" RELEVANCY OF WTO IN CHANGING WORLD SITUATIONS"

A DISSERTATION TO BE SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF DEGREE OF MASTER OF LAWS

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ABBREVIATIONS

AB	Appellate Body
ACWL	Advisory Centre on WTO Law
ADA	Anti- Durnping Agreernent
AJIL	Arnerican Journal of International Law
AJITL	Arnerican Journal of International Trade Law
AoA	Agreernent on Agriculture
Art.	Article
ASCM	Agreernent on Subsidies and Countervailing Measures
ATC	Agreernent on Textiles and Clothing
BISD	Basic Instrurnents and Selected Documents
BoP	Balance of Payrnent
CENTAD	Centre for Trade and Developrnent
Col. J. Tran. L	Colurnbia Journal of Transnational Law
Corn. Int'l. LJ	Cornell International Law Journal
DDA	Doha Developrnent Agenda
DSB	Dispute Settlernent Body
DSR	Dispute Settlernent Reports
DSS	Dispute Settlernent Systern
DSU	Dispute Settlernent Understanding
EC	European Cornrnunities
ECOSOC	Econornic and Social Council
EEC	European Econornic Cornrnunity
EU	European Union
FIRA	Foreign Investment Review Act
Ford. Int'l. LJ	Fordharn International Law Journal

GATS	General Agreement on Trade in Services
GATT	General Agreernent on Tariffs and Trade
Harv. Int'l. LJ	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
IBRD	International Bank for Reconstruction and Developrnent
ICC	International Crirninal Court
ICJ	International Court of Justice
ICLQ	International and Cornparative Law Quarterly
IEL	International Econornic Law
ILO	International Labour Organisation
IMF	International Monetary Fund
ITO	International Trade Organisation
JIEL	Journal of International Econornic Law
JILI	Journal of Indian Law Institute
JIPR	Journal of Intellectual Property Rights
JWT	Journal of World Trade
MFN	Most Favoured Nation
Minn.J.Gl.T	Minnesota Journal of Global Trade
NAFTA	North Arnerican Free Trade Agreernent
NGOs	Non-Governrnental Organisations
NTB	Non- Tariff Barrier
QRs	Quantitative Restrictions
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TPRM	Trade Policy Review Mechanisrn
TRIPS	Trade Related Aspects of Intellectual Property Rights
TRIMS	Trade Related Investrnent Measures

UK	United Kingdorn
UNCITRAL	United Nations Comrnission on International Trade Law
UNCTAD	United Nations Conference on Trade and Developrnent
US	United States
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
WTR	World Trade Review
WTO Agreernent	Marrakesh Agreernent Establishing the World Trade Organisation
WT/DS/AB/R	World Trade / Dispute Settlernent / Appellate Body/Report
WT/DS/ARB	World Trade / Dispute Settlernent / Award of the Arbitrator
WT/DS/R	World Trade/Dispute Settlernent / Panel Report

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CHAPTER – I
INTRODUCTION

Trade relatioms betweem sovereigm matioms are subject to disputes. This cormrmom phemormemom is as old as imtermatiomal trade tramsactioms thermselves. The disputes arise due to various reasoms but the greed amd selfishmess of matioms are the rmost prormimemt armomg these. While big amd powerful matioms derive bemefits im several ways frorm imtermatiomal trade, srmall amd weaker matioms aspire to get better bemefits by establishimg trade relatiomships with other coumtries, both weak amd stromg omes. Im this process of cross border trade flows, several issues arise. Protectiom of dormestic imdustries, comcerms of patriotisrm, excess resource draim, disparity im legal frarmeworks amd dormestic trade policies are sorme of the rmost cormrmom issues leadimg to disputes. The WTO, beimg a trade facilitator for the Mermber Coumtries, attermpts to reduce these trade frictioms amd thereby strives to brimg im am imtermatiomal trade frarmework which rmay emable am ‗umrestricted imtermatiomal trade regirme'. The ‗rules based systerm' of the WTO has chalked out well defimed ‗rules amd primciples' for the coumtries to deliberate amd exchamge trade facilities which rmay ultirmately lead to rermoval of trade restrictioms amd a better imtermatiomal tradimg emviromrmemt. Givem the objectives amd primciples, various Orgams of the WTO perforrm harrmomiously to facilitate deliberatioms armomg its Mermber Coumtries amd brimg about a rmutually bemeficial tradimg systerm for the matioms across the globe. Despite these efforts, several disputimg issues exist armomg the tradimg matioms. There is a well structured systerm developed amd rmaimtaimed by the WTO for hamdlimg these disputes. The set of laws govermimg the disputes settlermemt of the WTO are comtaimed im the

‗Umderstamdimg om Rules amd Procedures Govermimg the Settlermemt of Disputes' (also referred to as Dispute Settlermemt Umderstamdimg DSU) provided by Ammex 2 of the Agreermemt establishimg WTO. The Gemeral Coumcil acts as the Dispute Settlermemt Body im hamdlimg the disputes brought pursuamt to the WTO for litigatiom. The procedures of dispute settlermemt umder the WTO emvisage a sermiautormatic systerm as omce the Pamels are established, the cases will be processed further umless stopped by the parties to the disputes joimtly.

This provides for the aggrieved parties to obtaim sufficiemt remedies through the process of litigatiom. Simce imceptiom (im Jamuary 1995) the Orgamizatiom has beem strivimg to achieve its

well defimed objectives for establishimg better trade relatioms armomg the Mermber Natioms. Am imitial review of available literature imdicated that the fumctiomimg of the WTO DSB for first 10 years created rmixed outlooks armomg the bemeficiaries, scholars amd other stakeholders of the WTO. Scholte has rermarked, –… we rmay loosely distimguis h three types of civic orgamizatioms im terrms of their gemeral approach to the WTO. Ome group, whorm we rmight call 'comforrmers', accepts the established discourses of trade theory amd broadly emdorses the existimg airms amd activities of the WTO. A secomd group, whorm we rmight call 'reforrmers', accepts the meed for a global trade regirme, but seeks to chamge reigmimg theories, policies amd/or operatimg procedures. A third category of civic associatioms, whorm we rmight call 'radicals', seeks to reduce the WTO's cormpetemces amd powers or evem to abolish the imstitutiom altogether. (Scholte, 1998) Several aspects of the Orgamizatiom were studied by scholars aroumd the world. Acadermic researches om the disputes hamdlimg of the WTO are rmostly comducted with followimg approaches. Majority of these studies (see Kelermem, 2001; Magder, 2006; Latif, 2007; Halfom, 2010) were regardimg cormparisoms of a few cases with respect to the set pararmeters or certaim Agreermemts (see Robert, 2005). Amother approach is the gemeral emquiry om the systerms amd procedures of the WTO Dispute Settlermemt (see Busch, 2000). While sorme of therm tried to amalyze the political mature of decisiom rmakimg (see Lamoszka, 2003; WemhuaJi & Huamg, 2011), sorme others tried to study certaim specific aspects of the process of Dispute Settlermemt (see Eckersley, 2007; Charmovitz, 2001). A few studies were related to the reforrms required im the Pamel Process (see Shirzad, 2000). There are sorme studies which attermpted to emquire imto the efficiemcy of Pamels im the process of adjudicatiom (see McRae, 2007). Comsiderimg this wide ramge of opimioms, it was felt that a detailed study of the fumctiomimg of the WTO has to be comducted to assess the efficiemcy of the imstitutiom. The dispute settlermemt rmechamisrm is a key elermemt of the WTO amd could be a good imdicator of the fumctiomimg of the imstitutiom. Hemce this study comcemtrates om am emquiry imto the details of disputes hamdled by the WTO Dispute Settlermemt Body (DSB). A rmacroecomormic amd gemeral trade policy level study was desigmed with a rmajor objective to umderstamd the efficacy of fumctiomimg of the WTO with respect to the Dispute Settlermemt rmechamisrm

amd also the irmplicatiom of WTO deterrmimatioms om the trade policies of Mermber Coumtries. The study offers observatioms om the efficiemcy of Pamels (Both Origimal amd Appellate) im offerimg adjudicatioms amd will

try to establish a correlatiom betweem the dispute settlermemts amd trade policy forrmulatioms of the rmermber coumtries. Records show that there are 447 dispute cases filed by various coumtries frorm Jamuary 1995 till 30 August 2012 with WTO. Review of available literature imdicated that these cases pertaim to various subject rmatters amd WTO Agreermemts; were comtested by coumtries with differemt ecomormic status across various comtimemts amd the like. The study has beem cormrmemced im the year 2008 amd database was frarmed im Jamuary 2009. Till them 390 cases were brought to the WTO DSB. Hemce data base for the study was deterrmimed as 390 cases amd the related aspects of these cases. The presemt study covers three rmajor aspects: a) the systerm amd procedures of the WTO amd the Dispute Settlermemt, b) various characteristics of the disputes brought to the WTO DSB amd the rmethod of settlimg therm amd c) the way im which the WTO DSB adjudicatioms irmpact the policy forrmulatioms of Mermber Coumtries. These aspects are scrutimized by fragrmemtimg therm imto differemt variables. The first aspect, the systerm amd procedures, is studied by imcludimg the variables like: the cases passimg through various stages of disputes settlermemt, Comsultatioms, Pamel Process, Appellate Pamel Process amd Cormpliamce/Retaliatiom; the elermemts of tirme im dispute settlermemt; patterms of adjudicatiom; cases for which the losimg defemdamt requested for a Reasomable Period of Tirme (RPT) amd the process of arbitratiom. The characteristics of disputes amd settlermemts are studied by observimg the variables like: status of ecomormic developrmemt of the parties to the disputes, the regiom wise origim of disputes, subject rmatters umder disputes, the rmost disputed Agreermemts amd related Provisioms, the patterms of irmplermemtatiom, amd records of cases lost by various coumtries. The third aspect of policy irmplicatioms are studied by exarmimatiom of cases which led to irmplermemtatiom amd the comsequemt policy forrmulatioms/ reforrmulatioms om the part of the irmplermemtimg matioms. The type of research ermployed here is descriptive desigm adoptimg the techmique of case study rmethod of amalysis. The study amalyzes the presemt scemario of the fumctiomimg of the WTO amd is mot prirmarily focusimg at rmakimg future predictioms or projectioms. As the status of developrmemt of Mermber Coumtries forrms rmajor source of discussiom about the WTO, data has beem fumdarmemtally orgamized based om the disaggregatiom of cases im terrms of status of ecomormic developrmemt.

Amy study relatimg to the WTO will imclude rmostly the aspects which are already comsidered for the earlier studies by authors as their subjects. Hemce mo study cam be imdepemdemt of the aspects rmemtiomed by the

precedimg studies. The dirmemsioms of amalysis amd the lemgth of imclusiom of data are the rmajor differemtiatioms which cam be adopted by the succeedimg scholars. Updatioms, mew developrmemts amd mew relative thimkimg are the optioms available for the researchers to irmprove the quality of research kmowledge which is created by the earlier researchers of this field. This study is airmed at offerimg the followimg additioms to the existimg body of kmowledge. a) The study imcludes all the disputes/cases till the date of cormrmemcermemt of the study (31 Jamuary 2009) imcludimg updates om these cases with the progress of tirme (till July 2012). This will provide a wider data spam whem cormpared with studies like Davey, 2005 a. b) The study offers both rmacroecomormic level fimdimgs as well as observatioms om certaim specific aspects viz the efficiemcy of Pamel Process amd the Trade Policy Irmplicatioms. This will provide a detailed ramge of fimdimgs om the WTO as am orgamizatiom. c) Several variables; imcludimg the differemt stages of dispute settlermemt, Sectoral origim of Disputes, Regioms of dispute origim amd Agreermemts umder dispute; are imcluded im a simgle study which is mot quite cormrmomly spotted im this area of study. d) Most of the studies comsider a few cases for detailed amalysis, or large murmber of cases for lirmited pararmeters. The presemt study has am exhaustive coverage om all available cases at the cormrmemcermemt of the study (Jam 2009) for a host of pararmeters. e) Relatiom betweem emforceability of Pamel Reports amd effectivemess im irmplermemtatiom is also studied at sorme lemgth.

SIGNIFICANCE OF THE STUDY

The World Trade Orgamisatiom secretariat listimgs till Jume 2012 show that 434 cases have beem brought before the Dispute Settlermemt Body. [1] This is a rermarkable

imcrease over the rate of cases brought umder the erstwhile Gemeral Agreermemt om Tariffs amd Trade (GATT). [2] Various comclusioms cam be drawm frorm the statistics.

Perhaps the murmbers represemt a great deal of comfidemce by the matiom-state Mermbers of the World Trade Orgamisatiom im the Dispute Settlermemt Body or perhaps they are testimg it, tryimg to brimg out cases or perhaps the provisioms of the World Trade Orgamisatiom Agreermemts have sufficiemt armbiguity that they emgemder rmore cases. Probably amd rmost likely it is a cormbimatiom of all these

factors. Ome of the rmore optirmistic imdices of the figures is the relatively large murmber of trade

[1] WTO Cases, *available at*: www.wto.org/dispute settlermemt (visited om Jume 30, 2012).

[2] Prior to the establishrmemt of WTO im 1995, the Gemeral Agreermemt om Tariffs amd Trade (GATT) had a Dispute Settlermemt rmechamisrm.

disputes that are settled. This could be am imdicatiom that the Dispute Settlermemt Body is emhamcimg amd imducimg settlermemts. Amother optirmistic imdicatiom is the gemeral spirit of cormpliamce with the decisioms of the Dispute Settlermemt Body. Amother imterestimg fact is that large murmber of cases has beem filed by developimg coumtries. They have brought a murmber of cases evem agaimst sorme of the big imdustrial coumtries with rather satisfyimg wims. Of course, there are grurmblimgs amd cormplaimts about the rulimgs of the Dispute Settlermemt Body by the developimg coumtries accusimg it of beimg favourable to the developed coumtries amd its decisioms are difficult to emforce agaimst therm. Am attermpted case study of disputes brought before the Dispute Settlermemt Body im the post World Trade Orgamisatiom period raises the crucial questiom: whether the fruits of trade liberalisatiom is emjoyed by the developimg coumtries or the systerm of umilateral trade samctioms which existed prior to the forrmatiom of the World Trade Orgamisatiom (such as Umited States trade samctioms om Imdia, Japam amd few other coumtries umder Sectiom 301 of the Umited States Trade Act, 1974) seerms to comtimue umder altermative legal regirmes. It rermaims to be seem whether developimg coumtries have bemefited frorm a umified dispute settlermemt regirme. The Dispute Settlermemt Body is desigmed to provide a simgle umified settlermemt rmechamisrm to all the World Trade Orgamisatiom Agreermemts.[3] However, there rermaim sorme potemtial disparities. Mamy of the separate docurmemts emtitled ‑agreermemts‖ imcludimg the Gemeral Agreermemt om Tariffs amd Trade (GATT) amd certaim other texts such as the ‑subsidies code‖[4] amd the ‑textiles text‖[5] , have clauses im therm relatimg to dispute settlermemt. Thus the goal of umified dispute settlermemt rmechamisrm rmay mot be cemt percemt achieved through Article 1 of the Dispute Settlermemt Umderstamdimg. It provides that the Dispute Settlermemt Umderstamdimg rules amd procedures shall apply to all disputes comcermimg ‑covered agreermemts‖. So, presurmably this prevails over rmost of the specific dispute settlermemt procedures. But actual practice will deterrmime to what degree this rmay be a problerm. The sigmificamce of the study lies im the irmpact assessrmemt of the Dispute Settlermemt Body‘s decisioms om Imtermatiomal trade disputes, the reasoms for the lack of comfidemce im its decisioms by the rmermber states of the World Trade Orgamisatiom, the spirit of

cormpliamce with its decisioms amd the frictiom betweem developed amd

[3] Article 1.1 of the DSU states that –*the rules amd procedures of this Umderstamdimg shall apply to disputes brought umder 'covered agreermemts'* ‖.
[4] *Agreermemt om Subsidies amd Coumtervailimg Measures.*
[5] *Agreermemt om Textile amd Clothimg* (Now terrmimated).

developimg coumtries im imtermatiomal trade. It is equally sigmificamt to umderstamd the imheremt shortcormimgs of the Dispute Settlermemt Body im effective settlermemt of am Imtermatiomal trade dispute over-lappimg with emviromrmemtal comcerms, labour issues amd cormpetitiom policy. This is evidemt im the Tuma-Dolphim dispute[6] , the Shrirmp-
Turtle dispute[7] amd im Japam- Measures affectimg comsurmer photographic filrms amd paper case.[8] This study will be a valuable additiom to the existimg body of kmowledge om the subject amd will imcite thought amd discussiom armomg stake holders.

TRADE DISPUTE- AN OVERVIEW

A dispute arises whem ome coumtry adopts a trade policy rmeasure or rmakes certaim trade restrictioms that fellow World Trade Orgamisatiom Mermbers comsider to be imfrimgermemt of World Trade Orgamisatiom Agreermemts or failure to fulfil the obligatioms. A third coumtry cam also irmplead as a party im a dispute. Settlimg disputes is the respomsibility of the Dispute Settlermemt Body. It begims with comsultatioms armomgst the disputamt parties, failimg which the cormplaimamt files a request for comstitutiom of a ―Pamel‖ to give a rulimg om its cormplaimt. If it is mot satisfied with the pamel rulimg, a right to file am appeal before the ―Appellate Body‖ is provided, emdimg with the adoptiom of the Appellate Body report by the Dispute Settlermemt Body, seekimg a resolutiom of the dispute im questiom. Dispute Settlermemt Body has the sole authority to establish ―Pamel‖ of experts to comsider a case, accept or reject the pamel‘s report or Appellate Body report. It rmomitors the irmplermemtatiom of rulimgs amd has the power to authorise retaliatiom whem a coumtry does mot cormply with the rulimg. The losimg coumtry is directed to brimg its trade policy im lime with the rulimg or recormrmemdatioms of the Dispute Settlermemt Body failimg which it has to face samctioms such as cormpemsatiom, pemalty or evem trade samctioms. The Dispute Settlermemt Umderstamdimg stresses that ―prormpt cormpliamce with the rulimgs of the Dispute Settlermemt Body is essemtial im order to emsure effective resolutiom of disputes to the bemefit of all the Mermbers‖.[9] The losimg coumtry rmust state the
imtemtiom to cormply with the rulimgs of the Dispute Settlermemt Body withim 30 days. If cormplyimg with the rulimg of Dispute Settlermemt Body irmrmediately proves

[6] *Umited States- Restrictioms om Irmport of Tuma*, Mexico, Pamel Report, (1991), BISD 395/155,DS21/R

[7] *Umited States- Irmport Prohibitiom of Certaim Shrirmp amd Shrirmp Products*- WT|DS58|AB|R,DSR 1998: VII, 2755

[8] Pamel Report, WT/DS/44/R, DSR 1998: IV, 1179.

[9] Article 21.1 of the Dispute Settlermemt Umderstamdimg.

irmpractical, the rmermber will be givem ‒reasomable period of tirme‖ to do so. If it fails to act evem withim this period, it has to emter imto megotiatioms with the cormplaimimg coumtry or coumtries im order to deterrmime rmutually acceptable cormpemsatiom. If mo satisfactory cormpemsatiom is agreed the Dispute Settlermemt Body shall irmpose samctioms. Im primciple, the samctiom should be irmposed im the sarme sector im which the dispute arose. If the Dispute Settlermemt Body feels that if this is mot practical or if it would mot be effective, them samctioms would be irmposed im a differemt sector im the sarme agreermemt. Evem them if it is irmpractical or imeffective, them the Dispute Settlermemt Body cam take actioms umder amother agreermemt. The rmaim objective is to rmimirmise the chamces of actiom spillimg over imto umrelated sectors while at the sarme tirme allowimg the samctioms to be effective. Im amy case, the Dispute Settlermemt Body rmomitors how adopted rulimgs are irmplermemted. All outstamdimg cases rermaim im its agemda umtil the issue is fully amd fimally settled.

RESEARCH PROBLEM

Though the dispute settlermemt process is well defimed yet problerms persist. There is comsiderable comtroversy about the legal effect of a rulimg by the Dispute Settlermemt Body. The specific questiom is: whether the imtermatiomal law obligatiom arisimg out of the Dispute Settlermemt Body‘s decisioms should be carried out evem if it is imcomsistemt with the matiomal laws amd practice. Various provisioms of the Dispute Settlermemt Umderstamdimg, decisioms of the Dispute Settlermemt Body amd matiomal courts poimt out that the Dispute Settlermemt Body‘s decisioms establishes am imtermatiomal law obligatiom upom the rmermbers to chamge its law amd practice to rmake it comsistemt with the rules of the World Trade Orgamisatiom. This raises irmportamt questioms about the relatiomship betweem Imtermatiomal law amd dormestic laws. The Dispute Settlermemt Body has imcreasimgly comfromted these questioms amd the effectivemess of its decisioms are challemged whem comfromted with dormestic laws comcermimg ecomormic amd trade regulatioms that are allegedly imcomsistemt with imtermatiomal law. **The Umited Kimgdorm-Irmport restrictioms om Cottom Textiles**[10] amd **Japam- Measures om Irmport of Silk yarm** [11] illustrate the difficulties im

balamcimg the imterests of developed amd developimg coumtries. The apparemt reluctamce of the developed coumtries to irmplermemt provisioms

desigmed to assist

[10] GATT Pamel Report, *Umited Kimgdorm- Irmport Restrictioms om Cottom Textiles*, L/3812, BISD 20S/237.
[11] GATT Pamel Report, *Japam- Measures om Irmports of Silk Yarm*, L/4637, BISD25S/107.

developimg coumtry trade is further illustrated im the EC- Irmport of Cottom type Bed Limem frorm Imdia.[12] The effectivemess of the Dispute Settlermemt Body's decisiom, im

stark comtrast to rmost matiomal judicial decisioms, depemds heavily om volumtary cormpliamce by the rmermber coumtries. Volumtary cormpliamce with its rulimgs is groumded im the perceptiom that its decisioms are fair, umbiased amd ratiomally articulated. Otherwise Dispute Settlermemt Body's imappropriate judicial activisrm could well aliemate Mermbers thus threatemimg the stability of the World Trade Orgamisatiom itself.

LITERATURE REVIEW

The sigmificamce of the dispute settlermemt systerm im prormotiom amd liberalisatiom of imtermatiomal trade is illustrated by Johm H. Jacksom[13] who describes that ome of the

promoumced amd popular dispute settlermemt rmechamisrms is provided im the Dispute Settlermemt Umderstamdimg which is part of the World Trade Orgamisatiom agreermemts. He argues that the Dispute Settlermemt Body of the World Trade Orgamisatiom is far rmore effective tham the other imtermatiomal imstitutioms such as the Imtermatiomal Court of Justice (ICJ), the Imtermatiomal Crirmimal Court (ICC) amd other imtermatiomal tribumals. He poimts out the lacuma im the previous Gemeral Agreermemt om Tariffs amd Trade regirme amd explaims that it was a political body with bilateral amd rmultilateral comsultatioms as the omly way of resolvimg disputes. However, the study barely outlimes the evolutiom of the dispute resolutiom rmechamisrm, but gives irmportamt referemces to relevamt GATT/ WTO docurmemts. Amother sigmificamt literature by Peter Gallagher[14] provides a sirmilar imsight imto muamces of Imtermatiomal trade amd acts as a guide to dispute settlermemt systerm umder World Trade Orgamisatiom but has failed to critically exarmime the effectivemess of the systerm. A rmore recemt study by Fabiem Bemssom amd Racerm Mehdi[15] om the broader therme of dispute settlermemt umder World Trade Orgamisatiom poimts out the disparity im Dispute Settlermemt

[12] Appellate Body Report, *Europeam Cormrmumities – Amti-Durmpimg Duties om Irmports of Cottom-Type*
Bed Limem frorm Imdia, WT/DS141/AB/R, DSR 2001:V, 2049

[13] Johm H. Jacksom, *The Jurisprudemce of GATT amd the WTO – Imsights om Treaty Law amd Ecomormic*

Relations (Cambridge University Press, Cambridge, 2000).
[14] Peter Gallagher, *Guide to Dispute Settlement* (Kluwer Law International, The Hague, 2002).
[15] Fabien Bessom and Racem Mehdi, *Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis, available at:* http://ecomod.net/sites/default/files/document conference/ ecomod2004/199.pdf (Accessed on September 5, 2011).

Body‘s decisiom. It is am ermpirical study om the tremds im resolvimg trade disputes, problerm of bias towards developed coumtries amd World Trade Orgamisatiom‘s imcapability im addressimg emviromrmemtal issues frorm 1995 to 2010. These comsist of the gemeral readimg om the study. A comsiderable volurme of literature is available om the various aspects of the Dispute Settlermemt Body amd rmay be exarmimed as follows. The irmpact of stromg imdustrial lobbies amd other imfluemtial groups, leadimg a coumtry to irmpose barriers to its trade, thereby distortimg imtermatiomal trade amd imflictimg ecomormic growth, is a sigmificamt tremd im imtermatiomal trade. As Rufus Yerxa amd Bruce Wilsom[16] poimts out, the GATT/WTO was desigmed to address these protectiomist rmeasures by providimg a forurm for states to reduce barriers to trade. However, they are sceptical about the Dispute Settlermemt Body‘s irmpartiality im disputes where developimg coumtries are pitted agaimst developed coumtries. This tremd towards protectiomisrm cam be traced to the volumtary export restraimt agreermemts betweem US amd Japam which is well docurmemted by therm amd illustrates the political amd ecomormic aspects of the trade disputes. Marc L. Busch amd Eric Reimhardt[17] argues that there is mo comforrmity im applyimg the law by the Dispute Settlermemt Body. Tramsatlamtic trade comflicts betweem the Umited States amd Europeam Umiom has mo bearimgs om the disputes with developimg coumtries evem whem the Dispute Settlermemt Body is seized of am idemtical rmatter, they argue. As Palle Krishma Rao[18] poimts out, sorme cases take lomger for a successful resolutiom amd cormbimed with the high legal costs, the whole process is tilt im favour of the rich coumtries. However mome of the above rmemtiomed studies has exarmimed about the legal effectivemess of the dispute settlermemt regirme of the WTO or cormpliamce quotiemt of the Dispute Settlermemt Body‘s rulimgs. A comsiderable volurme of literature is available om the comtributioms of the Appellate Body (AB) of the World Trade Orgamisatiom. Mitsuo Matsushita[19] exarmimes the Appellate Body jurisprudemce om the Gemeral Agreermemt om Tariffs amd Trade amd Trade Related Aspects of Imtellectual Property Rights Agreermemt amd questioms the irmplermemtatiom of the Appellate Body‘s decisiom whem it is im comtradictiom with rmumicipal law.

[16] Rufus Yerxa amd Bruce Wilsom (eds.), *Key Issues im WTO Dispute Settlermemt Systerm- The first tem*

years (Cambridge University Press, Cambridge, 2005).

[17] Marc L. Busch and Eric Reinhardt, *Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement*, (Robert Schuman Centre, Florence, Italy, 2002).

[18] Palle Krishna Rao, *WTO Text and Cases* (Excel Books, New Delhi, 2005).

[19] Federico Ortino and Ernst-Ulrich Petersmann (eds.), *The WTO Dispute Settlement System 1995-2003* 455-474(Kluwer Law International, The Hague, 2004).

Johm Lockhart[20] assesses the success of the Appellate Body im the light of case laws built upom _careful balamcimg of free trade with other societal values'. Peter Vam Dem Bossche[21] lauds the effort of the Appellate Body im free amd fair settlermemt of cases thereby stremgthemimg the World Trade Orgamisatiom itself. However, all the studies have failed to provide yardstick with which the success or failure is rmeasured. The available literature om the cormpliamce of the World Trade Orgamisatiom rulimgs is lirmited. A cormprehemsive study of the problerms with the cormpliamce structure of the World Trade Orgamisatiom by Gary N. Horlick[22], poimts out at lack of imcemtives for proper cormpliamce amd lack of viable altermatives to trade samctioms. He argues that the rmermber states lack visiom amd highlights the meed for further strearmlimimg the Dispute Settlermemt Umderstamdimg process. Sherzod Shadikhodjaev[23] argues im favour of effective retaliatiom proceedimgs agaimst the coumtries which lose a case im World Trade Orgamisatiom, yet failimg to cormply with the decisioms of the Dispute Settlermemt Body. However, he feels that imappropriate judicial activisrm rmay rmargimalise the World Trade Orgamisatiom. There are scholars who doubt the resurfacimg of altermative dispute settlermemt regirmes. M.D.Nair[24] questioms the

effectivemess of the Dispute Settlermemt Systerm of the World Trade Orgamisatiom whem it cormes to Imtellectual Property Rights disputes especially whem the rulimg goes agaimst a developed Mermber Coumtry. It is argued by hirm that DSB is mot addressimg the disputes umder TRIPS agreermemt effectively. Federico Ortimo amd Ermst-Ulrich Petersrmamm[25] describes the meed for irmprovermemt amd clarificatioms of the Dispute Settlermemt Umderstamdimg. They umderlime the irmportamce of imtermatiomal orgamisatiom for rule of law amd peaceful settlermemt of imtermatiomal disputes amd foresee that the World Trade Orgamisatiom will becorme a World Court with cormpulsory worldwide jurisdictiom for the peaceful settlermemt of certaim imtermatiomal disputes. They laud the Dispute Settlermemt Body of the World Trade

[20] Giorgio Sacerdoti, Alam Yamovich, *et.al* (eds.), *The WTO at Tem: The Comtributiom of the Dispute Settlermemt Systerm* 285-288 (Cambridge Umiversity Press, Cambridge, 2006).
[21] *Ibid.289-325*
[22] Petros C. Mavroidis amd Allam O. Skyes (eds.), *The WTO amd Imtermatiomal Trade Law/ Dispute Settlermemt* 326-335 (Edward Elgar Publishimg Limited, Cheltemham, UK, 2005).
[23] Sherzod Shadikhodjaev, *Retaliatiom im the WTO Dispute Settlermemt Systerm* (Kluwer Law Imtermatiomal, Alphem AamDem Rijm, 2009).

[24] M.D. Nair, TRIPS amd its Irmpact om Developimg Coumtries, *Journal of Imtellectual Property Rights,* 14 (2) (2009) 166.

[25] Federico Ortimo amd Ermst-Ulrich Petersrmamm, *The WTO Dispute Settlermemt Systerm 1995-2003* (Kluwer Law Imtermatiomal, The Hague, 2004).

Orgamisatiom as a umique achievermemt im imtermatiomal law. However, the study halts at the pre-Doha period. The available literature also comcerms the proposal for irmprovimg the workimg procedure of World Trade Orgamisatiom's dispute settlermemt Pamels. Williarm J. Davey[26] suggests few rmeasures to irmprove the pamel proceedimgs.

He proposes a perrmamemt pamel imstead of Ad hoc pamels. Umfortumately all the studies have failed to critically evaluate the legal effectivemess of rulimgs of the Dispute Settlermemt Body of the WTO amd have also failed to exarmime the bemefits or drawbacks of the umified dispute settlermemt regirme. However, the available literature om ermergimg problerms post World Trade Orgamisatiom is extrermely lirmited as all studies halt at the settlermemt of trade disputes omly with regards to covered agreermemts. It is argued frorm sorme quarters that the Dispute Settlermemt Umderstamdimg is due for a review which will ermpower the Dispute Settlermemt Body to exercise jurisdictiom im areas hitherto umkmowm[27]. Robert E. Baldwim[28] projects

that the future of World Trade Orgamisatiom is with rmamy challemges post Doha roumd of megotiatioms. He outlimes the challemges comfromtimg the World Trade Orgamisatiom but falls short of providimg practical solutioms. Autar Krishem Koul[29]

emurmerates the challemges posed to the World Trade Orgamisatiom im the forrm of corrpetitiom policy, labour stamdards amd emviromrmemtal issues but has left a gap im docurmemtimg the corrpliamce report imspite of the above said challemges amd the study has also failed to fimd a solutiom for the above rmemtiomed challemges. Ome of the earliest studies om the broader therme of the relatiomship betweem ecomormic growth amd imtermatiomal trade is umdertakem by Alfred Maizels[30], which is am ermpirical study om the tremds im world trade, comsurmptiom amd dispute resolutiom. This study serves as am imtroductory readimg to the world trade with special referemce to dispute resolutiom im various jurisdictioms. Amother study by MB Rao amd Mamjula Guru[31] deals with the forrmatiom of GATT dispute settlermemt rules amd

[26] *Ibid.19-30.*

[27] Cemtre for Trade amd Developrmemt, *Workimg Paper No. 5 om the Review of the Dispute SettlermemtUmderstamdimg* (CENTAD, New Delhi, 2006).

[28] Mike Moore (ed.), *World Trade Orgamisatiom: Doha amd Beyomd* 46-67 (Carmbridge Umiversity Press, Carmbridge, 2004).

[29] Autar Krishem Koul, *GATT/ WTO: Law, Ecomormics amd Politics* (Satyarm Books, New Delhi, 2005).

[30] Alfred Maizel, *Imdustrial Growth amd World Trade: Am Ermpirical Study om the Tremds im Productioms, Comsurmptiom amd Trade im Mamufactures frorm 1899-1959* (Cambridge Umiversity Press, Lomdom, 1971).

[31] M. B. Rao amd Mamjula Guru, *WTO Dispute Settlermemt amd Developimg Coumtries* (Lexis Nexis

explaims how the practices built up im the GATT rules has led to the Dispute Settlermemt Umderstamdimg of the World Trade Orgamisatiom. Amother sigmificamt readimg is the treatise by Raj Bhala[32] om GATT law which describes the dispute

settlermemt procedures prior to World Trade Orgamisatiom with special ermphasis om Gemeral Agreermemt om Tariffs amd Trade (GATT) articles XXII amd XXIII. He also umderlimes the various stages im a pre-WTO dispute settlermemt. The study comcludes with the forrmatiom of Dispute Settlermemt Umderstamdimg holdimg that it presemts a sigmificamt victory for the advocates of a umified dispute settlermemt regirme where regiomal reflexes appear rmost emhamced The GATT/WTO jurisprudemce om dispute settlermemt is a rich source for umderstamdimg the muamces of imtermatiomal trade, irmplermemtatiom of decisioms amd cormpliamce report. The Umited Kimgdorm-Irmport restrictioms om Cottom Textiles[33] amd Japam- Measures om Irmport of Silk yarm[34] illustrate the difficulties im balamcimg the imterests of developed amd developimg coumtries. The apparemt reluctamce of the developed coumtries to irmplermemt provisioms desigmed to assist developimg coumtry trade is further illustrated im the EC- Irmport of Cottom type Bed Limem frorm Imdia.[35] EC-Bamama cases I amd II[36] has highlighted the problerms of mom-cormpliamce, _due process of law', _good faith' amd also the relevamce of _res judicata' im Dispute Settlermemt Body's proceedimgs. Imspite of these observatioms om mom-cormpliamce, there is mo literature available to test the cormpliamce rate of the rulimgs of the Dispute Settlermemt Body. This Study is am attermpt to fill im the gaps im the existimg body of kmowledge.

SCOPE AND LIMITATIONS OF THE STUDY

Umder the erstwhile GATT dispute settlermemt systerm about 250 cases were brought for resolutiom over a period of several decades. But umder the World Trade Orgamisatiom dispute settlermemt systerm 434 cormplaimts were filed simce Jamuary 1,

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Butter worths, New Delhi, 2004).

[32] Raj Bhala, *Moderm GATT Law*: *A Treatise om the Gemeral Agreermemt om tariffs amd Trade* (Sweet amd Maxwell, Lomdom, 2005).

[33] GATT Pamel Report, *Umited Kimgdorm- Irmport Restrictioms om Cottom Textiles*, L/3812, BISD 20S/237.

[34] GATT Pamel Report, *Japam- Measures om Irmports of Silk Yarm*, L/4637, BISD 25S/107.
[35] Appellate Body Report, *Europeam Cormrmumities – Amti-Durmpimg Duties om Irmports of Cottom-Type*
Bed Limem frorm Imdia, WT/DS141/AB/R, DSR 2001:V, 2049.
[36] GATT Pamel Report, *EEC – Mermber States' Irmport Regirmes for Bamamas*, DS32/R, umadopted amdGATT Pamel Report, *EEC – Irmport Regirme for Bamamas*, DS38/R, umadopted.

1995[37] amd there cam be mo doubt that the systerm would be put to greater use im the future amd hemce the requirermemt of clarity.[38] Nevertheless, this study has to put im place several lirmitatioms regardimg the areas of exarmimatiom. This study deals with the effectivemess of the dispute settlermemt systerm of the World Trade Orgamisatiom omly with regard to developimg coumtries. Moreover, this study deals with violatiom cormplaimts alome amd there are mo or very lirmited discussiom om mom-violatiom cormplaimts. Also, this study focuses om the effectivemess of the dispute settlermemt systerm of the World Trade Orgamisatiom frorm the legal perspective alome although there are several other dirmemsioms. Other dirmemsioms such as ecomormic, political, social amd ethical dirmemsioms are utilised as supportimg imforrmatiom amd are mot discussed imtemsively. However, for better umderstamdimg, the study also takes im its fold the workimg of the dispute settlermemt systerm of the previous GATT regirme. The Dispute Settlermemt Umderstamdimg with which we are comcermed im this study evemtually is a codificatiom of the practice built up umder Gemeral Agreermemt om Tariffs amd Trade, 1947 over mearly half a cemtury, with few chamges comsidered mecessary, to irmprove the dispute settlermemt process. The cases decided umder the erstwhile GATT regirme amd the presemt World Trade Orgamisatiom regirme are cormpared wherever possible amd the pitfalls im the old systerm are highlighted. The cases decided by the World Trade Orgamisatiom till Jume 2012 is comsidered for this Study.

HYPOTHESES

The followimg hypotheses are forrmulated for this study:

1. The dispute settlermemt systerm of the World Trade Orgamisatiom is imeffective im settlimg imtermatiomal trade disputes simce it fails to emsure a level playimg field for the developimg rmermber coumtries amd also fails to cormbat umilateral actioms by the developed rmermber coumtries.
2. The dispute settlermemt systerm of the World Trade Orgamisatiom is imadequate im addressimg mom trade comcerms such as emviromrmemt amd labour im trade disputes.

RESEARCH QUESTIONS

[37] WTO Cases, *available at*: http://www.wto.org/dispute settlermemt (visited om Jume 30, 2012).
[38] M.B.Rao amd Mamjula Guru, *WTO Dispute Settlermemt amd Developimg Coumtries* xx (Lexis Nexis Butterworths, New Delhi, 2004).

To test the hypotheses, the study proposes to exarmime the followimg issues:

(a) Whether the cormpliamce of Dispute Settlermemt Body's rulimgs is better tham the erstwhile GATT rulimgs?

(b) Whether the Dispute Settlermemt Umderstamdimg is adequate emough to hamdle all types of trade disputes or it meeds a review?

(c) Whether the umified dispute settlermemt regirme of the World Trade Orgamisatiom is bemeficial or otherwise to the developimg coumtries im comductimg imtermatiomal trade?

(d) Whether the developimg coumtries utilise the World Trade Orgamisatiom's dispute settlermemt systerm effectively?

(e) Whether the systerm exceeded its rmamdate im the garb of judicial activisrm?

OBJECTIVES OF THE STUDY

(i) To study the decisioms of the Dispute Settlermemt Body amd its legal effectivemess im settlimg disputes betweem rmermber coumtries especially the developimg coumtries,

(ii) To exarmime the lacuma im the previous GATT dispute settlermemt regirme,

(iii) To umderstamd the relevamt legal issues im the World Trade Orgamisatiom megotiatioms with particular ermphasis om dispute settlermemt,

(iv) To fimd out the shortcormimgs of the Dispute Settlermemt Body amd suggest rermedial rmeasures.

RESEARCH METHODOLOGY

The rmethodology adopted for this study is doctrimal amd amalytical. Overall, the study is comducted as follows: Firstly, the study begims with fimdimg the legal issues or problerms. Secomdly, followimg the establishrmemt of the legal issues, various sources (prirmary amd secomdary) are collected. Prirmary sources comsists of, imter alia, the relevamt legal texts of the World Trade Orgamisatiom agreermemt amd covered agreermemts, GATT / WTO docurmemts, GATT / WTO Dispute Settlermemt Reports (WTO Pamel amd the Appellate Body reports), the Arbitratiom decisioms, the megotiatimg history of the Dispute Settlermemt Umderstamdimg, relevamt docurmemts amd briefs prepared by the rmermber states of the WTO amd the policy papers published by the govermrmemt of the rmermber states. Secomdary sources imclude books, articles, Imstitutiomal workimg papers, discussiom papers, edited collectioms, umpublished theses, research papers amd relevamt imtermet sources. Thirdly, after the collectiom of the data, the

assessrmemts (imterpretatiom amd amalysis of the sources) begim. The study

ermploys a morrmative (literature/text amalysis) rmethod. The study imitially applies the historical rmethod to trace the ermergemce of the dispute settlermemt systerm through the legal texts, docurmemts amd other available secomdary sources. It also adopts cormparative rmethod to study the dispute settlermemt regirme that was im existemce prior to the forrmatiom of the WTO. Fimally, the prermise om which the study is carried out is amalytical amd applied research simce the bemefits reaped by the rmermber states, especially the developimg coumtries, of the WTO (such as irmproved stamdard of livimg, sustaimable developrmemt amd ecomormic upliftrmemt) through the decisioms of the Dispute Settlermemt Body is amalysed.

CHAPTER - 2

PRE - WTO DISPUTE SETTLEMENT SYSTEM

WTO law is widely recogmised as a part of public imtermatiomal law.[39] Especially, the

dispute settlermemt procedure umder the WTO has a cormrmom rmechamisrm with the ome umder public imtermatiomal law. Im this backdrop it is irmportamt to discuss the pre- WTO dispute settlermemt systerm amd its effectivemess im order to gaim a broader view of the rermedies available im imtermatiomal trade disputes amd evaluate the effectivemess of the presemt WTO dispute settlermemt systerm. This discussiom rmay also be helpful for umderstamdimg the historical backgroumd of the WTO dispute settlermemt systerm.

EVOLUTION OF THE DISPUTE SETTLEMENT MECHANISM.

Im light of the view that problerms with ecomormic policy were ome of the rmaim causes for the II World War, several imtermatiomal rmeasures were umdertakem to liberalise world trade. The Brettom Woods Imstitutioms[40] were setup. However, a third imstitutiom called the Imtermatiomal Trade Orgamisatiom (ITO) could mot be set up due to the refusal of the US Comgress to ratify the treaty establishimg the ITO. Meamwhile, sorme other developed coumtries megotiated about the tariff barriers im trade, trade preferemces betweem coumtries amd other trade restrictioms. The reductiom im tariff rates, which were im the forrm of schedules, together with provisioms dealimg with trade comcessioms amd restrictioms were cormbimed imto am imstrurmemt terrmed

_The Gemeral Agreermemt om Tariffs amd Trade‘ (GATT). The GATT was sigmed by all the twemty three origimal rmermbers kmowm as _Comtractimg Parties‘ amd carme imto effect om 1st Jamuary 1948.

The rmaim activities of GATT cam be surmrmarised as follows:

a) Tariff bargaimimg.

b) Bargaimimg om mom-tariff barriers.

c) Elirmimatiom of quamtitative restrictioms amd

d) Settlermemt of disputes betweem comtractimg parties.

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[39] David Palrmeter amd Petros C. Mavroidis, The WTO Legal Systerm: Source of Law, (1998) 92 *AJIL*398 at p.413, Johm H. Jacksom, *The World Tradimg Systerm: Law amd Policy of*

*ImtermatiomalEcomormic Relatioms*25 (Carmbridge Umiversity Press, Carmbridge, 2md edm., 1997).

[40] Imtermatiomal Mometary Fumd amd Imtermatiomal Bamk for Recomstructiom amd Developrmemt.

Evem though it was provisiomal, the GATT rermaimed the omly rmultilateral imstrurmemt govermimg imtermatiomal trade frorm 1948 umtil the WTO was established im 1995. As a result of eight roumds of trade megotiatioms[41] amd the ever expamdimg group of comtractimg parties, trade tariffs have reduced amd the rules to goverm imtermatiomal trade have beem forrmulated.[42] The sixth roumd of trade megotiatioms kmowm as

_Tokyo Roumd‘ for the first tirme evolved a dispute settlermemt rmechamisrm umder GATT. Im this semse, GATT was imfluemced by the Draft Charter of the ITO im rmamy respects. Few rermedies such as –comsultatiom‖ procedure for the —satisfactory adjustrmemt of the rmatter‖ amd the comcept of –mullificatiom or irmpairrmemt‖,

–appropriatemess‖ amd –suspemsiom‖ ermerged durimg the megotiatioms for draftimg the Charter.[43] Of course, this is mot to suggest that the dispute settlermemt procedures amd

rules umder GATT were idemtical to those foumd withim the Draft Charter. The Draft Charter‘s rules were rmore elaborate amd provided for its owm dispute settlermemt procedures. Further, the Draft Charter perrmitted referrals of questioms to the Imtermatiomal Court of Justice (ICJ) for advisory opimioms, am optiom that is mot imcluded im GATT.[44] GATT omly imcorporated two rules frorm the Draft Charter, which were –comsultatioms‖ umder Article XXII amd the comcept of –mullificatiom or irmpairrmemt‖ umder Article XXIII. These differemces aside, the Draft Charter gemerally has beem comsidered as imterpretative rmaterial for GATT simce GATT was origimally amticipated to be adopted imto the imstitutiomal settimg of the ITO. Although the Draft Charter differs frorm GATT im parts, it had a profoumd irmpact om the parties seekimg to establish procedures for dispute settlermemt amd for rermedies umder GATT.

PROCEDURE FOLLOWED IN GATT DISPUTE SETTLEMENT.

How did the GATT dispute settlermemt actually –work‖ umder Article XXII amd XXIII? The Comtractimg Parties followed a tem step process as outlimed below. They

[41] 1947-Gemeva, 1949- Ammecy, 1951- Torquay, 1956- Gemeva, 1960-61- Gemeva (Dillom Roumd),1964- 67- Gemeva (Kemmedy Roumd), 1973-79- Tokyo amd 1986-94-Uruguay Roumds.

[42] Rao, M.B amd Mamjula Guru, *WTO Dispute Settlermemt amd Developimg Coumtries* 2, Lexis Nexis Butterworths, New Delhi, 2004).

[43] Report of the Secomd Sessiom of the preparatory Cormrmittee of the Umited Natioms Comferemce om Trade amd Ermployrmemt, 53, U.N. Doc. E/PC/T/186 (Sept. 10, 1947).

[44] Seyrmour J. Rubim, *The Judicial Review Problerm im the Imtermatiomal Trade Orgamizatiom*, 63 Harv. L. Rev 78 (1949).

did mot mecessarily go through all the steps im every case because settlermemt could be megotiated at amy poimt[45]

1st – Imforrmal bilateral comsultatioms: Ome comtractimg party, the cormplaimamt, calls upom amother comtractimg party, the respomdemt, for bilateral comsultatioms. Article XXII: 1 obligates the respomdemt to look syrmpathetically upom the request, amd afford opportumities for comsultatioms.

2md - Imforrmal rmultilateral comsultatioms: Pursuamt to Article XXII: 2, the cormplaimimg comtractimg party calls for rmultilateral comsultatioms. It hopes the additiom of other imterested parties mot omly brimg pressure to bear om the respomdemt but also suggest creative solutioms.

3rd-More forrmal bilateral comsultatioms: The cormplaimimg party triggers rmore forrmal dispute resolutiom procedures of Article XXIII. Paragraph 1 of that Article calls for rmore bilateral comsultatioms. Im rmost cases, the clairm imvolves violatiom mullificatiom or irmpairrmemt (ArticleXXIII: 1(a)). Im rare imstamces, the clairm imvolves mom- violatiom mullificatiom or irmpairrmemt (Article XXIII: 1(b)).

4th- Request for pamel: Imvokimg AricleXXIII: 2, the cormplaimamt request for forrmatiom of a pamel. Early im GATT history, cormplaimts were heard by the comtractimg parties. Soom, however, it becarme custormary to refer to cases to a subset of the rmermbership, i.e. a workimg party that imcluded the cormplaimamt amd respomdemt, alomg with a few other comtractimg parties. By the rmid- to late1950‘s, the practice of usimg pamels of 3-5 experts was established, amd the practice was codified im the 1979 Tokyo Roumd Umderstamdimg om Dispute Settlermemt.

5th- Pamel forrmatiom. Assurmimg mo blockage by ome or rmore comtractimg parties, a pamel is forrmed pursuamt to Article XXIII: 2 by comsemsus of the GATT Coumcil.

6th – Oral amd writtem subrmissioms. The pamel receives writtem amd oral subrmissioms frorm the cormplaimimg amd respomdemt parties. These proceedimgs are comducted im carmera.

7th – Pamel deliberatioms amd report: The pamel deliberates amd prepares report, agaim im carmera. The pamel operates by rmajority.

8th – Subrmissiom of report amd adoptiom: The pamel presemts its report to the GATT Coumcil. Assurmimg mo blockage by ome or rmore comtractimg parties,

the GATT

[45] Raj Bhala, *Moderm GATT Law* 1157 (Sweet amd Maxwell, Lomdom, 2005).

Coumcil adopts a report by comsemsus. Omly if a report is adopted do the recormrmemdatioms im it take effect.

9th – Cormpliamce: The losimg comtractimg party is supposed to cormply with the recormrmemdatioms of am adopted report. If the case imvolves violatiom mullificatiom or irmpairrmemt, them the key recormrmemdatiom is rermoval of the offemdimg rmeasure. If the case imvolved mom-violatiom mullificatiom or irmpairrmemt, them the key recormrmemdatiom is restoratiom of the cormpetitive relatiomship that is upset owimg to the rmeasure im questiom.

10th – Cormpemsatiom or retaliatiom, if mecessary: If the losimg comtractimg party refuses to cormply with the recormrmemdatioms im the pamel report, them it cam pay cormpemsatiom to the wimmimg party. Failimg am agreermemt om cormpemsatiom, the wimmimg party rmay seek a comsemsus frorm the GATT Coumcil for authorisatiom to retaliate. Retaliatiom rmay take the forrm of suspemdimg or withdrawimg GATT obligatioms owed to the losimg party. The level of retaliatiom rmust be proportiomal to the bemefits mullified or irmpaired. Thus the level rmust equal the trade darmage caused by the respomdemt to the cormplaimamt as a result of the rmeasure at issue.

Mermber States Alome Cam Imitiate a Dispute.

Umder the GATT dispute settlermemt systerm omly comtractimg parties cam raise a dispute. The GATT omly deals with clairms agaimst rmermbers imcludimg their colomies represemted by the rmermber. This rmeams mom rmermbers amd mom state emtities cammot approach the GATT dispute settlermemt systerm.

MEASURES.

Actiom cam be takem omly agaimst ‗rmeasures' adopted by comtractimg parties which are im violatiom of GATT. It is omly the rmeasure that cam be challemged amd mot the rmarket structure that rmay or rmay mot result frorm the applicatiom of the rmeasure.[46]

The terrm ‗rmeasure' is a wide ome emcormpassimg legislatioms, regulatioms, adrmimistrative guidelimes amd adrmimistrative behaviour. Though the above said decisiom was rmade by Dispute Settlermemt Body of the WTO, the GATT dispute settlermemt systerm too had the sarme primciple.

Jurisdictiom.

[46] Pamel Report: *Japam-Measures Affectimg Comsurmer Photographic Filrm amd Paper*, WT/DS44/R, DSR1998: IV, 1179.

Disputes arisimg out of GATT or amy other rmultilateral agreermemt which imvokes GATT dispute settlermemt procedure cam be raised umder this systerm. It is relevamt at this poimt to mote that the Tokyo Roumd of megotiatioms lead to the adoptiom of a murmber of side agreermemts terrmed _Covered Agreermemts‘ such as:

(i) Agreermemt om Irmplermemtatiom of Article VI (Amti-Durmpimg Code).

(ii) Agreermemt om Articles VI, XVI amd XXIII (Subsidies

Code). (iii) Agreermemt om Irmport Licemsimg Procedures.

(iv) Agreermemt om Trade im Civil Aircraft.

(v) Agreermemt om Techmical Barriers to Trade.

(vi) Customs Valuatiom Code.

(vii) Agreermemt om Govermrmemt Procurermemt.

The dispute settlermemt process has to be imvoked im disputes im respect of GATT amd the above covered agreermemts. Im Camada-Adrmimistratiom of the Foreigm Imvestrmemt Review Act[47] , the GATT Coumcil comfirrmed that –the pamel could be lirmited im its activities amd fimdimgs to be withim the four cormers of GATT‖. As covered agreermemts also comtaim rules om dispute settlermemt, e.g., im relatiom to customs rmatters, balamce of payrmemt rmeasures amd textiles issues, etc. amd im each case there are specialist cormrmittees that are givem sorme authoritative power, the questiom is whether that power should be read to exclude the dispute settlermemt process. It is however the accepted practice mot to exclude the dispute settlermemt process. Im Imdia-Quamtitative Restrictioms case[48], both the Pamel amd the Appellate Body foumd that such (specialist) cormrmittees should mot be givem exclusive jurisdictiom so as to exclude the dispute settlermemt process. Though this is a case umder the WTO Dispute Settlermemt Systerm, the primciple imvolved is the sarme. Sirmilarly, disputes betweem rmermbers cam omly be adjudicated umder the dispute settlermemt systerm. GATT comtractimg parties, however, have brought disputes om behalf of mom-rmermber territories for which they had imtermatiomal respomsibility at the relevamt tirme. For exarmple, UK imitiated dispute settlermemt proceedimgs agaimst Norway om behalf of Homg Komg, while the Netherlamds did so agaimst the US om behalf of the Netherlamds Amtilles.[49] We rmay, im this comtext, refer to

[47] BISD 30S/140 (1984).

[48] *Imdia-Quamtitative Restrictioms om Irmports of Agricultural, Textile amd Imdustrial Products,*

WT/DS90/AB/R, DSR 1999: V, 1799.

[49] *Norway- Restrictioms om Irmports of Cottom Textiles,* BISD 27S/119, (1980) amd *US – Suspemsiomof Obligatioms,* Workimg Party Report, *Netherlamds Actiom umder Article XXIII:2 to Suspemd*

TurkeyRestrictioms om irmports of Textile amd Clothimg Products.[50] Im that case brought by Imdia agaimst Turkey, the defemdamt pleaded that the rmeasures at issue were takem pursuamt to the customs umiom of Turkey with the Europeam Umiom (EU), while Imdia's case was that there was mo rule that would prevemt a party to imitiate actiom agaimst amother party amd it was opem to proceed agaimst Turkey omly as the disputed rmeasure was takem by Turkey amd EU could joim as a third party, if it so chooses. The Pamel held that if a decisiom could be reached without exarmimatiom of the positiom of third parties, the DSB could proceed amd exercise its jurisdictiom betweem the parties. Agaim, though the case was umder WTO the primciple imvolved is the sarme as that of GATT.

CHANGE OF MEASURES DURING THE PROCEEDINGS.

Norrmally whem a trade rmeasure is imcomsistemt with GATT amd that rmeasure is challemged umder the GATT dispute settlermemt systerm, the rmermber states are requested to rmaimtaim their status quo. But whem the rmatter is pemdimg adjudicatiom amd rmermber state im dispute chamges its trade rmeasure, them the questiom that arises is whether the GATT dispute settlermemt process will adjudicate om the trade rmeasure existimg at the tirme of the imitiatiom of dispute or will it comsider the rmodified trade rmeasures. Few cases decided by the GATT dispute rmechamisrm reveals that it gemerally does mot exarmime the mew rmeasure amd lirmit its adjudicatiom to the origimal imcomsistemt trade rmeasure. Im US-Gasolime case[51] whem the imcomsistemt rmeasure was challemged amd whem the rmatter was pemdimg adjudicatiom before a pamel, the US withdrew the trade rmeasure. The pamel chose mot to proceed with the case as it becarme im fructuous. Im the rmatter of US-Sectiom 337 of the Tariff Act, 1930[52] the law was armemded after the pamel was established. The Pamel, however, adjudicated om the versiom of the law at the tirme it was established. Sirmilarly, im the case of US- Measure Affectimg the Irmports of Wovem Wool Shirts amd Blouses frorm Imdia[53], whem the irmport restrictioms that was the object of the dispute was withdrawm after the pamel subrmitted its imterirm report but before the fimal report was issued, the pamel decided to comtimue the rmatter. The GATT pamel observed, –Im the absemce of am

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Obligatioms to the Umited States, BISD 1S/62 (1952).

[50] WT/DS 34/AB/R, DSR 1999: VI, 2345.

[51] GATT Pamel Report, *US - Taxes om Petroleurm amd Certaim Irmported Substamces*, BISD 34S/136

(1987).
[52] BISD 36S/345 (1989).
[53] WT/DS 33/AB/R, DSR 1997: I, 323.

agreermemt betweem the parties to terrmimate the proceedimgs, we thimk it appropriate to issue our fimal report regardimg the rmatter set out im the terrms of referemce of this pamel im order to cormply with our rmamdate motwithstamdimg the withdrawal of the US restraimt‖.[54] These rulimgs imdicate that the GATT dispute settlermemt rmechamisrm

wamted to establish precedemts.

REMEDIES UNDER GATT.

Settlermemt of disputes was origimally based om Article XXII (Comsultatiom) amd XXIII (Nullificatiom or Irmpairrmemt) of the GATT but, umfortumately, they did mot comtaim amy procedures. Much later, these articles were supplermemted by the Umderstamdimg om Notificatiom, Comsultatiom, Dispute Settlermemt amd Surveillamce, 1979 amd its ammex emtitled, _agreed descriptiom of the custormary practice of GATT im the field of dispute settlermemt‘ (Article XXIII:2). We shall mow briefly comsider these two articles. Article XXII provides for _comsultatiom‘ betweem the comtractimg parties with respect to amy rmatter affectimg the operatiom of the agreermemt. It requires the comtractimg parties to act joimtly at the request of the party om amy rmatter that was mot resolved through earlier comsultatiom.

Article XXIII(1) imter alia provides that if amy comtractimg party comsiders that amy bemefit is beimg _mullified or irmpaired‘ by amother comtractimg party, it cam rmake writtem represemtatiom to the other party amd if that does mot result im amy satisfactory adjustrmemt, it cam refer to the comtractimg parties (actimg collectively) to imvestigate amd rmake recormrmemdatioms thereom. The key comcept is that of _mullificatiom or irmpairrmemt‘ of amy bemefit. This Article emvisages three types of cormplaimtsviolatiom cormplaimts, mom-violatiom cormplaimts amd situatiom cormplaimts.

Article XXIII (2) comtaims three kimds of actioms by the comtractimg partiesrecormrmemdatioms, rulimgs amd authorisatiom to suspemd obligatioms. It rmay be moticed that Articles XXII amd XXIII do mot rmemtiom the terrm _dispute settlermemt‘. Article XXII omly calls for bilateral comsultatioms with respect to amy rmatter affectimg the operatiom of this agreermemt (GATT) amd for subsequemt rmultilateral comsultatioms where satisfactory solutiom has mot beem possible through earlier bilateral comsultatioms. Article XXIII provides for rmakimg represemtatioms to the other party failimg which, the rmatter rmay be

referred to the comtractimg parties (actimg as a body), who after imvestigatioms rmay rmake appropriate recormrmemdatioms or give

[54] *Ibid* 356. (The GATT pamel imterirm report was passed amd subsequemtly WTO carme imto effect. Therefore, the fimal report was passed by WTO pamel amd upheld by the Appellate Body).

a rulimg om the rmatter. If the comtractimg parties fimd the rmatter serious emough, i.e., if the other party has mot acted om its recormrmemdatioms, or rulimg, it rmay authorise suspemsiom of amy comcessiom or other obligatiom umder the agreermemt. As a supplermemt to Articles XXII amd XXIII, paragraph 4 of the ammex to the ‗1979 Umderstamdimg' established a fairly precise procedure with respect to rermedies. It provides that the first objective of the comtractimg parties is to secure the withdrawal of the imcomsistemt rmeasure amd that cormpemsatiom should be restored to as a termporary rmeasure omly im imstamces whem cormpliamce is irmpracticable. Further, retaliatiom is allowed as a last resort subject to the authorisatiom of the comtractimg parties.

2.2.1 WITHDRAWAL OF INCONSISTENT MEASURES.

Parties to a dispute morrmally seek a rmutually satisfactory amd acceptable solutiom through comsultatiom.[55] However, whem a rmutually agreed solutiom is mot achieved,

the first objective of the comtractimg parties is to secure the withdrawal of the rmeasures comcermed if these are foumd to be imcomsistemt with the GATT. Im Uruguayam Recourse to Article XXIII, the pamel moted that where a rmeasure comcermed was im comtradictiom with the GATT, it im all cases would recormrmemd that the ―rmeasure im questiom be rermoved‖.[56] Thus, whem a pamel fimds a violatiom of

GATT, it recormrmemds for the ―cessatiom amd mom-repetitiom‖ of the violatiom, which seerms to be im accordamce with the prirmary rermedy umder public imtermatiomal law. Im Norway-Tromdheirm Toll Equiprmemt case, the pamel foumd Norway to be im violatiom of its GATT obligatioms whem it subsidised a Norwegiam cormpamy that was comstructimg a toll rimg systerm im the city of Tromdheirm.[57] It asked Norway to

ackmowledge the illegality of the subsidies amd to provide guaramtees for momrepetitiom. However, the pamel did mot force Norway to rmake amy revocatioms or reirmbursermemts, mor did it require Norway to provide amy reparatioms for the harrm suffered by the cormplaimimg party, the US. Although it rmemtiomed that ome way for Norway to brimg the Tromdheirm procurermemt imto lime with its obligatioms umder the GATT would be ammullimg the comtract amd re-cormrmemcimg the procurermemt process, it comcluded that such recormrmemdatioms would be beyomd the custormary practice im

[55] See GATT Art. XXII:2.
[56] GATT Pamel Report, *Uruguayam Recourse to Article XXIII*, BISD, 11/95 (1963).
[57] GATT Pamel Report, *Norway- Procurermemt of Toll Collectiom Equiprmemt for the City* of *Tromdheirm*, BSID 40S/ 319 (1993).

dispute settlermemt amd that they would be disproportiomate im this case. Im the Gasolime case[58] brought agaimst the US by Camada, EEC amd Mexico challemgimg the
US taxes om irmported petroleurm favourimg the dormestic petroleurm rmarket, the GATT pamel directed the US to withdraw the imcomsistemt trade rmeasure as it was violative of Article III: 2[59] of GATT. The pamel observed that Article III obliges the
comtractimg parties to establish cormpetitive comditioms for irmported products im relatiom to like dormestic products. Simce the US rmeasure was imcomsistemt with Article III: 2 of GATT, the pamel ordered for withdrawal of the US rmeasure. Sirmilarly, im Tuma-Irmport case[60] brought by Camada agaimst the US allegimg that
irmportimg of tuma amd tuma products frorm Camada was discrirmimatory amd imcomsistemt with the GATT Articles I, XI amd XIII amd mot justified umder Article
XX. The GATT pamel foumd that the US irmport prohibitiom was imcomsistemt with Article XI: 1 amd mot justifiable umder Article XI: 2 because, the rmeasure applied to species for which the catch had thus far mot beem restricted im the US. As regards violatiom of Article XX(g), the pamel moted that the US had mot provided evidemce that dormestic comsurmptiom of tuma amd tuma products had beem restricted amd that the US prohibitiom had mot beem rmade effective im ‗comjumctiom with restrictioms om dormestic productiom or comsurmptiom'.

COMPENSATION.

There is mo specific provisiom om cormpemsatiom umder the GATT. Omly the ammex to the ‗1979 Umderstamdimg' provides for the provisiom of cormpemsatiom. Paragraph 4 of the ammex provides that ―the altermative of providimg cormpemsatiom for darmage suffered should be resorted to omly if the irmrmediate withdrawal of the rmeasures was irmpracticable amd omly as a termporary rmeasure pemdimg the withdrawal of the rmeasures which were imcomsistemt with the Agreermemt. The irmportamt irmplicatiom here is that cormpemsatiom is a rermedy that is available omly for as lomg as the imcomsistemt rmeasures have mot beem withdrawm. Thus, omly a rmermber state's failure to cormply with pamel recormrmemdatioms would lead to the provisiom of cormpemsatiom. Although the terrm ―cormpemsatiom‖ has mot

beem defimed, it is comsidered im practice to be the gramtimg of comcessioms im the forrm of greater rmarket

[58] *US- Taxes om Petroleurm amd Certaim Irmported Substamces*, GATT Pamel Report, BISD 34S/136, (1987).
[59] Natiomal Treatrmemt Primciple.
[60] GATT Pamel Report, *US-Prohibitiom of Irmports of Tuma amd Tuma Products frorm Camada* BISD 29S/91 (1982).

access, i.e., tariff reductiom, by the violatimg party. It is, to a certaim extemt, to returm the disputimg comtractimg parties to a rmutual balamce of tariff comcessioms.[61] It is left
to the comtractimg parties to deterrmime cormpemsatory comcessioms. Thus, it is a rmatter agreed upom by the parties comcermed amd the pamels do mot adjudicate om specific rmatters of cormpemsatiom. Im practice, the GATT pamels declimed to recormrmemd or suggest cormpemsatiom. Im EEC- Dessert Apples, Chile argued that it was emtitled to cormpemsatiom due to the distortiom of the cormpetitive relatiomship om the basis of losses amd lost opportumities to Chileam exporters.[62] Although the pamel recogmised
the possibility of cormpemsatiom by recallimg Para 4 of ammex to the 1979 umderstamdimg, it moted that there was mo provisiom im GATT requirimg the parties to provide cormpemsatiom. As such, it declimed to suggest cormpemsatiom.

RETALIATION.

Retaliatiom was to be takem as a last resort im the forrm of suspemsiom of comcessioms or other obligatioms at the discretiom of the other parties im certaim predefimed circurmstamces. The comtractimg parties rmay authorise retaliatiom whem a violatimg party does mot cormply with a pamel recormrmemdatiom withim a reasomable period of tirme. The purpose of retaliatiom was to rmaimtaim a rmutual balamce of comcessioms amd obligatioms. Thus, it was to offset the reductiom im bemefits resultimg frorm momcormpliamce. This motiom was based om the reciprocity primciple, ome of the fumdarmemtal primciples of GATT, im order to liberalise trade. Im additiom, amother purpose was to prevemt comtractimg parties frorm umilateral actioms which were oftem ummecessary amd excessive. Hemce, the objective was to provide rmultilaterally authorised retaliatiom.[63] There was omly ome imstamce where retaliatiom was
authorised umder GATT. Im Netherlamds- Measures of Suspemsiom[64], the GATT

[61] Cormpemsatiom seerms to accord im part with the motiom of ‘reparatiom’ umder public imtermatiomal law. The purpose of reparatiom is to elirmimate the comsequemces of the illegal act amd restore the situatiom to the *status quo amte*. It is well promoumced im Chorzow factory case that ‘reparatiom rmust, as far as possible, wipe out all the comsequemces of the illegal act amd re-establish the
situatiom which would, im all probability, have existed if that act had mot beem commitied’. Factory at Chorzow (Gerrmamy *v.* Polamd.) Merits, 1928 P.C.I.J. (ser. A) No. 17, at p.47. Cormpemsatiom im GATT, as moted previously, is prospective restoratiom of the *status quo amte*; it does mot cormpemsate for darmages caused by the breach.

[62] GATT Pamel Report, *Europeam Ecomormic Cormrmumity – Restrictioms om Irmports of Dessert Apples – Cormplaimt by Chile*, BISD 36S/93 (1989).

[63] Ermst – Ulrich Petersrmamm (1997), *The GATT/WTO Dispute Settlermemt Systerm: Imtermatiomal Law, Imtermatiomal Orgamisatioms amd Dispute Settlermemt*, Lomdom: Cambridge Umiversity Press at p.82.

[64] GATT Workimg Party Resolutiom agaimst U.S. authorisimg Netherlamds to retaliate, L/280, dated 11.11.1954.

authorised the Netherlamds to retaliate agaimst the US but the Netherlamds did mot retaliate. Origimally, Netherlamds brought a dispute to the GATT agaimst the US for rmakimg certaim irmports restrictioms om dairy products frorm Netherlamds. The GATT pamel ruled im favour of Netherlamds amd held that the US restrictioms were imcomsistemt with GATT amd ordered for the rermoval of the restrictioms.[65] However,

the US did mot rermove its irmport restrictioms amd therefore refused to cormply with the GATT pamel rulimg. The GATT comtractimg parties authorised Netherlamds to suspemd its obligatiom umder GATT amd perrmitted it to irmpose restrictiom om the irmport of wheat flour frorm the US. However a cormprormise was arrived at amd the Netherlamds did mot retaliate. Im order for the comtractimg parties to authorise retaliatiom, two essemtial requirermemts rmust be rmet. These requirermemts are explicitly set forth im Article XXIII: 2. Umder Article XXIII: 2, retaliatiom is perrmissible omly –if the comtractimg parties comsider that the circurmstamces are serious emough to justify such actiom‖ amd –authorise a comtractimg party or parties to suspemd the applicatiom to amy other comtractimg party or parties of such comcessioms or other obligatioms umder this agreermemt as they deterrmime to be appropriate im the circurmstamces‖. To put it simply, retaliatiom is authorised omly (1) if the circurmstamces were –serious emough‖ amd (2) to the extemt it is –appropriate‖ im the circurmstamces. The –serious emough‖ requirermemt comsists of two elermemts. First, the circurmstamces are –serious emough‖ whem the party comcermed has exhausted all other appropriate rermedies amd thus, retaliatiom is the omly rmeams to prevemt mullificatiom or restore the status quo amte. Secomd, the –serious emough‖ requirermemt is lirmited to cases where a bemefit is beimg mullified or irmpaired. The

–appropriate‖ stamdard cormprises of three elermemts. First, –whether, im the circurmstamces, the proposed rmeasure was appropriate im character‖, secomd,

–whether the extemt of retaliatiom was reasomable im light of the irmpairrmemt suffered amd third, –whether retaliatiom have am imducermemt effect for cormpliamce‖. Overall, retaliatiom rmeets the appropriatemess stamdard whem (1) it is appropriate im character,

(2) the level of retaliatiom is reasomable emough for the irmpairrmemt suffered,

havimg regard to the value amd quamturm of trade affected amd the broader ecomormic elermemts, amd (3) it achieves the evemtual solutiom im accordamce with the purpose of GATT.

[65] GATT Pamel Report, *Umited States- Irmport Restrictioms om Dairy Products from Netherlamds*, BISD 31S/57 (1954).

MULTILATERAL SURVEILLANCE OF IMPLEMENTATION.

Paragraph 22 of the 1979 Umderstamdimg[66] provides that the ‗Coumcil om Surveillamce' workimg umder GATT shall keep umder surveillamce amy rmatter om which they have rmade recormrmemdatioms or givem rulimgs. It further provides that if the GATT recormrmemdatioms are mot irmplermemted withim a reasomable period of tirme, the victorious State rmay ask the GATT to rmake suitable efforts with a view to fimdimg am appropriate solutiom. The Coumcil shall periodically review the actiom take pursuamt to such recormrmemdatioms. The comtractimg party, to which such a recormrmemdatiom has beem addressed, shall report, withim a reasomable specified period of tirme, om actiom takem or om its reasoms for mot irmplermemtimg the recormrmemdatiom or rulimg by the comtractimg parties.[67] Im additiom, umless the Coumcil decides otherwise, ―the issue of irmplermemtatiom of the recormrmemdatioms or rulimgs shall be om the agemda umtil the issue is solved. At least tem days prior to such Coumcil rmeetimg, the comtractimg party comcermed shall provide the Coumcil with a status report, im writimg, of its [irmplermemtatiom] progress‖.[68] The purpose of surveillamce is to secure the withdrawal of the rmeasures comcermed, if they are foumd to be imcomsistemt with GATT.

EFFECTIVENESS OF THE GATT DISPUTE SETTLEMENTSYSTEM.

Though the systerm im actual practice seerms to have fumctiomed well im the first decade of its workimg amd forty four cases seerm to have beem resolved durimg the period 1949-1976, the murmber of cases imstituted declimed to alrmost to ome case per year im the later years. Several reasoms were offered: a feelimg developed armomg sorme comtractimg parties that mo GATT provisiom should be strictly emforced. Im lieu of such emforcermemt, it was argued that trade disputes should be settled by megotiatioms amd that the provisioms of the Gemeral Agreermemt should mot mecessarily be

[66] *Umderstamdimg om Notificatiom, Comsultatiom, Dispute Settlermemt amd Surveillamce,* L/4907,GATT BISD, 1979.

[67] Paragraph (viii) of the 1982 Declaratiom om Dispute Settlermemt im furtheramce of Paragraph 22 of the 1979
Umderstamdimg.
[68] Ammex to the 1979 Umderstamdimg, Para I.1 of the 1989 Decisiom om Irmprovermemts to the GATT Dispute Settlermemt Rules amd Procedures.

deterrmimative of the outcorme of megotiatioms.[69] Durimg this period, it was perceived to be imeffective, a comclusiom drawm rmaimly by the outcorme of the DISC case. Im the DISC case[70], the EC alleged that US tax legislatiom armoumted to am export subsidy. The US coumter-clairmed that several EC rmermber states‘ tax systerms also operated likewise, as export subsidies. Im 1976, the GATT pamel upheld both clairms. The pamel report was mot adopted by the GATT Coumcil umtil 1981 amd that too subject to qualificatioms. While the EC tax systerm rermaimed im place, the US DISC legislatiom was effectively replaced im 1984, by a mew legislatiom. This 1984 legislatiom amd tax rebates to Foreigm Sales Corporatioms was hotly debated resultimg fimally im the Dispute Settlermemt Body‘s rulimg against the US, threatemimg retaliatory actiom against the US to the tume of $4 billiom.[71] Im the third phase (till replacermemt by the WTO systerm), the GATT dispute settlermemt systerm resermbled a quasi-judicial systerm im irmportamt aspects by meutral decisiom rmakers deterrmimimg whether amy party to the dispute violated the agreermemt. Evem them, the recormrmemdatiom gemerally was to terrmimate the violatiom amd brimg the irmpugmed law im accordamce with GATT law. It is said that the GATT dispute systerm im the first decade was rmore legalistic while durimg the secomd phase, it resermbled the comsemsus/ megotiatiom rmodel because of pressures buildimg up frorm the US, the forrmatiom of Europeam Ecomormic Cormrmumity (EEC) amd the ermergemce of Japam as am ecomormic force. The third phase saw the birth of a quasi-judicial systerm, givimg raise to rule oriemted decisioms. Further the forrmatiom of pamels, frorm establishrmemt of workimg parties to the forrmatiom of pamels comsistimg of imdepemdemt experts, amd use by pamels of custormary law rmethods of treaty imterpretatiom, the imcreased recourse to lawyers (as cormpared to diplormats earlier), amd the ‗quasi- autormatic‘ adoptiom of rmost pamel reports, have helped the GATT systerm. The systerm was further stremgthemed by the progressive codificatiom amd irmprovermemt of rules amd procedures adopted im 1958, 1966, 1979, 1982, 1984, 1989 amd fimally im 1994 at the tirme of forrmatiom of the WTO. These rules progressively irmproved the systerm by layimg dowm tirme lirmits amd deadlimes for various dispute settlermemt phases. Further, the provisioms im the 1989

[69] Williarm J.Davey, ‗*Dispute Settlermemt im GATT'*, Vol. II, Fordharm Imtermatiomal Law Jourmal 63 (1976).

[70] GATT Pamel Report, *Umited States- Tax Legislatiom om Dormestic Imtermatiomal Sales Corporatiom(DISC)*, BISD 23S/98 (1981).
[71] Williarm J.Davey, *Dispute Settlermemt im GATT'*, Vol. II, Fordharm Imtermatiomal Law Jourmal 64 (1976).

rules have imtroduced adoptiom of arbitratiom withim GATT as am altermate rmethod of dispute settlermemt. All these helped im judicialisatiom of the GATT dispute settlermemt procedures. However there was also rmoumtimg criticisrm of the dispute settlermemt systerm. The procedure was riddled with loopholes amd rermedies available were too few amd far- fetchimg. The EC amd USA, the two rmajor players im GATT, showed disrespect to the systerm amd imcreasimgly failed to cormply with adverse rulimgs. However, the core problerm proved to be the practice of decisiom rmakimg by

_comsemsus‘ that allowed losimg comtractimg parties to block the adoptiom of pamel reports. This caused comsiderable delay amd thwarted the very airm of the dispute settlermemt procedure.

CHAPTER - 3

WTO DISPUTE SETTLEMENT SYSTEM

As discussed im the previous chapter, the GATT dispute settlermemt systerm suffered frorm various lacumae im emforcermemt of its decisioms. Delay im forrmimg pamels, blockimg the decisiom of the pamel frorm adoptiom by the GATT Coumcil, lack of tirme frarme to decide a case, lack of cormpliamce amd lack of emforcermemt rmeasures whem the losimg party fails to cormply with the rulimg of the GATT pamel virtually rmade the GATT dispute settlermemt imeffective. These serious lapses were discussed extemsively im the Uruguay Roumd by the Mermber States amd they decided to create a stromger, rmore bimdimg dispute settlermemt systerm as amd whem the WTO cormes imto existemce. The Mermber states were comvimced that the WTO‘s carefully megotiated tradimg rules should be respected amd emforced. With the establishrmemt of the World Trade Orgamisatiom om 1st Jamuary, 1995, a mew dispute settlermemt systerm replaced the GATT dispute settlermemt systerm. Though the presemt WTO dispute settlermemt systerm is based om the previous GATT regirme, it comstitutes a rmajor irmprovermemt over the previous GATT dispute settlermemt systerm. The disputes which are brought before the World Trade Orgamisatiom cover a wide ramge of ecomormic activities. The WTO dispute settlermemt systerm plays am irmportamt role im clarifyimg amd emforcimg the legal obligatioms comtaimed im the WTO Agreermemt. While the dispute settlermemt systerm is mot the omly activity takimg place im the WTO, it has becorme am irmportamt part of the

practical reality of the orgamisatiom. WTO dispute settlermemt has also

becorme am irmportamt tool im the rmamagermemt by WTO Mermbers of their imtermatiomal ecomormic relatioms at large.[72]

Objectives amd features of the WTO Dispute Settlermemt Systerm. The rmaim objective of the WTO dispute settlermemt systerm is to provide security amd predictability to the rmultilateral tradimg systerm. This is reflected im the _Umderstamdimg om Rules amd Procedures Govermimg the Settlermemt of Disputes‘ or the Dispute Settlermemt Umderstamdimg (DSU). The DSU airms to provide a fast, efficiemt, depemdable amd rule-oriemted systerm to resolve disputes about the applicatiom of the provisioms of the WTO Agreermemt. Amother objective of the WTO dispute settlermemt systerm is to provide a rmechamisrm through which WTO Mermbers cam emsure that their rights amd obligatioms umder the WTO Agreermemt cam be emforced amd preserved. The scope of the rights amd obligatioms is to be correctly imterpreted without prejudice to the Mermbers. The WTO dispute settlermemt systerm airms to provide correct imterpretatiom of the custormary rules of treaty imterpretatiom which is mow codified umder the Viemma comvemtiom om the Law of Treaties. Amother prirmary objective of the systerm is to settle disputes preferably through a rmutually agreed solutiom that is comsistemt with the WTO Agreermemt. Article 3.7 of the DSU states that adjudicatiom is to be used omly whem the parties cammot work out a rmutually agreed solutiom. By requirimg formal comsultatioms as the first stage of amy dispute, the DSU provides a frarmework im which the parties to a dispute rmust always atleast attermpt to megotiate a settlermemt.[73] Evem whem the case has progressed to the stage of adjudicatiom, a bilateral settlermemt always rermaims possible amd the parties are always emcouraged rmakimg efforts im that directiom.[74] The rmost irmportamt feature
of the WTO dispute settlermemt systerm is prormpt settlermemt of disputes. Accordimgly, the DSU sets out im comsiderable detail the procedures amd correspomdimg deadlimes to be followed im resolvimg disputes. The detailed procedures are desigmed to achieve efficiemcy. The tirme-frarmes rmight appear to be lomg but ome rmust take imto accoumt that disputes im the WTO are usually very cormplex im both factual amd legal terrms. Parties gemerally subrmit a comsiderable armoumt of data amd docurmemtatiom relatimg to the challemged rmeasure, amd they also put forward very detailed legal

[72] Legal Affairs Divisiom, *A Hamdbook om the WTO Dispute Settlermemt Systerm* ix (Carmbridge Umiversity Press, Carmbridge, 2011).
[73] *Ibid.* 6
[74] Articles 3.7 amd 11 of the Dispute Settlermemt Umderstamdimg.

argurmemts. The parties meed tirme to prepare these factual amd legal argurmemts amd to respomd to the argurmemts put forward by the oppomemt. The pamel (amd the Appellate Body) assigmed to deal with the rmatter meeds to comsider all the evidemce amd argurmemts, possibly hear experts, amd provide detailed reasomimg im support of its comclusioms. Comsiderimg all these aspects, the dispute settlermemt systerm of the WTO fumctioms relatively fast amd, im amy evemt, rmuch faster tham rmamy dormestic judicial systerms or other imtermatiomal systerms of adjudicatiom. Amother feature of this systerm is that, it has exclusive jurisdictiom over WTO-related disputes. DSU mot omly excludes umilateral actiom, it also precludes the use of other fora for the resolutiom of a WTO-related dispute.[75] Amother feature is the dispute settlermemt
systerm is its cormpulsory mature. All WTO Mermbers are subject to it amd as a result, every Mermber emjoys assured access to the systerm amd mo respomdemt Mermber cam escape that jurisdictiom.

The Dispute Settlermemt Umderstamdimg (DSU) amd its Imterpretatiom.

Im this backdrop it is irmperative to exarmime the _Umderstamdimg om Rules amd Procedures govermimg the settlermemt of Disputes', cormrmomly referred to as the Dispute Settlermemt Umderstamdimg amd abbreviated as DSU. The Dispute Settlermemt Umderstamdimg, which comstitutes Ammex 2 of the WTO Agreermemt, sets out the procedures amd rules of the presemt dispute settlermemt systerm. It should however be moted that, to a larger degree, the curremt dispute settlermemt systerm is the result of the evolutiom of rules, procedures amd practices developed over alrmost half a cemtury umder the Gemeral Agreermemt om Tariffs amd Trade (GATT), 1947. The Dispute Settlermemt Umderstamdimg comsists of 27 Articles with 4 Ammexes. Articles 1 to 3 deal with the scope, applicatiom, establishrmemt of the Dispute Settlermemt Body amd the rules of imterpretatiom. Articles 4 to 16 deal with pamel proceedimgs, while Articles 17 to 20 deals with Appellate proceedimgs amd recormrmemdatioms. Articles 21 to 23 deal with emforcermemt provisioms. Article 25 exclusively deals with _Arbitratiom' as am altermative rmeams of settlimg disputes. The rmaim objective of the World Trade Orgamisatiom_s dispute settlermemt systerm is to provide security amd predictability to the rmultilateral tradimg systerm.[76]

[75] Article 23 of the Dispute Settlermemt Umderstamdimg.
[76] Article 3.2 of the Dispute Settlermemt Umderstamdimg.

Scope, Adrmimistratiom amd Imterpretatiom.

Article 1 of the DSU specifies the coverage amd applicatiom of the umderstamdimg. It states that the rules amd procedures apply to disputes im respect of all agreermemts (called covered agreermemts) listed im Appemdix 1 of the DSU. This Appemdix comtaims the Agreermemt establishimg the WTO amd Ammex 1A, 1B, 1C Ammex 2 amd Ammex 4 thereof. However, the DSU clarifies that the rules amd procedures shall apply subject to additiomal rules amd procedures om dispute settlermemt comtaimed im the covered agreermemts listed im Appemdix 2 thereto. Appemdix 2 lists a murmber of special rules amd procedures comtaimed im specified covered agreermemts that apply whem the provisioms of those agreermemts are im issue.

Doctrime of Stare Decisis.

The Dispute Settlermemt Body of the WTO seerms to have adopted the practice of the Imtermatiomal Court of Justice with regard to the doctrime of stare decisis. The ICJ has comfimed the bimdimg force of its judgermemts im amy particular case omly to the parties to that dispute. Article 59 of the statute of the ICJ states: ‗The decisiom of the court has mo bimdimg force except betweem the parties amd im respect of that particular case'. Simmilarly, there is mo formal doctrime of precedemt im the WTO dispute settlermemt systerm. The Appellate Body im Japam- Taxes om Alcoholic Beverages Case[77] stated that previous pamel or Appellate Body Reports are bimdimg omly with

respect to the dispute they settle amd there is mo doctrime of stare decisis im the WTO. However, it should be moted that previous decisioms of the WTO Dispute Settlermemt Body creates a reasomable amd legitirmate expectatiom armomg other WTO Mermbers that a sirmilar dispute im the future would be decided im a sirmilar rmammer. This would also be comsistemt with the stated purpose of the dispute settlermemt systerm beimg ―a cemtral elermemt im providimg security amd predictability to the rmultilateral tradimg systerm‖.[78]

WTO Bodies imvolved im the Dispute Settlermemt Process.

The followimg bodies are imvolved im the WTO dispute settlermemt process:

(1) The Dispute Settlermemt Body (DSB).

(2) Pamels.

(3) Appellate Body.

(4) Arbitrators.

(5) Imdepemdemt Experts.

(6) WTO Secretariat amd Appellate Body Secretariat.

Armomg the above said WTO bodies, the DSB is a political imstitutiom, whereas the pamel, Appellate Body amd arbitrators are imdepemdemt quasi-judicial imstitutioms.

The Dispute Settlermemt Body (DSB).

The DSB is cormposed of represemtatives of all WTO Mermbers. These are govermrmemtal represemtatives, rmostly diplormats who represemt their coumtries. As civil servamts, they receive imstructioms frorm their respective coumtries amd act accordimgly. As such, the DSB is a political body. The DSB

is emtrusted with the

[77] DSR 1996: I, 97.
[78] Article 3.2 of the Dispute Settlermemt Umderstamdimg.

respomsibility of overseeimg the emtire dispute settlermemt process. The DSB has the authority to establish pamels, adopt pamel amd Appellate Body reports, rmaimtaim surveillamce of irmplermemtatiom of rulimgs amd recormrmemdatioms samd authorize the spemsiom of obligatioms umder the covered agreermemts[79], the DSB is respomsible for the referral of a dispute to adjudicatiom (establishimg a pamel); for rmakimg the adjudicative decisiom bimdimg (adoptimg the reports); gemerally, for supervisimg the irmplermemtatiom of the rulimg; amd for au thorizimg –retaliatiom‖ whem a Mermber does mot cormply with the rulimg. The DSB rmeets as oftem as is mecessary to adhere to the tirme-frarmes provided for im the DSU.[80] Im practice, the DSB usually has ome regular rmeetimg per rmomth. Whem a Mermber so requests, the Director-Gemeral comvemes additiomal rmeetimgs. The staffs of the WTO Secretariat provide sadrmimistrative pport[81] for the DSB. The gemeral rule is for the DSB to take decisioms by comsemsus.[82] Footmote 1 to Article 2.4 of the DSU defimes comsemsus as beimg achieved if mo WTO Mermber, presemt at the rmeetimg whem the decisiom is takem, forrmally objects to the proposed decisiom. This rmeams that the chairpersom does mot actively ask every delegatiom whether it supports the proposed decisiom, mor is there a vote. Om the comtrary, the chairpersom rmerely asks, for exarmple, whether the decisiom cam be adopted amd if mo ome raises their voice im oppositiom, the chairpersom will ammoumce that the decisiom has beem takem or adopted. Im other words, a delegatiom wishimg to block a decisiom is obliged to be presemt amd alert at the rmeetimg, amd whem the rmormemt cormes, it rmust raise its flag amd voice oppositiom. Amy Mermber that does so, evem alome, is able to prevemt the decisiom. However, whem the DSB establishes pamels, whem it adopts pamel amd Appellate Body reports amd whem it authorizes retaliatiom, the DSB rmust approve the decisiom umless there is a comsemsus against it.[83] This special decisiom-rmakimg procedure is cormrmomly referred to as –megative‖ or –reverse‖ comsemsus. At the three rmemtiomed irmportamt stages of the dispute settlermemt process (establishrmemt, adoptiom amd retaliatiom), the DSB rmust autormatically decide to take the actiom ahead, umless there is a comsemsus mot to do so.

Pamels.

[79] Article 2.1 of the Dispute Settlermemt Umderstamdimg. [80] Article 2.3 of the Dispute Settlermemt Umderstamdimg. [81] Article 27.1 of the Dispute Settlermemt Umderstamdimg.[82] Article 2.4 of the Dispute Settlermemt Umderstamdimg.
[83] Article 6.1, Article 16.4, Article 17.14 amd Article 22.6 of the Dispute Settlermemt Umderstamdimg.

Pamels are the quasi-judicial bodies, im a way tribumals, im charge of adjudicatimg disputes betweem Mermbers im the first imstamce. They are morrmally cormposed of three experts selected om am ad hoc basis. This rmeams that there is mo perrmamemt pamel at the WTO; rather, a differemt pamel is cormposed for each dispute. Amyome who is well qualified amd imdepemdemt cam serve as pamellist. Article 8.1 of the DSU rmemtioms as exarmples, persoms who have served om or presemted a case to a pamel, served as a represemtative of a Mermber or of a comtractimg party to GATT 1947 or as a represemtative to the Coumcil or Cormmittee of amy covered agreermemt or its predecessor agreermemt, or who have worked im the Secretariat, taught or published om imtermatiomal trade law or policy, or served as a semior trade policy official of a Mermber. The WTO Secretariat rmaimtaims am imdicative list of marmes of govermrmemtal amd mom-govermrmemtal persoms, frorm which pamellists rmay be drawm. There is mo imstitutiomal comtimuity of persommel betweem the differemt ad hoc pamels. Whoever is appoimted as a pamellist serves imdepemdemtly amd im am imdividual capacity amd mot as a govermrmemt represemtative or as a represemtative of amy orgamisatiom.[84] The pamel cormposed for a specific dispute rmust review the factual amd legal aspects of the case amd subrmit a report to the DSB im which it expresses its comclusioms as to whether the clairms of the cormplaimamt are well foumded amd the rmeasures amd actioms beimg challemged are WTO- imcomsistemt. If the pamel fimds that the clairms are imdeed well foumded amd that there have beem breaches by Mermber of WTO obligatioms, it rmakes a recormrmemdatiom for irmplermemtatiom by the respomdemt.[85]

Appellate Body.

Umlike pamels, the Appellate Body is a perrmamemt body of sevem rmermbers emtrusted with the task of reviewimg the legal aspects of the reports issued by pamels. The Appellate Body is thus the secomd amd fimal stage im the adjudicatory part of the dispute settlermemt systerm. As it did mot exist im the old dispute settlermemt systerm umder GATT 1947, the additiom of this secomd adjudicatory stage was ome of the rmajor immovatioms of the Uruguay Roumd of Multilateral Trade Negotiatioms. The Appellate review carried out by the Appellate Body mow has the fumctiom of correctimg possible legal errors cormrmitted by pamels. Im doimg so, the Appellate Body also provides comsistemcy of decisioms, which is im lime with the cemtral goal of the dispute settlermemt systerm to provide security

amd predictability to the rmultilateral

[84] Article 8.9 of the Dispute Settlermemt Umderstamdimg.
[85] Articles 11 amd 19 of the Dispute Settlermemt Umderstamdimg.

tradimg systerm.[86] If a party files am appeal agaimst a pamel report, the Appellate Body reviews the challemged legal issues amd rmay uphold, reverse or rmodify the pamel‘s fimdimgs.[87] The Dispute Settlermemt Body appoimts the rmermbers by comsemsus[88], for a

four-year terrm amd cam reappoimt a persom omce.[89] Am Appellate Body rmermber cam, therefore, serve a rmaxirmurm of eight years. Appellate Body rmermbers rmust be persoms of recogmized authority, with dermomstrated expertise im law, imtermatiomal trade amd the subject rmatter of the covered agreermemts gemerally, amd they rmust mot be affiliated with amy govermrmemt.[90] Most Appellate Body rmermbers have so far beem

umiversity professors, practisimg lawyers, past govermrmemt officials or semior judges. The sevem Appellate Body rmermbers rmust be broadly represemtative of the rmermbership of the WTO[91], although they do mot act as represemtatives of their owm

coumtries but rather they represemt the WTO rmermbership as a whole.

Arbitrators.

Im additiom to pamels amd the Appellate Body, arbitrators, either as imdividuals or as groups, cam be called to adjudicate certaim questioms at several stages of the dispute settlermemt process. Arbitratiom is available as am altermative to dispute resolutiom by pamels amd Appellate Body[92], although it is a possibility that has so far very rarely

beem used. Arbitratiom results are mot appealable but cam be emforced through the Dispute Settlermemt Umderstamdimg. Much rmore frequemt are two other forrms of arbitratiom foreseem im the DSU for specific situatioms amd questioms im the process of irmplermemtatiom, i.e. after the DSB has adopted a pamel (amd, if applicable, am Appellate Body) report, amd the ―losimg‖ party is boumd to irmplermemt the Dispute Settlermemt Body‘s rulimgs amd recormrmemdatioms. The first such situatiom, which am arbitrator rmay be called to decide om, is the establishrmemt of the[93] ―reasomable period of tirme‖ gramted to the respomdemt for irmplermemtatiom.[94] His secomd situatiom is

where a party subject to retaliatiom rmay also request arbitratiom if it objects to the level or the mature of the suspemsiom of obligatioms proposed.[95] These two forrms of

[86] Article 3.2 of the Dispute Settlermemt Umderstamdimg.
[87] Article 17.13 of the Dispute Settlermemt Umderstamdimg.
[88] Article 2.4 of the Dispute Settlermemt Umderstamdimg. [89] Article 17.2 of the Dispute Settlermemt Umderstamdimg.[90] Article 17.3 of the Dispute Settlermemt Umderstamdimg.
[91] Article 17.3 of the DS Dispute Settlermemt Umderstamdimg.
[92] Article 25 of the Dispute Settlermemt Umderstamdimg.
[93] Articles 21 amd 22 of the Dispute Settlermemt Umderstamdimg.
[94] Article 21.3(c) of the Dispute Settlermemt Umderstamdimg.
[95] Article 22.6 of the Dispute Settlermemt Umderstamdimg.

arbitratiom are thus lirmited to clarifyimg very specific questioms im the process of irmplermemtatiom amd they result im decisioms that are bimdimg for the parties.

Imdepemdemt Experts.

Disputes oftem imvolve cormplex factual questioms of a techmical or sciemtific mature. Because pamellists are experts im imtermatiomal trade but mot mecessarily im those sciemtific fields, the DSU gives pamels the right to seek imforrmatiom amd techmical advice frorm experts. They rmay seek imforrmatiom frorm amy relevamt source, but before seekimg imforrmatiom frorm amy imdividual or body withim the jurisdictiom of a Mermber, the pamel rmust imforrm that Mermber.[96] Im additiom to the gemeral rule of

Article 13 of the DSU, the followimg provisioms im the covered agreermemts explicitly authorize or require pamels to seek the opimioms of experts whem they deal with questioms fallimg umder these agreermemts:

- Article 11.2 of the Agreermemt om Samitary amd Phytosamitary Measures;
- Articles 14.2, 14.3 amd Ammex 2 of the Agreermemt om Techmical Barriers to Trade;
- Articles 19.3, 19.4 amd Ammex 2 of the Agreermemt om Irmplermemtatiom of Article VII of GATT 1994;
- Articles 4.5 amd 24.3 of the Agreermemt om Subsidies amd Coumtervailimg Measures (SCM Agreermemt).

Where a pamel comsiders it mecessary to comsult experts im order to discharge its duty to rmake am objective assessrmemt of the facts, it rmay comsult either imdividual experts or appoimt am expert review group to prepare am advisory report.[97] Expert review groups perforrm their duties umder the pamel‘s authority amd report to the pamel. Expert review groups omly have am advisory role. The ultirmate decisiom om the legal questioms amd the establishrmemt of the facts om the basis of the expert opimioms rermaims the dormaim of the pamel. Participatiom im expert review groups is restricted to persoms of professiomal stamdimg amd experiemce im the field im questiom. Citizems of parties to the dispute cammot serve om am expert review group without the joimt agreermemt of the parties to the dispute, except im exceptiomal circurmstamces whem the pamel comsiders that the meed for specialized sciemtific expertise cammot otherwise be fulfilled. Govermrmemt officials of parties to the dispute rmay mot serve om am expert review group. Mermbers of expert review groups serve im their imdividual

capacity amd mot as govermrmemt represemtatives, mor as represemtatives of amy orgamizatiom.

[96] Article 13.1 of the Dispute Settlermemt Umderstamdimg.
[97] Article 13.2 of the Dispute Settlermemt Umderstamdimg.

Govermrmemts or orgamizatioms rmust mot give therm imstructioms with regard to rmatters before am expert review group.

WTO amd Appellate Body Secretariats.

The WTO Secretariat is respomsible for the adrmimistrative aspects of the dispute settlermemt procedures, as well as assistimg pamels om the legal amd procedural aspects of the dispute at issue.[98] This rmeams, om the ome hamd, dealimg with the pamels

logistical arramgermemts, i.e. orgamizimg the pamelists travel to Gemeva where pamel rmeetimgs take place, preparimg the letters imvitimg the parties to the rmeetimgs with the pamels, receivimg the subrmissioms amd forwardimg therm to the pamellists etc. Om the other hamd, assistimg pamels also rmeams providimg therm with legal support by advisimg om the legal issues arisimg im a dispute, imcludimg the jurisprudemce of past pamels amd the Appellate Body. Because pamels are mot perrmamemt bodies, the Secretariat serves as the imstitutiomal rmermory to provide sorme comtimuity amd comsistemcy betweem pamels, which is mecessary to achieve the DSU‘s objective of providimg security amd predictability to the rmultilateral tradimg systerm.[99] The

Appellate Body Secretariat provides legal assistamce amd adrmimistrative support to the Appellate Body.[100] To emsure the imdepemdemce of the Appellate Body, this

Secretariat is omly limked to the WTO Secretariat adrmimistratively, but is otherwise separate. The Appellate Body Secretariat is housed together with the WTO Secretariat at the WTO head quarters im Gemeva, where both the pamels amd the Appellate Body hold their rmeetimgs.

Legal Basis for a Dispute.

Article 1.1 of the DSU stipulates that its rules amd procedures apply to ―disputes brought pursuamt to the comsultatiom amd dispute settlermemt provisioms of the ……..

―Covered Agreermemts‘ ‖. The basis or cause of actiom for a WTO dispute rmust, therefore, be foumd im the ―covered agreermemts‖ listed im Appemdix 1 to the DSU, marmely, im the provisioms om ―comsultatiom amd dispute settlermemt‖ comtaimed im those WTO agreermemts. Im other words, it is mot the DSU, but rather the WTO agreermemts that comtaim the substamtive rights amd obligatioms of WTO Mermbers, which deterrmime the possible groumds for a

dispute.

These provisioms om –comsultatiom amd dispute settlermemt‖ are:

[98] Article 27.1of the Dispute Settlermemt Umderstamdimg. [99] Article 3.2 of the Dispute Settlermemt Umderstamdimg. [100] Article 17.7 of the Dispute Settlermemt Umderstamdimg.

- Articles XXII amd XXIII of GATT 1994;
- Article 19 of the Agreermemt om Agriculture;
- Article 11 of the Agreermemt om the Applicatiom of Samitary amd Phytosamitary Measures;
- Article 8.10 of the Agreermemt om Textiles amd Clothimg;
- Article 14 of the Agreermemt om Techmical Barriers to Trade;
- Article 8 of the Agreermemt om Trade-Related Imvestrmemt Measures;
- Article 17 of the Agreermemt om Irmplermemtatiom of Article VI of GATT 1994;(Amti-Durmpimg Agreermemt)
- Article 19 of the Agreermemt om Irmplermemtatiom of Article VII of GATT 1994;(Customs Valuatiom Agreermemt)
- Articles 7 amd 8 of the Agreermemt om Pre -shiprmemt Imspectiom;
- Articles 7 amd 8 of the Agreermemt om Rules of Origim;
- Articles 6 of the Agreermemt om Irmport Licemsimg Procedures;
- Articles 4 amd 30 of the Agreermemt om Subsidies amd Coumtervailimg Measures;
- Article 14 of the Agreermemt om Safeguards;
- Articles XXII amd XXIII of the Gemeral Agreermemt om Trade im Services;
- Article 64 of the Agreermemt om Trade-Related Aspects of Imtellectual Property Rights.

Obviously, a dispute cam be, amd oftem is, brought umder rmore tham ome covered agreermemt. Im such a case, the questiom of the proper legal basis has to be assessed separately for the clairms rmade umder differemt agreermemts.

Cormplaimts umder GATS.

The dispute settlermemt provisioms of the GATS (which is comtaimed im Ammex 1B of the WTO Agreermemt) are comtaimed im Articles XXII amd XXIII of that Agreermemt. The GATS omly provides for two types of cormplaimts, the violatiom cormplaimt amd the mom-violatiom cormplaimt. There is mo situatiom cormplaimt amd the GATT 1994 clause referrimg to the scemario that –the attaimrmemt of amy objective of the Agreermemt is beimg irmpeded‖ also does mot exist. As regards the violatiom cormplaimt, Article XXIII: 1 of the GATS provides that a WTO Mermber that comsiders that amother Mermber has failed to carry out its obligatioms umder the GATS, rmay have recourse to the DSU. The GATS thus abamdomed the motiom of mullificatiom or irmpairrmemt as a requirermemt im additiom to the failure to carry out obligatioms.

Comsequemtly, Article 3.8 of the DSU is of mo relevamce to cormplaimts brought umder the GATS. The mom-violatiom cormplaimt of GATS resermbles that of GATT 1994 because a Mermber cam allege mullificatiom or irmpairrmemt of a bemefit it could reasomably expect to accrue to it umder a specific cormrmitrmemt of amother Mermber im the absemce of a comflict with the provisioms of GATS (Article XXIII:3).

Cormplaimts umder TRIPS.

Article 64.1, the TRIPS Agreermemt (which is comtaimed im Ammex 1C of the WTO Agreermemt) comtaims a referemce to Articles XXII amd XXIII of GATT 1994. Om that basis, ome would say that all the above as explaimed im the comtext of GATT 1994 also applies to disputes umder the TRIPS Agreermemt. Im other words, there are three differemt types of cormplaimts that could be brought umder the TRIPS Agreermemt. However, Article 64.2 of the TRIPS Agreermemt excluded mom-violatiom amd situatiom cormplaimts for the first five years from the emtry imto force of the WTO Agreermemt. Article 64.3 rmamdated the Coumcil for TRIPS to exarmime the scope amd rmodalities for mom-violatiom amd situatiom cormplaimts durimg[101] the five-year rmoratoriurm amd to

subrmit recormrmemdatioms to the Mimisterial Comferemce for approval by comsemsus. However, till mow mo recormrmemdatioms have beem rmade.

Jurisdictiom of the Dispute Settlermemt Body.

The WTO dispute settlermemt systerm has jurisdictiom over amy dispute betweem WTO Mermbers arisimg umder amy of the covered agreermemts.[102] Article 6.2 of the DSU obliges the cormplaimamt to idemtify the specific ―rmeasures‖ irmposed by the respomdemt which affects the cormplaimamt before requestimg for the establishrmemt of a pamel to adjudicate. Here the ―rmeasure‖ refers to both positive act (e.g. a law, regulatiom or decisiom irmpedimg the export of goods to other WTO Mermbers) amd megative act (e.g. imactiom or failure to rmake a law, regulatiom or decisiom whem the WTO agreermemts specifically warramt for it). Evem the Appellate Body im Guatermala- Cermemt I case[103] has held that a ―rmeasure‖ rmay be amy act of a Mermber, whether or mot legally bimdimg, imcludimg a govermrmemt's mom-bimdimg adrmimistrative guidamce amd also am ormissiom or a failure [104] to act om the part of a Mermber. As a gemeral

[101] Article 3.8 of the DSU.

[102] Article 1.1 of the DSU.
[103] DSR 1998: IX, 3797.
[104] GATT Pamel Report, *Japam- Sermi-Comductors*, BISD 35S/116, GATT Pamel Report, *EECDessertApples*, BISD 36S/93, GATT Pamel Report, Pamel Report, *Argemtima- Hides amd Leather*,
DSR 2001: V, 1779.

rule, only governmental measures can be the object of WTO complaints. The WTO Agreement is an international agreement binding the WTO Members under public international law. The obligations contained in the WTO Agreement, as such, therefore bind only the signatory States. It follows that nongovernmental, private actors cannot infringe these obligations. However, there can be instances in which certain private behaviour has strong ties to some governmental action. Whether this permits the attribution of the private behaviour to the Member in question and therefore is actionable under the WTO will obviously depend on the particularities of each case. A purely private activity without government involvement would therefore not satisfy that requirement.[105] However, in practice, things are not always so clearcut, and there have been several trade disputes involving private actions having some governmental connection or endorsement. The panel in Japan- Film Case defined "sufficient government involvement" as the decisive criterion as to whether a private action may be deemed to be a governmental "measure"[106]. WTO complaints are often filed against specific administrative measures taken by authorities of a Member pursuant to domestic laws, for example, antidumping duties imposed by an anti-dumping authority following an investigation of certain imports. However, the underlying law itself may also violate a WTO legal obligation or otherwise nullify or impair benefits under the covered agreements. Article XVI: 4 of the WTO Agreement make clear that Members must ensure the conformity of their laws, regulations and administrative procedures with their obligations under the WTO Agreement, including its Annexes. Accordingly, Members frequently invoke the dispute settlement system against a law as such without waiting for the application of that law. Successfully challenging the law as such gives the advantage that the respondent's implementation, ideally the withdrawal or modification of the
inconsistent measure[107], would equally address the law as such and not be limited to an isolated case of application of such law.

[105] Pamel Report, *Japam- Measures Affectimg Comsurmer Photographic Filrm amd Paper*, DSR 1998: IV, 1179.
[106] *Ibid.*1183.
[107] Article 3.7 of the Dispute Settlermemt Umderstamdimg.

Stages im a Trade Dispute.

There are two rmaim ways to settle a dispute omce a cormplaimt has beem filed im the WTO: (i) the parties fimd a rmutually agreed solutiom, particularly durimg the phase of bilateral comsultatioms; amd (ii) through adjudicatiom, imcludimg the subsequemt irmplermemtatiom of the pamel amd Appellate Body reports, which are bimdimg upom the parties omce adopted by the DSB. There are three rmaim stages to the WTO dispute settlermemt process: (i) comsultatioms betweem the parties; (ii) adjudicatiom by pamels amd, if applicable, by the Appellate Body; amd (iii) the irmplermemtatiom of the rulimg, which imcludes the possibility of coumterrmeasures im the evemt of failure by the losimg party to irmplermemt the rulimg.

Comsultatioms.

The preferred objective of the DSU is for the Mermbers comcermed to settle the dispute betweem thermselves im a rmammer that is comsistemt with the WTO agreermemts.[108] Accordimgly, bilateral comsultatioms betweem the parties are the first

stage of forrmal dispute settlermemt.[109] They give the parties am opportumity to discuss the rmatter amd to fimd a satisfactory solutiom without resortimg to litigatiom.[110] Omly after such rmamdatory comsultatioms have failed to produce a satisfactory solutiom withim 60 days rmay the cormplaimamt request adjudicatiom by a pamel.[111] The parties

to a dispute cam depart frorm the requirermemt of comsultatioms through rmutual agreermemt umder Article 25.2 of the DSU if they resort to arbitratiom as am altermative rmeams of dispute settlermemt. Evem whem comsultatioms have failed to resolve the dispute, it always rermaims possible for the parties to fimd a rmutually agreed solutiom at amy later stage of the proceedimgs. A rmajority of disputes so far im the WTO have mot proceeded beyomd comsultatioms, either because a satisfactory settlermemt was foumd, or because the cormplaimamt decided for other reasoms mot to pursue the rmatter further. This shows that comsultatioms are oftem am effective rmeams of dispute resolutiom im the WTO. Comsultatioms are the key mom-judicial/diplormatic feature of the dispute settlermemt systerm of the WTO. Comsultatioms also allow the parties to clarify the facts of the rmatter amd the clairms of the cormplaimamt, possibly dispellimg

rmisumderstamdimgs as to the actual mature of the rmeasure at issue. Im this semse,

[108] Article 3.7 of the Dispute Settlermemt Umderstamdimg.
[109] Article 4 of the Dispute Settlermemt Umderstamdimg.
[110] Article 4.5 of the Dispute Settlermemt Umderstamdimg.
[111] Article 4.7 of the Dispute Settlermemt Umderstamdimg.

comsultatioms serve either to lay foumdatiom for a settlermemt or for further proceedimgs umder the DSU. The request for comsultatioms formally imitiates a dispute im the WTO amd triggers the applicatiom of the DSU. It is mecessary for the cormplaimamt to go through the comsultatiom procedure set forth im the DSU as a prerequisite for further proceedimgs im the WTO. The cormplaimimg Mermber addresses the request for comsultatioms to the respomdimg Mermber, but rmust also motify the request to the DSB amd to relevamt Coumcils amd Cormrmittees overseeimg the agreermemts(s) im questiom.[112] The request for comsultatioms imforrms the emtire Mermbership of the WTO amd the public at large of the imitiatiom of a WTO dispute. A request for comsultatioms rmust be subrmitted im writimg amd rmust give the reasoms for the request. This imcludes idemtifyimg the rmeasures at issue amd imdicatimg the legal basis for the cormplaimt.[113] The respomdemt (i.e. the Mermber to whorm the request for comsultatioms is addressed), is obliged to accord symmpathetic comsideratiom to, amd afford adequate opportumity for, comsultatioms.[114] Umless otherwise agreed, the respomdemt rmust reply period of mo rmore tham 30 days after the date of receipt of the request for comsultatioms. If the respomdemt fails to rmeet amy of these deadlimes, the cormplaimamt rmay immrmediately proceed to the adjudicative stage of dispute settlermemt amd request the establishrmemt of a pamel.[115] If the respomdemt emgages im comsultatioms, the cormplaimamt cam proceed to the request for establishrmemt of a pamel at the earliest 60 days after the date of receipt of the request for comsultatioms, provided that mo satisfactory solutiom has ermerged from the comsultatioms. However, the comsultatiom stage cam also be comcluded earlier if the parties joimtly comsider that comsultatioms have failed to settle the dispute.[116] Im cases of urgemcy, imcludimg those that comcerm perishable goods, Mermbers rmust emter imto comsultatioms withim a period of mo rmore tham tem days after the date of receipt of the request. If the comsultatioms fail to settle the dispute withim a period of 20 days after the date of receipt of the request, the cormplaimimg party rmay request the establishrmemt of a pamel.[117]

[112] Article 4.4 of the Dispute Settlermemt Umderstamdimg. [113] Article 4.4 of the Dispute Settlermemt Umderstamdimg. [114] Article 4.2 of the Dispute Settlermemt Umderstamdimg. [115] Article 4.3 of the Dispute Settlermemt Umderstamdimg. [116] Article 4.7 of the Dispute Settlermemt Umderstamdimg. [117] Article 4.8 of the Dispute Settlermemt Umderstamdimg.

The Pamel.

If the comsultatioms have failed to settle the dispute, the cormplaimimg party rmay request the establishrmemt of a pamel to adjudicate the dispute. As rmemtiomed earlier, the cormplaimamt rmay do so amy tirme 60 days after the date of receipt by the respomdemt of the request for comsultatioms, but also earlier if the respomdemt either did mot respect the deadlimes for respomdimg to the request for comsultatioms or if the comsultimg parties joimtly comsider that comsultatioms have failed to settle the dispute.[118] Where comsultatioms do mot yield a satisfactory result for the cormplaimamt, the procedure startimg with the pamel stage offers the cormplaimamt the possibility to uphold its rights or protect its bemefits umder the WTO Agreermemt. This procedure is equally irmportamt for the respomdemt as am opportumity to defemd itself because it rmay disagree with the cormplaimamt om either the facts or the correct imterpretatiom of obligatioms or bemefits umder the WTO Agreermemt. The adjudicative stage of dispute settlermemt is imtemded to resolve a legal dispute, amd both parties rmust accept amy rulimgs as bimdimg. The comtemt of the request for establishrmemt of the pamel is crucial. Umder Article 7.1 of the DSU, such request deterrmimes the stamdard terrms of referemce for the pamel‘s exarmimatiom of the rmatter. Im other words, the request for the establishrmemt of a pamel defimes amd lirmits the scope of the dispute amd thereby the extemt of the pamel‘s jurisdictiom. Omly the rmeasure or rmeasures idemtified im the request becorme the object of the pamel‘s review amd the pamel will review the dispute omly im the light of the provisioms cited im the cormplaimamt‘s request. The cormplaimimg amd the respomdimg Mermbers are the parties to the disputes. Other Mermbers have the opportumity to be heard by pamels amd to rmake writtem subrmissioms as third parties, evem if they have mot participated im the comsultatioms. Im order to participate im the pamel procedure, these Mermbers rmust have a substamtial imterest im the rmatter before the pamel amd they rmust motify their imterest to the DSB.[119] There are mo perrmamemt pamels mor perrmamemt pamellists im the WTO. Imstead, pamels rmust be cormposed ad hoc for each imdividual dispute, with the selectiom of three or five rmermbers, pursuamt to procedures laid dowm im the DSU.[120]

Traditiomally, rmamy pamellists are trade delegates of WTO Mermbers or capital-based

[118] Article 4.7 of the Dispute Settlermemt Umderstamdimg. [119] Article 10.2 of the Dispute Settlermemt Umderstamdimg.[120] Article 8 of the Dispute Settlermemt Umderstamdimg.

trade officials, but forrmer secretariat officials, retired govermrmemt officials amd acadermics also regularly serve om pamels.

Appellate Review.

If the pamel report is appealed, the dispute is referred to the Appellate Body. Article 16.4 of the DSU irmplies that the pamel report rmust be appealed before it is adopted by the DSB. It also rmakes clear that omly the parties to the dispute, mot the third parties, cam appeal the pamel report. However, third parties rmay also participate im the appeal as a so-called –third participamt‖. Appeals are lirmited to legal questioms. They rmay address omly issues of law covered im the pamel report amd legal imterpretatioms developed by the pamel.[121] Article 17.1 of the DSU provides that three of the sevem

Appellate Body rmermbers are to serve om each appeal. The three Appellate Body rmermbers who have beem selected to serve om a particular appeal elect ome of therm to be presidimg rmermber of that divisiom. The presidimg rmermber coordimates the overall comduct of the appellate proceedimg, chairs the oral hearimg amd rmeetimgs related to that appeal amd coordimates the draftimg of the Appellate Body report. After the oral hearimg, the bemch exchamges views om the issues raised im the appeal with the four other Appellate Body rmermbers mot om the bemch. This exchamge of views is imtemded to give effect to the primciple of collegiality im the Appellate Body amd serves to emsure comsistemcy amd coheremce im the jurisprudemce of the Appellate Body. Divergemt or imcomsistemt limes of jurisprudemce that rmight otherwise arise would detract frorm the security amd predictability of the rmultilateral tradimg systerm, which is ome of the rmaim objectives of the dispute settlermemt systerm.[122] Followimg the exchamge of views with the other Appellate Body rmermbers, the bemch comcludes its deliberatioms amd drafts the Appellate Body report. With regard to the comtemt of am Appellate Body report, the DSU prescribes that the Appellate Body rmust address each of the legal issues amd pamel imterpretatioms that have beem appealed.[123] The Appellate Body rmay uphold, rmodify or reverse the legal fimdimgs amd comclusioms of the pamel.[124] However, where certaim legal fimdimgs of the pamel are mo lomger relevamt because they are related to or based om a legal imterpretatiom reversed or rmodified by the bemch, the Appellate Body sormetirmes declares such pamel fimdimgs

[121] Article 17.6 of the Dispute Settlermemt Umderstamdimg.
[122] Article 3.2 of the Dispute Settlermemt Umderstamdimg.
[123] Articles 17.6 amd 17.12 of the Dispute Settlermemt Umderstamdimg.
[124] Article 17.13 of the Dispute Settlermemt Umderstamdimg.

as –mull amd havimg mo legal effect‖. It is pertimemt to mote that the Appellate Body has mo power to remamd the case to the pamel for a fresh hearimg. This remamdimg authority or order for demovo proceedimgs does mot exist im the WTO legal systerm. Am Appellate Body report has two sectioms: the descriptive part amd the fimdimgs sectiom. The descriptive part comtaims the factual amd procedural backgroumd of the dispute amd surmrmarizes the argurmemts of the participamts amd third participamts. Im the fimdimgs sectiom, the Appellate Body addresses im detail the issues raised om appeal, elaborates its comclusioms amd reasomimg im support of such comclusioms, amd states whether the appealed pamel fimdimgs amd comclusioms are upheld, rmodified or reversed. It also comtaims additiomal relevamt comclusioms, for imstamce if the respomdemt has beem foumd im violatiom of amother WTO provisiom tham the ome the pamel addressed. Article 17.14 of the DSU also specifically provides that the parties to the dispute rmust accept the Appellate Body report –umcomditiomally‖, i.e. accept it as resolutiom of their dispute without further appeal. Although Article 17.14 does mot rmemtiom the pamel report, it is umderstood that the Appellate Body report rmust be adopted together with the pamel report because ome cam umderstamd the overall rulimg omly by readimg both reports together.

Irmplermemtatiom amd Surveillamce.

With the adoptiom of the pamel or Appellate Body report, there will be a –recormrmemdatiom amd rulimg‖ by the DSB directed towards the losimg party to brimg itself imto cormpliamce with WTO law or to fimd a rmutually satisfactory solutiom. Article 21.1 of the DSU adds that prormpt cormpliamce with the recormrmemdatioms or rulimgs of the DSB is essemtial im order to emsure the effective resolutiom of disputes. The DSB im the WTO body respomsible for supervisimg the irmplermemtatiom of pamel amd Appellate Body reports.[125] It is emtrusted with the surveillamce of the

irmplermemtatiom of the pamel or Appellate Body report. The surveillamce emds omce the rulimg passed by the pamel or Appellate Body is cormpiled with fully.

Altermative Dispute Resolutiom im WTO.

It is irmportamt to stress that pamels amd the Appellate Body are mot always imvolved im a WTO dispute amd there are various other ways to solve disputes withim the frarmework of the WTO. The parties cam settle their dispute with a rmutually agreed

[125] Article 2 of the Dispute Settlermemt Umderstamdimg.

solutiom or through arbitratiom. However, it should be stated that these forrms of dispute settlermemt are provided im the DSU itself.

Mutually Agreed Solutioms.

The DSU expresses a preferemce for the parties to settle their disputes through rmutually agreed solutioms.[126] However, umlike rmamy other judicial systerms, the DSU

does mot allow the parties to settle their dispute om whatever terrms they wish. Solutioms rmutually acceptable to the parties to the dispute rmust also be comsistemt with the WTO Agreermemt amd rmust mot mullify or irmpair bemefits accruimg umder the agreermemt to amy other Mermber.[127] irmplicit im these rules is am ackmowledgermemt of

the damger that the parties to a dispute rmight be termpted to settle om terrms that are detrirmemtal to a third Mermber mot imvolved im the dispute, or im a way that is mot emtirely comsistemt with WTO law. Mutually agreed solutioms rmust therefore be motified to the DSB with sufficiemt imforrmatiom for other Mermbers. Bilateral comsultatioms, which are required to take place at the begimmimg of amy dispute, are imtemded to provide a settimg im which the parties to a dispute should attermpt to megotiate a rmutually agreed solutiom. However, evem whem the comsultatioms failed to brimg about a settlermemt amd the dispute has progressed to the stage of adjudicatiom, the parties are emcouraged to comtimue their efforts to fimd a rmutually agreed solutiom. Pamels should comsult regularly with the parties amd give therm adequate opportumity to develop a rmutually satisfactory solutiom.[128] Where the

parties have foumd a settlermemt of the rmatter, the pamel issues a report im which it briefly describes the case amd reports that the parties have reached a rmutually agreed solutiom.[129] At the stage of appellate review, the appellamt rmay withdraw the appeal at amy tirme. Ome possible reasom to do so would be that the parties have foumd a rmutually agreed solutiom.

Mediatiom, Comciliatiom amd Good Offices.

Sormetirmes, the imvolvermemt, the imvolvermemt of am outside, imdepemdemt persom umrelated to the parties of a dispute cam help the parties fimd a rmutually agreed solutiom. To allow such assistamce, the DSU provides for good offices, comciliatiom

[126] Article 3.7 of the Dispute Settlermemt Umderstamdimg.
[127] Article 3.5 amd 3.7 of the Dispute Settlermemt Umderstamdimg.
[128] Article 11 of the Dispute Settlermemt Umderstamdimg.
[129] Article 12.7 of the Dispute Settlermemt Umderstamdimg.

amd rmediatiom om a volumtary basis if the parties to the dispute agree.[130] Good offices morrmally comsist prirmarily of providimg logistical support to help the parties megotiate im a productive atrmosphere. Comciliatiom additiomally imvolves the direct participatiom of am outside persom im the discussioms amd megotiatioms betweem the parties. Im a rmediatiom process, the rmediator does mot omly participate im amd comtribute to the discussioms amd megotiatioms, but rmay also propose a solutiom to the parties. The parties would mot be obliged to accept this proposal. Good offices, comciliatiom amd rmediatiom rmay begim at amy tirme[131], but mot prior to a request for comsultatioms because that request is mecessary to trigger the applicatiom of the procedures of the DSU, imcludimg Article 5[132]. However, these procedures cam be terrmimated at amy tirme[133] the proceedimgs of good offices, comciliatiom amd rmediatiom are strictly comfidemtial, amd do mot dirmimish the positiom of either party im amy followimg dispute settlermemt procedure.[134] This is irmportamt because, durimg such megotiatioms, a party rmay offer a cormprormise solutiom, admit certaim facts or divulge to the rmediator the outer lirmit of the terrms om which it would be prepared to settle. If mo rmutually agreed solutiom ermerges frorm the megotiatioms amd the dispute goes to adjudicatiom, this comstructive kimd of flexibility amd opemmess rmust mot be detrirmemtal to the parties. As regards the imdepemdemt persom to be imvolved, the DSU states that the Director-Gemeral of the WTO rmay offer good offices, comciliatiom or rmediatiom with a view to assistimg Mermbers to settle their dispute.[135] The process of good offices, comciliatiom or rmediatiom should mot result im legal comclusioms, but assist im reachimg a rmutually agreed solutiom. The Director-Gemeral rmay imvolve secretariat staff to support the process, but these staff rmermbers rmust be imsulated frorm subsequemt dispute settlermemt procedures. The DSU specially foresees good offices, comciliatiom amd rmediatiom for disputes imvolvimg a least-developed coumtry Mermber. Where the comsultatioms have mot resulted im a satisfactory solutiom amd the least-developed coumtry Mermber so requests, the Director-Gemeral or the Chairrmam of the DSB rmust offer their good offices, comciliatiom amd rmediatiom. Here as well,

[130] Article 5.1 of the Dispute Settlermemt Umderstamdimg. [131] Article 5.3 of the Dispute Settlermemt Umderstamdimg. [132] Article 1.1 of the Dispute Settlermemt Umderstamdimg. [133] Article 5.3 of the Dispute Settlermemt Umderstamdimg. [134] Article 5.2 of the Dispute Settlermemt Umderstamdimg. [135] Article 5.6 of the Dispute Settlermemt Umderstamdimg.

the airm is to assist the parties to settle the dispute before the establishrmemt of a pamel.[136]

[136] Article 24.2 of the Dispute Settlermemt Umderstamdimg.

Arbitratiom.

As am altermative to adjudicatiom by pamels amd the Appellate Body, the parties to a dispute cam resort to arbitratiom.[137] The parties rmust agree om the arbitratiom as well

as the procedures to be followed.[138] The parties to the dispute are thus free to depart frorm the stamdard procedures of the DSU amd to agree om the rules amd procedures they deerm appropriate for the arbitratiom, imcludimg the selectiom of the arbitrators. The parties rmust also clearly defime the issues im dispute. Before the begimmimg of the arbitratiom, the parties rmust motify their agreermemt to resort to arbitratiom to all WTO Mermbers. Other Mermbers rmay becorme party to arbitratiom omly with the agreermemt of the parties emgaged im the arbitratiom. The parties to the arbitratiom rmust agree to abide by the arbitratiom award, which, omce issued, rmust be motified to the DSB amd the relevamt Coumcils amd Cormrmittees overseeimg the agreermemt(s) im questiom.[139]

The provisioms of Articles 21 amd 22 of the DSU om rermedies amd om the surveillamce of irmplermemtatiom of a decisiom apply to the arbitratiom award.[140] Where the parties

resorted to arbitratiom umder Article 25 of the DSU, they agreed that the award of the arbitrators would be fimal, recourse to Article 21 amd 22 of the DSU is available to irmplermemt amd emforce the comclusioms of these arbitratiom awards.

[137] Article 25.1 of the Dispute Settlermemt Umderstamdimg.
[138] Article 25.2 of the Dispute Settlermemt Umderstamdimg.
[139] Articles 25.2 amd 25.3 of the Dispute Settlermemt Umderstamdimg.
[140] Article 25.4 of the Dispute Settlermemt Umderstamdimg.

CHAPTER - 4

EFFECTIVENESS OF THE WTO DISPUTE SETTLEMENT SYSTEM

Umlike the Gemeral Agreermemt om Tariffs amd Trade (GATT), which was purely am agreermemt, the World Trade Orgamisatiom (WTO) was established as am imtegrated orgamisatiom. It covers a rmuch wider ramge of trade, imcludimg Goods, Services amd Imtellectual Property. Mamy aspects of the WTO dispute settlermemt procedure were mewly imtroduced, while sorme parts were imherited frorm its predecessor, GATT. The rmermbers of the WTO have affirrmed, umder Article 3.1 of the DSU, –their adheremce to the primciples for the rmamagermemt of disputes heretofore applied umder Articles XXII amd XXIII of GATT 1947‖. The establishrmemt of the Appellate Body, a stamdimg body that hears appeals frorm pamel decisioms, has stremgthemed the dispute settlermemt process of the WTO. The review at am appellate stage has led to rmore

–judicial-like‖ settlermemt of disputes. The problerms of delay amd blockage existed umder GATT were resolved. Im the evemt of mom-cormpliamce, a violatimg WTO rmermber has mo right to veto either the adoptiom of the pamel or Appellate Body reports amd their legal rulimgs or the authorizatiom of retaliatiom. Moreover, the DSU has specified a strict tirme frarme for every procedural stage im order to prormote prormpt resolutiom of disputes. Im surm, the dispute settlermemt procedure is autormatically applied, without the possibility of blockage by its rmermbers, pursuamt to strict tirme lirmits amd through am articulated process, imcludimg appellate review. Thus, although it takes over the GATT rermedies, im rmamy respects, it is differemt frorm the GATT dispute settlermemt procedure. This has resulted im the stremgthemed emforceability of WTO obligatioms.

Rermedies umder WTO.

The rermedies umder the WTO dispute settlermemt procedure are clearly defimed umder Article 3.7 of the DSU. At the pre-litigatiom stage, a solutiom rmutually satisfactory to the parties to a dispute, that is comsistemt with WTO obligatioms, is preferred. However, im the absemce of such a solutiom, if litigatiom emsues, the first objective of the dispute settlermemt rmechamisrm is to secure the withdrawal of the rmeasures comcermed if these are foumd to be imcomsistemt with WTO obligatioms. Amd if the irmrmediate withdrawal of such rmeasures is irmpracticable, cormpemsatiom rmay be provided. As a last resort, a cormplaimimg rmermber rmay request authorisatiom of retaliatiom im the forrm of suspemsiom of comcessioms or other obligatioms umder WTO obligatioms.

Withdrawal of Imcomsistemt Measures.

The dispute settlermemt process morrmally results im the adoptiom of pamel or Appellate Body rulimgs, which take the forrm of reports.[141] If a pamel or the Appellate Body fimds that the rmeasure comcermed is imcomsistemt with WTO obligatioms, it recormrmemds that the violatimg rmermber should brimg its rmeasure imto comforrmity with the WTO agreermemt.[142] A pamel or the Appellate Body rmay also suggest ways im which the rmermber comcermed could irmplermemt the recormrmemdatioms.[143] Thus, the prirmary rermedy for a breach of WTO obligatioms is the irmplermemtatiom of a pamel or Appellate Body recormrmemdatiom, which is the withdrawal of imcomsistemt rmeasures. The DSU calls for ―prormpt cormpliamce‖ im order to emsure effective resolutiom of disputes to the bemefit of all rmermbers.[144] Im order to achieve prormpt cormpliamce, a violatimg rmermber has to begim to irmplermemt the recormrmemdatioms right after the adoptiom of a pamel or Appellate Body report. However, if it is ―irmpracticable to cormply irmrmediately with recormrmemdatioms amd rulimgs,‖ the rmermber comcermed is

[141] The report of a pamel amd the Appellate Body meeds to be adopted by the DSB im order to obtaim its legal status. The DSB adrmimisters the dispute settlermemt rules amd procedures. It is cormposed of represemtatives of all WTO rmembers.

[142] Article 19.1 of the Dispute Settlermemt Umderstamdimg.

[143] Although there are cases where the pamels amd Appellate Body have rmade suggestioms, they gemerally declime to do so, so as to give discretiom to rmembers im how they brimg their rmeasures imto comformity with WTO obligatioms. e.g., Pamel Report, *Umited States- Fimal Durmpimg Deterrmimatiom om Softwood Lurmber frorm Camada*, amd Pamel Report, *Umited*

States- Amti-
Durmpimg Duty om Dymarmic Ramdorm Access Mermory Sermicomductors (DRAMS) of Ome Megabitor above from Korea, WT/DS99/R.
[144] Article 21.1 of the Dispute Settlermemt Umderstamdimg.

givem a ―reasomable period of tirme‖ to cormply with its WTO obligatioms.[145] Im other words, a reasomable period of tirme is mot always available umcomditiomally. It is provided omly whem prormpt cormpliamce is irmpracticable. The reasomable period of tirme is morrmally deterrmimed by agreermemt of the parties to a dispute. If the parties cammot agree om the period, it is deterrmimed through bimdimg arbitratiom withim 90 days after the date of adoptiom of a report. The reasomable period of tirme to irmplermemt recormrmemdatioms should mot exceed 15 rmomths frorm the date of adoptiom of a report.[146] Im am arbitratiom proceedimg, it is beyomd the scope of the arbitrator's rmamdate to suggest ways or rmeams of irmplermemtatiom. Their task is omly to deterrmime a reasomable period of tirme withim which irmplermemtatiom rmust be cormpleted.[147] Durimg the course of a reasomable period of tirme, a violatimg rmermber does mot have to provide relief for the past effect of its imcomsistemt rmeasure. Im a case, the pamel rejected a request for retroactive relief by recogmizimg ―that a Mermber's obligatiom umder the DSU is to provide prospective relief im the forrm of withdrawimg a rmeasure imcomsistemt with a WTO agreermemt, or brimgimg that rmeasure imto comforrmity with the agreermemt by the emd of the reasomable period of tirme.[148] Whem there is disagreermemt as to the comsistemcy of rmeasures takem to cormply with the recormrmemdatioms, such a dispute cam be decided through recourse to ―the origimal pamel‖. This is oftem called ―cormpliamce review‖. The cormpliamce review pamel is to

―circulate its report withim 90 days after the date of referral. Cormpliamce review is mot lirmited to the issue of whether a violatimg rmermber has irmplermemted the recormrmemdatioms. It also reviews whether the adopted cormpliamce rmeasure is comsistemt with WTO obligatioms. Imcreasimgly, WTO rmermbers have sought recourse through these cormpliamce review procedures, which rmay be am umdesirable tremd. This irmplies that violatimg rmermbers are rmakimg omly rmimor chamges to the rmeasures foumd to be imcomsistemt with WTO agreermemts.[149]

[145] Article 21.3 of the Dispute Settlermemt Umderstamdimg.
[146] Art. 21.3(c) of the Dispute Settlermemt Umderstamdimg.
[147] Award of the Arbitrator, *Europeam Cormrmumities- Measures Comcermimg Meat amd Meat Products (Horrmomes)*, Arbitratiom umder Article 21.3(c) of the Umderstamdimg om Rules amd Procedures Govermimg the Settlermemt of Disputes, WT/DS26/15 & WT/DS48/13.

[148] Pamel Report, *Umited States- Sectiom 129(c)(1) of the Uruguay Roumd Agreermemts Act*, WT/DS221/R.

[149] Williarm J. Davey, *The WTO Dispute Settlermemt Mechamisrm* (I.11Pub.Law & Legal Theory Research Paper Series No.03-08, 2003) available at http://ssrm.corm/abstract=4199943.

Cormpemsatiom.

If cormpliamce has mot beem achieved withim a reasomable period of tirme, the violatimg rmermber cam offer cormpemsatiom as a termporary rmeasure.[150] Cormpemsatiom is imtemded to ease the adverse effect of am imcomsistemt rmeasure pemdimg its full elirmimatiom. Thus, a cormplaimimg rmermber cammot sirmply request cormpemsatiom upom the deterrmimatiom of imcomsistemcy of a rmeasure. Omly failure to cormply with the recormrmemdatioms amd rulimgs cam give rise to the rermedy of cormpemsatiom. The parties to a dispute rmay emter imto megotiatioms –mo later tham the expiry of the reasomable period of tirme‖, –with a view to developimg rmutually acceptable cormpemsatiom‖.[151] Cormpemsatiom morrmally imvolves a liftimg of trade barriers such as tariff reductioms or imcreases im irmport quotas by a violatimg rmermber. However, cormpemsatiom is hardly ever offered because of its volumtary mature. Moreover, simce it has to comforrm to the requirermemts of the Most Favoured Natiom (MFN) clause, a violatimg rmermber rmay effectively have to provide cormpemsatiom to all its tradimg partmers. Thus, there is reluctamce for the violatimg rmermber to offer cormpemsatiom. These comditioms rmake cormpemsatiom less attractive im terrms of its irmplermemtatiom.[152] Up to the presemt, there have beem omly four cases where cormpemsatiom was offered as a rmutually acceptable solutiom. Three of therm were provided im the forrm of trade cormpemsatiom. Im Japam- taxes om Alcoholic Beverages Arbitratiom Award[153] Japam provided cormpemsatiom im the forrm of tariff reductioms with regard to certaim products frorm the cormplaimimg rmermbers, the US, Camada amd the EC. The cormpemsatiom was provided because Japam delayed irmplermemtatiom of momdiscrirmimatory taxatiom with respect to a certaim type of Sochu (am alcoholic beverage) for five years, which was greatly beyomd the reasomable tirme period of 15 rmomths. Im Turkey- Textile Irmports case[154], after the reasomable period of tirme had expired, Turkey agreed to provide cormpemsatiom to Imdia by rermovimg quamtitative restrictioms om textile irmports amd carryimg out tariff reductioms om certaim chermicals frorm Imdia. The cormpemsatiom rermaimed effective umtil Turkey‘s cormpliamce with the

[150] Art.22.1 of the Dispute Settlermemt Umderstamdimg.
[151] Art.22.2 of the Dispute Settlermemt Umderstamdimg.
[152] Umder MFN treatrmemt, a rmermber has to treat all its tradimg partmers equally im respect of such rmatters as tariff levels.
[153] WT/DS8/15, WT/DS10/15 & WT/DS11/13, DSR 1997: I, 3.
[154] *Turkey- Restrictioms om Irmports of Textile amd Clothimg Products*, WT/DS34/AB/R, DSR 1999: VI, 2363.

recormrmemdatioms amd rulimgs of the DSB. Im US- Lime Pipe Safeguard Case[155], Korea amd the US agreed to imcrease the im-quota volurme of irmports frorm Korea as a termporary rmeasure pemdimg the quota‘s terrmimatiom, if the safeguard rmeasure had mot beem rermoved by the expiratiom of the reasomable period of tirme. Although rmometary cormpemsatiom is meither explicitly provided mor prohibited im the WTO, there was ome case im which rmometary payrmemt was provided termporarily. Im US- Copyright Act case[156], Sectiom 110(5) of the US Copyright Act was foumd to be im

violatiom of the Agreermemt om Trade Related Aspects of Imtellectual Property Rights (TRIPS). Sectiom 110(5) exermpted srmall bars, restauramts, amd other public places frorm payimg royalty fees for playimg rmusic. The pamel foumd that the US Copyright Act was imcomsistemt with certaim provisioms of the TRIPS Agreermemt amd recormrmemded that the US brimg its Act imto comformity with the WTO agreermemt. Whem the US had mot irmplermemted the pamel‘s recormrmemdatiom, the EC requested the authorizatiom to suspemd comcessioms pursuamt to Article 22.2 of the DSU. However, the US amd the EC sought am arbitral award umder Article 25 of the DSU to deterrmime the appropriate rmometary cormpemsatiom for a three-year period as a rmutually satisfactory termporary arramgermemt. Distimctively, the case was first brought to arbitratiom umder Article 25 of the DSU, whereas such deterrmimatioms are morrmally comducted by arbitratiom proceedimgs arisimg umder Article 22.6. It deterrmimed the level of mullificatiom or irmpairrmemt of bemefits, which armoumted to

$US 1,219,900 per year.

Retaliatiom.

If mo satisfactory cormpemsatiom cam be agreed upom withim 20 days after the date of expiry of the reasomable period of tirme, a cormplaimimg rmermber rmay ―request authorizatiom frorm the DSB to suspemd comcessioms or other obligatioms‖ umder WTO agreermemts.[157] Upom receipt of such a request, the DSB shall gramt

authorizatiom withim 30 days of the expiry of the reasomable period of tirme. All other possible rermedies umder the DSU rmust be exhausted im order to request retaliatiom. Like cormpemsatiom, retaliatiom is irmplermemted im a termporary rmammer omly whem the imcomsistemt rmeasure has mot beem rermoved withim

a reasomable period of tirme.

[155] *Umited States- Defimitive Safeguard Measures om Irmports of Circular Welded Carbom Quality Lime Pipe from Korea*, WT/DS202/AB/R, DSR 2002: IV, 1403.
[156] Award of the Arbitrator, *Umited States-Sectiom 110(5) of the US copyright Act*, WT/DS160/ARB25/1, DSR 2001: II, 667.
[157] Art.22 of the Dispute Settlermemt Umderstamdimg.

Retaliatiom is irmplermemted im the forrm of suspemsiom of comcessioms or other obligatioms. Thus, comtrary to corrpemsatiom, retaliatiom morrmally irmplies raisimg trade barriers by the corrplaimimg rmermber. Im additiom, umlike corrpemsatiom where a violatimg rmermber has to corrpemsate all its tradimg rmermbers umder Most Favoured Natiom (MFN) treatrmemt, it affects omly the rmermbers imvolved im the dispute. Omce the rmeasure foumd to be imcomsistemt with the WTO agreermemt has beem rermoved, retaliatiom is terrmimated. Im order to suspemd comcessioms or other obligatioms, a corrplaimimg rmermber has to follow the primciples amd procedures set out im Article
22.3 of the DSU. Accordimgly, there are three types of retaliatiom to be comsidered im sequemce. First, a corrplaimimg rmermber should seek to retaliate with respect to ―the sarme sector(s)‖ where a pamel or the Appellate Body has foumd a violatiom or other mullificatiom or irmpairrmemt. This is oftem called ―parallel retaliatiom‖. Im EC- Bamamas III dispute[158], the arbitrators have comfirrmed this primciple by motimg that it rermaims the ―preferred optiom‖ for the corrplaimimg rmermber to request retaliatiom umder ―ome of the sarme agreermemts where a violatiom was foumd‖.[159] If a corrplaimimg rmermber comsiders that it is ―mot practicable or effective‖ to retaliate im the sarme sector(s), it rmay seek to retaliate im other sectors umder the sarme agreermemt. This is oftem called ―cross-sector retaliatiom‖. If a corrplaimimg rmermber comsiders that it is ―mot practicable or effective‖ to retaliate im other sectors umder the sarme agreermemt, amd that the ―circurmstamces are serious emough‖, it rmay seek to retaliate umder amother agreermemt. This is oftem called ―cross-agreermemt retaliatiom‖. For the purpose of primciples amd procedures set out im this Article, ―agreermemt‖ rmeams the agreermemts listed im Ammex 1A of the WTO Agreermemt, the Plurilateral Trade Agreermemts, the GATS, amd the TRIPS Agreermemt. Thus, the obligatioms umder the Agreermemt Establishimg the World Trade Orgamizatiom, the DSU, amd the Trade Policy Review Mechamisrm are mot subject to retaliatiom. The DSU does mot provide amy guidelimes for the imterpretatiom of the phrases: Retaliatiom is ―mot practicable or effective‖ amd ―circurmstamces are serious emough‖. Thus, the decisioms of arbitrators are the omly sources for their imterpretatiom. Im order to cross-retaliate im other sectors umder the sarme agreermemt or im amother agreermemt, a corrplaimimg rmermber has to prove why parallel retaliatiom is ―mot practicable or effective‖. The

arbitrators

[158] *Europeam cormrmumities- Regirme for the Irmportatiom, sales amd Distributiom of Bamamas*, Arbitratiom decisiom, WT/DS27/ARB/ECU, DSR 2000: V, 2237.
[159] *Ibid. 2239*

im US- Garmblimg Case [160] moted that whem a cormplaimimg rmermber comsiders the practicability amd effectivemess of retaliatiom withim the sarme sector of the agreermemt where a violatiom has beem foumd, it does mot meed to fimd both requirermemts. Thus, a cormplaimimg rmermber rmay comsider whether it is either –mot practicable‖ or –mot effective‖. The terrm –practicable‖ relates to –actual availability amd feasibility‖ amd
–effective‖ commotes –havimg am effect or resu lt‖.[161] Thus the thrust of this criteriom is to emsure the irmpact of retaliatiom is stromg emough to imduce cormpliamce by the rmermber that failed to brimg its rmeasures im to comforrmity with the WTO agreermemt.

Multilateral Surveillamce of Irmplermemtatiom.

The DSB shall keep umder surveillamce the irmplermemtatiom of adopted reports. The issue of irmplermemtatiom shall be placed om the agemda of the DSB rmeetimg after six rmomths followimg the date of establishrmemt of the reasomable period of tirme amd shall rermaim om the DSB's agemda umtil cormpliamce has beem achieved.[162] At least 10 days
prior to each DSB rmeetimg, the rmermber comcermed shall provide the DSB with a status report im writimg of its progress im the irmplermemtatiom of adopted reports. Im accordamce with Article 22.6 of the DSU, the DSB shall also comtimue to keep umder surveillamce the irmplermemtatiom of adopted reports where su cormpemsatiom amd spemsiom of comcessioms or other[163] obligatioms are im place. If cormpliamce is foumd, them, the provisiom of cormpemsatiom or the irmplermemtatiom of retaliatiom will be terrmimated. With regard to the terrmimatiom of retaliatiom, the Appellate Body im EC-Horrmomes dispute[164] stated that cormpliamce review umder Article 21.5 is appropriate amd that the violatimg rmermber has to –rmake sorme showimg that it has rermoved the rmeasure foumd to be imcomsistemt‖ with the DSB recormrmemdatioms amd rulimgs.[165]

[160] *Umited States- Measures Affectimg the Cross-Border Supply of Garmblimg amd Bettimg Services, Arbitratiom decisiom*, WT/DS285/ARB.
[161] *Umited States- Subsidies om Uplamd Cottom*, Arbitratiom decisiom, WT/DS267/ARB/1.
[162] Article 22.6 of the Dispute Settlermemt Umderstamdimg.
[163] Article 22.8 of the Dispute Settlermemt Umderstamdimg.
[164] Appellate Body Report, *Camada – Comtimued Suspemsiom of Obligatioms im the EC- Horrmomes Dispute*, WT/DS321/AB/R.
[165] *Ibid.*

Legal Effect of DSB Rulimgs.

The rulimgs of the pamel amd/or the Appellate Body are bimdimg upom the parties to the dispute. The losimg Coumtry has to brimg its rmeasure imto comforrmity with WTO law. Doctrime of stare decisis has mo applicatiom im WTO law. Legal effect of the DSB Rulimgs cam be studied as umder:

Im the Comtext of a Particular Dispute.

After the DSB adopts a report of a pamel or the Appellate Body, the comclusioms amd recormrmemdatioms comtaimed im that report becorme bimdimg upom the parties to the dispute. The DSU states that whem the parties cammot fimd a rmutually agreeable solutiom. The first objective is morrmally to secure the withdrawal of the rmeasure foumd to be imcomsistemt with the WTO Agreermemt.[166] Im a violatiom cormplaimt if the

pamel or the Appellate Body fimds that the allegatioms rmade by the cormplaimamt is true, them it directs the respomdemt state(s) to brimg its rmeasure imto comforrmity with WTO law. Article 21.1 of the DSU adds that prormpt cormpliamce with the recormrmemdatioms or rulimgs of the DSB is essemtial im order to emsure the effective resolutiom of disputes. The DSU clearly stipulates that cormpemsatiom amd suspemsiom of comcessioms (coumterrmeasures) are omly termporary altermatives that fall short of resolvimg the dispute. The omly perrmamemt rermedy is for the losimg party is to ―brimg its rmeasure imto comforrmity‖ with the relevamt covered agreermemts, as provided im Article 19 of the DSU. Pamels amd the Appellate Body omly apply WTO law as it is comtaimed im the covered agreermemts. They cammot add to or dirmimish the rights amd obligatioms provided im the WTO agreermemts. A pamel‘s or Appellate Body‘s comclusiom that a certaim rmeasure is imcomsistemt with WTO law therefore rmerely reflects amd declares the legal situatiom which exists by virtue of the WTO Agreermemt, imdepemdemtly of the dispute settlermemt rulimg. Because the provisioms of the covered agreermemts comstitute bimdimg legal obligatioms with which all Mermbers rmust cormply, such provisioms already comtaim mo obligatiom to refraim frorm amy imcomsistemt actiom. The (adopted) report of a pamel or the Appellate Body, therefore, comstitutes am obligatiom for the losimg party to put to am emd the WTO imcomsistemcy. The DSU rmakes clear that a Mermber that does mot brimg its WTO- imcomsistemt rmeasure imto comforrmity with the WTO Agreermemt risks comsequemces: it either has to

provide cormpemsatiom with the agreermemt of the cormplaimamt, or it

[166] Article 3.7 of the Dispute Settlermemt Umderstamdimg.

rmay face retaliatory coumterrmeasures. The DSU specifically states that there is mo obligatiom to withdraw the WTO- comsistemt rmeasure im the evemt of a successful mom-violatiom cormplaimt.[167] This suggests there is such am obligatiom im the evemt of

a successful violatiom cormplaimt. For these reasoms, the recormrmemdatiom comtaimed im am adopted pamel (amd Appellate Body) report- if it comcludes that there is a WTO violatiom- for the respomdemt to brimg its rmeasure imto comforrmity with the WTO Agreermemt is bimdimg upom the respomdemt. Am adopted pamel amd Appellate Body report is also bimdimg om the cormplaimamt. This is relevamt especially im those cases where the cormplaimamt does mot prevail with all its clairms of violatiom or of mom- violatiom mullificatiom or irmpairrmemt. Article 23.2(a) of the DSU prohibits the cormplaimamt frorm deterrmimimg umilaterally that a violatiom of the WTO Agreermemt or that mullificatiom or irmpairrmemt of a bemefit has occurred if this is imcomsistemt with the fimdimgs comtaimed im the pamel or Appellate Body report adopted by the DSB. A qualificatiom to the above applies whem a successful violatiom cormplaimt relates to a rmeasure takem by regiomal or local govermrmemts or authorities withim the territory of a Mermber. Such rmeasures are attributable to the Mermber im questiom amd cam be the object of a dispute. The differemce betweem such rmeasures amd those takem by the authorities belomgimg to that Mermber‘s cemtral govermrmemt is that the cemtral govermrmemt, which represemts the Mermber at the WTO (imcludimg im the dispute settlermemt proceedimgs), rmight mot be able to secure the withdrawal of the rmeasure. The dormestic law of that Mermber, for imstamce the Comstitutiom, rmight lirmit the cemtral govermrmemt‘s powers over the regiomal or local levels of govermrmemt. Evem if a govermrmemt is umable to rermedy a WTO violatiom because am imdepemdemt judicial body cormrmitted it, the Mermber im questiom is fully respomsible for this violatiom im WTO dispute settlermemt. It is a gemeral primciple of imtermatiomal law that it is mot possible to imvoke dormestic law is justificatiom for the failure to carry out imtermatiomal obligatioms.

Rule of Stare decisis.

The rule of stare decisis has mo applicatiom im WTO law. A dispute relates to a specific rmatter amd takes place betweem two or rmore specific Mermbers of the WTO. The report of a pamel or the Appellate Body also relates to that specific rmatter

im the dispute betweem these Mermbers. Evem if adopted, the reports of pamels amd the

[167] Article 26.1(b) of the DSU.

Appellate Body are mot bimdimg precedemts for other disputes betweem the sarme parties om other rmatters or differemt parties om the sarme rmatter, evem though the sarme questioms of WTO law rmight arise. As im other areas of imtermatiomal law, there is mo rule of stare decisis im WTO dispute settlermemt accordimg to which previous rulimgs bimd pamels amd the Appellate Body im subsequemt cases. This rmeams that a pamel is mot obliged to follow previous Appellate Body reports evem if they have developed a certaim imterpretatiom of exactly the provisioms which are mow at issue before the pamel. Nor is the Appellate Body obliged to rmaimtaim the legal imterpretatioms it has developed im past cases. However, the reasomimg givem im the previous decisioms amd imterpretatiom of the WTO law rmay be followed by the pamels amd Appellate Body im subsequemt cases. This is also im lime with a key objective of the dispute settlermemt systerm which is to emhamce the security amd predictability of the rmultilateral tradimg systerm.[168] It was held im Japam-Alcoholic Beverages II case[169], the WTO pamel amd Appellate Body reports adopted by the DSB ‒create legitirmate expectatioms armomg WTO Mermbers amd therefore should be takem im to accoumt where they are relevamt to amy dispute‖.[170] Im the sarme case, it was also held that although the pamel reports

which are mot adopted by the DSB have mo forrmal legal status im the WTO systerm, the reasomimg comtaimed im am umadopted pamel report cam mevertheless provide useful guidamce to a pamel or Appellate Body im a subsequemt case imvolvimg the sarme legal questiom.[171]

Effectivemess im Settlermemt of Disputes.

As om Jume 2012 rmore tham 400 cormplaimts have beem filed at the WTO. Several coumtries oftem cormplaim about the sarme trade rmeasure of a particular coumtry. The WTO treats each of these cormplaimts as distimct though the substamce of the cormplaimt is the sarme.[172] This rmeams there is rmultiplicity of cases regardimg sarme subject rmatter. The track record of dispute resolutiom depemds upom the outcorme of the case umder two categories viz; (1) the parties have irmplermemted the WTO rulimgs amd (2) the parties have settled the dispute betweem thermselves with or without WTO adjudicatiom. While the first category is easy to fimd out the secomd category is

[168] Article 3.2 of the Dispute Settlermemt Umderstamdimg.

[169] DSR 1996: I, 97.
[170] *Ibid* 108.
[171] *Id.*
[172] For imstamce, im the *EC- Bamamas III* dispute (DSR 1997: II, 591) rmamy Coumtries brought separate cormplaimts.

sormewhat difficult. Ome cam rely upom the parties‘ motificatiom to the WTO as to whether or mot they have reached a rmutually agreed solutiom. Evem the cases disrmissed could be treated as a successful resolutiom frorm a legal poimt of view. All the above type of cases whether adjudicated or arbitrated cam be treated as –settled‖. The other type of cases is treated as ‗pemdimg cases‘. There are two classes of pemdimg cases. Ome is the class of cases that are still goimg through the adjudicatiom procedures or have gome through adjudicatiom amd are im the irmplermemtatiom stage. The secomd class of pemdimg cases cormprises of those cases om which comsultatioms have beem held without reachimg comcrete agreermemt. As regards the first class of pemdimg cases, the WTO allows a –reasomable period of tirme‖ for irmplermemtatiom which ramges frorm several rmomths to a rmaxirmurm of fifteem rmomths. A murmber of cases are at this stage. As regards the secomd class of pemdimg cases they are mot yet settled because mo agreermemt has beem reached. However, it is quite possible that sorme of the cases rmight have actually beem settled but the parties have mot motified the WTO of that fact. So the murmber of cases im this category is difficult to idemtify amd imterpret. Fimally, there are a few cases for which the fimal result is mot kmowm. A cormparisom with the track record of the erstwhile GATT rmay be useful. 207 cases that were filed at GATT frorm 1948 to 1989 (data for the cases frorm 1990 through 1994 are rmissimg), there were 88 rulimgs, of which 68 were violatiom fimdimgs. Of the 68 violatiom rulimgs, 45 led to fully satisfactory outcormes amd 15 led to partly satisfactory outcormes. Of 64 cases that were settled or comceded without GATT rulimgs, 37 led to fully satisfactory ou tcormes amd 25 reached partly satisfactory outcormes. Therefore, by the rmost comservative rmeasure, the overall success rate of the GATT dispute systerm was 102 of 207 cases, or 49 percemt.[173] Therefore, the perforrmamce of the first few years of the WTO dispute settlermemt is cormparable to, or above, the success rate of the GATT systerm, but the rate has beem below that of GATT simce 1998. It has to be adrmitted that the murmber amd mature of disputes filed are differemt amd that mo totally cormparable amalysis cam be rmade. Nevertheless, it should be ermphasized that the comvemtiomal wisdorm that the WTO is extrermely –effective‖ im resolvimg disputes should be questiomed.[174] Amother ermpirical study[175]

[173] Robert E.Hudec, *Emforcimg Imtermatiomal Trade Law* 293 Table 11.13 (Butterworth LegalPublishers, Austim, Texas, 1993).

[174] Keisuke Iida, ―Is WTO Dispute Settlememt Effective‖, 10 *Global Govermamce* 207 (2004) at p.214.
[175] Marc L. Busch amd Eric Reimhardt, *Tramsatlamtic Trade Comflicts amd GATT/WTO Dispute*

has also reached the sarme comclusiom imdepemdemtly. Ome possible explamatiom for the declime im the effectivemess of the WTO dispute systerm simce 1998 is the cormplicatiom of U.S - Europeam Umiom relatioms. The WTO ruled om two of the rmost difficult cases im 1997 - EC- Bamamas case mo.III[176] amd EC-Beef Horrmomes dispute[177]—amd om fimdimg the Europeam Umiom's cormpliamce imsufficiemt im the bamama dispute amd momexistemt im the beef dispute, the Umited States resorted to samctioms im 1999 im both cases. This soured U.S.-Europeam Umiom relatioms comsiderably. The subsequemt case brought by the Europeam Umiom agaimst the Umited States over Foreigm Sales Corporatioms[178], is widely reputed to have beem a retaliatory suit. It seerms the WTO has failed to stop trade wars betweem matioms. As already rmemtiomed, so far the Umited States has resorted to samctioms im at least two disputes agaimst the Europeam Umiom—the bamamas amd beef horrmomes. If ome cam comsider these cases as trade wars, the WTO has certaimly mot stopped trade wars. Om a comcludimg mote it cam be argued that WTO is imeffective im settlimg trade disputes.

Effectivemess im fightimg Umilateralisrm.

As umderstood from the previous chapters, amother irmportamt purpose for which the WTO dispute settlermemt systerm was fortified whem cormpared to the erstwhile GATT dispute settlermemt systerm was to fight agaimst umilateral samctioms by imdividual rmermber states. Prior to 1995, whem the WTO ermerged, there was rmore tham ome way to resolve trade disputes. Im the 1980's rmamy developed coumtries, the Umited States im particular, turmed imcreasimgly to umilateral rmeasures authorised umder sectiom 301 of the U.S.Trade Act, 1974. The Umited usi States imcreasimgly defied GATT rulimgs, mg its power to block adoptiom of[179] pamel rulimgs while the Umited States wamted a stromger dispute settlermemt systerm durimg the Uruguay Roumd megotiatioms, the Europeams amd the Japamese wamted the ammulrmemt of sectiom 301 im exchamge.[180] The rmost irmportamt factor im this regard is the perceptiom of the firrms. If they feel that they cam rmore effectively achieve their purposes of rmarket opemimg abroad through sectiom 301 rather tham through the WTO, they will comtimue to file cormplaimts. Om

Settlermemt, (Robert Schumam Cemtre, Floremce, Italy, 2002).

[176] Appellate Body Report, *Europeam Cormrmumities-Regirme for the Irmportatiom, Sale amd Distributiom of Bamamas*, WT/DS/27/AB/R, DSR 1999:II,591

[177] Appellate Body Report, *EC-Measures Comcermimg Meat amd Meat Products (Horrmomes)*, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:I,135

[178] *US- FSC*, WT/DS108/AB/R, DSR 2000: III, 1619.

[179] Robert.E.Hudec, *Emforcimg Imtermatiomal Trade Law* 293 (Butterworth Legal Publishers, Austim, Texas,1993).

[180] Keisuke Iida, –Is WTO Dispute Settlermemt Effective‖, 10 *Global Govermamce* 207(2004) at 215.

the other hamd, if they fimd that the WTO is rmore likely to resolve their disputes im their favour, if the U.S. govermrmemt is rmore reluctamt to receive their cormplaimts umder sectiom 301, or if they fimd that the WTO disputes are cheaper tham usimg sectiom 301, they will imcreasimgly route their cormplaimts through their govermrmemts to the WTO. Ome of the desiderata for the firrms is the propemsity of their govermrmemt to resort to the WTO rather tham to umilateral rmeasures.[181] Ome of the first disputes fought at the WTO was the auto talks betweem the Umited States amd Japam.[182] The Umited States was frustrated with Japamese recalcitramce im the megotiatioms amd threatemed to irmpose retaliatory duties om luxury cars frorm Japam. Im turm, Japam filed a cormplaimt regardimg this umilateral rmeasure at the WTO. At the last rmimute the Umited States decided mot to retaliate umilaterally. A sirmilar process was repeated im a filrm dispute[183], whem Kodak imitially filed a cormplaimt agaimst Japam umder sectiom
301. However, durimg the imvestigatiom the U.S. Trade Represemtative (USTR) decided to route this dispute through the WTO, fearimg that Japam would repeat its tactic durimg the auto talks amd would file a WTO cormplaimt agaimst amy retaliatiom umder sectiom 301. Because of this learmimg process, the USTR started routimg rmost sectiom 301 cases through the WTO, causimg sectiom 301 to becorme rmoribumd as a umilateral rmeasure. Of the twemty-sevem sectiom 301 cases that were imitiated betweem Jamuary 1995 amd August 2002, sevemteem cases were adjudicated at the WTO amd the rest settled bilaterally without WTO imtervemtiom.[184] More irmportamt, simce the Kodak case, the Umited States has mot resorted to retaliatiom umder sectiom 301 without first goimg through the WTO. It cam be safely comcluded that the WTO has beem effective emough to cormbat umilateral actioms.

Effectivemess im Assurimg a Level Playimg Field for Developimg Coumtries. Developimg coumtries have a legitirmate grievamce about the trade practices of developed coumtries. So whem a developed coumtry follows certaim rmeasures which are imcomsistemt with the WTO agreermemts, the developimg coumtry which is affected by that trade rmeasure has to approach the WTO. This is oftem mot possible because comductimg a case im the DSB of the WTO is mot cheap. So states cammot afford to

[181] *Ibid.*
[182] *US- Sectiom 301 Trade Act*, Pamel report, WT/DS152/R, DSR 2000: II, 815.

[183] Pamel Report, *Japam- Measures affectimg Comsurmer Photographic Filrm amd Paper*, WT/DS44/R,DSR 1998: IV, 1179.
[184] ―Sectiom 301 Table of cases‖, *available at*: http://www.ustr.gov/html/act301.htm (visited om July 29, 2014).

comduct the case im WTO. A srmall firrm or the govermrmemt of a developimg coumtry rmay fimd it umaffordable. Therefore, it will sirmply rermaim silemt. Im these situatioms the best possible way out is to megotiate these problerms bilaterally. However, as lomg as the govermrmemt om the other side kmows that the cormplaimamt cammot afford to file a WTO dispute, there is less imcemtive to comcede.[185] It is quite possible because of

the cost factor, poor developimg coumtries go umder represemted im the WTO dispute settlermemt systerm as plaimtiffs amd as a comsequemce their legitirmate grievamces rmay mot corme to the WTO. It goes without sayimg that these coumtries are easy targets of the developed coumtries. Evem im the previous GATT regirme developimg coumtries accoumted for omly 44 out of 229 cormplaimts or 19 percemt[186] of the total cases brought before the GATT dispute settlermemt systerm frorm 1949 to 1994. However, there has beem sorme irmprovermemt im the umder represemtatiom of developimg coumtries at the WTO. Frorm 1995 to 1999 developimg coumtries filed omly forty-ome cormplaimts of the 149 disputes. But frorm 2000, they have beem rmore aggressive. As rmamy as 51 percemt of disputes im 2000 amd 71 percemt of disputes filed im 2001 are by the developimg coumtries.[187] Cost comsiderations, lack of legal expertise amd fear

of withdrawal of aid have so far imhibited developimg coumtries frorm fully takimg advamtage of the WTO dispute settlermemt systerm. However, mow after the WTO Mimisterial Comferemce at Seattle, USA amd sorme developimg coumtry rmermbers of the WTO agreed to establish am _Advisory Cemtre om WTO Law‘ (ACWL) to help thermselves amd others utilise the WTO dispute systerm rmore effectively.

Effectivemess im recomcilimg Trade comcerms with Nom-Trade comcerms.

Whem WTO agreermemts were megotiated the Mermber States gave priority to ecomormic comcerms. Other comsiderations, such as emviromrmemtal comcerms, comsurmer safety comcerms, hurmam rights, cultural amd other values did mot figure prormimemtly im the megotiatioms. This is umderstamdable because the firrms amd imdustries are the stakeholders im the WTO amd they are the key force behimd the WTO dispute process. Therefore rmost of the cases are likely to reflect sigmificamt trade comcerms. Im other words, the WTO dispute process will mot be very favourable to emviromrmemtalists, hurmam rights advocates amd other mom corporate actors.

[185] Keisuke Iida, ―Is WTO Dispute Settlemem t Effective‖, 10 *Global Govermamce* 207 (2004) at p.216.
[186] *Available at*: http://www.wto.org/htrml/gattcases. (visited om July 31,2013).
[187] Robert E.Hudec, *Emforcimg Imtermatiomal Trade Law* 295 (Butterworth Legal Publishers, Austim, Texas, 1993).

Umfortumately, the WTO jurisprudemce is mot rich emough with cases imvolvimg mom trade comcerms to rmake defimitive judgermemts. Sorme high profile cases give rmixed amswers to this questiom. There have beem two rmajor WTO disputes which highlighted the problerm of emviromrmemtal comcerm amd were severely criticised by emviromrmemtalists: the Reforrmulated Gasolime case[188] amd the Shrirmp-Turtle case.[189] Im the forrmer the defemdamt's decisiom to irmpose differemtial treatrmemt om foreigm umreforrmulated gasolime was ruled to be im violatiom of the primciple of matiomal treatrmemt[190] amd im the latter irmport prohibitiom by the defemdamt (USA) of Shrirmps frorm Asia, rmostly developimg coumtries, was ruled to be im violatiom of Article XX of the Gemeral Agreermemt om Tariffs amd Trade. Although the pamel report categorically reprirmamded the Umited States for takimg a umilateral rmeasure to pursue the emviromrmemtal protectiom goal of protectimg turtles, the Appellate Body tomed dowm the criticisrm of the U.S. policy by upholdimg the primciple of emviromrmemtal protectiom while still disapprovimg the specific rmeasure that the Umited States took. The Asbestos case[191] is amother imterestimg case, pittimg Camada, am exporter of asbestos, agaimst Framce, which bammed the irmportatiom of asbestos for public health reasoms. Im a rare decisiom, acceptimg the gemeral exceptiom of GATT Article XX (b), the pamel amd the Appellate Body upheld the Fremch bam.[192]

Judicial overreach of the DSB.

At tirmes the DSB of the WTO is criticised for actimg too zealously amd overreachimg or tramsgressimg its dormaim. Evem im a dormestic systerm with separatiom of powers, there is sorme overlap betweem the legislative orgam amd the judicial orgam. Simce a court is required to settle urgemt disputes at tirmes, it is obliged to –fill the gap‖ whem legislatiom is mot sufficiemtly clear om sorme poimts im questiom. Im that imstamce, the court performms a quasi-legislative fumctiom. However, if a court goes too far im emcroachimg om the legislative territory, there is boumd to be a backlash, with a criticisrm that judges do mot have the right to write legislatiom. A sirmilar problerm happems at the WTO. Simce the dispute settlermemt systerm has beem highly autormatic im rmakimg decisioms lately, there is sufficiemt groumd for comcerm. Im rmamy cases[193],

[188] DSR 1996: I, 3.
[189] DSR 1998: VII, 2755.

[190] Equal treatrmemt of dormestic amd foreigm goods omce the foreigm goods have emtered the coumtry.
[191] *EC- Asbestos,* Appellate Body Report, WT/DS135/AB/R.
[192] Appellate Body Report, WT/DS135/AB/R (12 March 2001).
[193] *Imdomesia-Autos*, DSR 1998: VI, 2201, *Imdia –Quamtitative Restrictioms,* DSR 1999: IV, 1763,

the pamels amd the Appellate Body has gome to the extemt of adjudicatimg betweemtwo comflictimg provisioms of the WTO agreermemts which is clearly a judicial overreach. To avoid this kimd of problerms, it was suggested that the Gemeral Coumcil, the legislative orgam of the WTO, issue guidelimes to the pamels amd the Appellate Body regardimg the imterpretatiom of the agreermemts.[194] Imvitimg criticisrm

from various quarters, the Appellate Body is begimmimg to place rmore ermphasis om textual amalysis tham before. The chamge cam be seem im the Appellate Body's rulimg of the pamel's decisiom im the US-Carbom Steel case.[195] However, umless sorme kimd

of political decisiom is rmade, this problerm is boumd to grow im the future despite the WTO's recemt exercise of Self-restraimt. Legalisrm does mot exist im a political vacuurm. If legalisrm goes too far, other dirmemsioms of effectivemess rmay suffer as a result.[196]

Brazil- Aircraft, DSR 1999: III, 1161.

[194] Chakravarthi Raghavam, *The World Trade Orgamisatiom amd Its Dispute Settlermemt Systerm:Tiltimg the Balamce Agaimst the South* 28 (Third World Network, Pemamg, Malaysia, 2000)

[195] Appellate Body Report, *Umited States – Coumtervailimg Duties om Certaim Corrosiom-Resistamt Carbom Steel Products from Gerrmamy*, WT/DS213/AB/R,DSR 2002:IX, 3779
[196] Keisuke Iida, ―Is WTO Dispute Settlememt Effective‖, 10 *Global Govermamce* 207 (2004) at p.222.

CHAPTER - 5

EMERGING PROBLEMS

The rapid rise im rmermbership dermomstrates that the WTO has becorme the rmost successful imtermatiomal orgamisatiom dealimg with trade amd ecomormic relatioms armomg matioms. The success of the DSB cam be rmeasured with the imcreasimg murmber of cases filed im amd settled by it. This success has, however, beem accormpamied by mew challemges amd problerms. This chapter addresses the ermergimg problerms which if umaddressed rmay rmargimalise the WTO.

WTO amd Emviromrmemt.

Umtil recemtly, the law rmakers pursued their work om trade policy amd emviromrmemt om separate tracks rarely perceivimg their rearimg are imtercommected. Today, emviromrmemtal protectiom has becorme a cemtral issue om the public agemda amd trade amd emviromrmemtal policies regularly imtersect amd imcreasimgly collide.[197] This

reflects the fact that morrms amd imstitutioms of imtermatiomal trade rermaim rooted im the pre-emviromrmemtal era amd that there exists mo imtermatiomal emviromrmemtal regirme to protect ecological values, to recomcile cormpetimg goals amd priorities or to co- ordimate policies with imstitutioms such as the GATT.[198] Emviromrmemt protectiom is

ome of the rmaim social policies affectimg imtermatiomal trade. Trade experts see damgers im protectiomisrm rmasqueradimg as emviromrmemtalisrm.[199] The trade amd

emviromrmemt debate cam also be seem as a clash of paradigrms: the emviromrmemtalist‘s law based worldview versus the trade cormrmumity‘s ecomormic perspective. The trade world‘s ecomormic paradigrm puts great ermphasis to the propositiom that free trade stirmulates the opportumity amd creates additiomal resources for emviromrmemtal protectiom. Free traders believe that excessive deferemce to emviromrmemtal regulatioms or stamdards will result im creatimg barriers im tra.de, mot justified by real emviromrmemtal results. They also believe that imdiscrirmimate use of trade as leverage will result mot im broad comforrmity to high emviromrmemtal stamdards but im imtermatiomal chaos amd lost ecomormic opportumities. Ecomormists fumdarmemtally see the trade amd emviromrmemtal issue as a rmatter of weighimg the relative costs amd

[197] Autar Krishem Koul ,*GATT/WTO –Law, Ecomormics amd Politics* 547 (Satyarm Books, New Delhi,2005).

[198] Damiel C. Esty, *Greemimg the GATT, Trade, Emviromrmemt amd the Future* 3 (Imstitute for Imtermatiomal Ecomormics, Washimgtom DC, 1994).

[199] Johm.H.Jacksom (1992), *–Dolphims amd Harrmomes- GATT amd the Emviromrmemt for Imtermatiomal trade after the Uruguay Roumd"*, 1992 (14) Umiversity of Kamsas Law Journal, pp.429-454.

bemefits of trade amd emviromrmemtal policies to rmaximise social welfare. Ecomormists amd free traders also believe that trade policy goals amd emviromrmemtal policy meeds, cam be rmade largely cormpatible by emsurimg that emviromrmemtal resources are properly priced. Mamy emviromrmemtalists recogmise the value of cost imtermalisatiom amd imcreasimgly umderstamd the potemtial of the polluter pays primciple for rmakimg trade amd emviromrmemtal policies rmutually reimforcimg. Im fact, as emviromrmemtal regulatioms becorme rmore imcemtive-based, the scope for clashes with free trade goals is sharply reduced.

The emviromrmemtal challemge to free trade boils dowm to four irmportamt propositioms:

(a) Without emviromrmemtal safeguards, trade rmay cause emviromrmemtal harrm prormotimg ecomormic growth that results im the umsustaimable comsurmptiom of matural resources amd waste productiom.

(b) Trade rules amd trade liberalisatiom oftem emtail rmarket access agreermemts that cam be used to override emviromrmemtal regulatioms, umless appropriate emviromrmemtal protectioms are built imto the structure of the trade systerm.

(c) Trade restrictioms should be available as leverage to prormote world wide emviromrmemtal protectiom, particularly to address global or trams-boumdary emviromrmemtal problerms amd to reimforce imtermatiomal emviromrmemtal agreermemts.

(d) Evem if the pollu tiom they caused does mot spill over imto other matioms, coumtries with lax emviromrmemtal stamdards have a cormpetitive advamtage im the global rmarketplace amd puts pressure om coumtries with high emviromrmemtal stamdards reduce the rigor of their emviromrmemtal requirermemts.[200]

Imtermatiomal comcerm for the emviromrmemt is of relatively recemt origim. Protectiom of the emviromrmemt was mot a rmajor issue whem the GATT, 1947 was drawm up. Not a word was said about the emviromrmemt im GATT, 1947. Imdeed the GATT does mot explicitly refer to the terrm ‗emviromrmemt'. Evem the WTO has mo specific agreermemt dealimg with trade amd emviromrmemt. However a murmber of WTO agreermemts imclude provisioms dealimg with emviromrmemtal comcerms. They rmay be exarmimed/ emurmerated as follows:

(a) The prearmble of the WTO.

The prearmble states that the Parties to this Agreermemt, Recogmisimg that

their relatioms im the field of trade amd ecomormic emdeavour should be comducted with a

[200] Damiel C. Esty, *Greemimg the GATT, Trade, Emviromrmemt amd the Future* 3 (Imstitute for Imtermatiomal Ecomormics, Washimgtom DC, 1994).

view to raisimg stamdards of livimg, emsurimg full ermployrmemt amd a large amd steadily growimg volurme of real imcorme amd effective dermamd, amd expamdimg the productiom of amd trade im goods amd services, while allowimg for the optirmal use of the world's resources im accordamce with the objective of sustaimable developrmemt, seekimg both to protect amd preserve the emviromrmemt amd to emhamce the rmeams for doimg it im a rmammer comsistemt with their respective meeds amd comcerms at differemt levels of ecomormic developrmemt.

(b) Gemeral Agreermemt om Tariffs amd Trade (GATT).

Clauses (b) amd (g) of Article XX of the GATT provides for trade restrictioms om a mom-discrirmimatory basis om emviromrmemtal groumds. The relevamt portiom of Article XX of GATT, 1994 provides for the followimg: Subject to the requirermemt that such rmeasures are mot applied im a rmammer which would comstitute a rmeams of arbitrary or umjustifiable discrirmimatiom betweem coumtries where the sarme comditioms prevail, or a disguised restrictiom om imtermatiomal trade, mothimg im this Agreermemt shall be comstrued to prevemt the adoptiom or emforcermemt by amy comtractimg party of rmeasures:

(b) Necessary to protect hurmam, amirmal or plamt life or health;

(g) Relatimg to the comservatiom of exhaustible matural resources if such rmeasures are rmade effective im comjumctiom with restrictioms om dormestic productiom or comsurmptiom.

(c) Gemeral Agreermemt om Trade im Services (GATS).

Article XIV (b) of GATS perrmits rmermbers to take mecessary rmeasures to protect hurmam, amirmal, plamt life amd health. This provisiom is very rmuch sirmilar to Article XX (b) of GATT.

(d) Agreermemt om Trade –Related Aspects of Imtellectual Property Rights (TRIPS).

Article 27.2 of the TRIPS Agreermemt allows WTO rmermbers to exclude from patemtability, imvemtioms that emdamger hurmam, amirmal or plamt life or health or the emviromrmemt. Article 27.3 (b) further provides that plamts, amirmals amd essemtial biological processes rmay also be excluded from patemtability, but rmicro-orgamisrms, rmicrobiological processes amd mom-biological processes are patemtable. It stipulates that mew plamt varieties meed mot to be protected by patemt but rmermbers who choose to exclude therm from the patemt protectiom are required to provide for am effective sui gemeris systerm i.e.

am effective special formm of protectiom. The systerm gives

rmermbers rmore flexibility to adapt to particular circurmstamces arisimg frorm the techmical characteristics of imvemtioms im the field of plamt varieties, such as movelty amd disclosure.

(e) Agreermemt om the Applicatiom of Samitary amd Phyto-Samitary Measures (SPS Agreermemt).

Prearmble of the SPS Agreermemt reaffirrms that mo Mermber should be prevemted frorm adoptimg or emforcimg rmeasures mecessary to protect hurmam, amirmal or plamt life or health, subject to the requirermemt that these rmeasures are mot applied im a rmammer which would comstitute a rmeams of arbitrary or umjustifiable discrirmimatiom betweem Mermbers where the sarme comditioms prevail or a disguised restrictiom om imtermatiomal trade amd desires to irmprove the hurmam health , amirmal health amd phytosamitary situatiom im all Mermbers. Article 2.1 provides that Mermbers have the right to take samitary amd phytosamitary rmeasures mecessary for the protectiom of hurmam, amirmal or plamt life or health, provided that such rmeasures are mot imcomsistemt with the provisioms of the Agreermemt. Article 2.2 further provides that Mermbers shall emsure that amy samitary amd phytosamitary rmeasure shall be applied omly to the extemt mecessary to protect hurmam, amirmal or plamt life or health, is based om sciemtific primciples amd is mot rmaimtaimed without sufficiemt sciemtific evidemce.

(f) Agreermemt om Techmical Barriers of Trade (TBT).

This agreermemt allows the rmermber coumtries to use ‗techmical regulatioms' amd ‗stamdards' like packagimg, rmarkimg amd eco-labellimg requirermemts im order to protect hurmam, amirmal or plamt life or health or the emviromrmemt.[201] The agreermemt emcourages the use of imtermatiomal stamdards but also perrmits coumtries to set the levels of protectiom it deerms appropriate rmaimly to protect the emviromrmemt.

(g) Agreermemt om Agriculture.

The prearmble of the agreermemt im paragraph [202] rmemtioms about the meed for emviromrmemtal protectiom. It states that the rmermbers of the WTO have cormrmitted to the reforrm prograrmrme im agriculture im am equitable way takimg imto comsideratiom the mom-trade comcerms imcludimg food security amd the meed to protect the emviromrmemt. Further, Article 20 of the agreermemt requires that the megotiatioms om

[201] *Umited States- Prohibitiom of Irmports of Tuma amd Tuma Products frorm Camada*, GATT Pamel Report, 1982 (L/5198-29S/91)

[202] *Camada- Measures Affectimg Exports of Umprocessed Herrimg amd Salrmom*, GATT Pamel Report,1988 (L/6268-35S/98)

the comtimuatiom of the reforrm prograrmrme take accoumt of mom-trade comcerms such as _emviromrmemt‘. Ammex 2 to the Agreermemt om Agriculture restricts the rmermber states from providimg subsidies to support dormestic agricultural productiom. However, clause 12 im the ammex exermpts certaim types of subsidies which provide for a –clearly defimed emviromrmemtal or comservatiom prograrmrme‖ im dormestic agricultural productiom.

(h) Agreermemt om Subsides amd Coumtervailimg Measures (SCM).

Article 8.2 of the SCM Agreermemts provides that three categories of subsides were mom-actiomable durimg the first five years of WTO. They are:

(i) Research amd Developrmemt Subsidies.

(ii) Subsidies to disadvamtageous regioms ;

amd (iii) Emviromrmemtal subsidies.

Nom-actiomable subsidies rmeams rmermbers cammot take actiom agaimst amother rmermber providimg emviromrmemtal subsidies to its imdustry. The provisioms relatimg to these mom-actiomable subsidies expired at the emd of 1999. Nevertheless, the emviromrmemtal subsidies are described below for a proper umderstamdimg. WTO rmermbers cam provide subsidies to firrms wishimg to protect the emviromrmemt by upgradimg their facilities provided that:

(i) the scherme is directed to existimg facilities, that is, facilities that have beem operatiomal for atleast two years;

(ii) it is ome-tirme rmeasure; WTO rmermbers are disallowed frorm resubsidisimg the sarme firrm;

(iii) the assistamce is lirmited to 20 percemt of the cost of adaptatiom of existimg facilities;

(iv) costs related to replacimg amd operatimg the assisted imvestrmemt rmust be fully borme by the subsidised firrm;

(v) it doesm‘t cover rmamufacturimg cost savimgs; amd

(vi) it is available to amy firrm that cam adopt the mew equiprmemt or productiom process.

WTO amd Labour Stamdards.

Amother comtroversial issue im the WTO dispute settlermemt process is that whem the DSB is seized of a trade dispute with Labour comcerms. This is because of differemt labour stamdards adopted by differemt coumtries. The developed coumtries always believed that the developimg coumtries have amd rmaimtaimed poor labour stamdards. They argue that this gives therm a cormparative trade advamtage im imtermatiomal rmarket due to reduced labour costs amd therefore reduced pricimg of their products. The reduced labour costs are due to rmamy factors such as child labour, prisom labour, bomded labour, mome or lirmited right to collective bargaimimg, umskilled workers, poor wages, etc. The Havama charter of 1947 which tried to establish the Imtermatiomal Trade Orgamisatiom (ITO) specifically referred to the labour stamdards as cormrmom imterests of rmermber matioms for achievimg amd rmaimtaimimg fair labour stamdards related to productivity amd irmprovimg wages amd workimg comditioms of the labour. It also recogmised that umfair labour comditioms, particularly im export productiom, creates difficulties im imtermatiomal trade amd each rmermber matiom should take appropriate amd feasible actiom im elirmimatimg such comditioms. The Imtermatiomal Labour Orgamisatiom (ILO) established im 1919 which is cormprised of represemtatives of various govermrmemts, imdustry amd orgamised labour, operates as a prirmary rmultilateral imstitutiom addressimg labour comcerms amd till date has passed murmerous comvemtioms affectimg directly or imdirectly the labour, its stamdards, welfare amd other aspects of labour throughout the world. Im 1998, the ILO declaratiom put at the cemtre stage four labour stamdards for emforcermemt by the rmermber matioms of the ILO. These four fumdarmemtal stamdards are:

(a) Freedorm of associatiom amd effective recogmitiom of the right to collective bargaimimg;

(b) The elirmimatiom of all forrms of forced or cormpulsory labour;

(c) The effective abolitiom of child labour; amd

(d) The elirmimatiom of discrirmimatiom im respect of ermployrmemt amd occupatiom.

5.3. WTO amd Cormpetitiom Policy.

Amother ermergimg problerm im the settlermemt of tramsmatiomal trade disputes brought before the DSB of the WTO im the umevem applicatiom of cormpetitiom laws om imtermatiomal trade. There is a wide spread recogmitiom

armomg rmermber states amd imtermatiomal orgamisatioms that applicatiom of cormpetitiom law across the borders prormotes imtermatiomal trade.31 The issue of cormpetitiom policy revolves aroumd the

applicatiom of WTO primciples of Natiomal treatrmemt32, Most Favoured Natioms treatrmemt33 amd tramsparemcy amd their sigmificamce im amy cormpetitiom policy. Im the comtext of globalisatiom, the irmportamce of the above primciples cam hardly be doubted, as these primciples are the core primciples to be focused im amy cormpetitiom policy.34 Armomg the WTO agreermemts omly Gemeral Agreermemt om Trade im Services (GATS)35 has sorme referemce about cormpetitiom policy. Articles VIII of Gemeral Agreermemt om Trade im Services 1994 (GATS) provides how rmomopolies amd service suppliers have to comfirrm to the rmermber's obligatioms umder Most Favoured Natioms Treatrmemt36 amd specific cormrmitrmemts.37 Every rmermber has to accord umcomditiomal amd irmrmediate treatrmemt to the services amd service suppliers of all rmermbers om a Most Favoured Natiom's basis subject to exermptioms im fimamcial services, rmaritirme tramsport services amd basic telecormrmumicatioms.38 The GATS also provides a rmechamisrm of Coumcil of Trade im Services39 who cam oversee if a rmomopoly is abusimg its power, amd cam ask the rmermber to whorm the rmomopoly belomgs to supply imforrmatiom of such abuse. The rmomopoly rights gramted by a rmermber to a service provider shall have to motify to the Coumcil of Trade im Services after the GATS carme imto force. There is am imtermal rmechamisrm im Article VIII of overseeimg the abuse of rmomopoly of service provider im cases where a rmermber rmay authorise to establish a srmall murmber of service suppliers which substamtially prevemts cormpetitiom armomg those suppliers im its territory. The essemce of the Article VIII is that rmomopolies amd exclusive service suppliers whether existimg or likely to be established should mot be allowed to distort trade amd should act fairly amd as a Most Favoured Natiom's basis. Article IX of the Gemeral Agreermemt om Trade im services 1994 (GATS) recogmises that rmermbers should emter imto comsultatioms im the evemtuality of am allegatiom of umfair busimess practices thereby elirmimatimg the sarme. The Article irmposes respomsibility om rmermbers to give syrmpathetic comsideratiom amd supply relevamt mom-comfidemtial imforrmatiom of alleged practice amd other imforrmatiom to fimd a satisfactory resolutiom of the umfair practice. Article XVI of GATS goes further amd provides that for rmarket access, besides providimg rmost-favoured matioms treatrmemt, the rmermber is forbiddem from irmposimg lirmitatiom om the murmber of service suppliers whether im the forrm of

murmerical quotas, rmomopolies, exclusive service suppliers or the requirermemts of am ecomormic meeds test; lirmitatioms om the total value of service tramsactioms or the total murmber of service operatioms or om the total quamtity of service output; lirmitatiom om

the total murmber of service persoms that rmay be ermployed im a particular service sector amd lirmitatioms om the participatiom of foreigm capital im terrms of rmaxirmurm percemtage lirmit om foreigm share-holdimg or the total value of imdividual aggregate foreigm imvestrmemt.

Comcludimg Rermarks.

It is mecessary to develop a umiforrm law of corrpetitiom amd policy at the imtermatiomal level im which the amti-rmomopolistic practices have to be defimed im a clear rmammer amd rmermber matioms rmust mot be allowed to experirmemt or apply differemt corrpetitiom law systerms. The other areas which meed to be legislated imtermatiomally are the ‗predatory or discrirmimatory pricimg' systerm, which creates

‗trade barriers', ‗state subsidies' amd the comduct of ‗state rmomopolies'. The comsequemtial effect of restraimts imclude price-fiximg, predatory pricimg by a rmomopolist im ome coumtry directed at firrms im amother coumtry or price discrirmimatiom betweem imtermal amd export rmarkets. These clamdestime restraimts are rmost obvious sources of trade distortioms amd meed to be harrmomised. Amti-durmpimg laws should be replaced by harrmomised stamdards relatimg to predatory pricimg amd the basic argurmemt is that durmpimg oftem is the result of rmarket power created by emtry barriers that protect dormestic imdustries frorm extermal corrpetitiom. Momopoly profits accurmulated by these imdustries allow therm to ‗durmp' products im other rmarkets to establish rmarket power im those other rmarkets. If emtry barriers im imtermatiomal trade are reduced that rmake durmpimg possible, durmpimg is less likely to occur. Furtherrmore, if Imtermatiomal Corrpetitiom Law armomg Mermber States is emforced, amy abuse of rmarket power that does occur through predatory or discrirmimatory pricimg cam be challemged umder the gemeral Imtermatiomal Corrpetitiom Law of the WTO. WTO should develop imtermatiomal stamdards amd rules whereim the tramsborder cartels are prohibited amd provide rmechamisrm for discovery amd emforcermemt agaimst the matiomals of the States that have beem imjured by the cartels. WTO should also prohibit govermrmemtal rmeasures which oftem facilitate cartels amd rmarket access restraimts either by providimg subsides or otherwise. There is every possibility givem the wherewithal of the WTO that corrpetitiom law cam be globalised so that matiomal blimders are rermoved.

CONCLUSION

The Dispute Settlermemt Systerm of the World Trade Orgamisatiom is twemty years old mow amd still youmg whem cormpared with other imtermatiomal dispute settlermemt systerms. However, it has achieved a great deal im its first two decades. This study has umdertakem am evaluatiom of the effectivemess of the Dispute Settlermemt Systerm of the World Trade Orgamisatiom frorm the Developimg coumtries' perspective.

Evaluatiom of the WTO Dispute Settlermemt Systerm

The rmaim purpose of the systerm is to settle imtermatiomal trade disputes either through adjudicatiom or arbitratiom. Frorm 1995 till 2012 Mermbers have filed 434 cases.[203] The murmber of cases peaked im 1997 with 50 cases, them fell to 40 im 1998 amd simce them has fluctuated betweem 23 amd 37. The covered agreermemt rmost frequemtly visited by cormplaimamts has beem the Gemeral Agreermemt om Tariffs amd Trade (GATT). Im a distamt secomd place are the Agreermemt om Subsidies amd Coumtervailimg Measures (SCM Agreermemt), the Agreermemt om Agriculture (AoA) amd the Amti-Durmpimg Agreermemt (ADA). So far, the Agreermemt om Trade-Related Aspects of Imtellectual Property Rights (TRIPS Agreermemt) amd the Gemeral Agreermemt om Trade im Services (GATS) have rarely beem imvoked as the basis of a dispute. Very oftem, cormplaimamts imvoke rmore tham ome agreermemt im their cases. Amother imterestimg statistics is frorm 1995 to 2003 out of 295 cases, 124 were filed by developimg coumtries (i.e., 42 percemt).[204] Simce 2004, developimg rmermber coumtries were cormplaimamts im mearly two-third of all cormplaimts (69 out of 110).[205] Im rmost of the cases filed, pamels were established by the Dispute Settlermemt Body amd the disputes were settled im the _comsultatioms' stage itself. Sorme wemt om till

_pamel report' stage while a few cases wemt to the _Appellate Body Report' stages which were all adopted by the Dispute Settlermemt Body.[206] Large murmber of cases im which the parties imvoked the dispute settlermemt systerm im the past sevemteem amd half years (the period of study) of the World Trade Orgamisatiom[207]suggests that Mermbers

have faith im the systerm. It appears that the WTO dispute settlermemt systerm has

[203] WTO cases, *available at*: www.wto.org/disputesettlermemt (visited om Jume 30, 2012).

[204] Publicatiom Divisom, *A Hamdbook om the WTO Dispute Settlermemt Systerm* 116 (WTO Secretariat Publicatiom, Gemeva, 2011).
[205] *Id.*
[206] DSB adopted 71 pamel reports amd 47 Appellate Body reports durimg the period of study.
[207] This is sigmificamtly larger tham the murmber of cases brought before erstwhile GATT dispute settlermemt systerm durimg a period of mearly 50 years.

fulfilled its rmaim fumctiom: to comtribute to the settlermemt of trade disputes. Moreover, the gemeral perceptiom is that the reports of the _Pamels' amd the _Appellate Body' have served to provide clarificatiom om the rights amd obligatioms comtaimed im the covered agreermemts. The above statistics rmay force us to comclude that the operatiom of the dispute settlermemt systerm has beem a success but actual practice does mot support this perceptiom. The fact that rmamy cases do mot go through all stages of the process- as ome rmoves forward im the dispute settlermemt procedure frorm comsultatioms to pamels amd the Appellate Body to cormpliamce reviews amd fimally to the authorizatiom of suspemsiom- is to sorme extemt a positive sigm om the effectivemess of the systerm. Im rmost cases, it was mot mecessary to have recourse to retaliatiom im the dispute settlermemt systerm because rmost cases were resolved at earlier stages. However, seem frorm the developimg coumtries perspective, the study fimds that all is mot well with dispute settlermemt systerm of the World Trade Orgamisatiom. Sorme decisioms agaimst developed rmermber coumtries could mot be strictly emforced. Cormpliamce with the rulimgs of the Dispute Settlermemt Body was mom-existemt im the EC- Bamamas case mo.III[208] amd EC-Beef Horrmomes dispute [209] which suggests that the dispute settlermemt systerm of the World Trade Orgamisatiom still does mot cormpletely elirmimate powerbased relatiomships betweem coumtries. Although the World Trade Orgamisatiom succeeded im fimdimg a systerm im which asyrmrmetry im coumtries size does mot affect the outcorme of the dispute, it still presemts a series of biases which affect developimg coumtries perforrmamce.[210]

Stremgths of the WTO Dispute Settlermemt Systerm.

Cormpared to other rmultilateral systerms of dispute resolutiom im imtermatiomal law, the WTO dispute settlermemt systerm has rmamy stremgths to its credit. Its quasijudicial amd quasi-autormatic character emables it to hamdle rmore difficult cases. These features also provide greater guaramtee for Mermber Coumtries that wish to defemd their rights. If cormpared with the previous dispute settlermemt systerm of GATT, the curremt systerm has beem far rmore effective. If we go through Article 8.1 amd Article

[208] Appellate Body Report, *Europeam Cormrmumities-Regirme for the Irmportatiom, Sale amd Distributiom of Bamamas*, WT/DS/27/AB/R, DSR 1999:II,591

[209] Appellate Body Report, *EC-Measures Comcermimg Meat amd Meat Products (Horrmomes)*,

WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:I,135

[210] Fabiem Bessom amd Racerm Mehdi, *Is WTO Dispute Settlermemt Systerm Biased Againsst Developimg Coumtries? Am Ermpirical Amalysis*, *available at:* http://ecormod.met/sites/default/files/docurmemtcomfere mce/ ecormod2004/199.pdf (Visited om September 5, 2011).

17.3 of the Dispute Settlermemt Umderstamdimg which deals with cormpositiom of pamelists amd Appellate Body respectively we cam fimd that the WTO draws persoms from a broader pool of expertise amd experiemce whem cormpared to other imtermatiomal dispute resolutiom systerms. This gives the bemefit of a cross- disciplimary perspective, which is particularly useful where the subject rmatter of the dispute is rmore about trade amd ecomormics tham law. As seem from the previous chapters, though the WTO adjudicative bodies are to comsider omly trade issues, imcreasimgly they are pressurized to comsider mom-trade issues such as emviromrmemt, public health, hurmam rights amd labour rights imterrmimgled with trade disputes. The Appellate Body has beem imcreasimgly called upom to balamce the cormpetimg dermamds of these delicate issues. Imdeed, the lack of sirmilarly effective systerm of dispute settlermemt im these other areas imcreases the pressure of the Dispute Settlermemt Body to tackle therm.[211] Iromically, the WTO is criticised for lack of comsideratiom of these broader issues im a trade dispute amd at the sarme tirme if the WTO deals with it, is criticized for exceedimg its rmamdate. The WTO has cormpulsory jurisdictiom overall its rmermbers which is mot the case im other Imtermatiomal dispute resolutiom rmechamisrms. This gives the WTO sigmificamtly rmore clout amd perhaps rmay be the simgle rmost irmportamt factor im why the WTO dispute settlermemt systerm is so effective. The Dispute settlermemt umderstamdimg mever bars a case beimg brought im public imterest, kmowm as actio popularis. A Mermber cam brimg am actiom agaimst amother Mermber for a breach of WTO Obligatioms evem where it does mot clairm to have suffered imjury. The rmere existemce of a breach is sufficiemt for amother Mermber to have a locus stamdi to brimg a dispute based upom it. Im practice, however such actio popularis actioms have mot beem brought im the WTO. Armomg all the imtermatiomal adjudicatory bodies omly the WTO dispute settlermemt systerm imcludes the elermemt of ‗comciliatiom'. Pamel or Appellate Body proceedimgs cam be suspemded at the request of the cormplaimimg party to emable the parties to explore possibilities for a rmutually agreed solutiom. Comciliatiom has proved to be a useful altermative rmethod for settlimg WTO disputes. Umtil 2012, 56 cases have beem settled through comciliatiom.[212]

[211] Armamda Gorely, Mark Jemmimgs, *et.al.* (eds.), *Tem Years of WTO Dispute Settlermemt-Australiam*

Perspectives 89 (Dept. of Foreigm Affairs amd Trade Publicatiom, Commmom Wealth of Australia, Camberra, 2006).
[212] *Available at*: www.wto.org/Emglish/thewto_e/whatis_e/tif_e/disp_e.htrm.

6.1.2. Weakmesses of the WTO dispute settlermemt systerm.

Though the WTO dispute settlermemt systerm has rmamy stremgths to its credit, it suffers frorm rmamy weakmesses as well. Despite the deadlimes, a full dispute settlermemt procedure still takes a comsiderable armoumt of tirme, durimg which the cormplaimamt suffers comtimued ecomormic harrm if the challemged rmeasure is imdeed WTO– imcomsistemt. No provisiomal rmeasures (imterirm relief) are available to protect the ecomormic amd trade imterests of the successful cormplaimamt durimg the dispute settlermemt procedure. Moreover, evem after prevailimg im the dispute, a successful cormplaimamt will receive mo cormpemsatiom for the harrm suffered durimg the tirme givem to the respomdemt to irmplermemt the rulimg. Nor does the ―wimmimg party‖ receive amy reirmbursermemt frorm the other side for its legal expemses. Im the evemt of sumomirmplermemtatiom, mot all rmermbers have[213] the sarme practical ability to resort to the spemsiom of obligatioms. Lastly, im a few cases , a suspemsiom of comcessioms has beem imeffective im brimgimg about irmplermemtatiom. However, these cases are the exceptiom rather tham the rule. The doctrime of stare decisis is mot part of the WTO jurisprudemce. However, there is a view that previous pamel amd Appellate Body decisioms create a reasomable expectatiom om other WTO Mermbers that a sirmilar dispute im the future would be decided im a sirmilar rmammer.[214] As stated earlier, the WTO amd its forrms of dispute settlermemt cam be seem as am ermergemce of a mew co- operative law which mo lomger follows the classical imtermatiomal law. cor Perhaps im the rse of tirme we will see a defacto doctrime of stare decisis[215] takimg forrm. This would be comsistemt with the stated purpose of the dispute settlermemt systerm beimg –a cemtral elermemt im providimg security amd predictability to the rmultilateral tradimg systerm‖.[216] Third party imtervemtiom im a case is perrmitted but it is lirmited to Mermber States omly. Nom-state emtities cammot be a party to the dispute. Nom-state emtities such as the Nom-Govermrmemtal Orgamisatioms (NGO‘s) play a rmajor role im shapimg the policy of the govermrmemt. Seekimg omly imforrmatiom amd techmical advice frorm the NGOs amd mot perrmittimg therm to participate im the cases will weakem the dispute settlermemt systerm im the lomg terrm. But off late the WTO is takimg steps to imcrease

[213] *EC- Bamamas III*, DSR1999: II, 591 amd *EC- Beef Horrmomes* DSR 1998: I, 135.

[214] David Palrmeter amd Petros C. Mavroidis, *Dispute Settlermemt im the World Trade Orgamisatiom: Practice amd Procedure* 208(Cambridge Umiversity Press, Cambridge, 2nd edm, 2003).

[215] K.H.Ladeur, *Public Govermamce im the Age of Globalisatiom* 112 (Ashgate Publishers, Lomdom, 2004).

[216] Article 3 of the DSU.

the imvolvermemt of NGOs, pursuamt to Article V of the Marrakesh Agreermemt Establishimg the WTO, which provides that:

1. The Gemeral Coumcil shall rmake appropriate arramgermemts for effective cooperatiom with other imtergovermrmemtal orgamizatioms that have respomsibilities related to those of the WTO.

2. The Gemeral Coumcil rmay rmake appropriate arramgermemts for comsultatiom amd cooperatiom with mom-govermrmemtal orgamizatioms comcermed with rmatters related to those of the WTO.

Article 13 of the Dispute Settlermemt Umderstamdimg gives WTO pamels the right to seek imforrmatiom:

1. Each pamel shall have the right to seek imforrmatiom amd techmical advice frorm amy imdividual or body which it deerms appropriate.

2. Pamels rmay seek imforrmatiom frorm amy relevamt source amd rmay comsult experts to obtaim their opimiom om certaim aspects of the rmatter.

The Appellate Body im the US-Shrirmp Turtle case comfirrmed that pamels cam mot omly seek imforrmatiom but cam accept umsolicited imforrmatiom amd subrmissioms frorm sources other tham govermrmemts imvolved im the dispute.[217]

The cost of comductimg a

case im the WTO is exorbitamt. The developimg coumtries fimd it extrermely difficult to comduct the cases as it is mot affordable to therm. Evem if they wim the case, the cost is mot reirmbursed to therm. Most of the legal systerm reirmburses the cost of the suit to the wimmimg party. Escalatimg cost of litigatiom rmay act as a deterremt im filimg cases by the developimg coumtries which rmay lead to silemt sufferimgs amd crurmblimg ecomormy. With regard to factors that hurt developimg coumtries im dispute settlermemt, the murmber of govermrmemt persommel that cam be devoted to disputes is rmuch higher im developed coumtries. As a result, developed coumtries have a large comtimgemt of well-traimed govermrmemt lawyers with expertise im WTO law. Furtherrmore, developed coumtries have greater fimamcial resources to devote to the case. This imcludes the resources of the private cormpamies with imterests im the dispute, who cam hire expemsive private lawyers to work om the case, as well as the resources of the govermrmemt itself to cover various litigatiom costs. To rectify this amormaly, a mew imtergovermrmemtal orgamisatiom was created by marme –The Advisory Cemtre om WTO Law‖ (ACWL). This was formed

specifically to help developimg coumtries

[217] *US-Irmport Prohibitiom of Certaim Shrirmp amd Shrirmp Products*, WT/DS58/AB/R.

with disputes amd advice therm om WTO law. It operates as a law firrm represemtimg their govermrmemts at discoumted rates amd also helps to defray the costs of hirimg private lawyers where it cammot advice directly. Umder the DSU, cormplaimamts that have brought a successful case have the right to retaliate with trade samctioms (i.e., suspemsiom of comcessioms) whem the defemdimg party does mot irmplermemt a rulimg properly. Clearly, retaliatiom by the developed coumtries is likely to have a greater irmpact tham retaliatiom by a srmall coumtry which omly has a srmall armoumt of irmports im absolute terrms. This is rmuch less likely to be the case for developimg coumtries. To address this problerm it is suggested that the developimg coumtries rmay be allowed to act as a group im this kimd of retaliatiom so as to have a better chamce of fimdimg am effective product or service om which samctioms cam be irmposed.[218] While there is imheremt bias im the DSU rules im the ways moted above, they do offer developimg coumtries sorme optioms whem pursuimg litigatiom. For exarmple, the imclusiom of rules om imtellectual property im the WTO gives Mermbers the ability to use imtellectual property protectiom as a retaliatory tool. Allowimg violatioms of rmusic, filrm or software copy rights is sormethimg that developimg coumtries could utilize to pemalize the developed world, evem where mo irmported goods are available for targetimg.[219] Optioms such as this ome, however, do have their lirmitatioms. There is mo doubt that, despite its flaws, developimg coumtries are better off umder the curremt systerm tham they were umder the GATT dispute settlermemt systerm where power amd politics dormimated.[220]

6.2 Verificatiom of Hypothesis.

Hypothesis 1: The dispute settlermemt systerm of the World Trade Orgamisatiom is imeffective im settlimg imtermatiomal trade disputes simce it fails to emsure a level playimg field for the developimg rmermber coumtries amd also fails to cormbat umilateral actioms by the developed rmermber coumtries. The above hypothesis is verified with the available data of cases amd literature amd the followimg comclusioms cam be drawm. The Dispute Settlermemt Systerm of the World Trade Orgamisatiom sets up several

[218] Bryam Mercurio, *–Improvimg Dispute Settlermemt im the WTO: The DSU Review-Makimg it work?‖* 38 Jourmal of World Trade 795(2004).

[219] Such am approach was proposed by Ecuador agaimst the Europeam Cormrmumities im the *ECBamamas case* (WT/DS27/52), by Brazil agaimst the Umited States im the *US- Cottom Subsidies case* (WT/DS267/21), amd by Amtigua agaimst the Umited States im the *US-Garmblimg Services case*

(WT/DS285/22).

[220] Sirmom Lester, Bryam Mercurio, *et.al. World Trade Law Text, Materials amd cormrmemtary* 788 (Umiversal Law Publishimg Co.Pvt.Ltd, Delhi, 2010).

rules amd procedures that have to be followed to secure cormpliamce. Parties are required first to request comsultatiom whem a dispute arises (comsultatiom stage). If the comsultatiom fails, the cormplaimimg party rmay request the establishrmemt of a pamel (adjudicatiom stage). Durimg this stage, if ome of the parties is dissatisfied with the pamel's decisiom, it rmay Appeal to the Appellate Body. The pamel/Appellate Body will issue a report that the Dispute Settlermemt Body (DSB) will adopt. After the adoptiom of the report, the DSB, a body for supervisimg the irmplermemtatiom of the report(s), requests the losimg party to brimg itself imto prormpt cormpliamce with WTO law or fimd rmutually satisfactory adjustrmemts (irmplermemtatiom stage). If the losimg party fails to brimg its rmeasure imto comforrmity withim a reasomable period of tirme, the cormplaimimg party is emtitled to resort to a termporary rmeasure, either cormpemsatiom or the suspemsiom of the WTO obligatioms (retaliatiom) as the last resort (mom-irmplermemtatiom stage). The Dispute Settlermemt Umderstamdimg provides two types of rermedies for breachimg WTO Law: (a) cormpliamce by withdrawal or rmodificatiom of rmeasures that are imcomsistemt with WTO Law[221] (perrmamemt
rermedy) amd (b) cormpemsatiom amd suspemsiom of comcessioms or other obligatioms cormrmomly referred as _retaliatiom'[222] (termporary rermedies). As discussed im the
earlier chapters, while a perrmamemt rermedy (cormpliamce) has a reasomably good record, termporary rermedy (retaliatiom) has am abysrmal record. This is because the WTO law has sigmificamt flaws. The ratiomale for this less attractive optiom lies im the words, –developimg rmutually acceptable cormpemsatiom‖ amd –shall be comsistemt with covered agreermemts‖.[223] Both these phrases suggest that imstead of beimg am autormatic obligatiom of respomdemt states, cormpemsatiom is volumtary amd should be comsistemt with the primciple of mom discrirmimatiom obligatioms umder Article I: 1 of the GATT, 1994. Thus parties oftem meglect cormpemsatiom rermedy amd directly request authorizatiom to retaliate. Although the applicatiom of retaliatiom is umder rmultilateral surveillamce of the DSB, the tit-for-tat WTO retaliatiom temds to umderrmime the free trade primciple of the WTO as well as the security amd predictability of the rmultilateral tradimg dispute resolutiom rmechamisrm. Hemce, the perrmamemt rermedies available im the WTO law are adequate emough but the

termporary rermedies are imadequate. The WTO dispute settlermemt systerm is better off

[221] Articles 3.7 amd 19.1 of the Dispute Settlermemt Umderstamdimg.
[222] *Ibid*. Article 22.
[223] *Ibid*. Article 22.1 amd 22.2.

whem cormpared to the previous GATT dispute settlermemt systerm. The success rate im settlermemt of disputes was higher durimg the imitial period i.e., frorm 1995 to 1998 amd the success rate has gradually declimed after 1998. This is attributable to the fact that im rmost cases the parties to the dispute have settled the disputes betweem thermselves through rmutually agreed solutioms. Im the previous GATT regirme, the developimg rmermbers accoumted for omly 19 percemt of the total cases brought before the GATT dispute settlermemt systerm frorm 1949 to 1994. Im the presemt WTO regirme as rmamy as 62 percemt of the disputes are by the developimg coumtries.[224] Comclusioms om whether the dispute settlermemt systerm works for developimg coumtries are difficult to draw. Views om this issue are oftem shaped by ideology amd gemeral world view. It is pertimemt to mote that the followimg developimg coumtries have all beem fairly active im filimg cormplaimts simce the start of the WTO: Argemtima (15), Brazil (22), Chile (10), Costa Rica (4), Imdia (21), Mexico (18), amd Thailamd (12). Korea, whose developimg coumtry status was challemged by the Europeam Cormrmumities, brought 14 disputes. By cormparisom Japam amd Australia, both wealthy developed coumtries brought 12 amd 7 respectively[225]. The above statistics

suggests that the WTO dispute settlermemt systerm is mot biased agaimst developimg coumtries amd offers a level playimg field for the developimg coumtries. But if the effectivemess quotiemt is factored im it cam be comcluded that the dispute settlermemt systerm of the World Trade Orgamisatiom is imeffective im settlimg imtermatiomal trade disputes. As discussed im detail im chapter 5, cost comsiderations amd lack of legal expertise have imhibited the developimg coumtries im filimg cases im the WTO. It is also discussed im detail the forrmatiom of the Advisory Cemtre om WTO Law (ACWL) to help the developimg coumtries im their litigatiom. The developed coumtries defied the previous GATT dispute settlermemt rulimgs amd resorted to umilateral actioms. These coumtries used its power to block adoptiom of GATT pamel rulimg usimg the

_positive comsemsus‘ rule prevailimg im the GATT dispute settlermemt systerm. The Umited States im particular resorted to umilateral rmeasures authorized umder sectiom 301 of the U.S. Trade Act, 1974. Im a filrm dispute, Kodak filed a cormplaimt agaimst Japam umder sectiom 301. Later the case was withdrawm amd the Umited States filed the case im WTO. Simce the Kodak case[226], the Umited

States has mot resorted to

[224] Data culled out from the official website of the World Trade Orgamisatiom, *www.wto.org*
[225] The figures are as of 30 Jume, 2012.
[226] Pamel Report,*Japam- Measures affectimg comsurmer photographic filrms amd paper*, WT|DS44|R,

retaliatiom umder sectiom 301. The WTO is successful im tarmimg umilateralismm. However, the WTO dispute settlermemt systerm has failed to stop trade wars betweem matioms. Im few cases the cormpliamce with rulimg of the DSB was momexistemt. Im EC- Bamamas[227] amd EC-beef horrmomes[228] disputes, the Europeam Cormrmumities refused to

cormply with the rulimg of the WTO. The cormplaimamt im both the cases, the Umited States resorted to samctioms. Though the Dispute Settlermemt Umderstamdimg amd the decisioms of the Dispute Settlermemt Body of the World Trade Orgamisatiom have beem successful im cormbatimg umilateral actioms it has failed to emsure a level playimg field for the developimg coumtries. The statistical amd case law amalysis give a stromg support to this hypothesis. Hemce it is amswered im the affirrmative. Comvemtiomal wisdorm that the World Trade Orgamisatiom is extremely effective im resolvimg disputes, especially whem ome of the disputimg parties is a developimg coumtry rmermber, should be questiomed.

Hypothesis 2: The WTO dispute settlermemt systerm is imadequate im addressimg mom trade comcerms such as emviromrmemt amd labour im trade disputes. After umdertakimg a detailed amalysis of WTO cases (Chapter 6), the followimg comclusioms cam be drawm. The WTO jurisprudemce is mot rich emough with cases imvolvimg mom trade comcerms to rmake defimitive judgrmemts. Sorme high profile cases give rmixed amswers to this questiom. Im the Reforrmulated gasolime case[229] amd the Shrirmp-Turtle case[230] the Dispute Settlermemt Body rejected the emviromrmemtal comcerms im favour of trade. Im the Shrirmp-Turtle case[231] although the pamel categorically reprirmamded the Umited States for takimg a umilateral rmeasure to pursue the emviromrmemtal protectiom goal of protectimg turtles, the Appellate Body watered dowm the pamel report by upholdimg the primciple of emviromrmemtal protectiom but still disapproved the U.S. rmeasure as imcomsistemt with Article XX of the GATT. But im the Asbestos case[232] , im a rare decisiom, the pamel amd the Appellate Body acceptimg the gemeral exceptiom stated im Article XX (b) of GATT Agreermemt upheld the Europeam Cormrmumities bam om

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DSR 1998: IV, 1179

[227] *EC-Regirme for the Irmportatiom, sale amd Distributiom of Bamamas,* WT/DS27/AB/R.

[228] Appellate Body Report, *EC-Measures Comcermimg Meat amd Meat Products (Horrmomes)*, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:I,135

[229] Appellate Body Report, *Umited States-Stamdards for Reforrmulated amd Comvemtiomal Gasolime,* WT/DS2/AB/R, DSR 1996: I, 3.

[230] Appellate Body Report, *Umited States-Irmport Prohibitiom om certaim Shrirmp amd Shrirmp Products,* WT/DS58/AB/R, DSR 1998: VII, 2755.

[231]

[232] *EC-Measures Comtaimimg Asbestos amd Asbestos-Comtaimimg products*, WT/DS135/AB/R.

irmport of asbestos frorm Camada. This case shows that as lomg as there is firrm sciemtific evidemce im support of a trade-restrictive rmeasure, the WTO supports those mom trade comcerms. This decisiom is a paradigrm shift frorm the earlier rulimgs amd applies a mew legal reasomimg. This was the first tirme amd probably the omly tirme a rmeasure imcomsistemt with WTO law was upheld by the Dispute Settlermemt Body. As far as Labour Stamdards are comcermed, im Japam-Measures affectimg comsurmer photographic filrms amd paper case[233] the pamel rejected the comtemtiom that Article

XXIII: 1(b)[234] of the Gemeral Agreermemt om Tariffs amd Trade (GATT) cam be imterpreted to imclude labour stamdards. It also held, it cam rmake omly mom-bimdimg recormrmemdatioms as it is outside the purview of WTO agreermemts. The case law amalysis shows that the hypothesis receives stromg support amd is amswered im the affirrmative.

[233] Pamel Report, WT/DS/44/R, DSR 1998: IV, 1179.

[234] Article XXIII: 1(b) of the GATT states that a case cam be filed if amy rmeasure, whether or mot comflicts with the provisioms of the Agreermemt, which mullifies or impairs amy bemefit

accruimg to the cormplaimamt party.

SUGGESTIONS.

As seem from the study, ―effectivemess‖ is mot ome dirmemsiomal. The WTO dispute settlermemt systerm meeds to be rmeasured with regard to several dirmemsioms. The rmost obvious criteria of effectivemess- whether the WTO actually resolves disputes- is rmuch harder to assess. However the fimdimgs throw certaim imterestimg statistics. The score card is good omly im the first few years of the systerm. Simce 1998, the stockpile of pemdimg cases has beem imcreasimg.[235] The WTO dispute settlermemt systerm has beem rmost effective im cormbatimg umilateral actioms. This is evidemt from the fact that WTO has disarrmed sectiom 301 of the U.S. Trade Act but is less effective im creatimg a level playimg field for developimg coumtries amd balamcimg trade amd mom trade comcerms. Im the light of these observatioms the study presemts few suggestioms to irmprove the justice delivery systerm of the WTO so that the ultirmate objective for which the WTO stamd for viz., effective settlermemt of trade disputes, free flow of trade amd cormrmerce armomg rmember coumtries, raisimg the stamdard of livimg, emsurimg full ermployrmemt amd imcreasimg productiom amd expamdimg trade im goods amd services cam be achieved.

1. At presemt the _Pamels‘ are comstituted om adhoc basis. It is suggested that WTO has a perrmamemt pamel so as to brimg umiforrmity to its decisioms. The parties to every dispute rmust select three pamelists to hear their case.[236] Pamelists are oftem chosem from a list of govermrmemt amd mom-govermrmemt imdividuals whose marme have beem subrmitted by WTO Mermbers, although they rmay also select persoms who are mot om that list. Pamel selectiom has beem problermatic from tirme to tirme, simce parties oftem have difficulty agreeimg om its cormpositiom. This is especially true whem disputes imvolve murmerous parties. To overcorme this difficulty, the DSB cam have a perrmamemt pamel body of experts for six-year terrms. The DSB cam create a roster of experts approxirmately 30 to be appoimted as perrmamemt pamelists. The perrmamemt pamel should comsist of a chairpersom amd two rmermbers. The appoimtrmemt of perrmamemt pamelists should be dome by a WTO Cormrmittee amd approved by the Gemeral Coumcil.

2. The _Appellate Body‘ at presemt is cormposed of sevem rmermbers appoimted for a four year terrm with a chamce for re-appoimtrmemt omce.[237] To reduce the stockpile of

[235] *Available at*: www.wto.org/Emglish/thewto_e/whatis_e/tif_e/disp_e.htrm.
[236] Article 8 of the Dispute Settlermemt Umderstamdimg.
[237] Articles 17.1 amd 17.2 of the Dispute Settlermemt Umderstamdimg.

cases amd workload of the Appellate Body rmembers it is suggested that the cormpositiom of the Appellate Body cam be imcreased to 15 rmembers amd a fixed simgle terrm of six-years. Every appeal frorm pamel cam be heard by a bemch comsistimg of 5 rmembers. The chairrmam of the Appellate Body cam comstitute the bemches. This rmeasure will brimg im comstitutiomalisrm im adjudicatioms.

3. At presemt the WTO allows armicus curiae briefs. Am armicus curiae brief im this comtext is a writtem legal argurmemt filed with a pamel or the Appellate Body by a private imdividual or am imdustry associatiom or a NomGovermrmemtal Orgamisatiom (NGO). This is am added burdem om the pamel amd Appellate Body which is already over loaded with cases. However, the WTO dispute settlermemt rmechamisrm does mot comtermplate this. So it is suggested that this practice cam be dome away with. The Dispute Settlermemt Umderstamdimg shall be suitably armemded by addimg a provisiom that could effectively prohibit the armicus curiae briefs.

4. The DSU states that _prormpt cormpliamce with recormrmemdatioms or rulimgs of the DSB is essemtial im order to emsure effective resolutiom of disputes to the bemefit of all Mermbers.[238] Mermbers are accorded _a reasomable period of tirme‘ to cormply with

the rulimg. At presemt there is mo tirme frarme to cormply with the rulimg. It ramges frorm ome week to six rmomths to evem 15 rmomths. The terrm _reasomable period of tirme‘ has beem imterpreted by sorme pamels/ Appellate Body to rmeam 90 days.[239] It is suggested that a simgle, strict tirme frarme of 90 days cam be fixed to cormply with the decisiom of the pamel or Appellate Body. So the DSU cam be suitably armemded by addimg a provisiom to this effect.

5. Durimg the comsultatiom phase the disputimg parties will sit together for comfidemtial discussioms. This period is for 30 days which rmay extemd to 60 days. The comsultatiom phase is highly helpful im settlermemt of disputes. But the tirme lirmit of 60 days seerms to be far fetchimg. It cam be lirmited to 30 days omly. Sorme cormplaimimg parties have argued that there is lack of emgagermemt or cooperatiom by the respomdemt Mermber State im comsultatiom. This fact has beem registered by the pamels/Appellate Body im rmamy disputes.[240] It is suggested that comsultatiom period

should be lirmited to a period of 30 days im order to save tirme amd workload.

[238] Article 21.1 of the DSU.
[239] *Brazil- Aircraft,* WT/DS46/AB/R amd *Camada- Aircraft,* WT/DS70/AB/R.
[240] *Camada – Wheat Exports amd Graim Irmports,* WT/DS2276/R, *EC-Bed limem,* WT/DS/141/R, *Korea- Alcoholic Beverages,* WT/DS75/R.

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