DISPUTE SETTLEMENT MECHANISM EVOLUTION FROM THE GATT TO THE WTO

DISSERTATION

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SUBMITTED TO:

Miss. TRISHLA SINGH

(Assistant Professor)

SUBMITTED BY:

AMAN Singh

Roll No.1190990003

Corporate and Commercial Law

LL.M. IInd Sem.

BABU BANARASI DAS UNIVERSITY LUCKNOW

Batch: 2019-2020

CERTIFICATE

This is certified that **Mr. Aman Singh,** Student of LL.M. II Semester **ROLL NO.**1190990003, **Babu Banarasi Das University, Lucknow** has written dissertation entitled "**DISPUTE SETTLEMENT MECHANISM EVOLUTION FROM THE GATT TO THE WTO"** Under my supervision. This dissertation embodies the authentic and genuine work done by her.

(Miss. Trishla Singh)
(Assistant Professor)
School of Legal Studies
Babu Banarsi Das University
Lucknow

DECLARATION

I, **Aman Singh,** student of LL.M. (Corporate and commercial Law), School of Legal Studies, **Babu Banarasi Das University**, declare that the work embodied in this LL.M. Dissertation is my own bonafide work, carried out by me, under the supervision of **Assistant Prof**. **Miss. Trishla Singh** (Assistant Professor, School of Legal Studies, BBDU). The matter embodied in this dissertation has not been submitted previously for the award of any degree or diploma in any other University or Institute.

I declare that I have faithfully acknowledged, given credit, and referred to the authors wherever their works have been cited in the dissertation.

Date:

Signature

Place: Lucknow

Aman Singh

ROLL NO. 1190990003

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(Aman Singh)

LL.M. (Corporate and commercial Law)

Roll No. 1190990003

School of Legal Studies, BBDU

LIST OF ABBREVIATIONS

Abbreviation	Meaning
Art.	Article
AAA	American arbitration association
ADR	Alternative Dispute Resolution
AIR	All India Reporter
Am.Rev.Int'l.Arb	American Review of International Arbitration
CPC	Code of Civil Procedure
ECOSOC United Nations’	Economic and Social Council
GAFTA	Grain and Feed Trade Association
GC	Geneva Convention
ICA	International Commercial Arbitration
ICA	Indian Council of Arbitration
ICADR	International Centre for Alternative Disputes Resolution
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration

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CHAPTER I

INTRODUCTION

At the heart, trade dispute settlement mechanism in the international trade is to be effective guardian of rules based system. Evolution of Dispute settlement in international trade from General Agreement on Tariffs and Trade (GATT) to present days, dispute settlement body reflects an increasing importance to a system away from power based system. The earlier mechanism was relatively inefficient and lacked sufficient political oversight. WTO mechanism is hailed as new development in international economic relation which is considered to be more than power. However though this is a great achievement the present system remains neutral in some respect. Developed countries are much better positioned compared to developing countries and because of this reason many developing countries even do not think of invoking international forum. This is mainly due to phenomenal cost and uncertain benefits of participation.

In international law the term dispute means a specific disagreement relating to a question of rights or interests in which the parties proceed by the way of claims, counterclaims, denials and so on.[1] In another definition, dispute in international law is a situation when one entity of international law demands from another one specific action or behavior and such a demand is based on the rules of international law binding for both parties and this other entity resists this action or behavior.[2] The term dispute is therefore different from the notion of conflict, which means a general state of hostility between the parties. The distinction is important, since opposite to the conflicts, disputes are not entirely undesirable and may have certain valuable characteristics such as an effect of law clarification.[3]

The possibility of a legal dispute arising is never absent in international trade transactions. The reasonable exporter, in spite of the care he has taken in the preparation of the contract of sale, has to contemplate acting against a buyer who is in breach of contract. In such circumstances, he may weigh the cost effectiveness of litigation and decide that it is better to cut his losses rather than engage in costly and protracted proceedings. There are, however, situations in which such a

[1] J. Collier, V. Lowe, The Settlement of Disputes in International Law. Institutions and Procedures, New York 2000, p. 1.
[2] L. Ehrlich, Prawo międzynarodowe, Warszawa 1958, p. 356.
[3] J. Collier, V. Lowe, The Settlement…, p. 1..

solution is neither possible nor desirable. It may be that the subject matter of the contract is too valuable for a loss to be absorbed, that third party interests are involved or that the breach is too flagrant to allow it to pass unchallenged. The question therefore arise as to the most convenient, expeditious and cost-effective way to settle the dispute[4]. Ideally, parties engaged in international trade should consider this issue before entering into their contract. Unfortunately such parties often neglect to give full consideration to the dispute resolution provisions.

In the context of the WTO Dispute Settlement system, the term dispute stands for a situation in which one WTO Member State adopts a trade policy or measure or takes some action, that one or more concerned WTO Members consider to be a breach of the WTO Agreements or a failure to meet obligations under such agreements[5]. In such situation those countries undertake steps with accordance to the Dispute Settlement Understanding.

International trade disputes may arise due to (i) contracts for the sale of goods which may give rise to disputes, among other things, with respect to quality, price and payment, transportation and timing, and conditions of delivery;(ii) there is a difference between distributorship and agency contracts, distributors buy and sell, commercial agents promote and negotiate the sale of goods on behalf of another person(the principal) who then sells the goods to customers; (iii) performance of international construction and engineering contracts, such as tunnels, dams, bridges, highways and university complexes, is often spread over several years and involves considerable amounts of money. Small-value, short construction time and repetitive construction contracts are an exception to this general rule. Disputes may arise because: work performed does not comply with the contractual requirements; work is not completed within the contractually stipulated time; construction requires new or more materials or structures(variations) that were not provided in the contract and agreed price; government authorities impose new requirements that materially impact the scope and cost of the works: subcontractor and the owner, etc;(iv) international business contracts often involve intellectual property (IP) rights such as patent licensing, trademarks, technical assistance, transfer of technology and/or of know, regarding licensing, royalty, infringement etc ;(v) domain names disputes internet domain names, such as those ending with .com, .net, .org represent enormous value, as a result, their attribution and use

[4] Schmitthoff, 'Export Trade: The Law And Practice Of International Trade' 11th edn, (Sweet & Maxwell ,2007), p.537

[5] K. Sarhan, *The ABCs of WTO Dispute Settlement*, *Dispute Resolution Journal*, Nov 2005–Jan 2006, p. 72.

have given rise to numerous disputes over abuse of registration of domain names, commonly known as cyber squatting ect[6].

Dispute resolution is an important part of risk management in international trade. Reduced barriers are exposing small and medium-sized enterprises (SMEs) to new markets and international competition, as well as to new partners, countries, cultures and trade usages. International opportunities generate new risks. international business dealings give rise to disputes. As compared to disputes between entities from the same country, international business disputes have additional problems including various jurisdiction, various diverse legal system and traditions, different procedures and often involved more than one language. commercial dispute resolution strategies have evolved rapidly in the past 20 years.

The WTO's legalized dispute settlement system has been hailed as a new development in international economic relations in which law, more than power, might reign.

However, while these developments in international law constitute a great achievement, the system remains far from a neutral technocratic process in its structure and operation. Large developed countries are much better-positioned to take advantage of the resource-demanding legalized system and have done so. The system's rules on remedies, in particular, are structured to favour them. Many developing countries do not even consider bringing cases or otherwise participating as a third party in the dispute settlement system. In fact, there is little rationale for many of them to do so on account of the significant costs and uncertain benefits of participating.

During the last ten decades multilateral trading system evolved and improved gradually. Among all the gradual improvements, the most significant one took place during the Uruguay Round of GATT in 1995, when the World Trade Organization (WTO) commenced its journey with a comprehensive set of Agreements covering all major issues of international trade. The new set of Agreement e.g Disputes Settlement Understanding (DSU [7]) describes the procedures for resolving trade disputes. Unlike GATT, which had inadequate provisions for settlement of trade disputes, DSU describes the dispute settlement protocol in a very detailed format. One of the most remarkable and successful aspects of the WTO is its automatic and compulsory dispute

[6] International Trade Center (ITC)' Setting Business Disputes: Arbitration and Alternative Dispute Res olution'2nd edn.Geneva;ITC,2016

[7] DSU is stipulated in Annex 2 of the Agreement establishing the WTO.

settlement system. It is one thing for countries to agree to a treaty and quite another to enforce compliance with the treaty. Under the international law, states can only be brought before an international court or tribunal if they have consented to the jurisdiction of that court or tribunal. In many cases, this implies that breach of a treaty cannot be challenged in the third-party adjudication, or that when a dispute arises it can be settled in a judicial fashion only with the explicit consent of both parties.

As compared to most other international adjudicational regimes, WTO dispute settlement has detailed procedural rules, an appellate process, and back-up arbitration mechanisms to deal with non-implementation and the calculation of trade sanctions in response to continued non-compliance. Most important, WTO members have frequently used the dispute settlement system and in the large majority of cases with notable exception the system has managed to resolve the dispute.

The trends of trade disputes show that the developed countries are more active in the dispute settlement process of the Organization (WTO) than the developing countries. It also plays significant role in winning trade disputes. Therefore, lack of financial strength could be an explanation for the low rate of small-developing countries in the dispute settlement process. A close look at the Understanding on Rules and Procedures Governing the Settlement of Disputes may reveal that its inherent inability to provide feasible remedies against unfair trade practices.

This may also discourage the small-developing countries to participate in the dispute settlement process. To ensure equitable participation of the developing countries in the dispute settlement process, the WTO should increase legal and technical assistance for the small-developing countries. At the same time the WTO needs to ensure quick resolution of the disputes and replace the provision of "retaliation with other meaningful remedies[8]. However, the Agreements, including the DSU, seem to have several deficiencies that may create incentives for a country to deviate from the rules of trade stipulated in the WTO Agreements. Inability of the DSU to provide adequate and fast solution against such deviations seriously undermines the whole multilateral trading system of the WTO. Outcomes from Ministerial Meetings of the WTO show that in spite of enthusiastic commitments made by the members of the WTO, multilateral trade

[8] Das(1998) provides a handy summary of the deficiencies.

negotiation might still end in deadlock and failure. An effective WTO dispute settlement system is important from an institutional perspective as it has public good characteristics. Appropriate Membership participation in the system can also generate positive externalities. The WTO dispute settlement system acts as a public good if it improves property rights—in this context market access rights – and thus each Member country's ownership stake in the system.

Improved security of these rights reduces uncertainty, increasing the likelihood that firms and individuals in countries on both the export and import sides of international transactions make mutually beneficial, relationship-specific investments. Active participation in dispute settlement activity by WTO member countries can also have positive externalities if one country's litigation efforts contribute to the removal of a trade barrier that adversely affected the market access rights of other WTO members. The presence of these two potential market failures require monitoring, vigilance, and possibly intervention by market non-participants so as not to miss opportunities for fully exploiting the global benefits of a functioning dispute settlement system.

While enforcement of existing market access rights is of considerable concern for all WTO members, it is especially important for developing countries that are not yet fully integrated into the system. A failure of the dispute settlement system to enforce existing commitments and market access obligations may elicit a damaging feedback effect. If poor developing countries believe they cannot enforce their market access rights through dispute settlement, they may be less willing to follow through with implementation of their own WTO commitments or undertake new commitments in the ongoing Doha Round.

International trade disputes are settled in accordance with international treaties and national laws involving international bodies, including –

1. UN'S UNCITRAL14 Model Law

2. International Chamber of Commerce(ICC)

3. New York Convention on Reorganization and Enforcement of Foreign Arbitral Award,1958

4. Convention for the Pacific Settlement of International Disputes(1899 and1907)

5. The Permanent Court of Arbitration(PAC)

6. The American Arbitration Association(AAA)

7. The North American Free Trade Agreement(NAFTA)

8. The African Union Act, 2000 (A. U. Act)

9. WTO's Dispute Settlement Understanding (DSU)

10. Indian Contract Act, 1872

11. Civil Procedure Code 1908

Although many international trade scholars view the dispute settlement system of the WTO as a success, the definition of "success" depends on the perspective and experience of each Member state. Developed and some developing countries such as the United States, the European Union (EU), Brazil and India utilized the system with varying degrees of frequency. However, Member states with smaller economies or in differing stages of development either tend to shy away from participating in disputes or unable to access the system. The reasons for this may include a lack of resources, a lack of institutional capacity, or a lack of political will. Others have pointed out that overall smaller trade volumes also contribute to less usage by developing countries since there may be less potential for dispute[9].

Notwithstanding the impressive participation of some developing countries, such as Brazil, India and Mexico one commentator contends that "the vast majority of developing countries professed only what is known as 'systemic interest ystemic interest refers to the fact that developing countries rarely have more tan an indirect commercial interest" in the litigation due to their comparatively smaller trade volumes. This tangential relationship to disputes often translates into developing country participation only at the consultation stage or as a third party. These provisions specifically deviate from the general rules, and they provide special rights "which give developed countries the possibility to treat developing countries more favourably than other WTO Members. The text of the DSU alone contains at least eleven such provisions by which developing countries should enjoy, for example, the right to have special attention be paid to the particular problems of developing countries18,another provision allows developing countries to

[9] C Mohan Kumar, Dispute settlement in the WTO: Developing Country Participation and Possible Reform, in Reform And Development Of The WTO Dispute Settlement System 177.

insist that, in cases between them and a developed country, at least one panelist be from a developing country.

Objectives of the Study

The primary objective of the study is to provide an analysis of methods of international trade disputes and particularly of WTO's DSU and to offer strategies to make the dispute settlement more objective and efficient on the basis of equality.

The other objectives of the study are:

i) To evaluate the origin of methods of settlement of international trade disputes;

ii) To make a conceptual analysis of various methods of settlement of trade disputes;

iii) To analyse the legal provisions dealing with International Trade Disputes at Inter-national and Regional level;

iv) To make a comparative evaluation of the various provisions relating to International Trade Disputes under different systems of various countries, Associations and international organizations;

v) To analyse the position between Developed countries and Developing countries with respect to access to the dispute settlement system;

vi) To examine the provisions relating to settlement of International Trade Disputes under the Indian law and to determine its effectiveness;

vii) To offer pertinent suggestions for improving dispute settlement mechanism on the basis of findings of the study.

Hypotheses

In the light of the above objectives of the study and after careful perusal of the existing literature and material the following hypotheses are framed for investigation and research.

(i) The Dispute Settlement Machinery under WTO does not operate on the basis of equality and it is weighed against the developing countries.

(ii) There is a tendency among the developing countries not to resort to the Dispute Settlement Mechanism under WTO because of the pro-developed countries' procedure and practices.

(iii) The developing countries are compelled to forego their rights and immunities under the domestic contractual law because of their adverse bargaining power.

(iv) The existing dispute settlement system has failed to ensure contractual commitments and enforce market obligations of the member countries.

(v) The WTO dispute settlement mechanism has failed to provide adequate and fast remedies to aggrieved parties by initiating actions against the erring nations and parties.

Methodology

The methodology adopted in this study is purely doctrinal. The subject is analysed in the light of various provisions under the treaties administered by UN and WTO's DSU agreement, statutory provisions and judicial pronouncement. Various books, treatises, journals, periodicals, United Nations periodicals and publications, magazines, international materials, Legislative glossary, treaties and Conventions etc, have been studied for the collection of the data. Judicial contributions, Law

Journals, Law reports, workshops, Conferences, Seminar papers and News papers are used. Materials from various websites have been used in analysing the problem.

Limitations

The present study involves a detailed analysis of relevant international treaties and statutory key provisions with reference to the judicial decisions emerged there under from time to time. The study has been confined only to the doctrinal research involving books, articles, International documents and relevant statutory material. The study excludes empirical study on this aspect. Further lack of literature in print in this new area, the researcher has made reference to the material available on the Internet.

Research Questions

In pursuit of these hypotheses the following research questions have been addressed:

(i) What is the nature of International Trade and how are international trade disputes are resoled?

(ii) What is the rationale for reorganization of various methods to settle the International Trade Disputes?

(iii) How are international trade disputes resolved at the regional and international level?

(iv) How do WTO's DSU contribute to developing and under developing countries to resolve International trade disputes?

(v) How to resolve the conflict between Developed and developing countries in case of using WTO's DSU?

(vi) Whether DSU operates objectively and equally for the benefit of both developed and developing countries?

Review of Literature

Literature Review has been carried out of various research papers from relevant Journals, papers presented during proceedings of various international conferences, relevant govt. reports, past Research thesis, etc. The review has been carried out to create right scientific thinking & concrete knowledge base, develop focused ideas about the subject of Alternative dispute resolution system in general with specific reference to infrastructure contracts. Thereafter, these ideas have been developed with focus on improving the existing system of dispute resolution system in infrastructure projects for Indian Defence Forces.

Dispute is part and parcel of any commercial transaction. Dispute is any claim which the other party refuses to admit or admits but does not pay. Due to numerous uncertainties attached, infrastructure projects are potentially more prone to development of disputes than any other contract. Broadly there are two modes of Dispute Resolution Mechanism:

(a) Judicial process i.e. Litigation through courts.

(b) Alternative Dispute Resolution (ADR) Methods

Litigation

Any commercial dispute arising between the parties, if not resolved amicably, may be resolved through the intervention of civil courts. The dispute resolution process through the medium of courts is called litigation.

Litigation takes a long period of time to finally get the dispute resolved specifically in commercial disputes. The delay is even longer in case of disputes which are peculiar to Infrastructure Projects.

There is huge load on the judiciary due to long pending cases of civil as well as criminal nature. As per a recent report1 in Hindustan Times, New Delhi Edition on 04 Sep 14, there are 3.13 Cr cases pending in various Indian courts. Of this nearly 2.7 Cr are pending in subordinate courts, 43 lakh are pending in various High Courts and nearly 60,000 in the Supreme Court of India. The problem is compounded due to shortage of judges at each level with a combined vacancy of judges of over 4700. Thus existing strength is unable to take on the huge load. Thus, the gravity of the situation of immense load on judiciary is well appreciated by one and all.

The nature of contractual disputes pertaining to infrastructure projects requires specialist technical and engineering knowledge to understand the dispute in its entirety. The judges with only legal knowledge require sufficient time to appreciate the nuances of such technical disputes. Thus, it takes a lot of time to understand the dispute by the judges. Even the respective lawyers of each party take long time to understand and prepare their respective claims & pleadings. The nature of disputes requires lengthy discussions, arguments & explanations at stretch. However, with huge number of cases listed for hearing on a day, the time allotted for the dispute is impractical to have any reasonable discussion. Thus, it takes numerous hearings to put the points across to the judges. There are a lot of bulky technical documentation, drawings, detailing & calculations which is required to be understood & deliberated upon which is impossible within the time allotted to a case on a particular date.

Alternative Dispute Resolution (ADR) Techniques

As seen above litigation is a complicated, time consuming & costly affair to resolve civil disputes. Moreover, it is not a suitable method to resolve technical disputes as in infrastructure contracts. Further, litigation results in decisions resulting in win-lose situation for the two parties

to dispute and leads to further litigation in the form of appeals to the highest courts. It generally leads to disruption of commercial relationships.

Negotiation

Oxford Dictionary defines Negotiation as "Discussion aimed at reaching an agreement" whereas as per Businessdictionary.com it is defined as "Bargaining (give and take) process between two or more parties (each with its own aims, needs, and viewpoints) seeking to discover a common ground and reach an agreement to settle a matter of mutual concern or resolve a conflict.

Mediation

Mediation is a way of settling disputes in which a third party, a mediator, helps both sides to come to an agreement considered acceptable by both [10] . Thus, Mediation is amicable settlement of disputes between the parties through mediator who acts as a facilitator to bring the parties together. There is no imposed decision as in litigation or Arbitration and parties are free to walk out from the process if no possibility exists of an amicable settlement.

[10] 7 Lord Chancellor's Department on Alternative Dispute Resolution. (1998). A Consultation Paper on Alternate Dispute Resolution. London; also see (2012). Ch 6: Alternative Dispute Resolution. In D. Kelly, & G. Slapper, Sourcebook on English Legal System (p. 275). Routledge.

CHAPTER-II

HISTORY OF INTERNATIONAL TRADE DISPUTE

A comprehensive and fruitful analysis of the shaping factors of International Trade and settlement of international trade disputes cannot be understand without having a clear idea of the evolution of international trade over times. This chapter analysis past and present system in international trade and settlement of trade disputes. It identifies the multiple setbacks and reversals along the way and finally portrays the difference between GATT and WTO.

2.2 History of International Trade

2.2.1 Before GATT

Understanding the future shaping factors of world trade with an understanding of the historical forces that created the global trading system we have today. From the ancient Greeks we can see trade between and among the nations. From the ancient Greeks to the present, government officials, intellectuals and economics have pondered the determinates of trade between countries, have analyzed whether trade benefits or harms the nations and more importantly, have tried to determined what trade policy is the best for any particular country[11].

Since the time of the ancient Greek Philosophers, there has been a dual view of trade a reorganization of the benefits of international exchange combined with a concern that certain domestic industries or laborers or culture would be harmed by foreign competition. Depending upon the weight age attached to the overall gains from trade or the losses of those harmed by imports, analysts have arrived at different conclusions about the desirability of having free trade[12]. But economists have liked free trade to technological progress, although some minority interests may be prejudicially affected, the overall benefits to society are substantial.

[11] World Trade Organization, International Trade, Joint Venture and Foreign Collaborations, (New Delhi: The Institution of Company Secretaries of India, 2004)
[12] 2 Ibid

International trade law did not start on 30 October 1947, with the General Agreement On Tariffs and Trade (GATT). Trade economics did not begin with Adam Smith and David Ricardo4 , and their respective laws of Absolute and Comparative Advantage.

Trade itself did not commence after the Second World War (1939-45), the roots of the study and practice of international trade are ancient and interdisciplinary. The presumption trade ought to be free remains highly controversial[13].

Embedded in these roots, but buried by much modern legal and economic scholarship, is an integral link between trade and morality. According to the first chapter of his splendid account, Against the Tide explores the dichotomous views in Ancient and Medieval times of foreign commerce. Plutrarch of Delphi and Horace embody the extremes. Trade is expressed by Douglas as God created the sea to promote interactions and to8 facilitate commerce between the various people of the earth without the exchanges made possible by the sea man would be “savage and destitute”9 Horace, instead in odes, proffers “the sea brought contact with strangers who could disrupt domestic life by exposing citizens to the bad manners and corrupt morals of barbarians.

For ancient thinkers, traders themselves were part of the problem, whether trade is advantageous or threat to moral fiber and security. In Plato’s11 division of labour, retail trade was an occupation beneath the dignity of Greek citizens. It was best left to an inferior person- preferably a segregated foreign resident in a Greek City State incompetent at other activities. Plato acknowledged the need to import a good only if a city-state cannot supply itself, and to do so only if the good is necessary.12 Aristotle in [14] Politics14 looked askance at traders and dependency on foreign trade. Even Xenophon15 and Cicero16 also defended foreign trade.

Early Christian Fathers, too, viewed commerce as ethically unseemly, an occasion for many of the Seven Deadly Sins-anger, covetousness, envy, greed, lust, pride and sloth. They recalled the Gospel account of Christ throwing merchants the Temple. Saint Augustine (354-430 A.D) intoned in exposition on the Book of Psalms, Let Christians amend themselves, let them not trade. Give the risk of foreign commerce, coupled with an ethnocentric sense of superiority, the trade policy if it be called that of many ancient philosophers and theologians was to ban imports

[13] Raj-Bhala-‘International Trade Law’, Interdisciplinary Theory and Practice, 3rd edn, (Lexis Nexis, 2008)
[14] Disciple of Ploto

of non-necessities and forbid exports of necessities. Self- sufficiency was preferred, and so much the better if it could be achieved through autarky.

However, the trade began to turn in favor of free or freer trade with the Doctrine of Universal Economy[15]. This Doctrine states rade between regions should be accepted as beneficial and even be permitted to run its course free from interference Providence deliberately scattered resources and goods around the world unequally to promote commerce between different regions. There are four distinct elements in the doctrine. First, it embraces the stoic cosmopolitan belief in the universal brotherhood of man. Second, it describes the benefits to mankind arising from the trade and exchange of goods.

Third it embodies the nation that economic resources are distributed unequally around the world. Finally, it attributes this entire arrangement to the divine intervention of a God who acted with the deliberate intention of promoting commerce and peaceful co-operation among men.

Mercantilism

The first reasonably systematic body of thought devoted to international trade is called 'mercantilism' and it emerged in seventeenth and eighteenth century in Europe. An outpouring of pamphlets on economic issues, particularly in England and especially a predominant part of this period, mercantilist writers argued that a key objective of trade should be to promote a favorable balance of trade. A "favorable balance of trade is one in which the value of domestic goods exported exceeds the value of foreign goods imported. Trade with a given country or region was judged profitable by the extent imported[16]. Trade with a given a country or region was judged profitable by the extent to which the value of export exceed the value of import , there by resulting in a balance of trade surplus and adding precious metals and treasure to the country stock.[17] Exports of manufactured goods were considered beneficial, and exports of raw materials were considered harmful imports of raw materials were viewed as advantageous and imports of manufactured goods were viewed as damaging. This ranking of activities was based not only on employment grounds, where processing and adding value to raw materials was

[15] This Doctrine propounded by Seneca the Younger (4 B.C-65 B.C), Philo of Alexandria (20 B.C-50 A.D) Origen (185-254 A.D), Saint John Chrysostom (349-457 A.D) and Saint Theoderet of Cyrrhus (393-457 A.D)etc
[16] Supra note.1
[17] 0 Ibid

thought to generate better employment opportunities than just extraction or primary production of basic goods, but also for building up industries to strengthen the economy and the national defense.

But even if the logic of these theories was correct, this strategy could never work if all nations tried to follow it simultaneously. This is due to the fact that not every country can have a balance of trade surplus, and not every country can export manufactured goods and import raw materials.

Adam Smith's Wealth of Nations

While there were anti-mercantilist economic writers during this period, advocated free trade might be desirable. The breakthrough came with Adam Smiths An Inquiry into the Nature and Causes of the Wealth of Nation' with this book; Smith fundamentally changed economic thinking about international trade [18] . Smith argued that economic growth depended upon specialization helped promote greater productivity that is producing more goods from the same resources, which is essential for achieving higher standards of living .According to Smith the division of labor was limited by the extent of market in other words, small markets would not be able to support a great deal of specialization whereas the size of the market for any given country allowed for more refined specialization, created an international division of labour and thereby benefited all countries by increasing the worlds productivity and output. Smith argued that the great object of mercantilism was to diminish as much as possible, the importation of foreign goods for home consumption, and to increase as much as possible the exportation of the product of domestic industry.

These goals were to be achieved through import restrictions, on one hand and export subsidies on the others, Smith argued against both actions [19]. Smith dispensed with export subsidies and argued import restrictions were essentially wasteful.

Comparative Advantage

During the first quarter of the nineteenth country reinforced the case of free trade. The theory of comparative advantage emerged during this period and strengthened the understanding of the

[18] Adam Smith, Economics, Philosophy, (Scotland: William Strahan Thomas Cadell, 1776)
[19] Ibid

nature of trade and its benefits. David Ricardo has received most of the credit for developing this important theory a, although James Mill and Robert Torrens had similar ideas around the same time.

The theory of comparative advantage suggests that a country should export goods in the country in which its relative cost advantage, and not the absolute cast advantage, is greatest in comparison to other countries. The practical impact of the doctrine is that a country may export a good even if a foreign country may export could produce it more efficiently if that is wherein its relative advantage lies; similarly, a country may import a good even if it could produce that good more efficiently than the country from which it is importing the good[20].

These economists recognized that there may be situations in which a government might wish to sacrifice economic gains for some other political objective. There might be non-economic objective. There might be non-economic objectives that are so desirable that they are worth incurring economic losses.

2.2.2 Establishment of GATT and WTO

Internationalization of International Trade

In an effort to give an early boost to trade liberalization after the Second World War and to begin to correct the large overhang of protectionist measures which remained in place from the early 1930s tariff negations were opened among the 23 founding GATT contracting parties in 1946. This first round of negotiations resulted in 45,000 tariff concessions effecting $10billion or about one fifth of world trade. The tariff concessions and rules together became known as the General Agreement on Tariff and Trade and entered into force in January, 1948.

The WTO's predecessor, the GATT, was established on a provisional basis after the second world war in the wake of other new multilateral institutions dedicate to international economic co-operation notably "Breton Wood's" institutions now known as the World Bank and the International Monetary Fund.

The world trade organization is not a simple extension of GATT; rather it completely replaces its predecessor and has a very different character. It established with a permanent institution with its

[20] Ibid

own secretariat. Its commitments are full and permanent. The WTO covers trade in goods, services and trade related aspects of intellectual property. The WTO dispute settlement system, which is faster, more automatic and thus much less susceptible to blockages. WTO dispute findings will also be more easily assured[21].

Regional Trading Blocks

Along with WTO, so many regional trading blocks were established by nations at their regional level to promote international trade.

(i) Association Of South –East Asian Nations

It was established on 8th August,1967, in Bangkok, by the five original members countries namely, Indonesia, Malaysia, Philippines, Singapore and Thailand with the objective to 1)

1. Accelerate the economic growth, social progress and cultural development in the region through joint endeavors in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South East Asian nations, and

2. To promote regional peace and stability through abiding respect for justice and rule of law in the relationship among countries in the region and adherence to the principles of the United Nations Charter.

(ii) European Communities / European Union[22]

The term 'European communities' is a collective term for the European Coal and Steel Community28 the European Economic Community29and the European Atomic Energy Community30. France, Germany, Belgium, Italy, Luxembourg, Netherland were original members of European communities. Now brings together 14 countries in what is known as the European Union (EU). Denmark, Ireland, Greece, Portugal, Spain, Austria, Finland, Sweden. Recently United Kingdom came out from the union. It set out the single market, single currency

[21] Supra note 1
[22] EU

among the member nations. Its purpose is to establish new areas of European co-operation in foreign and security policy and justice and home affairs[23].

It has main four institutions namely, the Council of Ministers: the European commission: the European Parliament and European Court of Justice. Along with these four functional institutions it has other bodies also such as, Economic and Social Committee, the European Ombudsman and the European Central Bank.

(ii) North American Free Trade Agreement (NAFTA)

In January 1994, Canada, the United States and Mexico launched the NAFTA and formed the world's largest free trade area. Designed to foster increased trade and investment among the partners, the NAFTA contains an ambitious schedule for tariff barriers, as well as comprehensive provisions on the conduct of business in the free trade area. These include disciplines on the regulations of investment, services, intellectual property, competition and the temporary entry of business persons.

(iii) South Asian Associations for Regional Co-Operation

The South Asian Association for Regional Cooperation comprises Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Shrilanka. The main goal of the Association is to accelerate the process of economic and social development in member states, through joint action in the agreed areas of cooperation.

SAARC are:-

a) To promote the welfare of the people of south Asia and to improve their quality of life;

b) To accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realize their full potentials;

c) To promote and strengthen collective self-reliance among the countries of South Asia;

d) To contribute to mutual trust, understanding and appreciation of one another's problems;

e) To strengthen co-operation with other developing countries

[23] Supra note 1

f) To strengthen co-operation among themselves in international forums on matters of common interests; and

g) To co-operate with international and regional organizations with similar aims and purposes.

2.3 Settlement of International Trade Disputes Under GATT System

The current world trading system has its roots in the years immediately following World War II, when Western nations sought to eliminate the protectionist and discriminatory trade practices that had helped inflame international animosity and alienation between the world wars[24].

The GATT was the first real attempt by the major nations of the world to create a cohesive system of world trade regulations. In June of 1944, while the allied forces tore through Europe, representatives of the Allied nations met in Breton Woods, New Hampshire. With the end of World War II in sight, these nations recognized the need to address the financial and economic problems that had the contributed to the Great Depression and the War [25] . Because the participants in the Breton Woods conference were from the finance ministers of their respective governments, they placed on emphasis on financial and banking matters, not on trade issues[26]. At the end of the conference the participants had established the charters of two major international financial entities. International Monetary Fund and the International Bank for Reconstruction and Development

The Breton Woods participants also recognized the need for a third international organization one that would oversee the area of world trade. The protectionist measures that arisen during the two decades between the World War had hampered international trade and most nations felt that this obstruction of free trade was a major factor contributing to the Depression and the War. Shortly after the Breton Woods Conference, the United States and United Kingdom proposed the creation of an International Trade Organization the ITO.

The nations participating in this unprecedented multinational effort, however were eager to enjoy the benefits of free trade, and did not want to wait until the ITO could get on its feet. As

[24] Fordham Law Review Vol.65, (New York :Fordham University School of Law)

[25] John. H.Jackson, The World Trading System; Law and Policy of International Economic Relations, 2nd edn, (Cambridge: MIT Press,1997)

an interim measure, they decided to draft and enter into a multinational trade agreement that would regulate international trade until the ITO could take over. This provisional arrangement was the GATT, and in 1947 the participating nations signed a Protocol of Provisional Application, which put the GATT into force.

In the meantime, the ITO was running into problem. The proposed charter for the ITO was extremely ambitious and set numerous limits on the actions that participating nation could take in international trade. As a result, in 1950, the United States Congress, hesitant to cede too much power, refused to ratify the charter. As the only world power whose economy was not ravaged by World War II, the United States had tremendous influence and its refusal to ratify the ITO Character effectively ensured that the organization would never come into begin.

The untimely death of the ITO left a void in international trade regulation. The GATT, which was intended to be merely temporary, became by default the primary entity governing international trade.[27] Of course, the GATT was merely an agreement, without the force of a treaty and certainty without the power and presence of an organization. The mismatch between GATT's initial conception and its ultimate function manifested itself in a number of ways, including the artificial "leasing" of its staff from the non-existent ITO and the lack of any guiding constitution or charter.

The GATT's drafters indentured it to be instrumental in combating the high tariffs and other protectionist measure that had contributed to the Great Depression and World War II. To this end, Article II of the GATT prohibits the participating nations ,called 'Contracting Parties' from imposing any import restrictions other than tariffs and also limits the tariffs that can be imposed. Between the adoption of the GATT and its replacement by the WTO, the Contracting Parties repeatedly lowered the tariff limits referred to in Article II. Eventually, the tariffs reached such low level as to present no real impediment to free trade.

In addition to tariff reductions, the GATT also places limits on the international law and regulations of the Contracting Parties. Specifically, each nation's treatment of imports from another Contracting Party must satisfy two doctrinal principles of nondiscriminatory treatment

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set forth by the GATT. These are referred to as most favored nation treatment and ‘national treatment.

Article I of the GATT sets forth the most –favored-nation obligation49. Under this article, one Contracting Party cannot be given preferential treatment over another country. Instead, the imports from, and exports to, each Contracting Party must be afforded equitable treatment with respect to customs procedures and all other import or export-related regulations. In effect, each nation must grant to every other contracting party the most favorable treatment that it grants to any country.

The second type of non-discrimination is national treatment, set forth in Article III of the GATT.50 Under this doctrine, the domestic laws of a Contracting Party must treat goods imported from another Contracting Party than comparable domestically produced goods once the goods have entered the domestic market. In expectation that Contracting Parties would occasionally disagree about the interpretation and application of GATT provisions, the GATT provides a procedure for resolutions of trade disputes. Like the rest of the GATT, this procedure, set forth in Article XXIII, was intended to be merely provisional. Therefore, it does not exhaustively detail every step of the process, and much of the ultimate dispute resolution procedure was embodied in customs and practices developed by the Contracting Parties while resolving actual disputes.

GATT 1947 did not provide a detailed dispute settlement system: it contains only two articles relating to dispute settlement. Neither Article XXII of GATT nor Article XXIII of the GATT specifically mentioned dispute settlement or details way to handle an upcoming disagreement between the members. The unsuccessful settlement of dispute under Article XXII or XXIII was during the first year of GATT and handled by working parties. The working parties were and consisted of representatives of all interested Contracting Parties including the parties of the dispute. The working parties adopted the reports by consensus among all participants.

The system of working parties was replaced by panels consisting of three to five independent experts from non-involved GATT contracting parties. The Council which consisted of all the members. The council had to adopt the recommendations or rulings by consensus before it became legally binding upon the members concerned. The GATT panels created an important

jurisprudence and started to follow a more rules-based and judicial style of reasoning in their reports. This system worked well during the 1950s whilst the consisted of like- minded members which had worked together in the ITO/GATT negations and agreed upon the GATT 1947.

The dispute settlement system was not used frequently during the 1960s, but when the European Economic Community was established and an increasing number of developing countries became members of the WTO, the need for a dispute settlement system became essential. One problem that resulted was that the small, homogenous group of members was replaced by a new, larger organization consisting of a more argumentative generation. As a solution, a legal office was established in 1983 to help the trade diplomats with the panel reports. This created more confidence among the members, and the panel reports were used as a kind of precedent. The GATT dispute settlement system gradually changed from a power –based system of settlement through diplomatic negotiations into a system with features of a rule-based system of dispute settlement through adjudication.[28]

The GATT was established at the beginning of its history as a mutual-tariff reduction agreement under the International Trade Organization Charter. And also the GATT was never thought to be as an international organization by its members. The original intention of the GATT was to be placed as a legal framework for International Trade Organization. Read, R says about GATT dispute settlement system, "The GATT was established in the wake of the International Trade Organization" failure and contained a more limited array of measures derived from the Havana charter for the settlement of disputes between its contracting parties. The principle GATT articles dealing with disputes settlement are the Article XXII on consultation and XXIII on nullification and impairment.

Since its beginning of GATT, there was a controversy about dispute settlement system. One group argued that, the dispute settlement system must be 'diplomacy or power oriented' direction. Another group dictated it to be a 'rule-oriented' system. The former maintained that, the trade disputes would be resolved by negotiation. According to latter, it can be possible to make objective rulings to resolve a trade disputes. Evidence of this that, evolution of GATT resulted to the working parties shifted to the panel procedures.

[28] A WTO Secretariat Publication. 'A Hand Book on the WTO dispute settlement system' pp.12 -14

In the earlier stage, the GATT dispute settlement system was having a several weaknesses, because the GATT came to the life with its birth defects. For instance, there was an ambiguity about GATT decision-making procedures. The relevant articles of GATT dispute settlement system were informal. There was a plenary meeting of the contracting parties over the trade disputes. In addition, the GATT dispute settlement system was an in efficient and the principle of consensus was ambiguous. As a result of this, the contracting party can block the dispute procedure easily.

Furthermore, the system was having a problem about its institutional structures and also its provisional nature. According to Hudec "its operating procedures were quite ill-defined its legal ruling were written in vague language that suggested more than it said, and both its procedures and its ruling left plenty of room for negotiation[29].

Moreover, the countries representatives mostly were same persons, dominated by the United States and the United Kingdom. The GATT Secretariat did not have a legal background. They were diplomats or economist. This situation resulted to the lack of expert legal analysis in the work of the panels.

As a result of these, the Contracting Parties were losing their respect to the system. However, the system survived, because of the commitment of its members to support the GATT framework. In addition, according to support the GATT framework. In addition, according to Hoffman: after1952, the dispute settlement system became more formalized. The panel procedure was established and also independent expert acting in the process and not representatives of the member states[30].

The foundation of the GATT dispute resolution system is Article XXIII57. The system is triggered when a Contracting Party determines that a benefit a curing to it under the GATT is being "nullified or impaired" by the action of another Contracting Party"58 . The GATT requires the nations involved to try to resolve the dispute between themselves before bringing the dispute to the complaining nation must take is to "make written representations or proposals" to the

[29] R.Hudee, 'The New WTO Dispute Settlement Procedure' Minnesota Journal of Global Trade. (1994),4.
[30] J. Hoffman. 'Should trade disputes be handled in the world trade organization or in a unilateral way ? American Universit 1999.

nation it believes to be acting in contravention of the GATT. The other nation must "give sympathetic consideration" to these representations and proposals.

If parties are unable to resolve the disputes themselves, Article XXII allows the complaining party to bring the complaint before the other Contracting Parties, who will investigate and make appropriate recommendations. In the early years of the GATT, disputes were taken up at a meeting of all the Contracting Parties. Because of this proved too inefficient and time-consuming for most disputes, the Contracting Parties developed an alternate method, under which a working party would investigate the dispute and make a recommendation. The working party generally consisted of representatives of a few neutral countries.

In the mid-1950s, a third option became prevalent- the use of an impartial panel, composed of three to five trade experts. The experts were to decide the matter fairly and impartially and were not to act as representative government. After considering the arguments of both parties and of interested third parties, the panel would issue a report detailing its findings and recommendations.

The panel report had no legal effect unless it was adopted by consensus of the Contracting Parties. Therefore, the losing party could effectively block adoption of the report by voting against it.67 If the panel ruled in favor of the complaining nation and if the report was then adopted, the Contracting Parties were authorized to take action against the losing nation if circumstances were serious enough to justify such action," the Contracting Parties could authorized the complaining nation to retaliate against the losing nation by denying it any benefits that accrue to it under the GATT.

The GATT dispute resolution system worked remarkably well in its early years. Because of the homogeneity of the initial Contracting Parties and the consensus in support of GATT rules compliance with system was the norm[31]. In the 1950s and 1960s, Parties, this policy cohesion faltered, and the cumbersome.

The dispute resolution system began to grow more susceptible to increasingly fractious political considerations. One of the first blows to the credibility of the system came in 1955, when the

[31] Montana I Mora

United States used its political influence and power to get the other Contracting Parties to waive certain United States obligations regarding agricultural products. The potential political fallout of panel decisions began to undermine this effectiveness as panels intentionally wrote ambiguously worded opinions in politically sensitive areas.

The structure of the system itself was overly susceptible to political influence. The consensus requirement for adopting panel decisions meant that one party could block the decision by voting against it. Therefore, the losing nation could effectively veto any legal effect of the recommendation. As a result of this tepid adoption procedure, only one panel decision resulted in the authorization of retaliation by the Contracting Parties in the entire history of the GATT[32]. Even in this case, which resulted from a complaint by the Netherlands against the United States[33] political considerations forestalled application of the authorized retaliation, and the initial trade violation continued unabated[34]. Another political up short of the consensus requirement was that countries "occasionally withheld approval of a panel report in retaliation for some country's unwillingness to allow adoption of a panel report favorable to the first country.

In response to the growing ineffectiveness of the dispute resolution system nations relied increasing on unilateral threats and trade sanctions to resolve their trade related differences. The United States was particularly eager to resort to unilateral measures, a propensity that aggravated many of its trading partners and led to greater tension in the international arena. When the Contracting Parties met in the mid-1980 s to overhaul the international trade system, the growing importance of the GATT dispute resolution process was a major issue that they needed to resolve.

In spite of this, the GATT has evolved into an experienced organization especially with respect to its dispute settlement system which became the most important mechanism worked quite well. In order to make an effective and enforceable GATT rule, first, in1979, the Understanding on Dispute Settlement was established with consistent set of rules. Secondly in 1989 the Dispute Settlement Procedures was established. It gave the complainants right to a panel and defendants

[32] Jockson, supra note34 at 96
[33] In 1953, the Netherland raised a complaint about U.S. restraint on imported dairy products. The contracting parties authorized the Netherland's to retaliate by limiting U.S. grain imports.
[34] Ibid

could no longer block panel reports. Lastly, establishing an Appellate body gave to the system a more confidence.

Furthermore, Ministerial Declaration of the Uruguay Round made a significant improvement upon the dispute settlement system. According to this, ‘In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations[35].

The most important feature for the dispute settlement have evolved into the procedure during the GATT history in practices. Such as, the contracting parties duty is not only investigate and recommendation, but also to give a ruling on the issue. According to Uruguay Recourse to Article XXIII says about it. Paragraph 2 of Article XXIII provides, apart from promptly investigating any matter so referred to them, for two kinds of action by the Contracting Parties, namely

i) They shall make appropriate recommendations or give a ruling on the matter.

ii) They may authorize the suspension of concessions or obligations.

The action stated under (i) is obligatory and must be taken in all cases where there can be an ‘appropriate’ recommendation or ruling. The action under (ii) is to be taken at the discretion of the contracts parties in defined circumstances[36]. However, second action can be taken only when the situation quite serious to limit the applicability of the provisions to cases where there is nullification or impairment.

In conclusion, the establishment of the GATT was the failure of the International Trade Organization. The GATT came to the life with its shortcomings. The GATT also made no provisions to the dispute settlement mechanism. However, this mechanism was unique; it worked better than it was expected. As a matter of fact, the GATT dispute settlement system was a

[35] Ministerial Declaration of Uruguay Round (Punta del Declaration)GATT
[36] Ibid

bridge among the world trading countries over the trade disputes, even if it did not have a detailed provisions about dispute settlement and respectful trade organization in the world.

2.4 Settlement of International Trade Dispute Under the WTO

The next major step in the development of international trade was the creation of the WTO. The system for resolving international trade disputes underwent major changes as a result of the Uruguay Round. The WTO Charter contains an Understanding on Rules and Procedures Governing the Settlement of Disputes ('the Understanding'), which details the proper dispute resolution procedures in much greater detail than the GATT. The Understanding makes six important modifications to the system for resolving trade disputes. When viewed together, the new WTO system is a much more powerful and authoritative tool for resolving disputes than the GATT system.

Dispute Settlement is regarded by the World Trade Organization as the central pillar of the multilateral trading system. The first major change is the creation of a single entity, the Dispute Settlement Body (the 'DSB') to oversee all disputes.84 Because the GATT lacked such an over changing commission, there was an opportunity for parties to forum –shop for the particular dispute resolution mechanism that best suited their objectives. The formation of the DSB resulted the threat of inconsistent decisions that forum-shopping typically rises.

WTO facilitated an appellate procedure. In a clear attempt to make the dispute resolution system more consistent, fair and effective, the Understanding gives parties the right to appeal panel decisions to the Appellate Body. The Appellate Body is a permanent court made up of seven judges appointed by the DBS.

The understanding repairs a major weakness of the GATT system by making adoption of the panel and appellate body decisions virtually automatic. Adoption of a decision can only be forestalled if all the member nations, including the winning nation, agree by consensus not to

adopt it[37]. Under the GATT, the losing party could singlehandedly derail a panel decision by voting against it. This shift in from political sabotage and gives panel decisions much more potency.

Under the GATT, the dispute resolution system was open-ended and panels after deliberated in numerous sessions during a period of months. The understanding imposes strict time limits on the disputes. The Panel91 the Appellate Body and DBS at every stage of the proceedings and encourages those involved to discharge this duties promptly.

It also gives teeth to the dispute resolution system by empowering the WTO to impose sanctions on nations that refuse to comply with adopted decisions. The Understanding provides for ongoing surveillance of the transgressor's trade practices to ensure that they comply with the decision. Viewed together, these changes reflect the desire of the WTO member nations to depoliticize trade dispute resolution and encourage greater predictability and fairness in the application of trade agreements.

[37] Art.16(4),17(4) of WTO

CHAPTER-III

METHODS OF SETTLEMENT OF INTERNATIONAL TRADE DISPUTES

Disputes are bound to arise when trade takes place between different countries. Usually, the methods of dispute settlement in international trade are classified in two different ways. The first broad category represents diplomatic or non-judicial methods, and includes negotiations, mediation, inquiry, good office and conciliation. In this category, the parties remain in overall control of the dispute, and can either accept or reject the suggested settlement. The other general category is termed judicial or legal settlement since the basis of settlement is international law. The types here are arbitration and judicial settlement and are employed where a decision that is binding on the parties is needed. Judicial settlement involves referring the matter to the ICJ or other standing courts. Arbitration on other the hand needs the parties themselves to institute the methods of resolving the dispute between them[38]. Having stated the two general categories, this chapter thoroughly discusses each dispute settlement process, their meaning, respective merits, demerits and proceedings followed thereof.

3.2 Non-Judicial Methods of dispute settlement

According to Art.2 (3) of United Nation's Charter all members shall settle their international disputes by peaceful means in such a manner that international peace, security and justice are not endangered[39]. A tribunal may be set up, and might require the parties to negotiate in good faith, and could state what aspects the parties must consider while negotiating. Negotiation can also be defined as: a non-binding procedure involving direct interaction of the disputing parties where in a party approaches the other with the offer of a negotiated settlement based on an objective assessment of each other's position.

Negotiation, the International Court of Justice remarked that "there is no need to insist upon the fundamental character of this method of settlement. It observed in this connection as did its predecessor the Permanent Court of International Justice which is unlike other means of settlement.

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[38] Merrill J. G, 'International Dispute Settlement', 4th edn., New York

[39] Charter of UN (1945)

It is a consensual bargaining process in which parties attempt to reach an agreement on a disputed or potentially disputed matter. Negotiation which leads to the direct and friendly settlement of disputes between parties is universally accepted. Furthermore, negotiations are usually a prerequisite to resort to in other means of disputes. It should be noted that the term 'diplomacy' is used in some treaties such as the 1949 Revised General Act for the Pacific Settlement of International Disputes, as a synonym of 'negotiations as is also the phrase 'through the usual diplomatic channels as it appears for instance, in the 1948 Charter of the Organization of American States. Negotiation can also be defined as a non binding procedure involving direct interaction of the disputing parties where in a party approaches the other with the offer of a negotiated settlement based on an objective assessment of each others position.

Negotiation will involve consultation and exchange of opinions. Essentially, it is to do with the parties discussing the disagreement, in order to understand it. It is the method by which they decide how to proceed subsequently. By negotiating, the parties can separate the dispute into component parts to achieve their ambitions. Moreover, the obligation to negotiate does not necessarily imply a duty to reach agreement; in fact, negotiation represents the first step in dispute resolution, not necessarily its conclusion. According to Art. 66 of the UN Charter, if a dispute is not resolved within twelve months in the way covered by Art.33 then there are other methods to follow[40].

The Characteristics of Negotiation

a) Flexibility: The Manila Declaration of the Peaceful Settlement of International Disputes highlights flexibility as one of the characteristics of direct negotiations as a means of peaceful settlement of disputes. It is also flexible; it can be applied to all kinds of disputes. It is so flexible that it can be applied to all kinds of disputes, whether political, legal, technical, commercial, trade or business.

b) Effectiveness: Another characteristic of negotiation is effectiveness. Suffice to say, in this connection, in the reality of international life, negotiation is one of the means of peaceful

[40] Shaw. M. N. 'International Law', 5th edn., (Cambridge, Cambridge University Press, 2003),Ch 16, p.85 8.

settlement of disputes. It is most often resorted to by states for solving contentious issues and that, while it is not always successful, it does solve the majority of disputes[41].

c) Reduction of Cost and Time: Normally this system reduces the cost and time involved in solving disputes. negotiation is usually designed to start and finish in one day. The disputants usually share the cost of the negotiator. In such circumstances, the total cost of negotiation is minimal as compared to the cost of litigation.

(ii) Initial Phase

Normally the negotiating process starts as the result of one state proceeding with the existence of a dispute and inviting the other party to enter into negotiations for its settlement. The start of the negotiating process is conditional upon the acceptance by the other state of such an invitation. It may occur that a state invited to enter into negotiations has valid reasons to believe that there is no dispute to negotiate and that there is, therefore, no dispute to negotiate and that there is, therefore, no basis for the opening of negotiations. It may also occur that a state or party agreeing to enter into negotiations may lay conditions unacceptable to the first state. The discretion of states with respect to the initiation of the negotiating process is however subject to certain limitations[42].

A number of treaties place on the states parties an obligation to carry out "negotiation consultation or exchanges of views" whenever a controversy arises in connection with the treaty or agreement concerned.

The setting in motion of the negotiating process can be encouraged by international organizations. Such organizations also provide a meeting place where representatives of state parties to a dispute meet to arrive at a settlement. The means of settlement which the General Assembly has most frequently recommended to the parties to a dispute is negotiation.

[41] Ibid
[42] Hand book on the Peaceful Settlement of Disputes betwee n States-United Nations New York, 1992

It should be noted that the parties may be directed to negotiate by a judicial decision binding upon them. Reference is made in this connection to the Fisheries Jurisdiction cases, in which the International Court of Justice stated the following.

The obligation to negotiate thus flows from the very nature of respective rights of the parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the principles and provisions of the charter of the United Nations concerning peaceful settlement of disputes. As the court stated in the North Sea Continental Shelf case this obligation merely constitutes a special application of a principle which underlines all international relations, and which is more over recognized in Art.33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes.

(iii) Conduct of the Negotiating Process

Framework of the negotiating process in Bilateral Negotiations

Bilateral negotiations are traditionally conducted directly between duly appointed representatives or delegations or through written correspondence and have been greatly facilitated in modern times by the development of telecommunications and means of transportation.

There are many examples of bilateral negotiations conducted in the framework of diplomatic joint commissions, particularly for the settlement of territorial or waterway disputes. It should be noted that disputes relating to international waterways are often dealt within the framework of standing joint commissions established by treaties[43].

Individuals having no governmental position such as former ministers, university rectors, etc., may, in certain cases, be entrusted with the conduct of bilateral negotiations or with laying the ground for proper negotiations.

Framework of the negotiating process in Plurilateral or Multilateral Negotiation

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[43] For an analysis of the many waterway treaties providing for the establishment of standing joint comm issions, See Yearbook of the International Law Commission,1974,vol.II(Part II),United Nations publications, s ales No. E75.v.7(part II),document A/5409; 'Legal problems relating to the utilization and use of internation al rivers report of the Secretary -General

When several states are parties to disputes an international conference may provide the framework for the negotiating process. There are examples of conferences convened at the invitation of one of the parties and in which one or several of the other parties refrained from taking part. States having an interest in settlement of a dispute but not parties to it may hold a conference without the participation of the parties to study the dispute and make proposals for its settlement. In the absence of one or several of the parties, no negotiation is possible but such conferences may, if their recommendations to the parties bring to the settlement of the dispute; a contribution akin to good office or mediation[44].

(iv) Place of Negotiation

Bilateral or Plurilateral negotiations usually take place in the capital city of one of the parties. They may also be held alternately in each of the capitals. In the case of neighboring states, a locality close to the common border may be selected.

While collective negotiation within an international organization usually takes place at the seat of the organization, a specific organ having competence in the area of peaceful settlement of the disputes may choose to meet at a venue away from the seat of the organization.

(v) Degree of Publicity of the Proceedings

In the case of bilateral negotiations, it is for the parties to determine jointly the degree of publicity they wish to give to their negotiations. They may opt for confidentiality, at least in the initial phase. Bilateral negotiations have been encouraged by international organizations. They may in such cases receive a certain degree of publicity.

[44] Hand book on the Peaceful Settlement of Disputes between States -United Nations.NewYark,1992

Negotiations within an organ of an international organization are at least partly carried on in public and recorded in official documents. But a growing amount of such collective negotiations is conducted privately and informally[45].

(vi) Duration of the Negotiation Process

The time-frame for the negotiation process varies according to the circumstances. The process may be concluded in a few days or may extend over several decades. Practice offers many examples of intermittently conducted negotiations. Under certain treaties, a time limit is set for the completion of the negotiation process beyond which resort may be had to another means of peaceful settlement.

(vii) Disadvantages

Following are some of the disadvantages of negotiation as dispute settlement mechanism

a) In practice, if the parties have no shared interest in resolving their differences, negotiation will not succeed.

b) Negotiation will not suit a weaker party in dispute with a stronger party. Stronger here means greater political and economic strength.

c) It is also feared that widespread institutionalization of negotiation forums will undermine the development and improvement of the common law. Because informal dispute resolution is not based on records and precedents it may eventually prevent the codification of impartment social norms. To sum up, negotiation represents the first step in identifying and resolving an international dispute.

3.2.2 Inquiry and Fact finding

(i) Meaning, Functions and Relations to other peaceful means

Where the nature of a dispute between two contracting parties is rooted in different factual accounts of an event rather than a stated difference in terms of international law, a

[45] Supra note.1

historic approach has been to appoint an inquiry commission containing well qualified members whose task is to find out the fact[46].

Thus, the 1899 Hague Convention set out the scope of an inquiry commission. The purpose of an inquiry is to facilitate a solution of disputes by elucidating the facts by means of an impartial and conscientious investigation.

Inquiry, as an impartial third party procedure for fact-finding and investigation may indeed contribute to a reduction of tension and the prevention of an international trade disputes as distinct from facilitating the settlement of such disputes.

According to Collier and Lawe, "even if there is a legal basis to the dispute, the inquiry could help in resolving it[47]. This could be seen as a form of impartial detective work, to remove the risk of two separate national inquiries which might conflict in their findings. Inquiry is appropriate where the parties actively welcome the involvement of an impartial commission.

(ii) Initiations and Methods of Work

Inquiry may be set in motion by mutual consent of the states concerned as an adhoc basis, relying upon a treaty in force between them, creating a general obligation to settle disputes by peaceful means. It may also be initiated in accordance with the terms of an applicable treaty, specifically establishing inquiry as the mode of handling a category of disputes and indicating how the process may be initiated including method of work [48]. It may be made subject to a special agreement between the parties to a dispute. A treaty may also indicate the conditions under which the jurisdiction of the established commission may be invoked by one party unilaterally[49] and these under which the jurisdiction may only be invoked by mutual consent. A provision may also be made in a treaty requiring that parties invoking the jurisdiction of the commission draw up a protocol in which they state the question or questions which they desire the commission to elucidate these aimed at enabling the commission to elucidate.

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[46] Shaw. M.N. 'International Law',5th edn, (Cambridge: Cambridge University Press, 2003),ch.18,p.923
[47] Anglo-Russian Declaration of St.Petersburg, 25/1/1904
[48] Art.9 Supra note. 17
[49] The Pact of Bagota.

The methods of work of a commission of inquiry are those aimed at enabling the commission in accordance with the competence conferred upon it, to acquire all necessary facts in order to become fully informed of the issues giving rise to a dispute. A commission of inquiry may hear the parties to a dispute, examine witnesses and experts, carry out investigations on the spot with consent of the parties and receive and review documentary evidence. The parties are both in practice and under relevant treaties, entitled to be represented during the proceedings by agents and counsel. Here the parties are entitled to appoint special agents to attend the commission of inquiry, whose duty is to represent them and act as intermediaries between them and the commission .They are further authorized to engage counsel or advocates appointed by them, to state their case and uphold their interests before the commission.

According to Art.21.of the Convention every investigation and examination of a locality must be made in the presence of the agents and counsel of the parties or after they have been duly summoned". Further it states that "the sittings of the commissions are not public nor the minutes and documents connected with the enquiry published, except in virtue of a decision of the commission taken with the consent of the parties.

Finally commission has to prepare written report and submit it either to the state parties to the dispute or to the organ of the international organization which initiated it. Aim of the inquiry is to facilitate a solution of disputes by elucidating the facts by means of an impartial and conscientious investigation.

(iii) Composition

While composing the inquiry commission, generally the following aspects are noted. First of all, it should be noted that an inquiry must not necessarily be conducted by a group of people constituting a commission or a panel. An inquiry may indeed be undertaken by one person alone.

Secondly, it should be observed that an inquiry need not always be in the nature of a third-party procedure which means the appointment of either a commission or an individual to undertake an independent investigation on behalf of the parties to the dispute. This practice of

eliminating the third party element in an inquiry procedure exists in a number of bilateral treaties[50].

When party or parties fails or fail to fulfill their trade obligation in accordance with their agreement, parties can establish enquiry commission in accordance with their contract or agreement. Each party to the dispute appoints two members and the four members thus designated or failing agreement, a third state, jointly agreed upon, selects the fifth. Under Additional Protocol I to the 1949 Geneva Conventions, the states parties to the Protocol elect from a list of persons to which each of teams may nominate one person, the 15 members of the International Fact Finding Commission : as to the Seven member chamber to be set up unless otherwise agreed by the parties concerned in case of an inquiry is requested, it consists of five members appointed by the President of the commission after consultations with the parties and of the two ad hoc members to be appointed by each side. Under the 1982 United Nations Convention on the law of sea, there is a special third party procedure constituted in accordance with Art.3 of which may be requested to carry out an inquiry and establish the facts giving rise to the dispute, and which consists of five members of which each party select two, the fifth member being appointed by agreement by the parties to the dispute, preferably from a pre-constituted list of experts established under the convention. While various such models exist, account should also be taken of the inquiry commission appointed by a single authority, such as the Secretary-General of the United Nations or various organs of the United Nations,30 and as well as the commission of inquiry under Art.26 of ILO constitution which is to be appointed by the Governing Council on the proposal of the Director General.

(iv) Procedure

As to the question of rules of procedure, it may be observed generally that commissions have enjoyed varying degrees of freedom in settling the details of such procedures. In one instance, the Commission was instructed to "determine its own procedure and all questions affecting the conduct of investigation" subject to the provisions of the agreement which instituted it.31 In another instance, the provisions of the Hague Conventions were made applicable to the commission with respect to all points not specifically covered by the agreement

[50] For Such agreements, see e.g. UN'S , 'A survey of Treaty Provisions for the Pacific Settlement of Disputes' 1949 - 1962.(1966),pp788-866.

on the settling up of the inquiry commission.32 In still another instance, an agreement on the inquiry related to the commission and provided that the rules contained in the 1907 Hague Convention would be applicable as far as they were not at variance with the provisions of the inquiry convention[51].

(v) Disadvantages

There are following disadvantages with this method of dispute settlement.

a) In a wide range of disputes, it is not appropriate to solve the dispute by simply finding out the facts.

b) In all types of trade disputes, this type of official third party involvement would not be feasible; hence various states are not in its favor.
c) The outcome of a neutral inquiry commission is not binding hence, sometimes it is waste of time and energy. It suffers with an enforceability.

3.2.3 Good offices

(i) Meaning, Characteristics, Framework and Relation to other peaceful means

When state parties to a dispute are unable to settle it directly between themselves, a third party may offer its good offices as a means of preventing further deterioration of the dispute; and also as a method of facilitating efforts towards a peaceful settlement of the dispute. It may be initiated by the third party or by the request of one or more parties to the dispute, and is subject to acceptance by all the parties to the disputes.

Though Art. 33(1) of the United Nations Charter does not specifically mention good offices, however good offices is relevant where a third party tries to get the disputing parties to negotiate[52]. Thus, the 1982 Manila Declaration on the 'Peaceful Settlement of International Disputes' places good offices on an equal footing with the other peaceful methods enumerated in Art.33. Good offices aimed to share a league between parties to an international dispute, aimed,

[51] Art.8 of Agreement for inquiry in the Tubantia case.
[52] Ibid .p.921

as the case may be, at scaling down hostilities and tensions and designed to bring about an amicable solution of the dispute.

(ii) Functions of the Good office

a) The procedure of good offices aims to bring the parties together, so as to make it possible for them to reach an adequate solution between themselves[53].

b) It prevents further deterioration of disputes, at the same time encouraging the parties to the disputes to reach an amicable settlement.

(iii) Initiation of the Procedure:

Good offices may be set in motion either by the initiative of a third party, whose offer has been accepted by the parties or by an invitation by all the parties to the dispute. Thus, the third party tendering good offices cannot impose itself upon the parties to the dispute. It may be resorted to in accordance with the provisions of an applicable contract negotiation between the parties to the dispute on the basis of a general obligation recognized by the parties to settle their disputes by peaceful means.

(iv) Method of Work and Avenue

The third party exercising good offices normally establishes contact with the parties to the dispute through a number of informal meetings with each party, during which it ascertains the positions of both sides and then transmits to the parties each other's position with respect to the dispute. In performing the functions assigned by the parties to the dispute, the third party contributing good offices towards the peaceful settlement of the dispute may depending upon the nature of the dispute and with the consent of the parties, undertake field missions that would enable it to be fully acquainted with the issues involved.

(v) Termination and Outcome of the Process

[53] 6 Art. ix of the Pact of the Bagota

Good offices is a peaceful method which having been resorted to may to give way to other peaceful procedures accepted by the parties to the dispute. Though, there are also types of disputes, the peaceful settlement of which continues to elude the parties for a long time, thereby allowing the good offices method to remain one of the options for the possible achievement of peaceful settlement. In such a situation, there is no time limit which can be set for the termination of the good office method[54].

(vi) Demerits

The followings are the some demerits of this method of settlement of trade disputes.

a) Outcome not sure, it entirely depends upon the attitude of the parties to the dispute.

b) Third party does not have enforcement capacity.

c) Hence as rightly pointed out, the results of good offices have exclusively the character of advice and never have binding force.

3.2.4 Mediation

(i) Main characteristics and legal framework

Unlike good offices, in mediation the third party is actively involved in the negotiation. Mediation has been defined in the following terms "mediation is the participation of a third state or states, a disinterested individual or an organ of the United Nations with the disputing states, in an attempt to reconcile the claims of the contending parties and to advance proposals aimed at a compromise solution[55].

Mediation is a method of peaceful settlement of an international dispute where a third party intervenes to reconcile the claims of the contending parties and to advance its own proposals that aim at a mutually acceptable compromise solution. In most of the international instruments, mediation and good offices are treated largely as interchangeable procedures. Only in the Pact of Bagota of 1948 and 1964 OAU Protocol, contain provisions which deal with mediation as a distinctive method. Thus, mediation as a method of peaceful settlement is more

[54] Shaw.M.N. Supra 6

[55] Collier J and Lowe. V, 'The Settlement of Disputes In International Law', Oxford, Oxford University Press, 1990

than adjunct to negotiation. A very important fact regarding mediation is that it facilitates for the disputing parties to recourse to a peaceful approach to the dispute.

(ii) Functions

a) Main function of the mediation is to reduce the tension which may have developed in the course of an international dispute, thereby performing a preventive function.

b) Its objective is to prevent the rapture of pacific relations.

c) It's function is reconciling the opposing claims of the parties and promoting a solution which could command a measure of satisfaction for the parties.

d) According to the Pact of Bagota42 which provided in part, as follows the functions of the mediator or mediators shall be to assist the parties in the settlement of controversies in the simplest and most direct manner avoiding formalities and seeking an acceptable solution.

(iii) Procedures and Institutional Aspects

Mediation is a procedure which may be set in motion either upon the initiative of a third party whose offer to mediate is accepted by the parties to the dispute or initiated by the parties to the dispute themselves agreeing to mediation. An offer of mediation may be accepted by a written agreement. Mediation cannot be imposed upon the parties to an international dispute without their consent or their acceptance of the particular mediator. Mediator or mediators are to be chosen by mutual consent of the parties.

Mediation is usually resorted to purely on an ad hoc basis, although it may be carried out in accordance with the provisions of an applicable treaty between the parties to the dispute. Components of the mediation technique, depending upon the nature of the dispute, include the communication function, clarification of issues, drafting of proposals, search for areas of agreement between parties, elaboration of provisional arrangements to circumvent or minimize issue on which the parties remain divided as well as alternate solutions etc[56]. with the primary goal of an early and fundamental resolution of the dispute.

[56] Supra Note.6

The primary requirement of the procedure is informality and confidentiality. With respect to composition, the procedure depends upon the type of mediator accepted by the parties to the dispute. Thus, mediation may be undertaken by a single state, by a group of states or within the framework of an international organization such as the United Nations, it specialized agencies, other international organizations and associations or by a prominent individuals acting alone or with the advice of an established committee.

(iv) Demerits

This method is also not free from demerits. Below mentioned are the some demerits of the system.

a) Mediation does not have a binding effect. Thus, the outcome of mediation is non-binding. Hence, it sometimes results in waste of time and energy.

b) If the both parties are strong (politically or economically) and have very different aims, then mediation is not likely to be the successful procedure.

c) For success of mediation, co-operation is very much important; if parties do not co-operate with the mediator, mediation will not resolve the dispute.

d) Successful mediation frequently depends upon its timing, and the particular personality involved. There are no set terms on which the dispute should be resolved.

3.3 Judicial Methods of dispute settlement

3.3.1 Conciliation

Conciliation is frequently used in international trade agreement. A conciliation procedure aims at bringing the parties together before a third person whom they have chosen for the purpose of settling their dispute, if it is successful; the settlement agreement is recorded in conciliation minutes signed by the parties and conciliator.

It is a kind of formalized negotiation with the commission providing the necessary assistance to the parties to resolve their differences as a method of peaceful settlement of international dispute between parties. Among the conciliation evolved from a series of bilateral

treaties concluded in the first decade of the twentieth century, of considerable importance was the adoption in 1922 by League of Nations of a resolution encouraging states to submit their disputes to conciliation commissions. Subsequently, a number of multilateral treaties established conciliation as one of the third party procedures for the settlement of disputes under the treaty, the earliest of which was the 1928 Geneva General Act for the Pacific Settlement of International Disputes (later revised in 1949).

The Charter of the United Nations in its Art.33 paragraph 1, mentions conciliation among the peaceful means of the settlement of disputes to which Member states shall resort. It should also be noted that both the 1970 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' and the 1982 'Manila Declaration on Peaceful Settlement of international Disputes' refer to conciliation as one of the means that states should use when seeking an early and equitable settlement of their international disputes.

(i) Functions of Conciliation

Following are some of the important functions of conciliation

a) To investigate and clarify the facts in the dispute.

b) To endure to bring together the parties to the dispute in order to reach an agreement by suggesting mutually acceptable solution to the problem.

c) Conciliation is stipulated as a condition precedent to the judicial procedures thus establishing a link between conciliation on the one hand and arbitrationand judicial procedures on the other.

(ii) Institutional and Related Aspects

(a) Composition

In the various multilateral treaties establishing a conciliation commission, provisions are made for the appointment of generally an odd number of conciliators; usually, a five member of commission but sometimes a three-member commission. Each party to the dispute has the right to appoint either one of the three conciliators or two of the five conciliators, as the case may be.

The third or fifth conciliators, who is also often designated as chairman, is normally appointed by a joint decision of the two parties to the disputes and, in some cases, by the joint decision of either of the two or four conciliators already appointed by the parties. Where difficulties arise in the appointment of either the third or the fifth member, thus preventing the completion of the composition of a commission, the parties may assign the right of making the necessary appointment in such a case to a third party, usually a prominent individual[57].

One conciliator not of the nationality of that state or of any of these states shall be chosen from the list. The state or states constituting the other party to the dispute shall appoint two conciliators, in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request. The four conciliators shall, within sixty days following the last date of their own appointment, appoint a fifth conciliator chosen from the list, who shall be the Chairman.

If the appointment of the chairman or any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of International law Commission; any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

(iii) Initiation of the Process

A conciliation procedure may be set in motion in two ways; either by mutual consent of the states parties to an international dispute on an ad hoc basis relying upon a treaty in force between them and creating an obligation to settle such dispute by peaceful means or in accordance with the terms of a contract which either specifies the details of how an ad hoc conciliation may be constituted there under or establishes a permanent conciliation commission within the treaty itself.

The contract addressing the details of the conciliation procedure will invariably make the important choice as to whether initiation of the process and the establishment of the parties to the

[57] According to Art.7 of European Convention which provides that, in such a case, appointment should be tried first by a third state, failing which it should be made by the Int ernational Court of Justice.

dispute or the procedures of the conciliation commission may be invoked by an action of only one of the parties to the dispute.

(iv) Rules of procedure and methods of work

With respect to the question of rules of procedure, most of the treaties simply provide that the commission "shall decide its own procedure", or that the commission shall, "unless the parties otherwise agree, determine its own procedure. The decision of the commission on procedural matters and on other matters may be made by a majority vote of its members.

The Regulations on the Procedure of International Conciliation provide that the commission will name its Secretary at its first meeting and will determine the rules of procedure, in particular the question of the submission by the parties of written pleadings as well as the question of the time and place where the agents and counsel of the parties as the case may be, should be heard.

As to the method of work, it combines elements of fact finding and it would accordingly rely upon certain techniques for gathering and evaluating the facts giving rise to the dispute. Thus in all treaties in establishing conciliation as a third party procedure, there are provisions giving the commission the right to hear the parties, to examine their claims and objections and make proposals for an amicable solution or to draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement. In carrying out its functions, the commission may also summon and hear witnesses and experts and visit with the consent of the parties, the localities in question. Other provisions provide also the right of the parties to the dispute to be represented before the commission by agents, counsel and experts appointed by them, while also being required to supply the commission with the necessary documents and information which would facilitate its work. Some treaties provide that, unless the parties otherwise agree, the work of commission is not to be conducted in public[58].

(v) Duration and Termination

Consistent with its function as a method capable of bringing about an amicable settlement of the dispute referred to it or with its function of providing the necessary link between the non-judicial

[58] Art.10 of the Geneva General Acts, Art.11 of the European Convention Act,1957,The 1948 Pact of Bogot a, the OAU Protocol, Vienna Convention on law of Treaties address the same.

and the judicial procedures where so required, conciliation should be expected to reach its desired results within a reasonable time.Thus, as to duration, various time-limits within which a conciliation commission is expected to conclude its work have been stipulated. Six months duration is common in earlier treaties: 12 months is now the duration of conciliation found in recent multilateral treaties influenced by the 1969 Vienna Convention on the Law of Treaties.

Regarding termination the earlier multilateral treaties even the 1969 Vienna Convention on the Law of Treaties does not address the question of termination of contract. It was addressed in the 1982 United Nations convention on the Law of the Sea which says as follows the conciliation proceeding are terminated when a settlement has been reached, when the parties have accepted or one of the parties has rejected the recommendations of the report by written notification addressed to the Secretary-General of the United Nations, or when a period of 3 months has expired from the date of the transmission of the report to parties.

(vi) Outcome of the Process

Traditionally, as well established, the results of a conciliation process are normally in the form of non-binding recommendations to the parties to the dispute. But later, certain treaties started giving effect of binding force e.g. 1975 Vienna Convention for the Protection of the Ozone Layer recommends the parties to consider in good faith. The 1981 treaty of the Organization of Eastern Caribbean States, which created a conciliation procedure compulsory and binding states that any decisions or recommendations of the conciliation commission in resolution of the dispute shall be final and binding on the Member States.

(vii) Disadvantages

This method is also not free from demerits. The following are the demerits of this method of settlement of trade disputes.

(a) **Conciliation has not proved to be a very used method**.

It is because the treaties in which it has been used contain restrictions that have prevented its widespread use.

(b) It is time consuming formal procedure and would tend to discourage its use in smaller disputes.

A practical view point is that disputes are usually resolved along lines preferred by powerful states.

(c) No Access to Judiciary

One of the greatest disadvantages to conciliation is that parties do not have access to the state or federal court systems as they seek to resolve their claims. During conciliation, there is no access to a jury or the official rules of evidence. Formalities inherent in the judicial system are not present in an alternative dispute settling and the arbiter is free to conduct the proceedings any way he sees fit. Hearsay evidence may or may not be admitted and the right to appeal is abolished in nearly all alternative dispute settings. Conciliation may lead to forced compromise or splitting the disputed amount in an arbitrary way as opposed to a court of law which will either award the plaintiff what he asks for or nothing at all.

(d) Competence of Arbiter

Another disadvantage of conciliation concerns questions over the qualifications and potential biases of the conciliator. In a court of law, all parties know the judge received a formal legal education and served many years as an attorney before taking the bench. However, training to become a conciliator is much less intense than law school and usually involves some sort of qualification training. Parties are not reassured as to any potential biases of an arbiter, as opposed to state and federal judges who are under a legal requirement to rescues themselves in any event of personal knowledge of the case. Conciliators are under no duty to expedite the process and may take virtually unlimited time conducting the meetings at the expense of the parties. Conciliators make decisions based upon personal notions of justice, often not based upon law or statutes.

(e) No Discovery Phase

In a court of law, parties are entitled to an extensive discovery phase. Each side is entitled to all evidence to be used by the other side in preparation for the case. The only exclusion to this rule is evidence covered by the attorney-client privilege. In an alternative dispute resolution, no discovery phase is permitted and parties enter the discussion with no knowledge of the opposing

side's evidence or proposed argument. One side may present a particularly devastating piece of evidence and the other party will have no time to prepare a rebuttal.

(f) Difficulty Reaching Conclusion

In certain situations, alternative dispute resolution may appear nearly impossible for some parties as their conflict is acrimonious and they might never reach a solution. The arbiter or conciliator must remain with the parties until a solution is reached, which could take weeks or even months. Parties are free to hold to their bottom lines and many are not be eager to negotiate or reach any sort of conclusion. In some instances, arbitration is not binding on parties so disgruntled individuals end up commencing a lawsuit after, causing increased costs for both sides.

3.3.2 Arbitration

(i) Meaning, main characteristics and legal framework

Arbitration is a procedure to resolve disputes in binding decision upon the parties to the dispute. According to Collier and Lowe, arbitration is the name given to the determination of difference between states or between a state and a non-state entity through a decision of one or more arbitrators and an umpire or of a tribunal other than International court of justice or other permanent tribunal[59].

The 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes described the object of international arbitration as the settlement of disputes between states by judges chosen by the parties themselves and on the basis of respect for law[60]. They further provided that recourse to the procedure implied is submission in good faith to the award of the tribunal. In arbitration, the decision rendered is final and binding on the parties. It is subject to judicial reorganization and may be enforced against a losing party that does not honor the terms of the arbitral award.

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[59] Supra note 6 Ch.2, p.31
[60] Art.15 and Art.37 respectively of the 1898 and 1907 Hague Conventions for the Pacific Settlement of International Disputes.

(ii) Characteristics of Arbitration

a) Decision of the arbitration is binding.

b) Arbitration is constituted by mutual consent of the parties to the dispute.

c) It has emerged as one of the third-party procedures most frequently used for settling the international disputes.

d) It has certain limitations also e.g it cannot entertain if disputes are relating to questions which are within the exclusive jurisdiction of the state, disputes concerning military activities etc.

3.3.3 Institutional and related aspects

(i) Types of arbitration agreements

(a) Ad hoc arbitration

It is a type of arbitration where the parties themselves have to bear all the responsibilities of setting up of the arbitration tribunal, the tribunal will settle their disputes and they must stipulate the rules that will govern the conduct of the arbitration proceedings. The parties have to agree for fees and expenses directly with the arbitrators themselves.

(b) Institutional arbitration

In this type, the parties call upon an arbitration centre or an arbitral institution that they will have chosen to administer the proceedings in accordance with the institution's arbitration rules.

In institutional arbitration further there are two types. One is Partly administered arbitration and another one is Fully administered arbitration. In Partly administered arbitration, the institution has the power to fix a sum of money estimated to be sufficient to cover the costs of the arbitration at the end of the proceedings to determine the final costs.

On the other hand, in fully administered arbitration institution, institution not only receives the request for the arbitration for the notification to the other party, but also actually constitutes the arbitral tribunal, fixes the place of arbitration. Once the advance on the costs has been paid, the arbitration institution sends the file to the arbitrators and supervises the conduct of the proceedings until the rendering of the award. A good example of this type of arbitration institution is IIC arbitration.

(ii) Composition

Arbitration as a third party procedure may be performed by one individual appointed by the parties to the dispute, as a sole arbitrator or umpire or by a group of individuals appointed to form an arbitral tribunal[61]. In most treaties while establishing an arbitration tribunal, an odd number of arbitrators are usually provided; some require five arbitrators53 while the most

[61] See Geneva General Act for Pacific Settlement of International Disputes.

common practice has been arbitral tribunal of the three members[62]. Each party to the dispute has then the right to appoint either one of the three arbitrators, or two of the five arbitrators as the case may be. The chairman is normally appointed by a joint decision of the composition of the tribunal and in some cases, by a joint decision of respective arbitrators already appointed by the parties. Some of the arbitral tribunals are composed of individuals appointed by the parties relying upon a preconstituted list of arbitrators.

(iii) Rules of procedure

Rules of procedure are usually left to the tribunal. For example, one agreement provided that 'the tribunal shall, subject to the provisions of this compromise, determine its own procedure and all questions affecting the conduct of the arbitration. Another compromise granted that, 'the arbitration shall decide any questions of procedure which may arise during the course of the arbitration on another side some compromise has used more restrictive language regarding rules of procedure. e.g. In determining upon such further procedure and arranging subsequent meetings, the tribunal will consider the individual or joint request of the agents of the two parties. Another agreement instructs the tribunal to ascertain the views of the parties before determining a particular rule of procedure.

(iv) Applicable of Law

Parties to arbitration may agree on the law that the tribunal should apply to their disputes. Some arbitration agreements require the specific apply rules be applied and some only make a general reference to the applicable law. Many arbitration agreements specifically stipulate international law as the applicable law. Some arbitration agreements have remained silent on this issue. In such cases a solution has been recommended in article 28 of the 1949 Revised General Act.

Accordingly, if nothing is laid down in the arbitration agreement on the law applicable to the merits of the dispute, the tribunal should apply the substantive rules enumerated in Article 38 of the Statute of the International Court of Justice. Still other arbitration agreements have chosen principles of equity, justice, equitable solution etc. as applicable to the dispute.

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[62] Art. 22, League of Nations International Convention for the Protection of Ne w Varieties of Plants of 2 Dec, 1961.

(v) Methods of work and proceedings before the tribunal

Parties to a dispute submitted to an arbitral tribunal are represented by agents whose appointment and powers may be stipulated in compromise indicating the timeperiod within which they are to be appointed. Such agents are usually entitled to nominate an assistance agent as the occasion may require, and may be further be assisted by such advisers, counsel and staff as the agent deems necessary.

The agents of the parties to the dispute file written pleadings which may be limited to memorials and counter-memorials and which may be submitted in the order and within the time-limits determined by the Tribunal. Such determination may also be made by the tribunal with respect to the oral proceedings and relevant documentary evidence.

With respect to the question of documentary evidence, article 75 of the Hague Convention provided that "the parties undertake to supply the tribunal as fully as they consider possible, with all the information required for deciding the dispute". As appropriate, arbitral tribunals have also made use of expert witnesses on behalf of parties to the dispute and have also made use of expert witnesses providing expert opinion to the tribunal on a given issue, as may be explicitly stated in a compromise.

(vi) Seat and administrative aspects of an arbitral tribunal

The seat of the arbitral tribunal is usually specified in the compromise. Where there is no such specification, the tribunal itself may, as recommended by its president, determine where to conduct its business. Arbitration agreement can also specify the place where the tribunal shall hold its first meeting and leave the choice of the place for subsequent meetings to the tribunal. The choice of the seat of the tribunal is made on the basis of administrative convenience and financial considerations.

Arbitral tribunals are usually assisted by a secretariat or a registry. The function of the registry is to act as a channel for communication between the parties and the tribunal, to arrange for the custody of papers and documents submitted to the tribunal, to provide interpreters and translators and to conduct all administrative matters of the tribunal. Standing tribunals, which deal with a number of disputes over a long period time, normally have an organized secretariat

established in accordance with the compromise. For ad hoc tribunals, the parties may also agree to empower the tribunal or its president to appoint a secretary or a registrar and such supporting staff as may be necessary. The parties may also agree to appoint jointly a secretary or a registrar, and each appoints supporting staff in equal numbers.

(vii) Expenses of arbitral tribunal

Two kinds of expenses are involved in an arbitration proceeding. One related to the preparation of each party's case and its presentation to the arbitral tribunal. Such expenses include, for example, counsel's fees, experts' fees, expenses for gathering of evidence, translation of documents, travel and so forth which are borne by the parties themselves. Other expenses include the common expense of the arbitral tribunal, such as the arbitration fees, the salary of the registrar and staff of the arbitral tribunal, interpreters, clerical facilities and so forth.

Parties to the disputes bear their own expenses and share the administrative costs of the tribunal. In common practice, the arbitrator's fees are borne equally by both parties. Occasionally, however, some compromise parties provide technical assistance to the arbitral tribunal; each party is responsible for the remuneration of its own expert.

(viii) Outcome of arbitration and related issues

The outcome of arbitration is an award which is binding upon the parties to the dispute. Invariably, in all the compromise, parties to the dispute further stipulate that they undertake to abide by the decision of the arbitral tribunal in question. The arbitral awards are usually in writing, signed and dated. After an award has been rendered, it may be subject to correction or revision in connection with obvious errors such as clerical, typographical or arithmetical errors.

The last stage of arbitration is the execution of the arbitral award. Depending upon the nature of the dispute in question, parties may include in the compromise the necessary steps to be taken towards the execution of the award. Either side can appeal's ruling. Sometimes both sides do so. Appeals have to be based on points of law such as legal interpretation. The appeal can uphold, modify or reverse the panel's legal findings and conclusions.

(ix) Demerits

Following are the demerits of this method of settlement of international trade disputes.

a) High Costs: The cost of conducting an international arbitration is considerable. Actually, with the legal fees, administration cost and arbitration fees the average arbitration can more expensive than a lawsuit.

b) Delay tactics: Speed used to be used to be one of the advantages of arbitration. This is no longer so. In case of a technical or complex legal matter the arbitration can last just as long, or even longer, than a law suit.

c) Limited Judicial Review: The judicial reviews of the arbitration procedure and subsequent rewards are being limited to procedural or public policy checks only not review of the merits of the case. This means that there now exists the risk that one has to take defense against an obvious erroneous arbitration award in each country where one has to assist and that is a signatory to the New York Convention, since the arbitration award can no longer be annulled in the country of the arbitration suit.

d) Different Arbitration Laws: Contrary to its name, international arbitration is not regulated by international treaties but governed by the arbitration laws of the location of the arbitration suits.

3.3.4 Judicial Settlement

(i) Main characteristics, legal framework and function

States parties to a dispute may seek a solution by submitting the dispute to a preconstituted international court or tribunal composed of independent judges whose tasks are to settle claims on the basis of international law and render decisions which are binding upon the parties. This is generally referred to as judicial settlement, which constitutes one of the means of the peaceful settlement of international disputes set out in Article.33 of the Charter of the United Nations.

The first international court of a world-wide scale was the Permanent Court of International Justice which was created by the Covenant of the League of Nations in 1922. It was succeeded by the International Court of Justice, established in 1946 as a principal organ of the United Nations. Under Article 36 of its statute the International Court of Justice has general

jurisdiction in all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in the treaties and conventions in force.

Both judicial settlement and arbitration make recourse to an independent judicial body to obtain binding decisions however are essentially of an ad hoc nature, and are composed of judges selected on the basis of parity by the parties to a dispute who also determine the procedural rules and the law applicable to the case concerned. International court and tribunal by contrast, are pre-constituted inasmuch as they are permanent judicial organs whose composition jurisdictional competence and procedural rules are pre-determined by their constitutive treaties. Furthermore judicial settlement may be distinguished from arbitration in that the decisions of international courts and tribunals are as a rule not appealable.

(ii) Resort to judicial settlement

A brief analysis of both the Permanent Court of International Justice and the International Court of Justice indicates that, of the cases referred to those courts for judicial settlement, many involve questions of interpretation or application of treaties[63] or concern specific problems such as those relating to sovereignty over certain territories and frontier disputes those concerning maritime delimitations and law of the sea disputes those arising from the law of diplomatic protection of nationals abroad cases involving enforcement of contracts and violation of certain principles of customary international law.

(iii) Institutional and procedural aspect

(a) Jurisdiction, competence and initiation of the process

Jurisdiction

Settlement of international disputes by international courts is subject to the recognition by the States concerned of the jurisdiction of the courts over such disputes. The recognition may be expressed by way of a special agreement between the states parties to a dispute conferring jurisdiction upon a court in a particular dispute or by a compromissory clause providing for agreed or unilateral reference of a dispute to a court or by other means. In the event of a dispute as to weather a court has jurisdiction the matter is settled by the decision of the court.

[63] S.S.Wimbledon France,United Kingdom, Italy, Japan v. Germany, P.C.I.J Series, A.No 1,P.15

Initiation of process

Contentious proceedings before international courts are instituted either unilaterally by one of the parties to a dispute or jointly by the parties, depending upon the terms of the relevant agreement in force between them. Thus, if under the agreement the parties have accepted the compulsory jurisdiction of the International Court of Justice in respect of the dispute, then proceedings may be instituted unilaterally by the applicant state. In the absence of such a prior acceptance, however, proceedings can be brought before international courts on the basis of the mutual consent of the parties.

The procedure for instituting contentious proceedings is defined in the basic statute of the respective international courts. The Statute of the International Court of Justice provides under Article.40 as follows:

1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

2. The Registrar shall forthwith communicate the application to all concerned.

3. He shall also notify the Members of the United Nations through the Secretary General, and also any other States entitled to appear before the court.

Advisory opinion

International courts may be empowered to give an advisory opinion on a legal question relating to an existing international dispute between States referred to them by an international entity[64].

(b) Access and third party intervention

A State not party to a legal instrument establishing an international court is denied access to it. In the case of the International Court of Justice, however, States not party to the Charter of the United Nations may, by virtue of Article 93 paragraph 2 of the Charter, become party to the

[64] 5 E.g..Permanent Court of International Justice(Covenant of the League of Nations,Art.14);Internatio nal Court of Justice(Charter of United Nations, Art.96;Statute of the Court,Art.65

Statute of the Court on conditions to be determined by the General Assembly upon the recommendation of the Security Council.

(c) Composition

The size of the actual body varies in accordance with the terms of each instrument –for example, from 21 members constituting the International Tribunal for the Law of Sea, to15 members in case of International Court of Justice. The selection procedure is generally provided in the statute of the court concerned. The judges may be appointed by common agreement of member states, as provided for the Court of Justice of the European Communities or elected by one more political organs e.g. the General Assembly and the Security Council of the United Nations in the case of the International Court of Justice In addition a party to a dispute may appoint an ad hoc judge of its nationality if the court concerned does not include upon the bench a judge of that nationality.The judges are selected in their individual capacities strictly on the basis of legal qualifications. The terms of the judges are for example,nine years as regards the International Court of Justice, with one third of the bench elected every three years.

(d) Rules of Procedure

Rules of procedure governing the proceedings for the judicial settlement of international disputes are the basic statute of the international court or tribunal concerned, and by the supplementary rules adopted by it, which determine such technical requirements as the official languages, the structure and phases of the proceedings and contest and delivery of the decision. The official languages of the International Court of Justice are English and French[65]. All the communications and documents relating to cases submitted to the Court are channeled through the Registrar[66].

In contentions cases, the party at the time of filing a document instituting proceedings inform the competent court of the name of the agent who will be its representative in the proceedings; the other party then appoints its agent as soon as possible. The proceedings in contentious cases are usually divided into a written and oral phase. The written phase normally comprises the filing of pleadings with a time-limit fixed by the court, the pleadings are generally

[65] Ibid Art.39
[66] ICJ Rules,Art.26,paragraph.1(a)

confined to a statement of the case(memorial) and a defense (counter-memorial) and, if necessary, a reply and a rejoinder, together with papers and documents with support [67]. Depending upon the procedure agreed upon by the parties or regulated by the rules of the court; these pleadings may be filed simultaneously by the both parties or, alternatively, each party replying to the other. Written pleadings should contain a full statement of the facts considered relevant by the party and of its arguments as to the law.

The oral phase begins at the closure of the written proceedings. In principle, oral proceedings are held in public, unless it is otherwise decided under specific circumstances. The parties may address the court only through their agents, counsel or advocates. If the party fails to appear before the court in oral proceedings or fails to defend its case, the opposing party may request a decision in favour of its final claims. Subsequent to the closure of the oral proceedings, the court examines the factual and legal foundations of the claim. Specific instructions as to the applicable law are contained in its statute or in a special agreement for the claim. The deliberations of the court are kept private and secret.

The rules governing the procedure for reaching for a decision are fixed by the court. Its decision is made by the majority cotes of the judges present, with a casting vote to be given by the president or by the judge acting in his place, in the event of equality of votes for and against[68]. Decision should accompanied by reasons. A judge whose opinion differs in whole or in part may deliver an individual opinion along with the judgment, which could be expressed in the form of a 'separate opinion.

(e) Seat and administrative aspects

The seat of international courts and tribunals is established in accordance with their basic statutes and procedural rules. In case of International Court of Justice, its seat is established at the Hague. This, is however, does not prevent the Court from acting and exercising its functions elsewhere whenever the Court considers it desirable to do so[69].

[67] Ibid Art.50
[68] Ibid, Article.55
[69] Ibid, Article22:ICJ Rules, Article 55

The judges comprising international courts or tribunals elect from their members a president a vice-president81 and president of chambers for a specified term of office. The president directs the judicial business and the administration of the court and presides at all meetings of the court.

The administrative functions of international courts are carried out by a secretariat established for this purpose generally known as the registry. The executive head of the registry, the registrar, is appointed by the competent court for a specified term of office. The functions of the registrar are defined by the rules of court which include as its main function relating to cases before the court, the execution of all communications and transmission of documents to the court and to the disputants.

(f) Expenses and other financial arrangements

The basic statutes and procedural rules of international courts or tribunals determine the means for covering the expenses involved in the settling of claims. In principle, the expenses of the functioning of these courts or tribunals are borne by their member States on a regular basis. It is thus provided that the expenses of the International Court of Justice, including amounts payable to witnesses or experts appearing at instance of the Court, are borne out of the United Nations budget.86If a party to a case does not contribute to the United Nations budget, the court itself fixes the amount payable by the party as a contribution towards the expenses of the court for the case. Each party bears its own costs of the preparation and presentation of its claims, such as counsel's fees, printing costs and travel expenses,87 unless the court makes an order in favour of a party for the payment of the costs by the other party,88or unless a party qualifies to receive financial assistance from the Trust fund established by the Secretary-General of the United Nations in 1989 to assist States in the settlement of disputes through the International Court of Justice.

(iv) Outcome of judicial settlement

The outcomes of contentious proceedings involving international disputes are decisions which are final and binding on the parties. The judgments pertaining to interim proceedings such as those for provisional measures of protection preliminary rulings or objections, and interventions by a third party state are also binding upon the parties.

(v) Criticisms

(a). Costly: getting a justice from international courts or tribunal is not the cheap one. One has to bear heavy expenses. Advocates fees, travel expenses, experts fees, documentation, etc will be costlier than remaining means of settlement of international trade dispute

(b). No time limitation: The basic statutes and procedural rules of international courts or tribunals do not provide for any specific duration within which cases should be decided. Hence, there is chance of delay tactics.

CHAPTER - IV

ALTERNATIVE DISPUTE RESOLUTION IN INTERNATIONAL AND REGIONAL LEVEL

Over the years, there has been an increase in trade across borders between countries. With advancement in technology resulting in a new global business paradigm, various trade and governmental bodies such as the World Trade Organization (WTO) and Regional Arbitrations have intensified efforts to end protectionism, establish liberalized cross borders and put an end to the prevalence of beggar-thy-neighbour economic policies[70]. While these efforts have been hugely successful, trade barriers are being erected in an unlikely place-international commercial arbitration. These trade barriers have been erected because of conflicting national arbitral rules, applicability of substantive and procedural law, forum shopping, unenforceability of arbitration agreements and resulting arbitral awards especially against state parties. The outcome of the legal straits experienced by foreign investors in settling arbitration issues with their local partners led to a series of international interventions aimed at rectifying the problem. Prominent among these are the internalization of the arbitration rules in the arbitration law of all signatory states under the auspices of the United Nations Commission on International Trade Law (UNCITRAL) and the establishment of the International Chambers of Commerce (ICC) Rules of Arbitration[71].

4.2 The need for ADR in International disputes

There are different forums with the power to entertain disputes and give binding disposition to the dispute there under. The most dominant and binding one is that which derives its power from the supreme laws, i.e. constitution, of each nation to entertain disputes within the nation‘s jurisdictional limit. In addition, customary and alternative kinds of dispute resolution

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[70] Faturoti, Bukola. “Complementarity or Disparity? The UNCITRAL Model Law on International Commercial Arbitration 1985 and English Arbitration Act 1996 Revisited” Vol.2, No.1, University of Ibadan Law J ournal, 2012 pp.97-118

[71] Ibid

mechanism supplement the function of courts of law by entertaining disputes of different kinds in the domestic relations. The spheres of functioning of these devises are mostly limited to the disputes that arise in the national level. If the dispute has some nature of international dispute, it is not to mean that these forums established in the national level do not have jurisdiction to entertain the case. The issue here is about the conflict of interest that might arise between the disputants as to forum and law, and the nations and also the enforceability of such out comes in the other nation. International treaties have tried to address these conflict of interest issues and make court decisions much smoother and enforceable in other nations[72].

Further, international tribunals have been established by the UN to serve as a forum for international disputes. Most nations of the world are making their diplomatic and commercial relations much smoother by the help of their institutes, i.e. UN. Though, there are unlimited number of critiques against the enforceability and reasonableness of decisions given by UN dispute settlement systems, huge number of international disputes are well addressed by it. The panel established under WTO is also the other most widely acceptable dispute settlement mechanism entertaining a wide range of international trade disputes raised among the member states.

The growth of international trades bound to give rise to international disputes which transcend national frontiers and geographical boundaries. For the resolution of such disputes the preference to international arbitration vis-a-vis litigation in national courts is natural because of arbitration being preferred to litigation in courts and the foreign element being preferred in the international arbitration to the domestic elements in the national courts. This is also because there is no international court to deal with international commercial disputes. “In situations of this kind, recourse to international arbitration in a convenient and neutral forum is generally seen as more acceptable than the recourse to the courts as a way of solving any dispute which can’t be settled by negotiation[73].

The rationale and purpose of international arbitration should be to provide a convenient, neutral, fair, expeditious and efficacious forum for resolving disputes relating to international

[72] Tefera Eshetu and Mulageta Getu Aiternative, ‘Dispute Settlement Resolution, Teaching material’ spo nsored by the Justice and LEGAL System Research Institute, 2009
[73] Alan Redforn and Martin Hunter, Law and Practice of International Commercial Arbitration, 2nd edn, p .2

commerce. Basic features which are uniform in the legal framework for resolution of international commercial disputes "can be broken down in to three stages; (i) jurisdiction, (ii) choice of law, and (iii) the recognition and enforcement of judgments and awards[74].

The trend towards growing judicial intervention which tends to interfere with arbitral autonomy as also finality is a significant factor to be kept in view. The need is to reconcile and harmonize arbitral autonomy and finality with judicial review of the arbitral process. National law differs on this issue. UNCITRAL Model Law attempts to promote harmony and uniformity in this sphere. The aim is to ensure arbitral autonomy coupled with neutrality or impartiality in the arbitral process by the composition of the arbitral tribunal by competent and impartial members which ensures equality between the parties and full opportunity to them to present their case. Total exclusion of judicial intervention does not match with the current trend but the scope of judicial supervision needs to be reduced to the minimum. The source of authority of the international arbitral tribunal is the agreement of the parties and not the mandate of the State. The choice of the law applicable is also determined by the provision in the arbitral agreement. With the increased arbitral autonomy the requirement of reasons for the award is greater. Apart from transparency in the arbitral process, it also acts as an inherent check on the arbitrators and discloses to the party the basis of the award and the logical process by which the conclusion was reached by the arbitrators. The presence of the reason also regulates the scope of judicial supervision.

Informality of the arbitral process permits relaxation from strict rules of evidence and it reduces costs and delay which are often unavoidable in litigation. However, observance of basic principles of natural justice cannot be dispensed with. Appropriate provisions for enforcement of award are essential to impart efficacy to international arbitration[75].

4.2.1 To promote of Access to Justice

It is not only on the national level that peoples will be denied of the right to have access to courts, but sometimes it happens in the international relations as well. For instance, it happens when none of the domestic courts of the disputants assume jurisdiction over the matter. In other

[74] Jonathan Hill, in the Law Relating to International Commercial Disputes, para. 1.1.3.
[75] International Conflict Resolution; Consensual ADR Process, American Case Book Series, Thomson West Pub, 2005, p. 18

words, some times the national courts where the disputants belong to may not have the jurisdiction to entertain the case according to their own national laws. In such instances, the parties will not get access to any of the courts and the only alternative for them will be to look for ADR based on their free consent.

Following its exponential development in US, the ADR movement was exported to many parts of the world. National courts in Europe, stymied by the volume of transborder litigation, have been attracted to ADR. Members of the European Union see ADR as a way to facilitate access to justice, a fundamental right contained in Article 6 of the European Convention for the protection of Human rights and Fundamental Freedoms. Growing interest in ADR in the European Union has also resulted in a Green Paper proposing greater use of alternative process in civil and commercial matters, and efforts are currently underway to develop a European Code of Conduct on mediation[76].

4.2.2 Development of e-commerce

Most of the time it is thought that, there will be three parties involved in ADR, the two disputants whatever their number may be and the third neutral intermediator. But these days, it becomes common to see ADR as a square or rectangle instead of a triangle. The fourth party, the new presence in the table, is the technology that works with the mediator or arbitrator. Interest in this fourth party has been fuelled by the emerging cyber market place, a market place of transactions taking place over the internet, known as ecommerce. These buyers and sellers need access to cost effective and efficient means to resolving disputes that arise from these online transactions. These buyers and sellers need a dispute resolution process that is inexpensive one in which the costs are much lower than the purchase price of the commodity. Going to court or convening mediation are not viable resolution methods for these modest transactions[77].

‘The development of e-commerce also increased the need for ADR. Given the difficulties of processing e-commerce disputes in a global e-market place, on-line dispute resolution has become an attractive alternative particularly in small disputes. When ADR processes, such as

[76] Supra note 10
[77] Supra note 6

mediation and arbitration occur in the on-line environment it is often referred as online dispute resolution ODR.

In the context of civil disputes ADR processes, such as negotiation and mediation, introduced a civilized way to resolve international conflicts. They were designed to overcome the limitations and failures of domestic judicial processes and the lack of a binding international public process[78].

4.2.3 Influence of the UN Charter

The traditional dispute settlement procedures available under international law are enumerated in of the UN Charter

i) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peace full means of their own choice.

ii) The Security Council shall, when it deems necessary, call up on the parties to settle the dispute by such meas.

Negotiation is generally acknowledged as the most fundamental of these processes. The most common process for international dispute settlement, however, is the diplomatic or the consensual methods – mediation and good offices, enquiry, and conciliation. The consultation process, although not mentioned in Article 33 of the UN Charter, is a species of negotiation that should be considered as part of the traditional package of processes for the resolution of international disputes. Together with prenegotiation activities, such as public peace processes, coalition-building, dialogue groups, and co-existence practices, theses processes offer panoply of choices for dispute and conflict resolution practitioners.

This provision of the UN Charter and the general trend in the world towards ADR as a means of settling dispute makes the disputants to put trust and confidence on the procedure. The recognition of ADR in the charter as a first option before resorting to the International Court of Justice (ICJ), a court established under the umbrella of the UN by its charter, dictates the easy

[78] Supra note.10, p. 19-20

enforceability and the quality of ADR outcomes. It is also considered as a preliminary proceeding before going to ICJ.

4.2.4 The Limitation of International Courts

Internationally well functioning tribunals like the International Court of Justice (ICJ) and Criminal Court of Justice (CCJ) of the UN and the Dispute Settlement Body of the WTO have lots of limitation. The first one is the identity of the parties that have the right to institute a case or defend their case before these tribunals. It is only sovereign states and sometimes international organizations that can be a party before the ICJ. By the same taken, the WTO tribunal accepts claims only from member states. In terms of the subject matters which can be seen by these tribunals all cases cant be entertained before them. Most of the time ICJ entertains disputes concerning issues related to frontiers and maritime boundaries territorial sovereignty, the non-use of forces, noninterference in the internal affairs of States diplomatic relations hostage-taking the right of asylum, nationality, guardianship, rights of passage and economic rights[79]. In the other hand CCJ has jurisdiction to adjudicate only the gravest offences affecting the international community: genocide crime against humanity and war crimes. The WTO tribunal entertains disputes in the implementation of any of its documents, like the GATT.

Though, these tribunals try to cover most of the possible disputes in terms of subject matters, the right of the international community to take its cases before them is not fully guaranteed. Thus, a lot more parties who do not have a right before any of these tribunals, like individuals, NGOs, companies etc. By the taken, there are some more subject matters of disputes which can‘t be entertained in any of these tribunals, like ownership of property, tort claims etc. ADR tries to fill these gaps or matters which are not well addressed by these well known tribunals of the world.

4.3 Scope and Parties to International ADR

In the field where there exists the involvement of more than one parties or interaction among human beings, it might be inevitable to think of the possible existence of disputes. Human relationship is becoming diversified backed by modern technologies. The world's

[79] Ibid, p.42

commercial and diplomatic relation requires the involvement of at least more than one nation or citizens of a nation. Trade is becoming a global phenomenon which requires the involvement of more than one nations or citizens or entities of different nations. It is also becoming impossible this time to think of internal peace and security without having smooth diplomatic relationship with the neighbor and even other states far from once geographical location. Border disputes are also common between states especially after the mid of the 20th century as a result of a lots of independences in Africa, Asia and even in Europe. Extra – territorial crimes itself is one threat to the peace and stability of the international community which involves the cooperation of the nations of the world in making sure that criminals do not get a shelter in a nation other than where the crime was committed and are duly prosecuted. Dispute may arise in the extradition policy of one nation and the ambition of the other nation to prosecute the suspect. These give rise to the existence of differences or disputes which cannot be easily adjudicated by the formal courts of one of the nations involved there under[80].

These are some examples of international disputes that are frequent in the current global relations. The question to be raised at this very junction is that whether anybody can take all these and other kinds of disputes before ADR tribunal and get a valid and enforceable, before the international community and the disputants, out come from it? Are there any such subject matters of dispute which can‘t be safely entertained by ADR? The other related issue is about the capacity and identity of parties who can be a party before international ADR? The latter question is a kin to the controversy over the subjects of international law; sovereign nations and international organizations only or individual citizens and private institutes as well?

For instance, research has been done about the adequacy of the settlement of trade mark disputes occurring over the world by Rosanne T. Mitchell[81]. This article contends that current dispute resolution procedures are inadequate for alleviating trademark controversies over Internet domain names. The author believes expansion of the number of generic top level domains and registrars around the globe requires the implementation of an alternative dispute resolution system. Mitchell argues that this system will eliminate uncertainties in determining an

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[80] Supra note 6

[81] Rosanne T. Mitchell, Resolving Domain Name-Trademark Disputes: A New System of Alternative Dispute Resolution Is Needed in Cyberspace, 14 OHIO ST. J. ON DISP. RESOL. 157 (1998), Cardozo Journal of Conflict Resolution.

appropriate forum and will dramatically decrease litigation time and expenses. The International Ad Hoc Committee's proposal, facilitated by the World Intellectual Property Organization attains these goals by providing three dispute resolution procedures: (1) on-line mediation, (2) on-line expedited arbitration, and (3) administrative challenge panels. The author contends that this proposal embodies an optimum solution for insufficient conflict resolution methods. Thus, Mitchell proposes that the United States government and WIPO should adopt this method to effectively resolve all trademark domain name disputes. International arbitration has proved a useful method of settling some territorial disputes between nations. It has been concluded that the use of arbitration to solve territorial disputes can be successful only where the parties are committed to resolving the dispute peacefully through arbitration and that such a commitment is unlikely if the dispute involves an issue of vital national importance. Thus, this note contends that an attempt by the international community to force states to arbitrate such disputes may discourage future parties from using the procedure.

The above discussion makes clear the use of different kinds of ADR in resolving international conflicts of different nature. Public disputes which would get a challenge in the domestic jurisdiction of ADR have been freely and fruitfully entertained in the international relations. Thus, it may say that it would be difficult to say that there are subject matters of a dispute in the international level which can‘t be entertained by ADR[82].

In case of capacity of parties before international ADR, the same conclusion can be reached and say that as long as a party has a cause of action and as long as both of the disputants are consented, it would be the obligation of the panel or tribunal to enforce the interest of the parties. This is witnessed from the provisions of different international documents. In arbitration, a partys ability or obligation to arbitrate an international dispute arises from its consent as a signatory to a contract that contains an arbitration clause. According to AAA s International Arbitration Rules provides that an international arbitration shall occur where parties have agreed in writing to arbitrate disputes[83]. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards the legal framework by which the international

[82] Ibid
[83] Art.1 of AAA International Arbitration Rule

community has chosen to regulate the enforcement of arbitral agreements and awards imparts a similar writing requirement.

The effort made above shows that the limitation in domestic jurisdiction of ADR over public interest cases would not arise in international relation as most of the disputes between states are resolved by using ADR. In addition, public international law denies parties other than sovereign states and some international organization with the right to be a party before it. This will not happen in ADR as private individuals, private commercial and civic institutes, states and group interests are freely entertained before it.

4.4 International Documents and Organs Regulating ADR

ADR is being recognized as the most effective means of settling international disputes of any type. Basically, diplomatic and commercial relations are being enhanced by the employment of amicable dispute resolution mechanisms. To help this disposition to ADR than to other courts, lots of treaties have been signed so far either under the supervision of the UN or under the initiation of other public and domestic institutions and states. Tribunals have been established as a result of these treaties to serve as the best forum in settling disputes of international and domestic nature.

The widely known international institutions like the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC), and the Stockholm Chamber of Commerce . There are also ADR tribunals that have specialized in settling dispute of specific nature; The London Maritime Arbitration Center is one of them.

The researcher has selected four different sets of international documents for easy understanding of ADR in international level. The 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards as adopted by the UN diplomatic conference on June 10, 1958 and entered in to force in 7th of June, 1959 is the first one. Secondly, the five documents under the Permanent Court of Arbitration (PCA) two of which are Conventions that established the PCA whereas the others are optional laws are summarized. The United Nation Commission on International Trade Law (UNCITRAL) and the lastly, the institution of the

International Chamber of Commerce, its tribunal (International Court of Arbitration – ICA) and its rules have been discussed.

4.4.1 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. The Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. Widely considered the foundational instrument for international arbitration, it applies to arbitrations which are not considered as domestic awards in the state where recognition and enforcement is sought. Though other international conventions apply to the crossborder enforcement of arbitration awards, the New York Convention is by far the most important[84].

In 1953 the International Chamber of Commerce produced the first draft Convention on the Recognition and Enforcement of International Arbitral Awards to the United Nations Economic and Social Council (ECOSOC). With slight modifications, the ECOSCOC submitted the convention to the International Conference in the Spring of 1958. The Conference was chaired by Willem Schurmann, the Dutch Permanent Representative to the United Nations and Oscar Schachter, a leading figure in international law who later taught at Columbia Law School and School of International and Public Affairs, and served as the President of the American Society of International Law.

International arbitration is an increasingly popular means of alternative dispute resolution for cross-border commercial transactions. The primary advantage of international arbitration over court litigation is enforceability: an international arbitration award is enforceable in most countries in the world. Other advantages of international arbitration include the ability to select a neutral forum to resolve disputes that arbitration awards are final and not ordinarily subject to appeal, the ability to choose flexible procedures for the arbitration, and confidentiality. Once a dispute between parties is settled, the winning party needs to collect the award or judgment.

[84] www.newyorkconvention.org retrieved on 09/05/2016

Unless the assets of the losing party are located in the country where the court judgment was rendered, the winning party needs to obtain a court judgment in the jurisdiction where the other party resides or where its assets are located. Unless there is a treaty on recognition of court judgments between the country where the judgment is rendered and the country where the winning party seeks to collect, the winning party will be unable to use the court judgment to collect.

(b) Overview of the Convention

The convention has got XVI articles divided in to further sub articles, but with no further division into parts. It defines foreign arbitral award 'as arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal'. In addition, arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought can be assimilated to foreign arbitral awards I(1).30 Further it obliges the party applying for recognition and enforcement to provide, in the language of the nation where enforcement or recognition is sought, the copy of the authenticated original award or a duly certified copy thereof and the original agreement (arbitral submission) or a duly certified copy thereof.[85]

Under the Convention documents, an arbitration award issued in any contracting state can generally be freely enforced in any other contracting state, only subject to certain, limited defenses. These defenses are.

i) a party to the arbitration agreement was, under the law applicable to him under some incapacity

ii) the arbitration agreement was not valid under its governing law

iii) a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case

iv) the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration (subject to the

proviso that an award which contains decisions on such matters may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those matters not so submitted);

v) the composition of the arbitral tribunal was not in accordance with the agreement of the parties or, failing such agreement, with the law of the place where the hearing took place

vi) the award has not yet become binding upon the parties, or has been set aside or suspended by a competent authority, either in the country where the arbitration took place, or pursuant to the law of the arbitration agreement vii) the subject matter of the award was not capable of resolution by arbitration or

viii) enforcement would be contrary to public policy.

(c) List of Member States

Countries which have adopted the New York Convention have agreed to recognize and enforce international arbitration awards. As of June 2015, 156 of the 192 United Nations Member States34 have adopted the New York Convention.35 Only 36 Member States have not yet adopted the New York Convention.

This document, in fact, harmonized the enforcement of foreign arbitral award since most of the nations of the world approved it. Its contents help the disputants to fill confidence on enforceability of outcomes of tribunals validly established out of their national jurisdiction.

4.4.2 Convention for the Pacific Settlement of International Disputes (1899 and 1907) and the Permanent Court of Arbitration (PCA)

In July 1899, the sovereign Powers, meeting in The Hague at the first International Peace Conference, adopted a "Convention for the Pacific Settlement of International Disputes[86] which established a global institution for international dispute resolution: the Permanent Court of Arbitration. In the same way in which the 1899 Hague Peace Conference the world's first successful egalitarian assembly of a political character can be said to have been a precursor of the League of Nations and the United Nations the PCA as conceived by the drafters of the 1899

Convention – was a precursor of all present-day forms of international dispute resolution, including the International Court of Justice (ICJ).

The 1899 Convention was revised at the Second Hague Peace Conference in 1907, by the adoption of a second 'Convention for the Pacific Settlement of International Disputes. [87] ' Although the majority of States are parties to the 1907 Convention, both Conventions remain in force. There are currently 97 Contracting States.

In 1913, construction was completed on the Peace Palace in The Hague. Originally built to serve as PCA headquarters, the Peace Palace now also houses the ICJ, the Carnegie Library and the Hague Academy of International Law.

In the first few decades of the PCA's existence, a significant number of interState disputes were submitted to tribunals established under its auspices.40 Because the PCA was established for the purpose of resolving disputes between States, all of its early tribunals were called upon to decide disputes involving issues of public international law, including territorial sovereignty, State responsibility, and treaty interpretation. Many of the principles laid down in the early PCA cases are still good law today, and are cited by other international tribunals, including the ICJ[88].

The objectives behind the initiation of these conventions are set in the preamble of the documents. The following as their objectives.

i) a strong desire to work for the maintenance of general peace

ii) to resolve and promote by their best efforts the friendly settlement of international disputes;

iii) recognizing the solidarity uniting the members of the society of civilized nations;

iv) desirous of extending the empire of law, and of strengthening the appreciation of international justice

[87] Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199 [hereinafter, "1907 Convention"].

v) convinced that the permanent institution of a tribunal of arbitration, accessible to all, in the midst of the independent Powers, will contribute effectively to this result

vi) having regard to the advantages attending the general and regular organization of the procedure of arbitration

vii)sharing the opinion of the august initiator of the International Peace Conference that it is expedient to record in an international agreement the principles of equity and right on which are based the security of States and the welfare of peoples.

Among the points that necessitated the coming in to existence of the new Convention which was signed in the year 1907 were the following (it is noted that the second Convention also shares the objectives set by the first one listed here above)

1) Insuring the better working in practice of Commissions of Inquiry and Tribunals of Arbitration, and of facilitating recourse to arbitration in cases which allow of a summary procedure

2) The necessity to revise in certain particulars and to complete the work of the First Peace Conference for the pacific settlement of international disputes.[89]

The first Convention has 61 articles under four Titles. shortly in a single article, sets the objective of the Convention and interests of the signatory nations, i.e. with a view to obviating, as far as possible, recourse to force in the relations between States, the Contracting Powers agree to use their best efforts to ensure the pacific settlement of international differences. Next one established the first alternatives of settling dispute among member states by using Good Offices and Mediation and the procedures there under. The Title deals with the possibility of establishing, International Commission of Inquiry to facilitate a solution for differences of international nature by elucidating the facts by means of an impartial and conscientious investigation[90]. The last Title, in depth, regulates international arbitration between the member states. This part established the Permanent Court of Arbitration having its seat in The Hague. At

[89] Held in 1899

end the Convention has got a General Provision which speaks about the ratification or membership process, the coming in to force of the Convention and other matters.

When it comes to the second Convention, most of its contents are similar with the 1899 Convention except in some circumstances. It has, indeed, 97 Articles under its five Parts. The first two parts of this convention is a literal copy of its predecessor. Under Part III which deals about the International Commission of Inquiry, more detailed provisions have been included as to its working procedure. Especially the commission has been put under the supervision of the International Bureau of the Permanent Court of Arbitration which serves as a registrar. Part IV of it included a new system which was not there under the predecessor Convention. Chapter IV of it established, Arbitration by Summary Procedure in disputes admitting of a summary procedure. The last one, Part V, is devoted for ―Final Provisions regarding membership and coming in to force of the Convention.

When it comes to memberships, it can be seen three different categories of nation; member for one of the Conventions and member for both of the Conventions. Generally speaking, 119 states have acceded to one or both of the PCA's founding conventions[91].

The ultimate safeguard against using conciliation to delay commencement of arbitration is the key provision of these Rules that, as mentioned above, permits one party to terminate conciliation if it reaches the conclusion that the conciliation is no longer desirable. Moreover, by agreeing to conciliation under these Rules, the parties undertake that if the conciliation does not result in a settlement they will not introduce in any subsequent arbitration, or judicial proceedings, certain specified evidence that might be harmful. The evidence thus barred by these Rules consists of: (i) any views expressed by either party concerning possible settlement of the dispute, (ii) any admissions made by either party in the conciliation, (iii) any proposals made by the conciliator (s) or (iv) the fact that a party indicated willingness to accept a proposal for settlement made by the conciliator[92]. These provisions effectively protect parties and thereby encourage candor and a free exchange of views during the conciliation. Additional safeguards in these Rules include that the parties and conciliator undertake that, unless the parties vary the Rules, a conciliator will not act as an arbitrator or representative of a party in any arbitration or

[91] Ibid

judicial proceeding in respect of a dispute that is subject to the conciliation, and that no party will present a conciliator as a witness in any such proceeding.

A related safeguard arises from the provision of these Rules that makes clear that the conciliator may speak with the parties together or may meet them separately when that is advisable [93] . These Rules also provide that a party may communicate information to the conciliator subject to the restriction that it not be disclosed to the other party. These provisions encourage parties to confide in the conciliator which may be vital in guiding the conciliator in the search for an amicable solution and also to protect parties in arbitration or court litigation that may occur if no solution is found in the conciliation.

The Conventions for the Pacific Settlement of International Disputes are the first documents that opened the mob towards common understanding of the value of ADR in the settlement of international disputes of any kind. The fact that the PCA were working well even before the establishment of League of Nations and the court under it, i.e. the Permanent Court of Justice, shows that, the common understanding of the leaders of the nation about the threat of dispute to the world peace and the value of ADR to tackle it. The new three rules are not mandatory rules and anybody whether a member to the PCA or not can freely use it though the matter has not been referred to the PCA.

4.4.3 UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 196655. In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles.

UNCITRAL is a subsidiary body of the General Assembly of the United Nations with the general mandate to further the progressive harmonization and unification of the law of

international trade[94]. UNCITRAL has since prepared a wide range of conventions, model laws and other instruments dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade. UNCITRAL meets once a year typically in summer alternatively in New York and in Vienna.

It is important here to brief the difference between UNCITRAL and WTO since some peoples are confused of their difference and take one as part of the other, which in fact is not. UNCITRAL is a subsidiary body of the General Assembly of the United Nations. The Secretariat of UNCITRAL is the International Trade Law Division of the Office of Legal Affairs of the United Nations Secretariat. In contrast, the World Trade Organization (WTO) is an intergovernmental organization independent from the United Nations. Moreover, the issues dealt with by the WTO and UNCITRAL are different. The WTO deals with trade policy issues, such as trade liberalization, abolition of trade barriers, unfair trade practices or other similar issues usually related to public law, whereas UNCITRAL deals with the laws applicable to private parties in international transactions. As a consequence, UNCITRAL is not involved with "state- to-state" issues such as anti-dumping, countervailing duties, or import quotas.

UNCITRAL plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions. UNCITRAL legislative texts address international sale of goods international commercial dispute resolution including both arbitration and conciliation, electronic, commerce, insolvency, including, cross-border insolvency international transport of goods; international payments procurement and infrastructure development and security interests. Non legislative texts include rules for conduct of arbitration and conciliation proceedings; notes on organizing and conducting arbitral proceedings; and legal guides on industrial construction contracts and counter trade[95].

When look at the mandate or the objectives of its establishment the General Assembly gave the Commission the general mandate to further the progressive harmonization and

[94] 6 Ibid. The resolution also mandated that the Commission be composed of twenty -nine states representing the principal economic and legal systems of the world, to be elected by the General Assembly. For see U. N.Doc.A/216 (1968)

[95] Supra note 6

unification of the law of international trade. The Commission has since come to be the core legal body of the United Nations system in the field of international trade law.

"Harmonization" and "unification" of the law of international trade refers to the process through which the law facilitating international commerce is created and adopted. International commerce may be hindered by factors such as the lack of a predictable governing law or out-of-date laws unsuited to commercial practice. The United Nations Commission on International Trade Law identifies such problems and then carefully crafts solutions which are acceptable to States having different legal systems and levels of economic and social development. The UNCITRAL Arbitration Rules as a crucial pillar in the worldwide system of arbitral justice[96].

Harmonization may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions. Unification may be seen as the adoption by States of a common legal standard governing particular aspect of international business transactions. A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by States for the unification of the law at an international level. Texts resulting from the work of UNCITRAL include conventions, model laws legal guides, legislative guides rules and practice notes. In practice the two concepts are closely related.

(b) Membership

As is the case with most subsidiary bodies of the General Assembly, which is composed of all States members of the United Nations, membership in UNCITRAL is limited to a smaller number of States, so as to facilitate the deliberations. The General Assembly elects states to be a member of the Commission from UN member states. UNCITRAL was originally composed of 29 States; its membership was expanded in 1973 to 36 States and again in 2004 to 60 States. The membership is representative of the various geographic regions and the principal economic and legal systems of the world. Members of the Commission are elected for terms of six years, the terms of half the members expiring every three years.

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[96] See H. Holtzmann, The Conduct of Arbitral Proceedings, Report submitted to ICCA Interim Meeting at L ausanne, in UNCITRAL's Project for a Model Law on International Commercial Arbitration, 2 ICCA CONGRESS SERIE S 159 (1984).

In addition, there are five regional groups represented within the Commission: African States; Asian States; Eastern European States; Latin American and Caribbean States; Western European and Other States.

The degree of participation of developing nation is maintained to the possible extent. In accordance with its mandate, UNCITRAL takes into account in its work the interests of all peoples, and particularly those of the developing countries, in the extensive development of international trade". Members of the Commission represent different geographic areas, and are elected by the General Assembly "having due regard to the adequate representation of the principal economic and legal systems of the world, and of developed and developing countries[97].

Developing countries play an active role in both drafting and adoption UNCITRAL texts. The commitment of the Commission and the Secretariat to providing training and technical assistance to those countries is also long-standing and constant. Similarly, the General Assembly has expressed strong support for this work. For example, General Assembly reaffirms the importance in particular for developing countries of the work of the Commission concerned with training and technical assistance in the field of international trade law, such as assistance in the preparation of national legislation based on legal texts of the Commission.

Though UNCITRAL texts are initiated, drafted, and adopted substantially by a body made up of 60 elected member States representing different geographic regions, participants in the drafting process include the member States of the Commission and other States (referred to as "observer States"), as well as interested international intergovernmental organizations ("IGO's") and non-governmental organizations NGOs.

(c) Documents adopted by UNCITRAL

So far since its establishment by the decision of the General Assembly of the UN, UNCITRAL has adopted four documents for the purpose of "Harmonization" and "unification" of the law of international trade. These are the 1976 UNCITRAL Arbitration Rules, the 1980 UNCITRAL Conciliation Rules, the UNCITRAL Model Law on International Commercial

[97] Ibid, para. 1.

Arbitration of 1985 which is later amended in 2006, and the UNCITRAL Model Law on International Commercial Conciliation of 2002 which is also amended in 2004.

The following facts necessitated the adoption of the Arbitration Rules 1976

a) Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations

b) Being convinced that the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations

This rule has 41 Article under IV different Sections. Section I deals about Introductory Rules including the scope of application of the rule the second about the composition of the arbitral tribunal then about the arbitral proceeding and the lastly one about the nature of the award including the costs there under.

The General Assembly adopted the second rule of UNCITRAL, i.e. 1980 Conciliation rules which regulate conciliation as an alternative means of dispute settlement. The rules are divided in to 20 Articles and a Model Conciliation Clause. It stipulated a specific rule about the scope of application of the rule; the nomination, role, ethical responsibilities of the conciliators; the rule of evidence before them; the effect and costs of the conciliation proceeding. The followings were the observations of the time that necessitated the adoption of this rules, in addition to the general purpose of the UNCITRAL

a) Recognizing the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations,

b) Convinced that the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,

The recent two UNCITRAL documents which are model laws as the name itself indicates are specifically meant to regulate arbitration and conciliation proceedings in the international commercial relations. A model law is a legislative text that is recommended to States for

incorporation into their national law. Unlike an international convention, model legislation does not require the State enacting it to notify the United Nations or other States that may have also enacted it[98].

4.4.4 International Chamber of Commerce (ICC) and the International Court of Arbitration

The International Chamber of Commerce (ICC) was founded in 1919 to serve world business by promoting trade and investment, open markets for goods and services and the free flow of capital. The organizations international secretariat was established in Paris and the ICC's International Court of Arbitration (ICA) was created in 1923.

The International Chamber of Commerce (ICC) is a non-profit, private international organization that works to promote and support global trade and globalization. It serves as an advocate of some world businesses in the global economy, in the interests of economic growth, job creation, and prosperity. As a global business organization, made up of member states, it helps the development of global outlooks on business matters. ICC has direct access to national governments worldwide through its national committees among others[99].

To attain this objective, ICC has developed a range of activities. The ICC International Court of Arbitration (ICA) is a body which hears and resolves private disputes between parties. Its voluntary rule-writing for business spreads best practice in areas as varied as banking, marketing, anti-corruption and environmental management. Their policy-making and advocacy work keeps national governments, the United Nations system and other global bodies apprised of the views of the world business on some of the most pressing issues of the day.

Initially representing the private sectors of Belgium, Britain, France, Italy and the United States, it expanded to represent worldwide business organizations in around 140 countries.

World Council, National Committees, and International Secretariat:

[98] Supra note 6

[99] World Trade Organization, International Trade, Joint Venture and Foreign Collaborations, (New Delhi : Institution of Company Secretaries of India, 2004

The ICC World Council is a general assembly of a major intergovernmental organization composed of business executives. National committees name delegates to the Council. Ten direct members may be invited to participate. It usually meets twice a year. The Council elects the Chairman and Vice-Chairman for two-year terms. The Council elects the Executive Board on the Chairman's recommendation.

The Secretary General heads the International Secretariat. The Secretary General works with the national committees to carry out ICC's work programs and is appointed by the World Council. The ICC International Secretariat is based in Paris and is the operational arm of ICC. It carries out the work program approved by the World Council, feeding business views into intergovernmental organizations.

(b) Dispute Resolution Services

ICC International Court of Arbitration (ICA) continues to provide the most trusted system of commercial arbitration in the world, having received 14000 cases since its inception in 1923. Over the past decade, the Court's workload has considerably expanded.

The Court's membership has also grown and now covers 86 countries. With representatives in North America, Latin and Central America, Africa and the Middle East and Asia, the ICC Court has significantly increased its training activities on all continents and in all major languages used in international trade.

In the world of international commerce, the ICC is perhaps best known for its role in promoting and administering international arbitration as a means to resolve disputes arising under international contracts. It is one of the world's leading institutions in providing international dispute resolution services, together with the American Arbitration Association, the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC), and the Stockholm Chamber of Commerce[100].

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[100] Ibid

(c) ICC Rules

Since its establishment the ICC has adopted different rules to foster the settlement of disputes by using ADR. The rule that establishes the International Court of Arbitration, i.e. ICC Rule of Arbitration is the most recent one. In addition, it has adopted the ICC Rules of Optional Conciliation which came in to force in January, 1988. The later rule is now substantially being replaced by ICC ADR Rules. The widely used definition of ADR is not fully accepted by the ICC. For instance, ADR has been defined by as ―Amicable Dispute Resolution as contrary to the widely used meaning Alternative Dispute Resolution. In addition, in most of the official ICC documents and its rules, ADR does not include arbitration but only proceedings which do not result in a decision or award of the Neutral which can be enforced at law.

The ICC ADR Rules are the result of discussions between dispute resolution experts and representatives of the business community from 75 countries. Their purpose is to offer business partners a means of resolving disputes amicably, in the way best suited to their needs. A distinctive feature of the Rules is the freedom the parties are given to choose the technique they consider most conducive to settlement. Failing agreement on the method to be adopted, the fallback shall be mediation[101].

As an amicable method of dispute resolution, ICC ADR should be distinguished from ICC arbitration. They are two alternative means of resolving disputes, although in certain circumstances they may be complementary. For instance, it is possible for parties to provide for ICC arbitration in the event of failure to reach an amicable settlement. Similarly, parties engaged in arbitration may turn to ICC ADR if their dispute seems to warrant a different, more consensual approach. The two services remain distinct, however, each administered by a separate secretariat based at ICC headquarters in Paris. The ICC ADR Rules, which replace the 1988 ICC Rules of Optional Conciliation, may be used in domestic as well as international contexts.

4.5 ADR at Regional Level

This part is devoted to appreciate in a bit detail about the importance of ADR in regional institutes. Thus, the experience of European Union and North American Nations under NAFTA

[101] Supra note 59

in the settlement of dispute is taken care of. Lastly, the African approach to ADR is considered though it is only in its infant stage of development.

4.5.1 Europe

Access to justice is at the top of the political agenda in all Member States of the European Union. More and more disputes are being brought to court. As a result, this has brought not only longer waiting periods for disputes to be resolved but has pushed up legal costs to such levels as to often be disproportionate to the value of the dispute.

This is where ADRs come in. Alternative dispute resolution (ADR) methods are extra-judicial procedures used for resolving civil or commercial disputes. These usually involve the collaboration of disputing parties in finding a solution to their dispute with the help of a neutral third-party. As there are numerous types of ADR methods available, they can be applied and adapted to a variety of areas whether civil or commercial in nature.

The advent of the single European market has increased the movement of goods and of people across the European Union. Unfortunately, it also has increased the number of disputes involving nationals of different Member States. These cross-border disputes add another dimension of complexity to already complicated issues. In this context, ADRs are regarded as an important element in the attempt to provide fair and efficient dispute-resolution mechanisms at EU level.

In recent years, the use of ADRs has increased considerably in the European Union. They are being used to resolve disputes between citizens and administrations, within families, working relationships or yet again in commercial relations and consumer disputes[102].

4.5.2 America (NAFTA)

The North American Free Trade Agreement (NAFTA) is an intergovernmental government that creates a free trade area in North America with the United States, Mexico and Canada. NAFTA's purposes include: eliminating trade barriers, promoting fair competition, increasing investment opportunities, providing protection for intellectual property rights, creating

[102] Supra note.6

procedures for implementing and enforcing NAFTA, and establishing a forum for further enhancement and expansion of the benefits provided by NAFTA.

NAFTA establishes three new dispute resolution mechanisms: First NAFTA Chapter 20 applies to disputes between signatory states. Chapter 20 creates a non-binding process for dealing with most other disputes under the treaty and this process can only be initiated by governments at the federal level. There are several stages to the chapter 20 dispute resolution process including consultation, negotiation and the issuance of report by a five member arbitral panel. Secondly, NAFTA Chapter 19 applies to disputes between the signatory states relating to investigations of anti-dumping and countervailing duty (AD/CVD) investigations. This process may be initiated by private parties. And thirdly, Chapter 11 applies to disputes between signatory states and investors from another signatory state (foreign investors). This is one of the more controversial aspects of NAFTA that allows foreign investors to use binding arbitration against another signatory state that violates the investment provisions of NAFTA. Although NAFTA does not create a private right of action, it encourages alternative dispute resolution methods and the study of the methods' effectiveness to resolve private international disputes.

NAFTA parties to seek consultations with the other parties in an attempt to arrive at a mutually satisfactory resolution. Pursuant to Article 2006 of NAFTA, the parties have three responsibilities during the consultation phase: (1) to provide the other parties with sufficient information to enable a full examination of how the proposed measure might affect the operation of NAFTA; (2) to protect confidential or proprietary information; and (3) to avoid resolution that adversely affects the interests under NAFTA of any other party.

If the consultations fail to resolve a dispute within the identified statutory period, any of the parties may subsequently request a meeting of the Commission, which Chapter 20 charges with resolving disputes relating to interpretation or application of NAFTA. The Commission must convene shortly after a party has requested its involvement in a dispute, and must attempt to "resolve the dispute promptly." Moreover, in attempting to resolve the dispute, the Commission is permitted to call in technical advisors and make recommendations. It may also have recourse to good offices and have access to conciliation, mediation, or other dispute resolution procedures. If upon the termination of the allocated statutory period,83 the parties still have not reached an agreement, any party to the dispute may request that the Commission

convene an arbitral panel comprised of five members chosen by the parties from a predetermined roster of eligible panelists. Of the five panelists, the disputing parties must agree on a chairperson; each party then selects two additional panelists who are citizens of the other disputing party.

Upon the convening of a dispute resolution panel, NAFTA lays out specific Rules of Procedure to which the panel must adhere[103]. These rules guarantee the provision of at least one hearing before the panel, as well as an opportunity to provide initial and rebuttal submissions. Once the panel has heard all arguments and considered all submissions, it must issue an initial report containing: (1) its findings of fact; (2) its determination as to whether the measure at issue is or would be inconsistent with the NAFTA obligations; and (3) recommendations for resolution of the dispute. Thirty days after the issuance of this initial report, the panel must issue a final report. Up on receipt of the final report, the disputing parties must agree on a resolution that conforms with the panel's determinations and recommendations.

Notably, the findings contained in the final report are not binding on the parties. Upon receipt of the final report the parties shall agree on a resolution, and provides that such a resolution "normally shall conform to the determinations and recommendations of the panel."86 Thus, the parties are not required to follow the letter of a given panel's decision.

4.5.2.1 Private Commercial Disputes under NAFTA

NAFTA does not create a private right of action; however, it promotes alternative dispute resolution (ADR) methods and mandates the study of the methods' effectiveness to resolve private international disputes. ADR methods offer many advantages over litigation when resolving international investor disputes. Although American businesses embrace litigation to resolve disputes, many other cultures view litigation as a personal failure. International investors using arbitration may not have to worry about some of the factors that can plague them in international litigation, including: choice of law, forum non convenience, home country bias, foreign judicial procedures, or foreign rules of evidence.

[103] Article.2012 of NAFTA

NAFTA mandates that the signatory states create an Advisory Committee on Private Commercial Disputes to study the effectiveness of arbitration and other ADR methods to resolve private international commercial disputes. The Advisory Committee was charged with.

(b) The Institutional Structure

In the past African leaders created various institutions to manage conflicts. Some of these have been in the form of ad hoc committees and commissions. For example, African leaders established the Ad Hoc Committee on Inter-African Disputes in July 1977 at the 14th Ordinary Session of the OAU Assembly in Libreville. Whatever the benefits of ad hoc arrangements for dealing with conflicts, one of the deficiencies is that such arrangements are remedial rather than proactive. The following section, however, deals with three major institutional structures designed by African leaders for the management and resolution of conflicts. The first, which is now defunct but is described below to set the context for the other arrangements, is the OAU Commission of Mediation, Conciliation and Arbitration. The second is the MCMPR and the third and most recent is the Peace and Security Council.

(i) The OAU Commission of Mediation, Conciliation and Arbitration

When African countries adopted the OAU Charter in 1963, they created the Commission of Mediation, Conciliation and Arbitration to accomplish the purposes of the Charter. It served as a mechanism for the peaceful settlement of disputes among Member States. The Commission was described as the raison d'etre of the OAU, given the fact that peaceful resolution of conflicts, both large and small, provided the necessary conditions for orderly progress of Africa as a whole and of the Member States of the OAU in particular. It has, however, been asserted that African leaders gave high priority to the Commission because of the border conflicts then occurring between Ethiopia and Somalia and between Algeria and Morocco.

In 1964, the OAU adopted a Protocol that defined the duties and powers of the Commission. The Protocol was made an integral part of the OAU Charter; which is to say that there was no provision for a formal ratification of the Protocol, as the Protocol merely required the approval of the OAU Assembly for it to become an integral part of the OAU Charter. This approval was given at the first Assembly at its meeting in Cairo, Egypt, in July 1964. The Assembly had to

dispense with the need for a formal ratification of the Protocol in order to avoid undue delay that might stultify efforts to address urgent security problems that were plaguing Member States.

(iii) The Peace and Security Council

In July 2002, the Assembly of Heads of State and Government of the AU, meeting in Durban, South Africa, adopted a Protocol on the establishment of Peace and Security Council (PSC) for Africa. The PSC will be a standing decision-making organ for the prevention, management and resolution of conflicts. It shall be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa. The Commission, a Panel of the Wise, a Continental Early Warning System, an African Standby Force, and a Special Fund, will support the PSC. Upon its entry into force, the Protocol will replace the Cairo Declaration and will supersede all resolutions and decisions of the OAU relating to the MCMPR in Africa that are in conflict with it.

CHAPTER-V

THE ROLE OF WTO IN SETTLEMENT OF INTERNATIONAL TRADE DISPUTES

The General Agreement on Tariffs and Trade (GATT[104]) reformulated and institutionalized as the World Trade Organization (WTO) in 1994, has provided much of the framework through which international trade has flourished for over fifty years. The post-war philosophy of trade liberalization has also paved the way to the creation of regional trade agreements. Regional and multilateral4 trade arrangements have promoted this growth in trade with the creation of institutions and procedures, particularly dispute settlement systems, through which signatories can ensure and enforce predictable and stable business environments for their citizens. During negotiations, state actors formulate institutions and structures within the agreements to enable the dispute settlement processes which may be most effective in resolving these disputes. The primary purpose of dispute settlement systems in international trade agreements is to guarantee respect for the agreement(s), in responding to violations and legitimate expectations under such agreements. The existence of rules, however, is not the only factor determining whether a dispute settlement system is effective.

Despite debuting to little fanfare under the General Agreement on Tariffs and Trade (GATT), dispute settlement under the World Trade Organization (WTO) has been called the "backbone of the multilateral trading system[105]. Indeed, whereas GATT dispute settlement could scarcely have seemed more flawed the WTO's Dispute Settlement Understanding (DSU) is widely touted for boosting confidence in an increasingly rules based global economy.8 Why such starkly different views of GATT and WTO dispute settlement? The conventional wisdom is that the GATT's diplomatic norms have been supplanted by the WTO's more legalistic architecture, 9 resulting in a system in which "right perseveres over might. Perhaps unsurprisingly, many observers insist that a wider variety of Members and developing countries, in particular are achieving more

[104] The General Agreement on Tariffs and Trade, signed in 1947, was created by the Bretton Woods meeting s that took place in Bretton Woods, New Hampshire (U.S.), in 1944, setting out a plan for economic recovery after World War II, by encouraging reduction in tariffs and other international trade barriers. General Agreemen t on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GAT]

[105] Moore, Michael. "WTO's Unique System of Settling Disputes Nears 200 Cases in 2000." PRESS/180. Geneva: World Trade Organization 2000

favourable results in dispute settlement due to the reforms introduced with the DSU and the WTO's greater clarity of law.

The 1994 signing of the World Trade organization (WTO) Agreement marked the initiation of the most far-reaching and comprehensive international agreement on trade in the history of the modern world.The creation of an actual trade organization was a marked improvement over the WTO's predecessor, the 1994 GATT, Among the many improvements to the GATT, the WTO Agreement substantially changed the mechanism for dispute settlement whenever conflict arose between member states. This change, was initially hailed as a great improvement over the GATT dispute settlement provisions.

Unfortunately, the DSU has not been the comprehensive dispute settlement mechanism its framers had hoped to create.14 After explaining the history of dispute settlement before GATT, and in GATT, this chapter will discuss the current aspect and procedure of the DSU, examine the problems with these procedures, and suggest how the dispute settlement system under the WTO can operate in a more effective and efficient manner.

5.2.1 Early Trade Dispute Settlement

What explains early settlement in the shadow of weak law? In domestic litigation, the expectation is that plaintiffs withdraw cases lacking merit, and defendants plead meritorious cases. But this happens in the shadow of strong law, backed by credible enforcement. Under the GATT which was long derided as a "court with no bailiff rulings could hardly have been argued to carry much legal weight, assuming these rulings were adopted in the first place. Even under the WTO regime where defendants are more likely to face binding rulings compliance remains a question mark, given the difficulty of following through on authorization to retaliate, assuming the complainant even asks for such authorization. What then, explains early settlement in GATT/WTO disputes?.

It has been shown that the answer is rooted in the way uncertainty about the disputants' resolve enters into the bargaining process[106]. The defendant, meanwhile, must weigh various considerations: the economic damage from potential retaliation; the desire to avoid the normative

[106] Reinhardt, Eric. 2001. "Adjudication without Enforcement in GATT Disputes." Journal of Conflict Resolution 45 (2):2001, pp174-195

condemnation elicited by overtly breaking the trade rules; possible strategic concerns about setting a precedent which could, in turn, spark a wave of future non-compliance by others; or narrower tactical considerations (e.g., a defendant's executive branch, or other liberalizing domestic groups, may be better able to overcome domestic protectionist opposition by "tying hands" with a ruling17). There is accordingly inherent uncertainty both as regards the complainant's will to follow through on costly retaliation and as regards the defendant's will to bear the costs of non-compliance. Both the complainant and defendant seek to exploit this uncertainty concerning their own course of action to their own advantage, leveraging concessions or upholding the status quo, respectively. The complainant's (often low-probability) estimate that the defendant is going to concede in the event of an adverse ruling leads it to set a high bar for the kinds of early settlement offers that it will accept. At the same time the defendants desire to avoid normative condemnation compounded by the desire to forestall potential retaliation, induces the defendant to meet the complainants (high) demands and thus to offer more generous concessions up front than after a ruling. The increased value of concessions in early settlement is thus a product of the anticipation of both normative condemnation[107] and market punishment. The twist here is that the uncertainty about the defendant's preparedness to incur the costs of non-compliance ends once the ruling is issued and the defendant acts, or fails to act. Rulings thus eliminate the uncertainty that serves, ex ante, as the basis for the complainant's heightened resolve, and thus the defendant's richer early settlement offer. This anticipation, and not the realization of a ruling, is thus the system's most effective means of extracting market-liberalizing concessions. Sometimes settlement talks fail, and the dispute goes to a ruling. This occurs when there is little ex ante expectation either that the defendant would prefer to avoid the appearance of overt non-compliance, or that the complainant would be willing to retaliate in any event. In such cases the window for settlement is too small, such that the parties escalate the dispute fully. A ruling against the defendant, then, is most likely when an adverse ruling is least likely to affect the defendant's behaviour. This is not to say that the direction of a ruling is in- consequential, for in fact these verdicts do matter to the extent that non-compliance, given the system's norms, can be costly. Still, there is likely to be a nontrivial level of non-compliance with adverse rulings; such instances would occur disproportionately

[107] Hudec, Robert E. "'Transcending the Ostensible': Some Reflections on the Nature of Litigation Betwee n Governments."Minnesota Law Review 72 (December) 1987: 211 -26.

where defendants care less about these costs. More generally, market power, or asymmetric dependence, should be only a partial predictor of the defendant's level of concessions, for all the reasons outlined above. These predictions offer a window on the efficacy of likely reforms of the DSU. Most noteworthy, in this regard, is that, because retaliation depends on the resolve of the complainant, not the regime's official authorization, reforms such as those which eased approval for the suspension of concessions should have little impact on dispute outcomes. Similarly, because the regime's normative power lies in the interpretations of its rulings not in their official legal force once adopted reforms such as those which removed the defendant's ability to veto adoption should also have little effect. This should improve the likelihood of realizing trade liberalizing. That said, reforms are unlikely to yield benefits to developing countries lacking the expertise required to navigate the complexities of the legal regime, especially if they favour recourse to litigation rather than to diplomacy and thus reduce the likelihood of early settlement, the stage of the process where concessions are most likely.

5.2.2 GATT Dispute Settlement

First codified in an annex to the 1979 Understanding on Dispute Settlement, the process by which GATT adjudicated trade conflicts shares much in common with the system set out by the DSU. Then, as now, a case would first manifest itself in a request for consultations. If a mutually satisfactory solution to the dispute were not struck in consultations, a complainant would then request a panel proceeding. Of course, the wrinkle in this story is that, under the GATT, a defendant could block the complainants request for a panel, a possibility long regarded as one of system's most glaring birth defects. Interestingly, few defendants blocked requests for a panel[108]. Rather, they more frequently blocked the adoption of panel reports, taking advantage of GATT's other notorious shortcoming. For example, in both GATT-era Bananas disputes, the European Communities (EC) blocked the adoption of panel reports, revealing the challenge of winning a ruling against a recalcitrant defendant. Given the prospect of being denied a panel proceeding, let alone a favourable panel report, one could be forgiven for wondering why complainants would ever have made use of GATT dispute settlement, never mind that they did so quite often, and often quite successfully.

[108] Van Bael, Ivo. 1988, "The GATT Dispute Settlement Procedure."Journal of World Trade 22 (4): 67 -77.

The 1989 Dispute Settlement Procedures Improvements closed the first of these loopholes, giving complainants the right to a GATT panel. Although the threat of nonadoption still loomed large, defendants could no longer block, or significantly delay, a panel request. In the GATT-era Bananas cases, for example, the EC conceded that the Improvements had removed the tactic of delay, and urged that the panel not proceed too quickly in hearing this complicated case. In this sense, the Improvements gave complainants a way to escape the "power politics" of the consultation stage. Perhaps not surprisingly, the Improvements were thus argued to have revitalized dispute settlement given GATT teeth and encouraged the paneling of disputes more generally.

5.2.3 Principal shortcomings of GATT Dispute Settlement System

i) The relevant Articles were brief and did not specify clear objectives and procedures, such that settlement relied upon the creation of ad hoc processes.

ii) Ambiguity concerning the role of consensus, leading to the 'blocking' of adverse decisions.

iii) Delays and uncertainty in the dispute settlement process, given that there was no right to a panel and no hard time constraints on any aspect of the proceedings.

iv) Delays in, and partial non-compliance with, panel rulings.

In spite of the apparent success of the GATT system there was a clear decline in its compliance performance after 1980 affecting a significant number of new dispute cases. It is evident that the increasing volume and complexity of trade disputes between a growing number of member countries put undue strain on a system that had not been designed to bear the burden of such economic, legal and political expectations. These weaknesses were evident in three high profile cases of non-compliance in the final years of the GATT system. They involved bananas, beef hormones (both EU non-compliance) and foreign sales corporations (US non-compliance).

Nevertheless, it is important to realize that, given the alternative forms of international dispute settlement available, the GATT system must be recognised has having been a success25 . Further, in spite of its shortcomings, the GATT dispute settlement system served its purpose

sufficiently well to form part of the foundations of the WTO Dispute Settlement Understanding[109].

5.3 WTO's Dispute Settlement System

The WTO Dispute Settlement Understanding (DSU) superseded the GATT system from 1 January 1995 and is regarded as being one of the central achievements of the Uruguay Round negotiations. Prior to the commencement of the Uruguay Round negotiations, there was a general consensus among the GATT Contracting Parties that the dispute settlement system required reform. This was state very clearly in the Punte del Este Declaration: 'To assure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations[110]. This is not to say however, that there was a great degree of consensus concerning how any new dispute settlement system should be constructed. A primary objective of Canada, the EU and Japan, along with many developing countries, was to limit the use of unilateral action by the United States, permitted under its federal law. The principal objectives of the United States however, were the adoption of a ruleoriented approach (automaticity), a clear timetable for dispute resolution and agreement on the potential for cross-retaliation. The negotiated outcome, the WTO DSU, satisfied most of these desired modifications and improvements to the GATT system. Unilateral action by the United States and other Members is restrained in several ways. Article XVI.4 of the Agreement Establishing the WTO requires that Members' national laws comply with their obligations under the WTO. The DSU also requires that Members abide by its rules and procedures, further ensured by its inclusion in the covered agreements listed in Appendix 1 of the DSU. The DSU incorporates the US objective of automaticity as a pivotal element of the dispute settlement process[111]. The negative consensus

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[109] Jackson, John H. 1998. "Designing and Implementing Effective Dispute Settlement Procedures: WTO Disp ute Settlement, Appraisal and Prospects." In The WTO As An International 180 Organization, edited by Ann e O. Krueger. Chicago: University of Chicago Press

[110] GATT,1986

[111] Stoler, AndrewL, "The Current State of WTO", workshop on the EU, the US and the WTO, Stanford Univer sity, 28 February-1 march,2003.

requirement means that the adoption of Panel Reports can no longer be blocked by losing respondents and thus triggers the right of plaintiffs to retaliate. A strict, and therefore predictable, timetable for the dispute settlement process is provided in Article 20. The limited potential for cross-retaliation between sectors, given noncompliance, is dealt with in Article 22.3.

(ii) The Articles of the WTO Dispute Settlement Understanding

The WTO DSU is an integral part of the Uruguay Agreements, running to 27 Articles and four Appendices[112]. As such, it provides a significantly more substantial and effective framework for settling international trade disputes than the GATT system that preceded it.

Article 1: Coverage and Application

The coverage of the DSU is identified in Article 1.1 and the Agreements included are listed in the DSU. These Agreements include: the WTO Agreement, its component multilateral trade agreements – for goods, the General Agreement on Trade in Services34 , the Agreement on Trade-Related Aspects of Intellectual Property Rights35 and the DSU – together with four plurilateral trade agreements – covering Civil Aircraft, Government Procurement, Dairy and Bovine Meat. The special or additional applications of the DSU rules are covered in Article 1.2. In the case of differences in the rules or procedures of these specific Agreements and the DSU, the former take precedence over the latter.

Article 2: Administration

This Article outlines the functions and procedures of the Dispute Settlement Body (DSB) which administers the DSU.

Article 3: General Provisions

Article 3.1 explicitly recognizes the foundations of the DSU in GATT Articles XXII and XXIII. The remaining eleven paragraphs cover the various objectives of the DSU. These include its role in providing security and stability to the multilateral trading system36, the prompt settlement of disputes37 and the use of the DSU3.

Article 4: Consultations

[112] 3 WTO,1999

The 11thParagraphs of this Article cover the function of, and timetable, for Consultations between Members in dispute. A request for consultations is required as a pre-condition for a request for the establishment of a dispute panel [113]. Special attention is to be given to the particular problems and interests of developing country Members[114].

Articles 11, 12, 13 and 14: Panel Functions, Procedures, Rights to Seek Information and Confidentiality

The function of a WTO Panel is to assist the DSB by making an objective assessment of the facts of a case and the applicability and conformity with the relevant covered agreements.50 Panel procedures are laid down in the DSU51, including a proposed timetable for Panel work. Further, WTO Panels are empowered to seek information and technical advice from any appropriate individual or body. Evidence may also be requested from an Expert Review Group. All Panel deliberations are confidential 54 and non-attributable.

[113] Article 4.3
[114] Article 4.10

Article 21: Surveillance of Implementation of Recommendations and Rulings

This Article is concerned with the response of Members in bringing their trade policy into compliance with the WTO rules. Members have 30 days after the adoption of a Report to inform the DSB of their intentions regarding the implementation of Panel or Appellate Body recommendations65. This is to be 'within a reasonable time', according to the conditions laid out in Paragraphs 3(a), (b) and (c). In the event of disagreement concerning Members' compliance with a Panel's recommendations and rulings, recourse may be made to the dispute settlement procedures and leading to a Panel Report within 90 days66. Under Article 21.6, the DSB keeps the implementation of adopted recommendations and rulings under surveillance.

(iii) Procedure followed by the WTO's DSU to Settlement Trade Disputes

Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the global economy. Without a means of settling disputes, the rule-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly –defined rules, with timetables for completing a case.86 However DSU is not aiming to pass judgments. The priority is to settle disputes, through consultations if possible. By April, 2016 the 507 cases have registered. Most of them have either been notified as settled "out of court" or remain in a prolonged consultation phase since 1995.

(iv) Principles of WTO's Dispute settlement understanding

'Equity, fast, effective, mutually acceptable' are the principles of the WTO's DSU is following. Disputes in the WTO are essentially about broken promises. 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 abiding by the agreed procedures, and respecting judgments. A dispute arises when one country adopts a trade policy measures or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations. A third group of countries can declare that they have an interest in the case and enjoy the same rights.

(vi) How are disputes settled?

Settling disputes is the responsibility of the Dispute Settlement Body which consists of all WTO members.89 Unless it decides by consensus not to do so, the DSB will (1) approve requests to establish panels, (2) adopt panel and Appellate Body reports, and (3) if requested by the prevailing Member in a dispute, authorize the Member to impose a retaliatory measure where the defending Member has not complied. In effect, these decisions are virtually automatic. Given that panel reports would otherwise be adopted under the reverse consensus rule, WTO Members have a right to appeal a panel report on legal issues. The DSU creates a standing Appellate Body to carry out this added appellate function. The Appellate Body has seven members, three of whom serve on any one case.

First Stage (Consultation up to 60 days[115])

Under the DSU, a WTO Member may request consultations with another Member regarding "measures affecting the operation of any covered agreement taken within the territory" of the latter. If a WTO Member requests consultations with another Member under a WTO agreement, the latter Member must enter into consultations with the former within 30 days.

5.4 Criticisms of WTO's Trade Dispute Settlement System

i) Rules for joining consultations are not adequate: Current rules allow the Member being consulted to establish its own standard as to whether the request to join is well founded, and do not provide for deadlines.

ii) Sanctions are unfair to, and unworkable for, most developing countries: Sanctions are a tool for the economically powerful. Sanctions also run counter to the WTO's ethos. It is therefore unacceptable to retain sanctions as the ultimate method of enforcement.

iii) Lack of transparency: Lack of transparency is a critical issue for the credibility of the WTO dispute settlement system. In practice, amicus curiae brief do little to contribute to transparency, but not satisfactory. The result is that the WTO has neither adequate transparency in terms of the

[115] Article 4

openness of its dispute settlement processes to public observation nor adequate provisions for any amicus or intervener process.

The WTO dispute settlement system seems a permanent part of the international economic law landscape and it is difficult to conceive of the multilateral trading system without it. After all, the dispute settlement system has been one of the success stories of the WTO. Of course, there are criticisms and there are many proposals in the context of DSU reform. But no government is currently calling for the abolition of WTO dispute settlement. Indeed, many proposals for reform are calling for quicker, more effective dispute settlement.117 Modifications may be on the horizon, but surely the future of WTO dispute settlement is assured.

CHAPTER-VI

THE OVERALL EFFECTS OF DISPUTE SETTLEMENT MECHANISM ON THE TRADE, COMMERCE AND ECONOMIC GROWTH OF DEVELOPING AND LEAST DEVELOPED COUNTRIES

The WTO's legalized dispute settlement system has been hailed as a new development in international economic relations in which law, more than power, might reign[116].However, while these developments in international law constitute a great achievement, the system remains far from a neutral technocratic process in its structure and operation. Large developed countries are much better-positioned to take advantage of the resource- demanding legalized system and have done so. The system's rules on remedies, in particular, are structured to favour them. Many developing countries do not even consider bringing cases or otherwise participating as a third party in the dispute settlement system. In fact, there is little rationale for many of them to do so on account of the significant costs and uncertain benefits of participating.

The World Trade Organization (WTO) dispute settlement mechanism can be critical for developing countries seeking to defend their trade rights and development interests. The system has been essential for challenging harmful subsidy programs, eliminating unfair anti-dumping duties and ensuring that Least Developed Countries (LDC) can pursue strategies to diversify trade in order to create new employment and income opportunities[117].

It has often been said that the DSU works more in favour of the richer members with their vastly greater resources, as well as an army of staff lawyers, to pursue trade problems, which is difficult, costly and time-consuming for the developing members to do. On the other hand, one of the principal objectives of the Dispute Settlement Understanding (DSU) was to create a fairer system, in which every member could bring forward a complaint, have it fully investigated, obtain a ruling on the compatibility of the measure or practice with WTO rules, and – more generally – "to have its day in court"3 . The guiding principle was intended to be: 'Every member is equal before the law', and this was designed to lead to fairer and more equal opportunities than a system where power politics could, and did, influence the results. Few

[116] Julio Lacarte- Muro and Petina Gappah, Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench, 4 J.Int'l Econ.L.395,401(2001)
[117] 2 Ibid

would dispute that the DSU has successfully introduced a more juridical approach to trade disputes, one that is based upon careful analysis of the rules and neutral interpretation of them. These changes have led to a situation where all stages of a dispute, from the first lodging of a complaint to securing a formal ruling, have become largely de-politicized, and the current area which can in certain cases create difficulties relates to the enforcement of the ruling following adoption of a panel report and often an appeal body report. So, in this rather positive atmosphere, how have the developing countries been able to exploit their right to a day in court.

The World Trade Organization's dispute settlement mechanism can be critical for developing countries seeking to defend their trade rights and development interests. The system has been essential for challenging harmful subsidy programs, eliminating unfair anti-dumping duties and ensuring that least developed countries can pursue strategies to diversify trade in order to create new employment and income opportunities.

But countries can only take advantage of the WTO dispute settlement mechanism if they can effectively pursue their rights in this complex legal regime. Their ability to do so largely depends on having staff with adequate legal, economic and diplomatic experience and a large network of external experts and private sector representatives. Research by ICTSD has shown that a lack of such legal capacity has impeded developing countries' ability to participate fully in the system[118].

6.2 The Participation in the WTO Dispute Settlement System and its effect on WTO Law and International Economic Relations

Participation in the WTO dispute settlement system is essential for shaping WTO law's interpretation and application over time. Participation in WTO judicial processes is arguably more important than is participation in analogous judicial processes for shaping law in national systems for two reasons. First, the difficulty of amending or interpreting WTO law through the WTO political process enhances the impact of WTO jurisprudence. Unlike national or EC law, WTO law requires consensus to modify so that the WTO political/legal system remains extremely weak.6Changes in WTO rules only take place through infrequent negotiating rounds

[118] Busch et al, 'Does Legal Capacity Matter? Explaining Dispute initiation and Antidumping Action in th e WTO', ICSTD Dispute Settlement Programme Series, Issue Paper No.4,(ICTSD,2008).

held around once per decade involving complex tradeoffs between over one hundred and forty countries with widely varying interests, values levels of development and priorities. In addition, because of the complex bargaining process within the WTO rules are often purposefully drafted in a vague manner as part of a political compromise. WTO member thereby delegate significant de facto power to the WTO dispute settlement system to interpret and effectively make WTO law. Second, WTO law, although it does not formally adopt a common law approach, has taken more of a common law orientation, with the WTO Appellate Body and the WTO panels citing and relying on past WTO jurisprudence in their legal reasoning. Individual WTO cases involve more than the judicial resolution of an individual dispute. WTO panel and Appellate Body decisions also produce systemic effects for future cases.

As a result of the increased importance of WTO jurisprudence and the rigidity of the WTO political process to modify it through treaty amendment or formal interpretation, those governments that are able to participate most actively in the WTO dispute settlement system are best-positioned to effectively shape the law's interpretation and application over time to their advantage. Not surprisingly, the United States and EC remain by far the predominant users of the system, and thereby are most likely to advance their larger systemic interests through the judicial process. From 1948 to the Nov 2016, the United States was either a complaint or defendant more than 50% of the total number of disputes, while European Community was a party in 36% of that total.[119] The U.S and EC participation rates are much higher than the United States and EC's percentages of global trade.

In its broadest sense, participation would cover any form of activity in the WTO system. But it is clear that it is much easier to engage in certain types of activity than in others: for example, to seek to join in (that is, to be present) as a third party during bilateral consultations does not take much effort (a simple request), nor require any active participation, whereas the pursuit of a case into a panel procedure as a complainant does involve substantial, and at times prolonged, investment of resources in time and effort. While, therefore, we have to bear in mind that developing countries will often have participated in the disputes launched by other members as third parties, it is difficult to take this as a fair measure of their ability to participate in the system as a whole. It is true that third party participation in panel meetings or appeal hearings

[119] According to WTO website. accessed on 23-11-2016

will impose a somewhat heavier burden on members that decide to use these rights; but it is nevertheless not the principal area where problems for developing countries would be expected to arise.

6.3 Participation of Developing Countries in DSU System

The term developing country is broad, covering economies ranging from those largely based on substance agriculture to those of Brazil and India which have highly industrialized sectors that include commercial aircraft production and software engineering. Although the term "developing country" is often used in WTO agreements, the term is left undefined so that countries largely self-designate their status, subject to challenge from another.

The general lack of definition of what constitutes a "developing" compared to a "developed" country has generated criticism[120]. Yet, it is easy to explain the difficulty for WTO members to legally define what constitutes a developing country in the WTO context. Differentiating developing countries in terms of which countries receive meaningful preferential treatment is highly controversial in an agreement among onehundred-forty members that can have real economic impacts on commercial sectors. Developed countries are wary of granting special and differential ("S&D") treatment where doing so can affect their own commercial constituencies. They thus prefer either to retain control over the application of preferential programs (as under General System of Preferences(GSP)programs), limit their international obligations under preferential programs to "least developed" countries that pose little competitive threat or make their obligations merely declaratory when applied to all "developing countries" so that they again retain discretion as to how to apply them(as under most "S&D" WTO provisions).20 In general, developed countries have agreed to include special treatment provisions in WTO agreements for an undefined mass of "developing countries" because the special provisions, in operation, are of limited relevance. They also have been willing to grant preferential market access to developing countries under national GSP programs because they can unilaterally modify them at will by withdrawing product coverage, resetting quotas, or "graduating" countries from the program. Were internationallybinding special and differential treatments to have real bite, such as through

[120] See, e.g. T. Ademola Oyejide, Special and Differential Treatment, Trade and the WTO: A Handbook, 504, 507 (Bernard Hoekman et.al. end, 2002)

the creation of a preferential system of remedies, developed countries likely would insist on a much tighter definition of what constitutes a "developing country" beneficiary?

6.3.2 'Participation' in the system

In its broadest sense, participation would cover any form of activity in the WTO system. But it is clear that it is much easier to engage in certain types of activity than in others: for example, to seek to join in (that is, to be present) as a third party during bilateral consultations does not take much effort (a simple request), nor require any active participation, whereas the pursuit of a case into a panel procedure as a complainant does involve substantial, and at times prolonged, investment of resources in time and effort. While, therefore, we have to bear in mind that developing countries will often have participated in the disputes launched by other members as third parties, it is difficult to take this as a fair measure of their ability to participate in the system as a whole. It is true that third party participation in panel meetings or appeal hearings will impose a somewhat heavier burden on members that decide to use these rights; but it is nevertheless not the principal area where problems for developing countries would be expected to arise[121].

6.3.3 Special observation of Special and differential treatment for developing countries

The DSU generalised for all members the privileges of the right to a panel and observance of time limits that were reserved only for developing countries in the 1966 Special Procedures for Developing Countries. Although the Special Procedures thus lost much of their relevance, in Article 3.12 of the DSU, developing countries retained the right to invoke those procedures as an alternative to the provisions of the DSU.34 The additional benefits that this provided were shorter time frames and mediation by the Director General to settle the dispute before the panel stage. A qualification was added that where the panel considers that the time frame provided for submission of its report in the 1966 Decision is insufficient, the time frame might be extended with the agreement of the complaining party. In addition, certain other provisions of the DSU accord special and differential treatment (S&DT) to the developing countries.35 The full list of such provisions is Articles 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8,

[121] Are Developing Countries Deterred from Using the WTO Dispute Settlement System? - Participation of Developing Countries in the DSM in the years 1995-2005 ECIPE WORKING PAPER. No. 01/2007

and 27.2. Two provisions, Articles 24.1 and 24.2 give certain privileges to the Least Developed Countries (LDCs). Article 4.10 is a very broadly phrased provision requiring all Members to give special attention to developing country Members' particular problems and interests. Article 8.10 mandates that when a dispute is between a developing country Member and a developed country Member, the panel must include a panelist from a developing country if so requested by the developing country concerned. Article 12.10 allows time extensions to them in the pre-panel consultations involving a measure taken by a developing country. If there is disagreement on whether the consultation period has concluded, the Chairman of the DSB has been empowered to extend the period of consultation. In such cases, the panel is also mandated to give to developing countries sufficient time to prepare and present its arguments.36 Article 12.11 is an important 9 provision, which calls for an explicit indication of the form in which account was taken of the S&DT of developing countries envisaged in the covered agreement in question. Article 21.2 is another broadly phrased provision that stipulates that particular attention should be paid to matters affecting the interests of developing country Members. Article 21.7 requires that during surveillance of implementation, if the matter is one that has been raised by a developing country Member, the DSB may consider what further appropriate action could be taken.37 Article 21.8 adds that in considering such appropriate action the DSB must take into account not only the trade coverage of the measures complained against but also their impact on the economy of the developing country Member concerned. Article 27.2 requires the WTO Secretariat to make available a qualified legal expert from the WTO technical co-operation services to any developing country Member which so requests. The qualification is added that the expert must assist the developing country Members 'in a manner ensuring the continued impartiality of the Secretariat'. Lastly, Article 24.1 requires that particular consideration be given to the special situation of least developed countries (LLDCs) in all stages of dispute settlement procedures. Further, all Members have been mandated to exercise due restraint in raising disputes against the LDCs and in asking for compensation or seeking authorisation of retaliatory measures in cases in which nullification or impairment has been found to result from a measure taken by them. Article 24.2 provides that in a dispute involving a least- developed country Member and where consultations have not led to a solution, the least- developed country Member concerned may request the Director General or the Chairman of the DSB for their good offices, conciliation and mediation, before making a request for the establishment of a panel.

6.4 Effects of DSU on the Developing and Least developed countries' trade, commerce and economic growth

To participate in DSU by developing countries and least developed countries means facing many challenges especially relating to trade, commerce and its economic growth. Major effects are discussed below.

a) It's economic growth

The World Trade Organization (WTO) dispute settlement mechanism can be critical for developing countries seeking to defend their trade rights and development interests. The system has been essential for challenging harmful subsidy programs, eliminating unfair anti-dumping duties and ensuring that least developed countries (LDC) can pursue strategies to diversify trade in order to create new employment and income opportunities.

But countries can only take advantage of the WTO dispute settlement mechanism if they can effectively pursue their rights in this complex legal regime. Their ability to do so largely depends on having staff with adequate legal, economic and diplomatic experience and a large network of external experts and private sector representatives. Research by ICTSD has shown that a lack of such legal capacity has impeded developing countries' ability to participate fully in the system.

CASE STUDY

The United States first raised this issue in March of 1987 during the early stages of the Uruguay Round of multilateral trade negotiations. Arguing that the three Council Directives were not supported by scientific evidence and were in violation of the Agreement on Technical Barriers to Trade (TBT) Agreement, the US requested the establishment of a ìtechnical expert group (ìTEGî) pursuant to Article 14.5 of the TBT Agreement. The TBT Agreement was signed by 102 nations during the Tokyo Round of multilateral trade negotiations. The EU denied the USí request stating that the use of growth promotion hormones was a process and production method (PPM) and, thus, was not subject to the TBT Agreement.52 The EU instead requested the establishment of a Panel to evaluate the case.

The case went unresolved, and in 1989, the United States ìintroduced retaliatory measures in the for m of 100 per cent ad valorem duties on a list of products imported from the European Communities.î53 The EU then requested the establishment of a Panel to address the US duties, but the US blocked this action.54 The US and the EU formed a joint task force to address the problem in 1989. The task force was only able to reduce the list of products subject to the US retaliation. When the US requested th at the matter be addressed under the newly formed Dispute Settlement Body, the WTO convened a Panel to hear the case and the US withdrew its retaliation measures (see Box 2.1).

The EC- Hormones dispute case began in the 1970s when European consumers became concerned over the possible effects of growth hormones used on livestock. In response to this concern, the EC Counc il of Ministers began to legislate restrictions on certain growth hormones and their uses. The Council of Ministers implemented three Council Directives. The first of these restrictions, Council Directive 81/602/EEC, went into effect on July 31, 1981 and the last, Council Directive 88/299/EEC, went into effect May 17, 1988. The US first raised the issue in March of 1987 at the Tokyo Round of multilater al trade negotiations arguing that these restrictions were in violation of the Technical Barriers to Tr ade Agreement (TBT Agreement). When the EC refused to amend their restrictions, the US introduced retaliatory measures in the form of 100 per cent ad valorem duties on a series of products from the EC. The dispute continued unresolved until the formation of the World Trade Organization and its Dispute Settlement Body in January of 1995. A dispute Panel was established on May 20, of 1996.

CONCLUSION

The dispute settlement system of the WTO is considered as a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. The recommendations or rulings made by the WTO DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements[122].

In my view, it's fruitful that before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be productive. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements which is clearly to be preferred." In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.

The WTO dispute settlement system is one of the most comprehensive in international dispute resolution; in fact the resort to political reality today indicates that there is still need to reinforce the enforcement mechanism and remedy of the weak points in this system. Therefore, it necessitates providing more collective implementation machineries.

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

[122] Art. 6. 4 of the DSU.

The Dispute Settlement Body (DSB) is composed of all the WTO Members. It provides a strong institutional mechanism for the parties to the dispute to resolve their trade differences.

The DSB is responsible for the application of the DSU; in other words, it oversees the entire dispute settlement procedure. It has the authority to set up panels, adopt panel and Appellate Body Reports, monitor the application of recommendations and authorize retaliatory measures when a Member fails to comply with rulings.

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

The WTO Dispute Settlement System aims to provide sufficient methods to settle the disputes brought before it. Hence, the system aims to secure a positive solution to disputes. A solution mutually acceptable to the parties to dispute and consistent with the covered agreement is clearly to be preferred. So, 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 agreem ents.

Suggestions

The Dispute Settlement Understanding that entered into force in 1995 has undergone several review efforts since 1998. The most important effort so far has been undertaken under the Doha mandate in 2002 and 2003. Suggestions on virtually all provisions of the DSU have been received, including suggestions on each stage of the process and on most horizontal issues. So far, all attemp ts to review and reform the system have failed as members were unable to reach consensus on a package of modifications.

The question of reform of the WTO dispute settlement system is very important to the WTO Members. The issue of strengthening the implementation and enforcement of Dispute Settlement Body recommendations and rulings directly affect the level of enforcement pressures which would be applied to governments in violation of WTO obligations.

The matters of reform in this system challenge the central issue of how strong the WTO Members want their legal system to be accepted regardless the of legal part iculars of the rules and recommendations to be taken by WTO DSB, the matter of reforming the DSU rests with the WTO

Members who make their decisions by consensus, so the reforms should be acceptable to all WTO's Members.

There are different streams of tho ught on the methods and nature of the DSU reforms relating to implementation and enforcement of DSB rulings and recommendations. Some view desire to preserve and strengthen the existing system, through development and expansion of the current system. And others view their opinions in proposing change of the whole system and starting an alternative system of implementation and enforcement.

It's noticed that second view seems to be difficult to change dispute system completely, but the fir st view, is considered more rational for improving the process of adoption of rules and recommendations.

The WTO dispute settlement system for resolving trade disputes between WTO Members has achieved remarkable success in many aspects during its operation.

It submitted that no working dispute settlement system is perfect; there are positive and negative aspects.

The weak points in the dispute settlement system, is especially the matter of time, in fact the fiil l dispute settlement procedure still takes a great amount of t ime. That reflects on the complainant undergo economic damage if the contest measures is certainly inconsistent. The other point of weakness is th e high cost of defense especially with developing and least developed countries.

In fact the contestant count ries, especially developed countries have won the majority of WTO disputes. But in the case of developing and least developed countries (poor countries) don't resort to the dispute system because it is subject to threats of contest to their laws by richer members. The other weakness, refusal to comply with WTO rules and recommendations, is considered as the most serious problem effecting on the system.

Form other side the difficulties facing reforming dispute settlement system (DSU), that negatively r eflect on active participations. Many developing countries and least developed countries do not use it thro ugh lack of confidence in its worth to invoke dispute settlement processes. A perception exist that awareness that recourse to dispute settlement will be viewed as an unfi-iendly act. Moreover most of the developing and least developed countries lack courage and capability to handle trade disputes.

BIBLIOGRAPHY

GATT, Basic Instruments and Selected Documents. APPELLATE BODY REPORTS

Banana Case (1998) WT/DS 27/AB/R.

Brazil- Measures Affecting Desiccated Coconut Case, (1997) WT/DS 22/AB/R.

Brazil- Export Financing Programme for Aircraft Case,.(1999), WT/DS/96/AB/R.

Canada - Measures Affecting the Export of Civilian Aircraft Case, (1999), WT/DS/70/ AB/R.

Hormones Case, (1999), WT/DS/26/ABR.

Indian - Patent Protection for Pharmaceutical and Agricultural Chemical Products Case, (1998), WT/DS/AB/R 50.

Shrimp Case, (1999), WT/DS/ 58/AB/R. Shirts and Blouses Case, (1998), WT/DS33/AB/R.

US Standard for Reformulated and Conventional Gasoline Case, (1996), I.L.M. 603. US- Cotton Man-Made Fiber Underwear Case, (1997). WT IDS 24/ ABIR.