CHAPTER V

PROCESS OF PANEL STAGE

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CHAPTER - V

PROCESS OF PANEL STAGE

5.1. General Introduction

World Trade Organization was created in 1995. It is an extension of the General Agreement on Trade and Tariffs which came up in 1947. The purpose of the GATT was to push for an open trade and new rules to regulate trade.

The WTO, with the covered agreements was negotiated to achieve the objective of reducing trade barriers. It confronted the outstanding question of how these agreements would be implemented. The creation of an effective enforcement mechanism to ensure enactment and compliance was conceived as the solution.\(^1\)

The WTO Members have agreed that, if they believe fellow-Members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means they should abide by the agreed procedures, and respect judgments.\(^2\)

At first, the parties of dispute are likely to pursue to resolve disputes arising between them through bilateral discussion in order to reach agreed solution. If unsuccessful they invoke the WTO Procedure. The complainants can request the establishment of a panel by the Dispute Settlement Body (DSB).\(^3\)

The purpose of this chapter is to examine the nature of the Panel processes of the World Trade Organization and the active roles played for settling the disputes. This Chapter deals with different stages of panel. Providing discussion, analysis with

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\(^3\) Article4.3 of the DSU.
5.2. Request for Establishment of Panels

If consultations fail to resolve the dispute within 60 days of the request for consultations, the complaining party may request the Dispute Settlement Body (DSB) to establish a panel to rule on the dispute. If a member to whom a request for consultations are made agrees within 10 days to consult within 30 days, the complaining party may not ask for a panel until 60 days of passing form the date of original request, unless the parties agree that further consultations would not be productive. The request for establishment of panel has to be prepared in writing and such request shall show whether consultation can be preceded. The request for panel also provides specific measures at issue; and also provides a brief summary of legal basis of the complaint sufficient to present the problems clearly.

The jurisprudence as evolved by the DSB on the interpretation of Art.6 is as follows:

a) The request for establishment of panel shall be made with the basic requirements under the Article 6.2. In the case of Korea – Dairy, the Appellate Body analyzed the requirements imposed by Article 6.2:

"The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In its fourth requirement, Article 6.2 demands only a summary – and it

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4Art.4 of the DSU.
may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is 'sufficient to present the problems clearly'.

b) The request for establishment of panel shall be sufficiently precise for two reasons; firstly it often forms the basis for the terms of reference of panel pursuant to Art.7 of the DSU; and secondly, it informs the defending party and third party(s) of the legal basis of complaining.

c) The need for ‘legal interest’ could not be implied in the DSU or any other provisions of the WTO agreement and that members were expected to be largely self-regulating in deciding whether the DSU procedures would be fruitful and no requirements for an economic interest is needed.

d) The request for establishment of panel also shall indicate whether consultations were held. This is clear in Brazil - Desiccated Coconut: the Panel examined the request of the Philippines to make a finding that Brazil’s refusals to hold consultations were inconsistent with Articles 4.1, 4.2 and 4.3 of the DSU. The panel stated: “The Philippines’ request for establishment of a panel clearly fulfills the first requirement of the Article 6.2, by indicating the Philippines’ view that consultations were not held because Brazil refused to consult… We therefore conclude that the Philippines’ claim regarding Brazil’s failure to consult is not within our terms of reference. The terms specific measures at issue” in Article 6.2, through the case US - Corrosion-Resistant Steel Sunset Review, the Appellate Body referred to Article 3.3 of the DSU when defining what type of measures can be the subject of dispute settlement.

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6Appellate Body Report on Korea - Dairy, Para. 120.
8Panel Report on Korea - Dairy, Para. 7.13.
9Panel Report on Brazil - Desiccated Coconut, Para. 290. See also Article 22.6 Arbitration Report on EC - Bananas III (Ecuador)(Article 22.6 - EC), Para. 28.
proceedings. The AB emphasized the link existing between “measures” and “Member” taking measures: “Article 3.3 of the DSU refers to situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member.” 10

5.3. Establishment of Panel

The establishment of Panels shall be at least at the DSB meeting following a meeting within 15 days at which the item appears on the DSB’s agenda, unless the DSB consensually agree not to do so.11 This is unlikely to occur because the party which is requesting the establishment of panel normally would not join a consensus against its establishment, if the party changed its position towards the other party; it would withdraw its request. In the case of the requesting party which believes further consultations are necessary it might agree not to establish a panel of meeting at the DSB.12 The establishment of panel can be at the first meeting, if the respondent party does not object to its establishment. Often the respondent object to the establishment of the panel at the first DSB meeting, arguing that it hopes and believes that a mutually agreed solution can still be found.13 The decision of the dispute settlement body is generally preceded by short statement by the parties of dispute setting forth their respective positions. Directly after the DSB’s decision to the establishment of a panel and within 10 days from establishment, the other WTO’s Members may inform their interest in the dispute and reserve third party rights.14 Sometimes there are more than one member’s requests to the establishment of a panel related to the same

11 Art. 6.1 of the DSU.
14 Ibid. 234.
matter. In the case of multiple panels involving the same parties and same claims, it’s clarified in *Australia – Automotive Leather I* pursuant to a request made by the United States a panel was established on 22nd January 1998 and 22nd June 1998 regarding the same matter. In the latter request for the establishment of a panel, the United States asked that its earlier request to be withdrawn. Australia argued that the United States did not have the right to have a second panel established at the DSB meeting on 22nd June 1998 and the DSB did not have the right under the DSU to establish such a panel against the wishes of Australia. Australia argued that the Panel was not properly established, and that therefore the Panel should terminate its work immediately. So, The Panel examined Australia’s opinions and concluded that:

"The establishment of a panel is the task of the DSB...... we deny Australia’s request to terminate this Panel, and will continue our work in accordance with our terms of reference." 

In *US-steel safeguards*, the DSU at first established multiple panels to hear and decide on similar complaint by the EC, Japan, Korea, China, Switzerland, Norway, New Zealand and Brazil. The US and complaining parties reached an agreement to the establishment of a single panel according to Art. 9.1 to adjudicate the matter of issue. The US requests the panel to issue eight separate reports rather than one report. The panel decided to issue its Reports in the form of one document constituting eight panel Reports with the common cover page and common

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15 Art.9.1 of the DSU state that; a single panel may be established to examine those complaints taking into account the right for all Members concerned.
16 WT/DS106/2.3.Australia — Subsidies Provided to Producers and Exporters of Automotive Leather (Complainant: United States of America) 10 November 1997.
17 WT/DS126/2.Australia — Subsidies Provided to Producers and Exporters of Automotive Leather (Complainant: United States of America) 4 May 1998.
The panel will be established within around 90 days from the date of initial request for consultations, so the complaining parties are not required to request a panel at any time until considerably more than 60 days after the start of consultations. The major criticisms of the panel process, is the lack of automaticity in the establishment of panel after complaining party request to establish the Panel. The time frame for dispute settlement procedures; the WTO’s DSU sets a general time frame in which Article 20 sets the time period that’s 9 months from the date of the establishment until the DSB considers the report for adoption, or 12 months in the case of a Panel report appealed.

5.4. Composition of Panel

Panels are the quasi-judicial bodies in charge of adjudicating dispute between the Members. For the composition of Panel the Article 8 of the WTO DSU, Panels consist of three persons or if the parties agree five persons within ten days of the establishment of panel. The panel is requiring to be composed of well-qualified government or non-government individuals; the DSU indicates that these individuals shall be:

“Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or

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19 Art.9.2 which explicitly provide s for the right of parties to have of separate reports.
20 A. T. Guzman and J. H.B. Pauwelyn, INTERNATIONAL TRADE LAW, 120 (2009). See also Art.4.8 of the DSU.
its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member." 22

The Secretariat proposes nominations to the panel the dispute parties may not oppose the suggestions except for 'compelling reasons'.23 Nonetheless, the parties often reject the nominations initially proposed by the WTO Secretariat without much justification. In practice, the composition of the panel is often difficult and contentious process, which may take many weeks.24

The selected Panelists shall be composed of persons having the qualifications as the following:

First, the panels are to be composed of well-qualified government or non-government individuals, such persons are who have previously served on panels, presented a case to a panel, served as a Member’s representative to the WTO or GATT, served on councils, Committee, the Secretariat, taught or published in an international trade law or policy, or served as a senior trade official of a Member.

Second, Panel members should be selected in such a way as to ensure the independence of panelists, a sufficiently diverse background, and wide spectrum of experience.

Third, citizens of Members whose government are parties or third parties to a dispute are disqualified from serving on a panel concerned with that dispute.

Fourth, panelists are to serve in their individual, and not representative, capacity.25

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22 Art. 8.1 of the DSU.
23 Art. 8.6 of the DSU.
For establishment of panel in regard to matters relating to General Agreement on Trade in Service shall have the necessary expertise relevant to the sector involved, the Annex on Finance Services to GATT obviously provides that “Panels for dispute on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial services under dispute.”

In fact, well-qualified persons include: academic, private lawyers or persons present or former Member of government delegations to the WTO who are not parties to the disputes; the panelist shall work in an individual capacity in order to avoid conflict of interests or the appearance of impropriety. The parties of the dispute can select the panelists themselves, by mutual agreement based on suggestions made by the Secretariat.

Members are generally required to permit their officials to serve as panelists and are prohibited from giving them instructions or seeking to influence them with regard to matters before the panel. But if the dispute involves developing countries, at least one panelist shall be from a developing country.

In recent years, the Director-General has determined the composition of about half of the panels. And to assist in selection of panelist, the Secretariat maintains a list of government and non-government individuals possessing the required qualifications to serve as a panelist. Members periodically suggest the names of the individuals for inclusion on this list, and those names are added to the list after approval by the DSB.

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27 Art. 9.8 of the DSU.
28 Art. 8.10 of the DSU.
29 Art. 8.4 of the DSU.
5.5. Nominating the Panelists

The parties of dispute by themselves may agree on composition of a panel and notify the DSB of that fact; in practice this is extremely rare. The nomination of panelist is done by the Director of legal Affairs Division in collaboration with the director division of the Secretariat having substantive responsibilities for the matters in dispute.

The Secretariat consults with the parties concerning the types of panelist; they would or would not prefer, and attempts to reflect these views in selection of proposed panelists. The parties and Secretariat then meet to discuss the list of candidates, and if there is no agreement the Secretariat will propose a new list of candidates based on the feedback received from the parties.  

Within twenty days from the date of establishment of panel, if the parties of disputes do not agree on panelist they may request the Director-General, of the WTO with the consultation of the chairman of relevant council or committee, to name the panelist.

In fact the Secretariat has the key role in selecting panelists. In some cases the dispute arises over the naming of panelists as in the Guatemala – Cement II. Guatemala requested the Panel to rule its composition which was inconsistent with WTO and international law principles, and that therefore the Panel lacked competence to review the matter before it. Guatemala asserted that the Director-General’s nomination of panelist who had served in the first panel, claiming that the panelist’s

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31 Art. 8.9 of the DSU.
service on the first panel detracted from the objectivity and impartiality necessary for the second panel to accomplish its task.\textsuperscript{33}

Mexico disagreed, arguing that the Panel was composed in conformity with the DSU. The panel rejected Guatemala’s claim on the ground that Art.8 of the DSU, regarding the nomination of panelists, did not give the panel itself any role in the process. Guatemala may avail itself of the procedure provided for in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes\textsuperscript{34}.

In fact, the USA and the European Union are the biggest users of the WTO dispute settlement system. As a consequence to the appointment of panelists, the DSU Article 8(3) stated who will be serving as panelists.\textsuperscript{35} There are problems arising out for prospective panelists who are the citizens of one of the parties to the dispute, citizens of the USA and of EU member countries play a relatively small role, in comparison to these Members’ participation in disputes, as panelists, because they are unlikely to serve as panelists in disputes where these Members are parties. The consequence is that WTO panelists tend to come from countries that are active in WTO affairs but not the main users of the dispute settlement mechanism.

From the initial WTO 1995, the top 10 countries represented in terms of panelist positions, taking into account circulated panel reports only has been shown in the Table.

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\textsuperscript{33} Panel Report on Guatemala – Cement II, Para. 8.10.
\textsuperscript{34} Panel Report on Guatemala – Cement II, Para. 8.11.
\textsuperscript{35} Citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise. In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.
Table 5.1: The top 10 countries represented in terms of panelists since 1995

<table>
<thead>
<tr>
<th>Rank</th>
<th>Country</th>
<th>Number of panelists</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>New Zealand</td>
<td>39</td>
</tr>
<tr>
<td>2</td>
<td>Australia</td>
<td>38</td>
</tr>
<tr>
<td>3</td>
<td>Switzerland</td>
<td>37</td>
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<tr>
<td>4</td>
<td>Canada</td>
<td>21</td>
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<tr>
<td>5</td>
<td>Brazil</td>
<td>20</td>
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<tr>
<td>6</td>
<td>Hong Kong</td>
<td>19</td>
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<tr>
<td>7</td>
<td>India</td>
<td>17</td>
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<tr>
<td>8</td>
<td>Chile</td>
<td>17</td>
</tr>
<tr>
<td>9</td>
<td>South Africa</td>
<td>15</td>
</tr>
<tr>
<td>10</td>
<td>Poland</td>
<td>14</td>
</tr>
</tbody>
</table>

In order to avoid double counting of panelist positions, the table counts only one of the panel reports in these disputes.

Accordingly, in the above table, out of 444 total panelist positions, 174 were from six countries custom territories: New Zealand, Australia, Switzerland, Canada, Brazil and Hong Kong. By contrast, only 12 positions were taken by US citizens. The situation of the European Union is more complicated, as many countries have joined the European Union only recently. For example, note that in the above table Poland has 14 panellist positions. However, all of these were prior to 2004, the year Poland joined the European Union. The total numbers of panellist positions held by citizens of WTO Members who are now part of the EU is 70.

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36 The statistics presented in this article are taken from their Dispute Settlement Commentary subscription service offered on the http://www.worldtradelaw.net web site. Visited on 25-09-2011.
5.6. Written Submission

5.6.1. First Written Submission

When the panellists have been selected, there will be a meeting to fix a timetable and working procedure. At this point, for the defending party, the most important issue revolves around the timing of its first written submission. For the exact time of the first written submission, the appointed panels shall set precise deadlines for written submission by the parties to the dispute, and consequently the parties should respect the deadlines.39

The parties of dispute make written submissions to the Secretariat for immediate transmission to the panel and to other party or parties to the dispute, subsequently; the complaining member shall submit its first submission in advance of the responding member’s first submission.40

In the Korean Liquor Taxes case, Korea had four weeks to respond and in the Korea –Safeguard Case, Korea had less than four weeks to draft its first submission.

It is necessary to bear in mind that the complainants will have had sufficient time to thoroughly prepare their written submission. The replying Member, on the other hand, is given only three to four weeks to prepare and submit its written submission.41

In the first written submission, the parties shall state the facts of the case and their point of view.

39Art. 12.5 of the DSU.
40Art. 12.6 of the DSU.
41One of the reasons cited for the short time period for the responding party is the proposed timetable set forth in Appendix 3 which suggests 2-3 weeks be given to the party complained against to respond.
5.6.2. Second Written Submission

Within two to three weeks of the first meeting, the parties shall file simultaneously their rebuttal submissions.\(^{42}\)

The meaning of ‘second written submission’ explained in the *US – Steel Safeguards*, the Panel sent a letter to all the parties counting a series of primary rulings on organizational matters. The Panel referred to the United States’ request to replace the reference to “rebuttal submissions” in paragraph 11 of its Working Procedures with the word “rebuttals”.\(^{43}\)

Hence, the reference to “rebuttal submissions” in paragraph 11 would limit the application of the requirement in that paragraph to rebuttals made in writing and would not extend to rebuttals made orally. The complainants argued in response that the suggested amendment would allow, for example, new arguments and evidence to be adduced orally at the Panel’s second substantive meeting. The Panel disagreed recalling the comments made by the Appellate Body in the case of *Argentina – Textiles and Apparel*.\(^{44}\)

In the second submission, each party submits replies to the argument by the other party. In general within one to two weeks after the rebuttal submission the panel will have to hold a second meeting with the parties of dispute.

\(^{42}\) Art. 12.6 of the DSU.
\(^{43}\) Panel Report on US – Steel Safeguards, Para. 6.1 stated that: Paragraph 11 of the Panel’s Working Procedures read as follows: Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions, or answers to questions or provided that good cause is shown. In all cases, the other party (ies) shall be accorded a period of time for comment, as appropriate.
\(^{44}\) WT/DS56/AB/R, Para. 79. in that case, specified that they had drafted paragraph 11 to ensure due process and that new evidence was not presented at a late stage in the panel process, while concurrently to guaranteeing that all parties and the Panel were kept fully informed of all related proofs.
5.7. The Terms of Reference of Panels

In order to avoid delays and also to clear the function of panel, the standard terms of reference are to be furnished within 20 days from its establishment.

It’s required for panel to examine the dispute in accordance to the terms of reference, in other words in the light of relevant provisions in the covered agreements stated by the parties of dispute.

The Importance of the terms of reference mentioned in the Appellate Body in Brazil – Desiccated Coconut\textsuperscript{15} clarified the significance of the terms of reference in the following terms:

“A panel’s terms of reference are important for two reasons. First, terms of reference fulfill an important due process objective – they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant’s case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.”\textsuperscript{46}

The terms of reference are important, as the request of the complaining party will have referred to the particular agreements at issue and also, the relevant provisions of those agreements, the panel jurisdiction will be limited by these references. The panel therefore, may not go beyond them to consider whether the measures or actions complained of are inconsistent with other agreements or other provisions of the agreement mentioned.

\textsuperscript{15}WT/DS22, Brazil — Measures Affecting Desiccated Coconut (Complainant: Philippines)\textsuperscript{30} November 1995.

The panel terms of reference directed and ruled by Article 7 of the WTO’s DSU, which establishes the claims of the complaining parties relating to the issues referred to DSB. Although panel has some discretion in establishing its own working procedures, this discretion does not extend to alter the substantive provisions of the DSU. Moreover, Art. 12.1 of the DSU states: “panel shall follow the working procedures in Appendix unless the panel decides otherwise after consulting the parties to the dispute”. There are not in the DSU give panel authority or also to neglect or to modify any provisions of the DSU. So, the panel is obliged to consider any claims under its terms of reference.47

5.8. The Function, Authority and Responsibilities of Panel

The aims of the panel is to make an objective assessment of the matter before it by examining the facts of the case and the relevant covered agreements, in order to assist the DSB in making recommendations or giving rulings.48 The panel achieves this task through confidential 49 analysis of written submissions,50 oral arguments,51 expert witnesses,52 and other relevant sources.53 The entire panel period is to last not more than six months.54

The panel composed for a specific dispute must review the factual and legal aspects of the case and submit a report to the DSB in which it expresses its conclusions as to whether the claims of the complainant are well founded and the measures or actions being challenged are WTO-inconsistent. If the panel finds that the

48 Art.7 of the DSU.
49 Art.14.1 of the DSU.
50 Art.12.6 of the DSU.
51 Art.15.1of the DSU.
52 Art.13.2 of the DSU.
53 Ibid.
54 Art.12.8 of the DSU.
claims are indeed well founded and that there have been breaches by Member of WTO obligations, it makes a recommendation for implementation.\textsuperscript{55}

The role of panel is to assist the DSB in discharge of its responsibilities under the DSU and the WTO agreement.\textsuperscript{56}

The function of Panel was noted through observed Appellate Body Report, that Panel come under a duty to address issues in at least to instance. First, the duty to address issues that are put to them by parties, and second, to address and dispose of jurisdiction issues even if they are not addressed by the parties.\textsuperscript{57}

Panel control the DSB within the confines of the rules set out in the DSU, establishing deadlines for written submissions and otherwise establishing the schedule.\textsuperscript{58}

Panels have the right to seek information and technical advice from any source they deem appropriate.\textsuperscript{59} Panel may consult experts to obtain their opinion with respect to scientific and technical matters, may request an advisory report from an expert review group.\textsuperscript{60}

5.9. The Panel Process

Settling disputes is the responsibility of the Dispute Settlement Body, which consists of all WTO Members. The Dispute Settlement Body 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

\textsuperscript{55} Art. 11 and 19 of the DSU.
\textsuperscript{56} Art. 11 of the DSU.
\textsuperscript{57} Appellate Body Report, Mexico- Com, WT/DS132- Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States (Complainant: United States of America) 8 May 1998.
\textsuperscript{58} Art.12.3, 12.4, 12.5 of the DSU.
\textsuperscript{59} Art.13.1 of the DSU.
\textsuperscript{60} Art.13.2 of the DSU, procedures governing the establishment and conduct of expert group are set out in Appendix 4 to the DSU.
recommendations, and has the power to authorize retaliation when a country does not comply with a ruling. The purpose of this section is to explore the adjudicating Panel Process of the World Trade Organization.

When the consultations fail to settle the dispute within 60 days in the normal situations or 20 days in the case of urgency, the complaining party may request the establishment of a panel.  

The parties to the dispute have 20 days from the establishment of panel to agree on "terms of reference" otherwise, standard terms of reference will be used. 

A panel normally meets with parties after agreement to set working procedures and a time schedule. The standard timetable for panel makes provision for two meetings between the panel and parties to discuss substantive issues regarding the case.

In some cases there are more than one member requesting the establishment of panel, and the interest of more than two parties are involved in a dispute, a single panel can consider the disputes of multiple complaints, and also the third parties who have interest in a dispute have right for hearing by the panel.

A panel functions to assist the DSB in resolving the dispute. The panel process involves the following: (1) written submissions of parties and third parties, and (2) meeting (oral hearing) with parties and third parties.

If one side raises scientific or other technical matters, the panels require obtaining information and technical advice from any appropriate source.

61 Art. 25 of the DSU.
62 Art. 7.1 of the DSU.
64 Art. 9.1 of the DSU.
65 Art. 10.2 of the DSU.
66 Art. 11 of the DSU.
67 Art. 12 of the DSU.
68
That reports or advice requested by panel shall be offered in writing from an expert's review group.\(^6^9\)

### 5.10. Standard of Review of Panels

A panel is called upon to examine the consistency of challenged measure with WTO Law, both of the measures are at issue and the relevant provision of WTO Law allegedly violated. Determined by the terms of reference of the panel has to apply in reviewing the WTO consistency of the challenge measures. With the reference to Article 11 of the DSU states "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

Under this Article the duty of panel is clear; when any party appeals from panel reports, the Appellate Body focuses on the matters of law, whether a panel had failed to discharge its duty under Art.11 of the DSU to make objective assessment of the case before it. In US - Cotton Yarn\(^7^0\), the Appellate Body indicated that its Reports on Argentina - Footwear (EC), US - Lamb and US - Wheat Gluten\(^7^1\), all concerning disputes under the Agreement on Safeguards, stated the standard of review under Article 11 of the DSU. The appellate body report states:

\(^{6^8}\) Art. 13.1 of the DSU.
\(^{6^9}\) Art. 13.2 of the DSU.
\(^{7^0}\) WT/DS192, United States of America — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (Complainant: Pakistan) 3 April 2000.
\(^{7^1}\) WT/DS166, United States of America — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (Complainant: European Communities) 17 March 1999.
“panels must examine whether the competent authority has evaluated all relevant factors: they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination: and they must also consider whether the competent authority’s explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data”.

According to the Appellate Body to find that the key elements of a panel’s standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations, that means the panel acted consistently with Art.11 or not. In the US-Steel Safeguards, the Appellate Body noted that a challenge under Art.11 of the DSU ‘must not be vague or ambiguous’ but shall be clearly articulated and substantiated with specific argument. In other cases the Appellate Body noted Reference in Panel’s reasoning to provisions not included in the claims, in Argentina – Footwear (EC), the Appellate Body considered Argentina’s argument that the Panel violated Article 7.2 of the DSU and exceeded its terms of reference, because the Panel not only considered, but also relied on, alleged violations of Article 3 of the Agreement on Safeguards even though the request for the establishment of a Panel submitted by the EC only alleged violations of Articles 2 and 4 of the Agreement on Safeguards. So, The Appellate Body considered that it “failed to see how any panel could be expected to make an ‘objective assessment of the matter’, as required by Article 11 of the DSU, if it could

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74 DS/121, Argentina – Safeguard Measures on Imports of Footwear, Complainant: European Communities, on 6 April 1998.
only refer in its reasoning to the specific provisions cited by the parties in their claims.\textsuperscript{75}

5.11. Panel and Right to Seek Information

In order to achieve their objectives effectively through application of the DSU rules and procedures, the panel is called upon to make an objective assessment of the matter before it. The panels enjoy a broad right of discretion in the collection and appreciation of the evidence. Article 13 of the DSU provides panels a broad right to ‘seek information’; panels have invoked this provision in several disputes to seek advice from individual scientific experts.\textsuperscript{76}

In fact, the right of seeking information from the special expert is not completely new. Under the GATT 1947; dispute settlement procedures adopted at the end of the Tokyo Round contained a reference to the need for panels to seek information and technical opinion. The GATT in the Field of Dispute Settlement (Article XXIII:2) contained in the 1979 Understanding Regarding Notification Consultation, Dispute Settlement and Surveillance indicated that “Panels often consult with and seek information from any relevant source that they deem to appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter”.\textsuperscript{77}

Moreover, the Tokyo Round TBT Agreement already contained the possibility for panels to establish ‘technical expert groups’.

\textsuperscript{75}Appellate Body Report on Argentina – Footwear (EC), Para. 71.
\textsuperscript{76}R. Yerxa, and B. Wilson, KEY ISSUES IN THE WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS, 204 (2005).
\textsuperscript{77}Ibid. 207.
Actually the practice of seeking technical information from experts in old GATT 1947 were of little use in dispute settlement, but in the WTO 1995 entry force, the use of expert sources is more common.

Art.13.1 of the DSU entitled right to seek information, establishes the right for panels to seek any technical or scientific information relevant for the resolution of the dispute:

"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 Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual body, or authorities of the Member providing the information."

Under Art. 13.1 of the DSU, panelists have the right to seek information and technical advice from any individual or body they deem appropriate.

In the case EC – Hormones, the Appellate Body examined the EC 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 AB stated:

“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”.

The importance of seeking information from qualified experts is mentioned in the US-Shrimp, the Appellate Body stated: "the comprehensive nature of the authority" given to panels by Article 13, explaining that seeking outside expertise may be "indispensably necessary" to discharge the duty of DSB panels to make "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".

The nature of the panelist is experts exclusively in the field of international trade, sometimes they require expert’s opinions regarding to scientific field. So, the DSU grants panels right to seek technical information from experts, in order to make objective assessment for disputes.

5.12. Evident Issues

To examine a complaint, the panel shall follow certain basic evident rules. The most basic rule concerns the task of the burden of proof. The Appellate Body has held that the burden of proof rests upon the party who asserts the affirmative of a particular claim or defense.

The Appellate Body claims the cases in terms of the need for a claimant to establish a prima facie case. To establish facts, panel asks oral questions to the

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81(Latin) a legal presumption, which means 'on face of it' or 'at first sight'. Law-makers will often use the device to establish that of a certain set of facts is proven, then another fact is proven, then another fact is established prima facie. For example, proof of mailing a letter is prima facie proof that it was received by the person to whom it was addressed and will be accepted as such by court unless proven otherwise.

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parties. The parties bring the government experts in this field to the panel meetings. And some parties submitted affidavit evidence to establish facts.\textsuperscript{82}

In fact the duty of panel required to examine all evidence that comes in accordance to Art.11, the EC-Hormones the Appellate Body stressed that “the duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence.\textsuperscript{83}

In the other case also, in \textit{US – Carbon Steel} the Appellate Body summarized its previous jurisprudence on the extent of panel duty to examine the evidence:

Article 11 requires panels to take account of the evidence put before them and forbids them to willfully disregard or distort such evidence.\textsuperscript{84} Not many panels make affirmative findings that lack a basis in the evidence contained in the panel record.\textsuperscript{85} Provided that panels’ actions remain within these parameters, however, we have said that ‘it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings’\textsuperscript{86} and, on appeal, we ‘will not interfere lightly with a panel’s exercise of its discretion’.\textsuperscript{87}

\textbf{5.13. Time Limit of the Submission of Proof}

DSU stipulated that the panel shall provide sufficient time for the parties of the dispute to prepare their submission; moreover the panel should set specific time or deadline for written submission.\textsuperscript{88} The Parties of dispute can produce and submit

\textsuperscript{83}Appellate Body Report on \textit{EC – Hormones}, Para. 133.
\textsuperscript{84}Appellate Body Report, \textit{EC – Hormones}, para. 133.
\textsuperscript{88}Art. 12.4.5 of the DSU.
additional proof after the first hearing. The Panel in Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items stated:

"Until the WTO Members agree on different and more specific rules on this regard, our main concern is to ensure that 'due process' is respected and that all parties to a dispute are given all the opportunities to defend their position to the fullest extent possible". The DSU does not impose a strict time limit on when evidence must be submitted to a panel and the Working Procedures of Appendix of 3 to the DSU doesn't provide compulsory deadlines with which a panel must comply.

In Korea - Measures Concerning the Shelf-life of Products case encountered a situation in which a part of evidence was submitted as an exhibit to the second oral statement. So, the submission of evidence on the date of the second oral hearing can effect on the right of other member for an opportunity to make an effective rebuttal if it is only given a short period to respond to the new evidence. Moreover it can also cause delays, which Members proposed to avoid by having a strict time frame in the DSU. This difficulty can be resolved at the initial meeting with the panel to fix the working rules. Some panels require that all factual evidence must be produced by not later than the date of the first oral hearing, except with respect to rebuttal evidence or answers to questions from the panel or other parties.

5.14. Issuance of Reports

The panel report has important remark; the cases before WTO Dispute Settlement, the complaining party assert the levels of violation were suffering

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According to WTO agreement. So, the panel examines that WTO has been nullification or impairment of benefit.\textsuperscript{91}

The process of issue of panel report coming through different stages as:

a) **First draft**, the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.

b) **Descriptive part** and **Interim Report**

When the second oral hearing is completed, the descriptive part of the report, which runs to hundreds of pages, is issued and parties are asked to submit their comments within usually two weeks.

Within Two to four weeks later, a full interim report is issued. This contains not only the descriptive part but also the panel's findings and recommendations.\textsuperscript{92}

In the interim review stage, there is a 'mini appeal' in the sense that parties can request that the panel review specific points of its findings and recommendations and can ask for an interim review meeting. This mini appeal stage can be important because a party can request that the panel review and reconsider facts of the case, whereas the Appellate Body will review only legal issues during the appeal stage.\textsuperscript{93}

\textsuperscript{91}A. T. Guzman and J. H.B. Pauwelyn, INTERNATIONAL TRADE LAW, 122 (2009).
\textsuperscript{92}In the DRAMs case, the issuance of the interim report was postponed three times for a period of four weeks. In this regard, although a minor point, panels in practice do exceed the strict time limit imposed by Article 12.9 of the DSU which states that 'In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.' In the DSU Review, the provision of Article 12.9 should be amended to reflect the delays which take place from time to time.
Generally, the panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.

c) **Review**, the period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides. And two to three weeks after the comments on the interim report are submitted, the final report is issued to the parties. This is clear in case *Australia – Salmon*, Australia had requested a review of the whole of the Panel’s report during the interim review on the grounds that a large part of the legal reasoning of the interim report was not based on an objective assessment of the matter before the Panel and contained a number of factual inaccuracies and assertions not supported by evidence before the Panel. Therefore, in this case the Panel recalled that Article 15 provides for the review of “**precise aspects**” of the interim report and not of the whole of the report. Thus, the Panel dismissed Australia’s request.\(^{94}\)

d) **Final Report**, the final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure is to be made to conform to WTO rules. The panel may suggest how this could be done.

The report becomes the Dispute Settlement Body’s ruling or recommendation within 60 days unless a consensus rejects to adopt it. The parties of dispute can appeal the report.

\(^{94}\)Panel Report on Australia – Salmon, Para. 7.3.
A panel report is essentially required at least, to set out the findings of fact, the applicability of relevant provision and the basic rationale behind any findings and recommendations that it makes.

In some cases the parties challenge the panel reports before Appellate Body for lack of basic rational behind any findings and recommendations, In Korea – Alcoholic Beverages, the Appellate Body stated: “Korea claims that the Panel has failed to fulfill its obligation under Article 12.7 of the DSU to set out the basic rationale behind its findings and recommendations. Korea maintains that ‘much’ of the Panel Report contains contradictions and that it is vague.\textsuperscript{95}

The time period of examination and to make the procedures more effective, the period from the panel shall conduct examination until the date of final reports are issued to the parties of dispute, shall not exceed six months in normal case, but in the urgent case the period shall reduce to three months.\textsuperscript{96} There shall benotification of delay in the issuance of a panel report to the parties, when the panel cannot issue its report within six months, or three month in cases of urgency. The panels shall notify the DSB of a delay in the issuance of reports in writing of reason for the delay with an approximation the period it will issue its report. In general, no case should exceed period from establishment of panel until the circulation of the report to the members exceed nine months.\textsuperscript{97}

The time period when developing countries are involved in dispute, panel to take into account the position of developing countries in examination complainant

\textsuperscript{95}Appellate Body on Chile – Alcoholic Beverages, Para. 78.
\textsuperscript{96}Art.12.8 of the DSU.
\textsuperscript{97}Art.12.9 of the DSU.
against developing countries, the panel shall accord sufficient time to prepare and present its argumentation.98

The consideration mentioned above is clearly through case, India – Quantitative Restrictions, India requested additional time to prepare and present its first written submission, pursuant to Article 12.10 of the DSU. The Panel, “in light of this provision, and considering the administrative reorganization taking place in India as a result of the recent change in government”, decided to grant an additional period of time (10 days) to India.99 Moreover, the extension time period for developing countries, there are differential and more favorable treatment for developing countries Members100. In the case of India – Quantitative Restrictions the Panel considered that: the Panel then noted that its analysis of Article XVIII:B of GATT 1994, which embodies the principle of special and differential treatment in relation to measures taken for balance of payments purposes, reflected its consideration of the relevant provisions on special and differential treatment.101

5.15. Adoption of the Panel Report

The minimum time-period for consideration of reports by the DSU 20 days after the report has been circulated to the Members.102 The final report is referred to the DSB for formal adoption, which takes place within 60 days unless there is a consensus not to adopt the report, or the party has notified its decision to appeal, so

98Art.12.10 of the DSU.
100Art.12.11 of the DSU.
102Art.16.1 of the DSU.
the panel report shall not be considered for adoption by DSB until completion of the appeal procedures.\textsuperscript{103}

The Time-period stipulated in the Art.16.4 for the adoption of Panel Reports is 60 days from the date of circulation. There are some in some case requesting of postponement. In December 2004, Australia, Brazil, Thailand and the European Communities request that a meeting of the DSB be held on 13\textsuperscript{th} December 2004 for the DSB to agree to postpone consideration of the Panel reports in \textit{EC - Export Subsidies on Sugar} and to agree to an extension of the corresponding time-period under Article 16.4 of the DSU until 31\textsuperscript{st} January 2005. At the DSB meeting of 13\textsuperscript{th} December 2004, the DSB took note of the request and agreed that it would adopt the Panel Reports, upon request, on or before 31 January 2005, unless the DSB decided otherwise by consensus not to do so or a party notified the DSB of its decision to appeal.\textsuperscript{104} If a Panel Report is appealed, after completion of the appeal, it is adopted as affirmed, modified or reversed by the Appellate Body.

5.16. The Right of Third Party

For participating in panel procedures, a WTO Member having a substantial interest in matter before a panel and having notified its interest to the DSB shall have an opportunity to be heard by the panel and to make written submission to the panel.\textsuperscript{105}

The third party is invited by the panel to present their views during special session of the first substantive meeting. The third party written arguments to the panel are also circulated to the parties of dispute. The rights of third parties for participating in the panel procedures are quite limited. There are different opinions on participation

\textsuperscript{103}Art.16.4 of the DSU.

\textsuperscript{104}WT/DSB/179, Para.8 and 9.

\textsuperscript{105}Art. 10.2 of the DSU.
of third party in dispute settlement processes; there are good reasons to increase third party rights. It is true that the bilateral character of dispute settlement and its useful from political point of view, but the move towards changing bilateral character, would entail a further strengthening of the quasi-judicial decision making process. There are many legal issues that are raised before panel and appellate body plead for expansion of participation of the third party, to enhance dispute settlement system through more transparency and to avoid weakening of the efficiency of the dispute settlement process.106

In EC– Bananas III considered requests by Members to be allowed to participate more broadly in the Panel proceedings than provided for under the relevant provisions of the DSU. More specifically, these Members requested that they would be granted the right of presence at all meetings of the Panel with the parties and the right to make statements at all such meetings. Furthermore, these Members also demanded the right to receive copies of all submissions and other materials and to be granted permission to make written submissions to both meetings of the Panel. While the DSB took note of these statements, there was no consensus on such participation.107

In the case of multiple complainants and third parties, according to DSU, a single panel maybe established to examine complaints on the same problem brought by more than one Member.108 Therefore, the DSU provides that intervening parties are invited “to present their views during a session of the first substantive meeting of the panel set aside for that purpose”.109

107 WT/DSB/M/16, item 1, pp. 1–5.
108 Art. 10 of the DSU.
109 Annex 3.6 of the DSU.
5.17. Rules of conduct for panelists

In 1996, the DSB adopted the Rules of Conduct for the Panelist, Appellate Body Members, experts, arbitrators and Secretariat staff assigned to assist in the dispute settlement process ‘the covered persons shall be independent, impartial and shall avoid direct or indirect conflict of interest and respect the confidentiality of proceeding of bodies, so the maintenance of such standard of conduct, integrity and impartiality of the mechanism are preserved.”

The DSU provides that panelists serve in their individual capacities and no members should give them any instructions or seek to influence them. Therefore, to “ensure compliance with the rules such persons shall disclose the existence or development of any interest, relationship or matters that person could reasonably be expected to know and that is likely to affect or to give rise to justifiable doubts as to, that person’s independence or impartiality”. The parties of disputes have rights to raise a suspected material violation of the rules of conduct, which leads to the replacement of the challenged person.

The third parties receive the submissions of the parties to the dispute to the first meeting of the panel and are called to introduce their views during a special session of the first substantive meeting set for that purpose.

The independence of panel and their impartiality has been on the program of DSU reform both in term of stripping WTO Secretariat officials of their current dispute settlement functions as well as playing the panelists due compensation commensurable to their qualifications and work given to them. To improve the

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111 Art. 10.3 of the DSU.
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impartiality of panelist is to form a class of law clerks who should assist the judicial panels that are not regular to WTO bureaucracy. Further, conflicting opinions must be published as it gives notion which may be discussed on the issue.\textsuperscript{113}

5.18. Role of WTO Secretariat

The WTO Secretariat has the responsibility of assisting the panel, especially on the legal, historical and procedural aspects of the matter to deal with and of providing secretarial and technical support.\textsuperscript{114} The legal affairs Division and the Rules Division are the main divisions of the WTO Secretariat that assist dispute settlement panels. However, a significant number of staff form other ‘operational division’ of the WTO are also involved. Depending on the agreement principally at issue in the dispute, a panel will be assisted by an interdisciplinary team i.e. economists and lawyers.\textsuperscript{115} The role of Legal Affairs Division is to advise panelists on points of WTO’s law, and to assist the panel in maintaining coherent and consistent case law jurisprudence. In \textit{Chile –price Band System}, Chile referred to a letter from a GATT Secretariat in support of its position. The mere fact that an individual in the GATT secretariat might have made a statement, the panel stated “it is not determinative”. Actually the WTO delegation depends on the existence of the Secretariat as an impartial guardian of shared values and institutional history.

The role of Secretariat in dispute settlement is both important and difficult. The Secretariat can play vital role on the outcome of dispute, so that influence is exercised with caution. That’s why the proposal for permanent panel by the head of the Legal Affairs Division. The establishment of a permanent panel would increase the expertise of panelists and the quality of their work product.

\textsuperscript{113} A. K. Koul, \textit{GUIDE TO THE WTO AND GATT ECONOMICS, LAW AND POLITICS}, 70 (2005).
\textsuperscript{114} Art.27.1 of the DSU.
5.19. Proposal for Improving the Working Procedures of WTO Dispute Settlement Panel

There are several shortcomings inherent in the Dispute Settlement Body processes, from initiation by consultation, and concluding by implementation of Panel and Appellate Body Reports and recommendation. The proposals by EU to strengthen and reform the mare as follows:

- The setting of time limits for the notification by interested third parties of their intention to participate as intervening parties in panel proceedings.
- Clarification of the time limits for the completion of the arbitration process for the suspension of concessions under Article 22(6) of the DSU.
- A review of the panel working procedures with a view of ensuring increased consistency in the way that panels conduct their proceedings.\textsuperscript{116}

There was abroad agreement on the desirability of codifying WTO Panel procedures to the extent that they had proven successful in the past dispute settlement practice.

For this purpose, rather than spending much time in negotiations in these subjects, negotiators could delegate this task to the proposal for permanent panel.

Many speakers supported the proposed panel proceeding open to the public in order to strengthen the transparency and credibility of the WTO dispute settlement system. The bilateral negotiation for dispute settlement usually outside the panel process would be more transparent. Such panel proceeding would have no negative impact on attempts at bilateral agreed settlement of disputes. There was also broad agreement on facilitating third party participation in panel proceedings.

Most panel proceedings do not respect the timeframes prescribed in Art. 12.8 and 12.9 of the DSU 6-9 months hence the, proposal for a faster start up process e.g. by granting a panel request at the first meeting of the DSB, and speedier selection of panelists.

5.19.1 Proposal for permanent Panelists

There is a proposal by Prof. Thomas Cottier to moving ad hoc Panel to permanent Panel. Permanent Panel would enhance expertise, legitimacy, independence and coherence in WTO jurisprudence and lead to facilitate preliminary rulings and the overview of remand powers of the Appellate Body. He made a proposal of fifty full or part-time panelists obliged to serve if called upon. For the nomination of panelists, the expertise highlighted the importance of consensus and flexibility. Engaging WTO diplomats as ad hoc panelist could combine the possibility of mutually agreed ad hoc panel with a unilateral right to submit the dispute to a permanent panel, when the parties of dispute fail to reach agreement on the composition of panels within 2-3 weeks. There are question arising, whether a permanent panel would improve the legitimacy of panelist, e.g. decreasing the present dependence of ad hoc panelist on assistance and support from the WTO Secretariat. The developing countries should have a rational self-interest in professional and neutral panelists. A strengthening of judicial elements in panel proceeding could improve the legal quality, consistency and speedy explanation of panel reports.

The other proposals regarding the composition of panels, with an aim of ensuring a more balanced geographical representation and improving the rights of

\[118\] Ibid, 9.
developing countries to request representatives of such countries as panelists in cases involving them.\textsuperscript{119}

5.20. Conclusion

There are strong grounds for arguing that the increasing numbers of disputes are simply the result of expanding world trade and the stricter rules negotiated in the Uruguay Round; and the fact that more disputes are coming to the WTO reflects a growing faith in the dispute settlement system.

The panel processes considered under the WTO’s DSU have unique features such as limited timeframe in order to perform its functions, as formulation of panel and other procedures up to issuance of their reports. In fact Appellate Body does not review the facts of the case since appeals are limited to issues of law. Consequently, the Panel stage is called upon to make an objective assessment of the matter before it\textsuperscript{120}, including an objective assessment of the facts of the case. WTO panels enjoy a broad margin of freedom of choice in the collection and appreciation of the evidence. This requires an obligation to analyze the evidence in a critical and credible method. In order to issue sound report dependence on sound and clear procedures as stipulated in the WTO's DSU; thus, their reports are more convincing and persuasive to the WTO Members. Moreover, the WTO’s panel process becomes more systematic, simple and less formalistic compared to old GATT system.

\textsuperscript{119} The African Group, the LDC Group and Jordan submitted to ‘Doha Development Agenda’.
\textsuperscript{120} Art. 11 of the DSU.