subsequent panel proceeding even if that third party did not participate in the consultations". There are ambitions to strengthen the position of developing countries and third party joined in consultations process by proposal to amend Article 4, the EC proposal to replace word “should” by “shall” in Article 4:10 of the DSU “during consultations Member shall give special attention to the particular problems and interests of developing country Members”, this could contribute in rendering the

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11 DS/165- between United States of America — Import Measures on Certain Products from the European Communities (Complainant: European Communities, 4 March 1999).
12 DS/213- United States of America — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (Complainant: European Communities), (10 November 2000).
14 DS/132, Mexico — Corn Syrup- Complainant United States of America
15 Panel Report on Mexico – Corn Syrup, Para. 7 41.
provisions on special and differential treatment of developing countries in the DSU more effective. Also the proposals made by Costa Rica suggest to enlarge third party rights by amending Paragraph 11 of Article 4 of the DSU to the effect that a Member other than the consulting Members shall be joined in the consultations whenever such third party requests. There are number of proposals to enhance the third party rights. In fact, the bilateral character of dispute settlement is useful from a political point of view. From the other side, the enhancement of a third party is required to strengthen the quasi-judicial process. In some views the third party rights issue is closely related to the amicus curiae. There are difference between third party and amicus curiae in the purpose of intervention, in the case of requesting third party in consultation, under Article 4:11 to join in consultation under the claim of substantial interest, but in the case of amicus curiae, asking for permission to intervene in the case in which they are neither plaintiff nor defendant, usually to present their point of view is obviously a different purpose. Actually, the refusal participation of third party in consultation stage, is not well received by many Members, and goes against the principle of transparency.

In most of the WTO disputes involving third party participation, Members joined the complaining parties to protect their interests. However, although there are cases when a party may desire to participate in a dispute on the side of the defending party, as was the case when Korea joined the defendant party, Indonesia, in the

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36 Ibid., 94.
37 Latin for 'friend of the court', person invited by the court to advise it on some matter, amicus curiae brief is an appellate brief prepared and submitted by non-party with the court's permission. The persons asking for permission to intervene in a case in which they are neither plaintiff nor defendant, usually to present their point of view in a case which has the potential of setting a legal precedent in their area of activity.
Indonesia - Automobile case, the DSU is silent on the status of co-defendants. In the DSU Review, a provision should be added to clarify the rights of co-defendants.39

4.4. Confidentiality during Consultation Phase

The dispute settlement system insists on the important confidentiality of information in the stage of consultations, Article 4.6 of the DSU, states “Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings”, the provisions of this section clearly state that confidentiality between the parties of consultations should not cause any prejudice to the other WTO Members.40 In the case of India – Patents (US), the United States argued that if India had disclosed, during consultations, the existence of certain administrative instructions, the United States directly requesting DSB to establish panel on the argue of under Article 63 of the TRIPS Agreement, Indian disclosure of the information during the consultation between them, the Appellate Body stated that “All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations.41

In the other case Korea – Alcoholic Beverages, Korea claimed before the Panel that the complainants breached the confidentiality requirement of Article 4.6 of the DSU by making reference, in their submissions, to information that was supplied

40 Art. 5.2 of the DSU.
41 Appellate Body Report on India – Patents (US), Para. 94.
by Korea during consultations. The panel report stated that “We note that Article 4.6 of the DSU requires confidentiality in the consultations between parties to a dispute. This is essential if the parties are to be free to engage in meaningful consultations. We therefore, find that there has been no breach of confidentiality by the complainants in this case in respect of information that they became aware of during the consultations with Korea on this matter”.42

4.5. Consultation with Good Faith

Article 4.3 of the DSU emphasizes on, entering into consultation in good faith, as stated: “If a request for consultation is made pursuant to a covered agreement, the Member to which the request is made...shall enter into consultations in good faith within a period of not more than 30 days after the date of receipt of the request, with a view of reaching a mutually satisfactory solution”. The Article 4.3 may be considered as a sub-function of more general obligation of Art.3.10 of the DSU to engage in dispute settlement procedures in good faith; “It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked”. However, the obligation under Art.4.3 DSU set out more specific duty than its counterparts in Art.3:7 and 3:10 of the DSU.

It’s clear that the Art.4:3 has more limited scope and addresses only for the Members who request for consultation, dissimilar to Article.3:10 which address all members involved in consultation and settlement procedures. Article 4 has more limited scope and addresses only to the Member to which the consultation is made,

42 Panel Report on Korea – Alcoholic Beverages. Para. 10.23.
but in other Article 3.10, which engages both Members involved in conciliation and dispute settlement procedures. Panel reports in different cases contain reference to Article 4.3 of the DSU as EC-Bananas, US-FSC, Turkey -Textiles and Barisal-Coconut but, in the case of Mexico-HFSC panel report referred to Article 21.5 to offer any additional commentary on Article 4.3 of the DSU.\(^43\)

It’s clear from different cases that there are complainants from the entrance of the consultation stage with good faith towards other Member, in Korea – Alcoholic Beverages, Korea and EC, US case, Korea argued before the Panel that the complaining parties violated Articles 3.3, 3.7 and 4.5 of the DSU by not engaging in consultations in good faith to reach a mutually agreed solution. Korea maintained that there had been no meaningful exchange of facts because of the complainants treated by the consultations as one-sided question and answer sessions. Korea asserted that such an approach frustrated any reasonable chance for a settlement and considered the non-observance of specific provisions of the DSU as a “violation of the tenets of the WTO dispute settlement system”.\(^44\)

4.6. Adequacy of the Consultation

The EC – Bananas II case, confirmed that the panel does not have a mandate to investigate the adequacy of the consultation process that took place between the parties. In our view, the WTO jurisprudence so far has not recognized any concept of ‘adequacy’ of consultations. The only requirement under the DSU is that consultations were in fact held, or were at least requested, and that a period of sixty days has elapsed from the time consultations were requested to the time a request for

\(\text{\footnotesize \cite{Panizzon2006, PanelReportKoreaAlcoholicBeverages, PanelReportTurkeyTextiles}}\)
a panel was made. What takes place in those consultations is not the concern of a panel. The point was put clearly by the Panel in *Bananas III*..."We do not wish to imply that we consider consultations unimportant. Quite the contrary, consultations are a critical and integral part of the DSU. But, we have no mandate to investigate the adequacy of the consultation process that took place between the parties and we decline to do so in the present case".\(^{45}\)

The panel reaffirm their function regards consultation is only to ascertain whether consultation were held. The report stated: "Consultations are . . . a matter reserved for the parties. The DSB is not involved; no panel is involved; and the consultations are held in the absence of the Secretariat. While a mutually agreed solution is to be preferred, in some cases it is not possible for parties to agree upon one. In those cases, it is our view that the function of a panel is only to ascertain that the consultations, if required, were in fact held".\(^{46}\)

### 4.7. Result of Consultations

The result of consultation explained by the *EC-Banana III* case, when the European Communities argument that consultations must produce an adequate explanation of a complainant's case, the panel report rejected this argument; panel considers the consultations as the first step in the dispute settlement process; the Panel Report emphasize on "as to the EC argument that consultations must lead to an adequate explanation of the Complainants' case, we cannot agree. Consultations are the first step in the dispute settlement process. While one function of the consultations may be to clarify what the case is about, there is nothing in the DSU that provides a complainant cannot request a panel unless its case is adequately explained in the

\(^{45}\) Ibid.

\(^{46}\) Panel Report on EC – Bananas III, Para. 7.19.
consultations. The fulfillment of such a requirement would be difficult, if not impossible, for a complainant to demonstrate if a respondent chose to claim a lack of understanding of the case, a result which would undermine the automatic nature of panel establishment under the DSU. The only prerequisite for requesting a panel is that the consultations have ‘failed to settle a dispute within 60 days of receipt of the request for consultations’.

Ultimately, the function of providing notice to a respondent of a complainant’s claims and arguments is served by the request for establishment of a panel and by the complainant’s submissions to that panel.

4.8. Good Offices, Conciliation and Mediation

The WTO Dispute Settlement System is concerned to provide different means to settle disputes between the Members. Those means sometimes characterized by the compulsory nature as consultations in the Art. 4 of the WTO DSU, other alternative means as good offices, conciliation and mediation, stipulated in Art.5 of the WTO DSU, with the voluntary nature encouraging WTO Members to solve their disputes amicably.

4.8.1. Introduction

The good offices, conciliation and mediation, as methods for solving disputes are mostly to settle disputes diplomatically; in other words without resorting to judicial actions. The good offices, conciliation and mediation are not only formalities and way stations to resolution of the dispute by a panel or Appellate Body process. In fact, the solution is mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. Moreover, it is understood that requests for conciliation should not be intended as contentious acts and that, if a

47 Article 4.7 of the DSU.
48 Panel Report on EC – Bananas III (Guatemala and Honduras), Para. 7.20.
dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.⁴⁹

Regarding to the stage of consultations, “Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by them.

The DSU emphasize on making all efforts before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.⁵⁰ The nature of consultations, resort to which is mandatory, the DSU provides for voluntary use of three other mechanisms long available in international disputes as Good offices, Conciliation and Mediation.

4.8.2. Alternative Means to Settle Disputes

The DSU provides different means of settling the disputes arising out before DSB (WTO) as Good office, Conciliation and Mediation as the methods for solving dispute. In fact those means depend on diplomatic efforts more than the legal principles, the party(s) of dispute, have the rights to voluntarily request the procedures for good office, conciliation and mediation if the parties of dispute agree, the proceeding shall be strictly confidential and not diminish the position of either party in any following dispute settlement procedure. This is important because, during such negotiations, a party may offer a compromise solution, admit certain facts or divulge to the mediator the outer limit of the terms on which it would be prepared to settle. If no mutually agreed solution emerges from the negotiations and the dispute goes to adjudication, this constructive kind of flexibility and openness must not be detrimental to the parties, and without prejudice to the rights of either party in any

⁴⁹ Article 3.7.10 of the DSU.
⁵⁰ Article 4.1.5 of the DSU.
future proceedings. When the parties of disputes agree, procedures for good office, conciliations and mediation may continue while the panel process proceeds. The Director-General may act in an ex officio, offer good office, conciliation and mediation.

The initiate of the good office, conciliations and mediation, acting through requesting Director-General by the parties of dispute to assisting parties to settle a dispute, or by the Director-General to express his willing to offer good office, conciliations and mediation by himself or by mediator, of course all those means acting only after initiating of consultation, not before. For e.g. the parties can enter into those procedures during their consultation, so the complainant party or parties cannot request establishment of panel before this 60 days period has expired, unless the parties of dispute consider that good office, conciliations and mediation process has failed to settle the dispute.

4.8.3. Proposal of assistance by Director-General

The Article 5.6 empowers the WTO Director General to express his offer for the purpose of good office, conciliation and mediation, in the view to assist Member to settle dispute, the practical application for this Article stated in the case dated on 13th July 2001, the WTO Director-General addressed a communication to the Members expressing his views that “Members should be afforded every opportunity to settle their disputes through negotiations whenever possible”.

The WTO Director-General noted that Article 5 of the DSU, which provides for the use of good offices, conciliation and mediation, had not been used and

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51 See the http://www.wto.org/WTO Disputes - Dispute Settlement CBT - Dispute Settlement without recourse to Panels and the Appellate Body - Mutually agreed solutions - Page 2.mht.
52 Article 5.1.2.5.6 of the DSU.
53 Ibid, Article 5.4 of the DSU.
reminded Members that he was ready and willing to assist them as is envisaged under the terms of Article 5.6. The communication included a set of procedures for Members to use to request assistance under Article 5. The communication notes that these procedures are intended “purely to help Members resolve their differences and do not limit their treaty rights in any manner”.54

4.8.4. Mediation

On 10th October 2002, the WTO Director-General issued a communication informing the Members that on 4th September 2002, the Philippines, Thailand and the European Communities had jointly requested mediation by himself or by a mediator appointed by him with their agreement. The purpose of the mediation was “to examine the extent to which the legitimate interests of the Philippines and Thailand are being unduly impaired as a result of the implementation by the European Communities of the preferential tariff treatment for canned tuna originating in African-Caribbean-Pacific (ACP) States. In the event that the mediator concludes that undue impairment has in fact occurred, the mediator could consider means by which this situation may be addressed”. Moreover, the requesting Members considered that the matter at issue was not a dispute within the terms of the DSU; they agreed that the mediator could be guided by procedures similar to those envisaged for mediation under Article 5 of the DSU, as described in a communication by the Director-General. The mediation resulted in an amicable outcome reached by the parties based on an advisory opinion of the mediator.55

Article 5 of the DSU provides for good offices, conciliation and mediation to be the agreements to which the DSU applies are contained in Appendix I of DSU.

55 WT/GC/66 and WT/GC/66 and also see WT/GC/71.
They are referred to as the "covered agreements" in the DSU. Many matters brought before the DSB include alleged violations of more than one covered agreement. In EC-Regime for the Importation, Sale and Distribution of Bananas, complaint by Ecuador, Guatemala, Honduras, Mexico and the United States, for instance, the matter included alleged violations of GATT 1994, the Import Licensing Agreement, the Agreement on Agriculture, the TRIMs Agreement and the GATS. The DSU provides that the parties to a dispute may agree voluntarily to employ good offices, conciliation and mediation as settlement technique. Such procedures begin or are terminated at any time. The complaining party must allow a period of 60 days after the date of request for consultation before requesting for establishment of panel. Normally, the Director-General, acting in an ex-officio capacity will offer good offices,conciliation or mediation with the view in assisting Members to settle a dispute.

These three procedures are similar to that of a neutral third party involved to aid the process of dispute settlement. A good office is more of channel of communication than an active participant in the dispute settlement process. Formal mediation is rare, since the parties normally have exhausted all diplomatic efforts to resolve the dispute before seeking other actions. The first request to the WTO Director General for mediation was not made until 10th October 2002, after the WTO had been existence for nearly 8 years. The Article 5 has so far not been used in WTO dispute settlement. In one instance, three WTO Members jointly requested the Director-General (or a person designated by the Director-General with the requesting

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56 (WT/DS27).
57 Art.5 of the DSU.
58 Ibid, Art. 5.6 of the DSU.
Members' agreement) to mediate. The mediator was requested to examine the extent to which a preferential tariff treatment granted to other Members unduly impaired legitimate export interests of two of the requesting Members. The task of the mediator was also possibly proposing a solution.

A mediator independently investigates the dispute and makes written proposal for its resolution. A mediator is an active participant in the dispute settlement process, bringing the parties together in an informal setting and making suggestions for resolution and closure of the dispute. In practice, the three procedures are useful not only in resolving issues of law and fact but also in dealing with unjustifiable issues that an adjudicative process cannot settle.⁶⁰

The DSU specifically foresees good offices, conciliation and mediation for disputes involving a least-developed country Member. Where the consultations have not resulted in a satisfactory solution and the least-developed country Member so requests, the Director-General or the Chairman of the DSU must offer their good offices, conciliation and mediation. Here as well, the aim is to assist the parties to settle the dispute before the establishment of a panel.⁶¹

4.8.5 Proposal for Strengthening Good Office, Conciliation and Mediation

Under the alternative means of settling the disputes such as good offices, conciliation and mediation stipulated in Art.5 of the DSU has never been invoked until recently in WTO practices. Also under GATT 1947, there have likewise been only very few cases where the Director General was asked to provide good offices, conciliation and mediation. Some of these mediation efforts by DG or by his representative were not successful; for example, as mediation by the DG in the 1982

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⁶¹ Article 24.2 of the DSU.
citrus preference dispute between the EC and the US, or the good offices by the DG in the first Banana dispute 1992 between developing countries and EC.

There was limited success as the mandatory conciliation phase in the subsidies committee pursuant to the 1979 Tokyo Round, the agreement on subsidies have prompted WTO member to refrain from making consultation compulsory under the dispute settlement provisions of the WTO Agreements. For improving for Art. 5 to be more operational, the DG has notified WTO Members of his willingness to assist them pursuant to Art.5 of the DSU. Moreover, the first time request to specify the nature of the Art. 5 by viewing the legal differences between good offices, conciliation and mediation. In 2002, the new Article 5 procedures have been invoked for the first time by Philippines, Thailand and the EC. In 2003, the EC accepted the mediation proposal and implemented it through an EC regulation. The procedures for requesting actions follow the Art.5 of the DSU, as attached to the communication from the DG dated 17th July 2001, the WTO law for more procedures make it more effective, the alternative dispute resolution method, become more important in certain kind of dispute e.g. trade related IPRs, Private Investment Right or government procurement contracts. As in private business law, the interest of the economic operators affected by the violation of the WTO rules. The legal remedies available in alternative forum may vary considerably, e.g. reparation of injury and financial compensation being available on the basis of general international law principles of state responsibility in ICJ, but not in the WTO panel and appellate proceeding. The important initiative by the D-G in July 2001 for Art. 5 to regulate the inherent ex officio power of the DG should not preclude consideration of the need for

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62 See, WT/DSB/25.
additional Art. 5 procedures such as the establishment of Alternative Dispute Resolution Center “ADR” and complementary for the advisory center of WTO law established in 2001.\textsuperscript{64}

4.9. Conclusion

The WTO Dispute Settlement System aims to provide sufficient methods for settling the disputes brought before it. The system aims to secure a positive solution to disputes. A solution mutually acceptable to the parties of dispute and consistent with the covered agreement is clearly to be preferred. Therefore, the preferred objective of the DSU is for the Members concerned to settle the dispute among them in a manner that is consistent with the WTO agreements.\textsuperscript{65}

The alternative means for settling disputes are good offices, conciliation and mediation. Consultations are the key non-judicial/diplomatic feature of the dispute settlement system of the WTO. Consultations provide the parties to clarify the facts of the matter and the claims of the complainant, possibly dispelling misunderstandings as to the actual nature of the measure at issue. Moreover, consultations serve either to lay the foundation for a settlement or for further proceedings under the WTO DSU.

The consultation stage is considered as compulsory requirement and important stage for settling trade disputes. Consultations give the parties opportunity to discuss the matter and to find a satisfactory solution without resorting to litigation; only after such mandatory consultations have failed to produce a satisfactory solution within 60 days may the complainant request adjudication by panel.\textsuperscript{66} Consultations enable the dispute parties to understand better the factual situation and legal claims in respect of the dispute; such understanding may allow them to resolve the matter without future

\textsuperscript{64} Ibid.
\textsuperscript{65} Article 3.7 of the DSU.
\textsuperscript{66} Article 4.7 of the DSU.
proceeding. The consultation can serve as an informal pre-trial discovery mechanism to enable the dispute parties to understand better the factual situation and legal claims in respect of the dispute; such understanding may allow them to resolve the matter without future proceeding. The WTO DSU emphasizes on the interest of developing country so that during the consultation stage members should give special attention to the particular problems and interest of developing country members.\(^\text{67}\)

Moreover, the alternative means for settling dispute as stated by Art.5 good office, conciliation and mediation, of the DSU emphasizes on offering all efforts before resorting to further action under this Understanding. Members should attempt to obtain satisfactory adjustment of the matter with the voluntarily nature if the parties of dispute agree to undertake it. The flexibility in these procedures permit consultation which can be requested at any time by any party to a dispute also terminates at any time as stated by Art.5:3 of the DSU. The proposal for improving Article 4 and 5 for consultation, good office, conciliation and mediation to be more strengthened; it’s clear by the proposal from different Members as mentioned in the previous sections. Through consideration of those proposals for improvement from different sides and views, I think it is rational because any system has to be more flexible and respond to the requirement of their Members. Generally, the sense is that the WTO DSU needed to do more to assist parties to resolve disputes at the early stages, by providing professional training courses or by establishment of the Advisory Center for training (ADR) for mediators.\(^\text{68}\)

\(^{67}\) Art. 4.10 of the DSU.
\(^{68}\) The ADR establish by WTO in 2001.