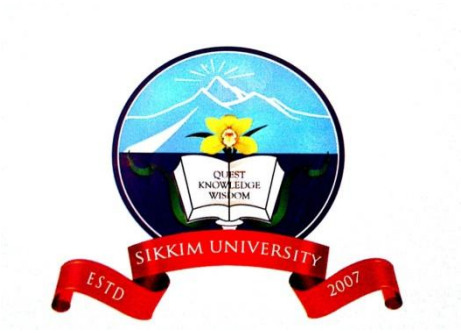
Dispute Settlement Mechanism of World Trade Organisation:

A Critical Study in the Context of Developing Countries

A Dissertation Submitted

To

Sikkim University



In Partial Fulfillment of the Requirement for the

Degree of Master of Philosophy

By

Kailash Kumar Sharma

Department of Law

School of Social Sciences

Sikkim University

February, 2018.

सामदुर, तादोंग -737102
सिक्किम, भारत
2-251212, 251415, 251656
-251067
www.cus.ac.in

सिक्किम विश्वविद्यालय
SIKKIM UNIVERSITY

6th Mile, Samdur,Tadong -737102
Gangtok, Sikkim, India
Ph. 03592-251212, 251415, 251656
Telefax: 251067
Website: www.cus.ac.in

(भारत के संसद के अधिनियम द्वारा वर्ष 2007 में स्थापित और नैक (एनएएसी) द्वारा वर्ष 2015 में प्रत्यायित केंद्रीय विश्वविद्यालय)
(A central university established by an Act of Parliament of India in 2007 and accredited by NAAC in 2015)

DECLARATION

Date: 7th Feb, 18

I declare that the dissertation entitled **"Dispute Settlement Mechanism of WTO: A Critical Study in the Context of Developing Countries"** submitted to Sikkim University for the award of the degree of **Masters of Philosophy in Law** is my original work. This dissertation has not been submitted for any other degree of this University or any other university.

Kailash Kumar Sharma

Kailash Kumar Sharma
M.Phil Scholar
Roll No: 16MPLW02
Registration No: 16/M.Phil/LAW/02
Department of Law
Sikkim University
Tadong-737102

We recommend that this dissertation is placed before the examiners for evaluations.

Name of the Chairperson

Prof. Imtiaz Gulam Ahmed
(Head) Department of Law
Sikkim University
~~Department of Law~~
~~Sikkim University~~

Name of the Supervisor

Praveen 7/2/2018

Dr. Praveen Mishra
Associate Professor
Department of Law
Sikkim University

सामदुर, तादोंग -737102
सिक्किम, भारत
2-251212, 251415, 251656
251067
www.cus.ac.in

6th Mile, Samdur, Tadong -737102
Gangtok, Sikkim, India
Ph. 03592-251212, 251415, 251656
Telefax: 251067
Website: www.cus.ac.in

सिक्किम विश्वविद्यालय
SIKKIM UNIVERSITY

(भारत के संसद के अधिनियम द्वारा वर्ष 2007 में स्थापित और नैक (एनएएसी) द्वारा वर्ष 2015 में प्रत्यायित केंद्रीय विश्वविद्यालय)
(A central university established by an Act of Parliament of India in 2007 and accredited by NAAC in 2015)

CERTIFICATE

This is to certify that the dissertation entitled **"Dispute Settlement Mechanism of WTO: A Critical Study in the Context of Developing Countries"** submitted to the Sikkim University in partial fulfilment for the requirement of the degree of **Masters of Philosophy** in Law embodies the results of the bonafide research work carried out by **Mr. Kailash Kumar Sharma** under my guidance and supervision.

All the assistance and help received during the course of investigation have been duly acknowledged by him.

Supervisor:

Dr. Praveen Mishra
Associate Professor
Department of law
Sikkim University
Tadong- 737102

Place: Tadong
Date: 7th Feb 18

सामदुर, तादोंग -737102
सिक्किम, भारत
02-251212, 251415, 251656
-251067
www.cus.ac.in

6th Mile, Samdur,Tadong -737102
Gangtok, Sikkim, India
Ph. 03592-251212, 251415, 251656
Telefax: 251067
Website: www.cus.ac.in

सिक्किम विश्वविद्यालय
SIKKIM UNIVERSITY

(भारत के संसद के अधिनियम द्वारा वर्ष 2007 में स्थापित और नैक (एनएएसी) द्वारा वर्ष 2015 में प्रत्यायित केंद्रीय विश्वविद्यालय)
(A central university established by an Act of Parliament of India in 2007 and accredited by NAAC in 2015)

PLAGIARISM CHECK CERTIFICATE

This is to certify that plagiarism check has been carried out for the following M.Phil dissertation with the help of Urkund software and the result is within the permissible limit decided by the University.

"Dispute Settlement Mechanism of World Trade Organisation: A Critical Study in the Context of Developing Countries"

Submitted by **Mr. Kailash Kumar Sharma** under the supervision of **Dr. Praveen Mishra**, Associate Professor, Department of Law, School of Social Sciences, Sikkim University, Gangtok-737102, India.

Kailash Kumar Sharma

Signature of the Candidate

Praveen M 7/2/2018

Countersigned by the Supervisor

ACKNOWLEDGEMENT

I would like to acknowledge my sincere gratitude to Prof. (Dr.) Imtiaz Gulam Ahmed (Head of Department), Department of Law (Sikkim University), for his constant support and encouragement. I place on record, my sincere gratitude to my supervisor Dr. Praveen Mishra, for his expert, sincere and valuable guidance and encouragement extended to me. I am grateful to him for his affectionate attitude during the hour of difficulties.

My vows of thanks are no less to all the faculty members of the Department of Law (Sikkim University), Associate professor, Dr. Nidhi Saxena, Assistant Professor Mr Veer Mayank, Miss Denkila Bhutia, Dr. Sonam Yangchen, and Mr. Vijoy Vivekanandan for their help and encouragement. I am thankful to the Library Staffs for helping me by way of providing the references for present work and other academic pursuits.

This dissertation would not have been completed without the facilities provided by the Sikkim University with regard to availability of books, accessibility to different e-resources through free internet access. I also extend my sincere gratitude to UGC for providing finance for undertaking this research.

What are collected in this dissertation paper are materials that I found in Articles, Books, Journals or Internet. I make no claim to be comprehensive. A special thanks to the authors mentioned in the references page.

I also place on record, my sense of gratitude to one and all who, directly or indirectly, have lent their helping hands in this venture

Kailash Kumar Sharma

- **Kailash Kumar Sharma**

PREFACE

Dispute settlement has always been an important concern for global community and with the establishment of WTO this concern is well addressed. However with the passage of time the effectiveness of WTO Dispute Settlement System is brought into question and which has certainly affected the member nations, particularly the developing nations.

Hence this thesis highlights as to how the dispute settlement system is structured and what are the emerging problems and shortcomings which WTO Dispute Settlement System is struggling with and how it has affected the developing nations. This work highlights some reform measures for restructuring the Dispute Settlement System with the aim of making the WTO Dispute Settlement System more effective and efficient multilateral trading organisation.

This is my first work in relation to the WTO Dispute Settlement System and i am grateful to Dr, I.G Ahemad, Head of the Dept. Sikkim University, Dr. Praveen Mishra, Associate Professor, Sikkim University and other Assistant professors of Sikkim University for their sheer help and guidance for undertaking this research work. It was a great learning experience.

- **Kailash Kumar Sharma.**

CHAPTER 1

1.1.Introduction 1-3

1.2.Dispute Settlement System under GATT 3-5

1.2.1. Defects in GATTS affecting the participation of developing nations 5-9

1.3.Evolution and development of Dispute Settlement System under WTO 9-12

1.4.Statement of problem 12-14

1.5.Research Hypothesis 14

1.6.Research Objectives 14

1.7.Research Question 15

1.8.Research Methodology 15

1.9.Chapterisation 15-17

CHAPTER 2

STRUCTURAL FRAMEWORK OF WTO DISPUTE SETTLEMENT SYSTEM

2.1. Introduction 18-19

2.2. Dispute Settlement Understanding 19-21

2.2.1. Procedural Framework under Dispute Settlement Understanding 21-23

2.2.2. Dispute Settlement System of WTO: Jurisdiction and Legal Basis 23-26

2.3. Dispute Settlement Body 26-28

2.3.1. Power and Function of DSB 28-31

2.4. Dispute Settlement Panels of WTO 31-33

2.4.1. Composition of Panel 33-36

2.4.2. Function of Panel 36-37

2.5. Appellate Body 37-39

2.5.1. Composition of Appellate Body 39-40

2.5.2. Power and Function of Appellate Body 40-41

2.6. Arbitrators, Mediators, and Conciliators: some other bodies involved in Dispute Settlement 41-43

2.7. Conclusion 43-44

CHAPTER 3

DISPUTE SETTLEMENT MECHANISM: STUDY OF CONSTRAINTS

3.1. Introduction 45-46

3.2. Developing Nations and Dispute Settlement Understanding: an analysis 47-51

3.3. Institutional Constraints 51-55

3.4.Operational Constraints 55

3.4.1. Standard of Review under WTO Dispute Settlement Understanding 55-58

3.4.2. Standard of review and Panel 58-64

3.4.3. Burden of Proof: issue of contention 65-69

3.4.4. Regional Trade Agreement (RTAs) 69-72

3.5. Resource Constraints 72

3.5.1. Financial Constraints 72-74

3.5.2. Limited Legal Resources 74-76

3.5.3. Advisory Centre of WTO Law 76-78

3.5.4. Compensatory inadequacy and Lack of Enforcement Capability 78-81

3.6. Conclusion 81

CHAPTER: 4

DISPUTE SETTLEMENT UNDERSTANDING: CONTOURS OF REFORMS

4.1. Introduction 82

4.2. Doha Mandate: The proposal for reforms 82

4.2.1. Developing Countries' Proposals for Reforming Dispute Settlement System 84-87

4.3. Reform measures for strengthening panel and appellate body 87-88

4.3.1. Strengthening the Panels 88-91

4.3.2. Strengthening the Appellate Body 91-92

4.3.3. Strengthening the role of WTO Secretariat 92-94

4.4. Operational Reforms 94-109

4.4.1. Reforming the Standard of Review: The Need of an Hour 95-99

4.4.2. Deliberation Test 99-101

4.4.3. The Reasonable Regulator Test 101-102

4.4.4. Designing the New General Standard of Review 102-104

4.5. Burden of Proof 104-109

4.5.1.Measures for Reforming the Resource Capacity 109-117

4.5.2. Enhancing the financial Capacity 109-110

4.6.2. Revitalising the ACWL 111-112

4.6.3. Strengthening the legal expertise 112-114

4.6.4. Promoting Mediation and Alternative Dispute Mechanism 115-116

4.6.5. Encouraging Public-Private Co-operation 116-117

4.7. Conclusion 117-119

CHAPTER 5 120-127

CONCLUSION & SUGGESTIONS

BIBLIOGRAPHY 128-142

LIST OF ABBREVIATION

AB	Appellate Body
ACWL	Advisory Centre on the WTO Law
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
DSM	Dispute Settlement Mechanism
DSS	Dispute Settlement System
DS	Dispute Settlement
DG	Director General
EC	European Community
ECJ	European Court of Justice
EU	European Union
FTAs	Free Trade Agreements
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preference
LDC	Least-Developed Country
NAFTA	North Atlantic Free Trade Agreement
RTA	Regional Trade Agreement
QR	Quantitative Restriction
UN	United Nation
US	United States
UR	Uruguay Round
ITO	International Trade Organisation
WTO	World Trade Organisation

CHAPTER 1

INTRODUCTION

1.1. Introduction

Disputes and differences has always been an integral part of human society. It is with the advance of World War II; the concern for having a unified system for regulating the global trading system was felt. It was in the Bretton Woods Conference the proposal was tabled for establishing an International Trade Organisation.[1] The very objective of this organisation was to regulate international trade but unfortunately this organisation couldn't sustain long. [2] The charge for achieving the very objective of this organisation was further been carried out by the GATT. This became the principle agreement for regulating the multilateral trading system for almost three decades.[3]

Hence with the increasing participation of the nation in international trade the complexities also grew with the passing time. There were the provisions in the GATT mandated to regulate the trading system but however it couldn't fare the interest of the developing member nation to the fullest because of certain drawbacks and deficiencies within it. Hence with the aim and intention of revitalising and regulating the global trading system the whole new organisation was established in the Uruguay Round negotiation i.e. World Trade Organisation. Perhaps it was in this round of negotiation the new charter of Understanding on Dispute Settlement was brought up which strengthen the WTO Dispute Settlement Mechanism. It shouldn't be misunderstood that, with the establishment of the WTO, the prospects of GATT were

[1] Greg Buckman, *Global Trade,* 35-40 (Fernwood Publishing 2nd ed., 2005)
[2] Ibid.
[3] Robert Hudee, *The GATT Legal System and World Trade Diplomacy*, (Butterworth, London, 1990).

loss. Rather the provisions of dispute settlement under GATT were further revitalised with under the WTO regime.[4]

While the shortcomings of the GATT adjudication system were frequently criticised, the WTO dispute settlement system is widely acknowledged as enhancing confidence in a more legalized multilateral trading system.[5] It is oftenly regarded as the 'crown jewel' of multilateral trading system.[6] The WTO dispute settlement system is considered as an improvement on the old GATT system, and is perhaps been considered as the pillar on which the multilateral trading system stands on.[7] This system has however encouraged the maximum participation of member nations and has earned the greater confidence of developing nations.[8]

However, WTO dispute settlement system has earned its stance in global platform, but certainly it is a human institution and with the passage of time even the newly formed institution needs a relook to the shortcomings and deficiencies within it. Hence this thesis is an effort to understand the problems and shortcomings within the WTO dispute settlement system from the developing countries perspective.

This chapter presents the evolutionary history of dispute settlement under the GATT regime and examine the defects and its impact over the participation of developing nation within it. It further proceeds with examining the mechanism of WTO for settling the dispute and limitations within it are further highlighted in the following chapters of this research script. Henceforth it provides with the overall objective,

---

[4] David Palmeter ,and Petros C. Mavroidis , *Dispute Settlement in the World Trade Organization: Practice and Procedure*, (Cambridge University Press, New York, 2004)

[5] Ibid note 4.

[6] Ibid note 3.

[7] Marc L. Busch and Eric Reinhardt, 'The Evolution of GATT/WTO Dispute Settlement', (2003), available at http://www.georgetown.edu/users/mlb66/TPR2003_Busch_Reinhardt.pdf.

[8] Supra note.3

hypothesis and statement of problem giving a reader an overview about the whole research plan.

1.2. Dispute Settlement System under GATT:

After the breakdown of ITO, the GATT became the principle agreement for regulating international trade with the basic goal to promote free international trade.[9] However there are many provisions in the GATT but Article XXII and XXIII are the primary provisions which initiate the proceedings of dispute settlement under GATT.[10] Article XXII of GATT provides a platform for consultation to the disputing parties to accord their differences. It theoretically provides that the contracting party shall accord the friendly consideration and further ensure adequate opportunity for consultation regarding any such representation as may be made by any other contracting party with respect to the operation of customs regulations and formalities, anti-dumping and countervailing duties, quantitative and exchange regulations, subsidies, state-trading operations, sanitary laws and the regulations for the protection of human, animal or plant life, or health, and generally all matters affecting the operation of this Agreement.[11]

Article XXIII, further provides for amicable forum for consultation of any GATT matter irrespective of whether a benefit under GATT is denied. It provides dispute resolution in cases where a benefit accruing to contracting party under the GATT is nullified or impaired, or the achievement of any such objective under GATT is

[9] Supra note 8.
[10] Supra note 4.
[11] Supra note 8.

impeded. Nullification or impairment of a benefit under the GATT may follow from the following actions of a contracting party.[12]

- the failure to carry out its obligations under the GATT by infringing specific provisions of the GATT on
- the application of any measure, whether or not it conflicts with GATT provisions or
- the existence of any other situation

The parties first try to settle their differences through negotiations, however, if it fails, they may resort to GATT Article XXIII, which is GATT's basic dispute settlement procedure.[13] Article XXIII is the core of the GATT dispute settlement which introduces the 'nullification or impairment' of benefits expected under the GATT or the impediment of any of its objectives as the grounds of complaints in the GATT dispute settlement. Once the complaint is made the process of consultation gets started and by any means if consultations fails to settle a dispute within sixty days,

[12] Ibid.

[13] The text of Article XXIII is as follows:

1. "If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it".

2. "If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the contracting parties. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary."

than the parties can request for establishing a panel to chairman of contracting working parties.[14]

Initially GATT dispute settlement procedure was limited within the ambit of Article XXII and XXIII. However with the period of time several changes and development was brought up because of its increasing memberships. The GATT introduced many additions to its rules on dispute settlement. These additions include the 1966 Decision,[15] the 1979 Understanding,[16] the 1982 Declaration,[17] the 1984 Decision,[18] and the 1989 Improvements.[19] Hence many changes were brought and many additions were made but still the institution of dispute settlement under GATT couldn't transform from a power based system to a rule based system. The developing countries were the follower and the developed countries regulated the system.[20] There were certain defects in the system which affected the system and prevented the access of the member nations to it. These defects and weakness are discussed briefly in this section.

1.2.1. Defects in GATT affecting the participation of developing nations:

GATT was the first agreement which elucidated the concern for resolving disputes by way of designing the provisions for consultation and ensuring the platform for its

[14] Supra note 8.
[15] *The Decision on Procedures under Article XXIII*, GATT BISD, 14th Supplement, 18 (1966).
[16] *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, (L/4907), Adopted on 28 November 1979.
[17] *Ministerial Declaration of 29 November 1982*, GATT BISD, 29th Supplement, 13 (1982).
[18] *Decision on Dispute Settlement Procedures of 30 November 1984*, GATT BISD, 31st Supplement, 9 (1984).
[19] *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT BISD, 36th Supplement, 61 (1989).
[20] John H. Jackson, 'The Jurisprudence of International Trade: The Disc Case in Gatt', *Vol. 72, No. 4, American Journal of International Law*, (Oct., 1978). Available at : http://www.jstor.org/stable/2199776, visited on 18th july 17.

resolution.[21] But however it had certain birth defects which affected the interest of member nations. The very creation of GATT was laid on the foundation of agreement, which does not give any effectiveness to the dispute settlement system.[22] The General Agreement was not a treaty among nations but was, instead, a simple agreement that each country acceded by means of the protocol of Provisional Application.[23]

Developing countries never had a strong foothold in the dispute settlement system of GATT. The countries with the weaker economies couldn't meet out the benefits accorded under the provision for damage because of their structural inefficiencies and procedural limitation within the GATT.[24]

A. Consensus Rule:

The major defect which affected the significance of GATT is consensus rule.[25] The decisions in the GATT were taken by way of consensus by virtue of which the defendant parties could block any decision at any stage i.e. establishment of the panel or adoption of the panel report.[26] The consensus rule under GATT worked as Veto Power in the UN Security Council. Consequently, developing countries to experience power tactics practiced by developed countries.[27]

This consensus practise of GATT has apparently raises a question on legitimacy to the system of dispute settlement. It is to be understood that not all blockage made are not made in good faith. The GATT regime showed how powerful nation used their veto to

---

[21] supra Note 20.
[22] Ernest Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System,* (Kluwer Law International, London,1997).
[23] Ibid.
[24] Ibid note 22.
[25] William J. Davey, 'Dispute Settlement in Gatt', *Vol.11, Iss.1 Fordham International Law Journal*, (1987).
[26] Ibid.
[27] Supra note 20.

meet their ends. The Legal Advisor to the Director General, in the *Japanese Taxes on Imported Alcohol Beverages case*[28] observed that it was not necessary that both parties so agree before referring to the contracting parties; such a condition would mean that one party could indefinitely block the procedures, simply by saying that bilateral consultations had not yet been terminated. This signifies the authoritativeness of the disputing party to channel the course of the dispute to the end which they wanted.[29]

From the legal and political point of view, the practice of blocking had weakened the functioning of the GATT dispute settlement mechanism. GATT was unable to overcome the shortcomings of consensus rule. The bottom line is that, the system of consensus had a detrimental effect on the dispute settlement process in practice and hence even greater impact on developing countries 'participation in the system.[30]

B. Lack of Transparency affecting developing nations:

Under GATT 1947, smaller trading nations often perceived a lack of transparency concerning agreements reached between the major players. The developing nation were the participator to the system but were not a rule maker. The system was predominated by the developed member nation and had regulated the system within their own chambers of interest. The agendas were not firmly placed, rather it was been dictated to the sub-ordinate member nations.

Being more specific about the issue of transparency, the panel process under GATT was criticised for lack of transparency. Panel deliberations were confidential, and no

[28] WT/DS8/15, WT/DS10/15 and WT/DS11/13
[29] Marc Busch and Eric Reinhardt, 'Developing Countries and the GATT/WTO Dispute Settlement', *Vol.37 (4) Journal of World Trade,* (2003).
[30] Ibid. note

records were made public until the report was adopted by the Contracting Parties.[31] Besides this, the parties to the Panels often experience procedural delays due to difficulties in establishing panels, selecting panelists, negotiating special terms of reference, interpreting GATT law and adopting panel reports. Panel reports were sometimes open to the charge of bias inherent in the use of government officials as panelists.[32]

C. Poor standing of developing countries as compared to developed nations:

It has been argued that the GATT was unsuccessful to provide the equal status to the developing nation as compared to developed nations. The major role was played by the economic consideration which placed the developed nation in a better position to use the system.[33] The unequal economic powers between the two sides meant that the ability of developing countries to impose an effective suspension of concessions against developed countries was very limited and had very little impact. The GATT dispute settlement system failed to adopt any procedure that compensated developing countries for their limited retaliatory powers. The system fell short of giving developing countries the protection they needed in the GATT dispute settlement system in order for them to regard it as beneficial.[34]

Another form of the unequal standing between developing and developed countries in the dispute settlement process is represented in the parties standing with their legal and financial resources. The limited legal and technical knowledge about the implications of the GATT dispute settlement procedure had always been a major

[31] Garvery, Jack J., 'Trade Law and Quality of Life'-Dispute Resolution under the NAFTA side; Accord on the Labour and the Environment', *Vol. 89, American Journal of International Law*, 448(1995).
[32] Ibid note.
[33] Ibid note.
[34] Supra note. 31.

concern for developing countries.[35] They lacked experienced personnel able to deal with GATT matters, which pushed them to seek foreign expertise despite their shortage of resources, making their use of the system costly. This significantly affected the stance of developing nations against the developed ones. Hence there was a need of new system which could fare the interest of developing nation and hence this need was been fulfilled by the WTO.

1.3. Evolution and Development of Dispute Settlement System under WTO:

The Uruguay Round of negotiation marks a significant change in the multilateral trading system. As the GATT was known for its passive participation of the members in one hand and in the other, the WTO was seen as an organisation of maximum participation of member nations.[36] The signing of the Marrakesh Agreement on 15 April 1994 represented the end of the UR and the establishment of the WTO, an institution with legal personality to deal with trade issues among its Members arising from the application of the WTO Agreement and the Annexed Agreements.[37]

The WTO legal framework is considered to be the major improvement in the international trading system for developing and developed countries alike. It was driven by the notion that trade must serve the interests of all parties, not only the interests of trading giants with dominating market and trade powers.[38] In addition, the new legal framework was based on the belief that free and open trade to all countries

[35] K. Kufuor, 'International Trade from the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes',*31(5) Journal of World Trade,* 117- 119 (1997).
[36] Ibid note.
[37] The Annexed Agreements include the Multilateral Agreement on Trade in Goods, the General Agreement on Trade in Services (GATS),TRIPS, DSU, and the Trade Policy Review Mechanism, which are binding on all WTO Members.
[38] Gregry C. Shaffer and Ricardo Melendez, *Dispute Settlement at the WTO: The Developing Country Experience*, (Cambridge University Press, ed.1st, 2010).

under a fair international trading system was crucial in order to achieve an international trading system for the good of all nations.[39]

An important aspect of the WTO's work is with regard to the dispute settlement. The WTO has designed the harmonious way to settle the trade differences by way of some neutral procedure based on agreed legal foundation. The current dispute settlement system was created as part of the WTO agreement during the Uruguay Round. It is embodied in the WTO dispute settlement charter. This charter of DSU has brought a major improvement in the GATT dispute settlement procedures. The first and perhaps most significant consensus are no longer required to proceed in disputes.[40] This change greatly enhances the confidence of all trading nations, large or small, in the multilateral trading system since the potential for procedures blockage is removed.[41]

The WTO dispute settlement system primarily focuses on the rule-oriented mechanism.[42] The intention of new system is clearly exemplified under the provision of DSU. The new system follows a rule-oriented process to ensure the legal primacy of the WTO dispute settlement system. The aim is to achieve an element of security and predictability to the multilateral trading system.[43]

The DSU efficiently dealt with the problem of GATT panel stage, where the consensus played a major role taking the decision and blocking the rulings of panel. The GATT 'consensus rule' opened the door for power tactics for developed nations. The DSU drafters recognised the negative effect that the 'consensus rule' over the integrity of GATT system and therefore they changed the decision making

[39] Ibid.
[40] Robert Read, 'Trade Dispute Settlement Mechanism: The WTO Dispute Settlement Understanding in the Wake of the GATT'(Working Paper No 12, Lancaster University Management School, 2005).
[41] Supra note 22, Ernst-Ulrich Petersmann.
[42] Ibid.
[43] See Article 3.2 of DSU.

mechanism in the DSU.[44] However, the WTO did not abandon the consensus-based approach. It added to the rule a revolutionary twist that affected the entire legal framework of the system in one way or another. It has adopted in its DSU a negative consensus approach, which means that a consensus is needed in order to halt the proceedings from advancing at any stage of the dispute settlement procedures.[45] But however the 'negative consensus' rule of WTO has not frustrated the principals of DSU like the way 'positive consensus' in the GATT has affected.[46]

It can be asserted without any conflict of opinion that the WTO DSU has introduced the dispute settlement system which is integrated, mandatory and rule-oriented with a strong judicial character which was absent in the previous system of GATT system.[47] The Uruguay Round negotiation brought a major development in the context of international trade. The establishment of WTO marked the new era of international trade and what makes this organisation different is the charter of Dispute Settlement.[48] This organisation is known for its dispute settlement system. This system has insignificantly proven it efficiency as compared to the GATT regime. The participation is increased, power-based system is transformed to a rule-based system, participation of member nations has widened up.[49] But certainly, it is to be understood that with the passage of time any new institution or organisation grow old and it get acquainted with certain defects and shortcomings. Hence this research is a way

[44] Alban Freneau, 'WTO Dispute Settlement System and Implementation of Decisions: A Developing Country Perspective'(LLM thesis, Manchester University, 2001).
[45] Ibid.
[46] Ibid.
[47] *A Handbook on the WTO Dispute Settlement System*, WTO Secretariat Publication, 18(Cambridge University Press, 2004)
[48] Constantine Michalopoulos, 'Developing Countries' participation in the WTO' (Policy Research Working Paper No WPS1906, World Bank, 1998) 2.
[49] H.Nottage, 'Developing Countries in the WTO Dispute Settlement System', *The Global Economic Governance Programme*.
Available on: http://www.globaleconomicgovernance.org/wp-content/uploads/nottage-working-paper-final1.pdf, visited on 24th oct17

forward to understand and examine such deficiencies and understand what are the measures taken and what else the system requires for safeguarding the interest of the every next member nation, basically the developing member nation within the organisation.

1.4. Statement of Problem:

Dispute Settlement under WTO is undoubtedly a way more effective than that of GATT dispute settlement system. No doubt saying that the WTO Dispute Settlement Understanding has added considerable vitality to the settlement of trade disputes by encouraging the members to participate in WTO Dispute Settlement process. However, this advance does not mean that the Dispute Settlement Mechanism has been without a problem.[50] The Dispute Settlement Mechanism has often been questioned by the developing nations, who claimed that the procedural problems or legal provisions still act as a barrier on them.

The current Dispute Settlement Body of WTO is struggling with the overloaded files of dispute and its mechanics of panel and Appellate Body are running short to deal and settle such disputes which involve expertise to examine and understand the complexities of the Agreements.[51] The members so appointed by the Secretary of WTO for panel and Appellate body are generally the trade diplomats or the professional other than the legal professionals which limits the efficiency of dispute settlement under the WTO regime. Another main cause of this problem is lack of legal resource in the secretariat to staffs in panel. The WTO Dispute Settlement System however has gain faith and trust amongst the members but it is finding hard to

[50] Bartosz Ziemblicki, "*The Controversies over the WTO Dispute Settlement System*" Wroclaw University of Economics., Available at http//www.bibliotekacyfrowa.pl>content, Visited on 8th April 17.

[51] Giorgio Sacerdoti, 'The WTO In 2015: Systemic Issues of The Dispute Settlement System and The Appellate Body'S Case Law', *Vol.16 Italian Year Book of International Law* (2016).

maintain that legacy because of its systemic inefficiencies and hence it is needed to be checked.[52]

WTO dispute settlement is constrained by the influenced of overshadowed political involvement in the appointment of panel and the Appellate body which in some way or other affect the decisions in favor of powerful members and their compliance and adoption record to the decision raises the question on the effectiveness and transparency of WTO Dispute Settlement System.[53]

Panel and Appellate Body play an important role in initiating and executing the proceedings in WTO dispute settlement system. Panel contributes in finding the fact and legal issues with regard to any agreements which raises the question of differences between the member nations. But it is been found that there is no any set standard to guide the Panel as to how and to what extent they can scrutinize the fact and legal questions arising in the dispute, which consequently affects the decisions of Dispute Settlement Body. The current standard of review also does not contemplate the standard of prima facie evidence and the task of developing the jurisprudence for its implementation has been left to the Appellate Body.[54] However, Appellate Body rulings have not been consistent with respect to exactly what evidence should be considered by a panel and therefore it is not clear how a panel should conduct its prima facie analysis. Hence, the Clarification is necessary in this regard.

Problem of compliance has always been in the forefront of Dispute Settlement System. The nation with relatively greater market size and institutional capacity has

[52] Gregry C. Shaffer and Ricardo Melendez, *Dispute Settlement at the WTO: The Developing Country Experience*, (Cambridge University Press, 2010).
[53] Habib Kazzi, "Reshaping the WTO Dispute Settlement System: Challenges and opportunities for Developing Countries in the Doha Round Negotiation", *Vol.11 European Scientific Journal,* (2015).
[54] Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development,* (Oxford University Press, 2012).

always signified their hegemony over the system of dispute resolution. The political and economically sound members have been found influencing the decision either by way of consensus or by bargaining the interest of participating members.[55]The position of developing nation is still in the question no matter how efficiently they participate in the dispute settlement process there interest are always been kept in loop. Hence there is a dire need of proper check and balance over the system to maintain its effectiveness and allow maximum scope for the developing nations for using the mechanism of dispute settlement under the WTO regime.

1.5. Research Hypothesis:

A democratic set up of dispute settlement system of the WTO would lead to better representation of interests of the developing countries.

1.6. Research Objective:

2. To understand and analyze the structure and functioning of WTO Dispute Settlement system.
3. To analyze the impact of change of constitution of the Panel and Appellate Body to a more democratic representation on developing countries interest at the Dispute Settlement system.

[55] Christina L. Davis, 'The political logic of dispute settlement: Introduction to the special issue', *Vol. 10(2), The Review of International Organizations,* (2015).

1.7. Research Questions:

2. Is the legal framework of the WTO's Dispute Settlement system biased against developing nations?
3. What are the emerging constraints that have been faced by the member nations particularly developing countries in WTO dispute settlement proceedings?
4. What should be the contour of reforms of the Dispute Settlement Understanding of WTO to provide it greater relevancy in the present world?

1.8. Research Methodology:

Methodology so adopted for this research is basically doctrinal and analytical. The analysis will be based on both primary and secondary sources. The primary materials shall include: the WTO legal instruments; the DSB Panel, Appellate Body and Arbitration reports pertaining to remedies; the charter of Dispute Settlement Understanding. Further, the study shall review secondary materials such as books, articles reviews and comments of experts' publicists etc.

1.9. Chapterization:

Chapter 1: **Introduction**

This chapter starts up with outlining the historical evolution of dispute settlement system of WTO. It provides the reader a brief understanding as to how dispute was settled under GATT and what were the defects therein led to the introduction of WTO Dispute Settlement Understanding. This chapter further introduces the research

problem and subsequently analyzes the objectives and research question. It explains the limitation of research and methodological premise and finally presents the organization of research under chapter head.

Chapter 2: **Structure of WTO Dispute Settlement System**

This chapter aims to give an overview of the Dispute Settlement mechanism of WTO. It will give an insight with regard to the overall structural framework of WTO Dispute settlement system. It gives a reader an overview of an institutional design so set up for regulating the dispute settlement process.

Chapter 3: **Dispute Settlement Mechanism: study of constraints**

This chapter highlights the challenges and constraints which dispute settlement under WTO is facing. The problems are classified into the three broad heads, which will give an easy understating with regard to the issues and problems which is existing within the WTO dispute settlement system.

Chapter 4: **Dispute Settlement Understanding: contours of reforms.**

This chapter highlights the reform measures in order to strengthen the WTO Dispute Settlement Body of WTO. The reform measure is studied with relation to the problems designed in the former chapter. This will provide a grasp to the reader with regard to the problems and the possible solution to the challenging issues of the WTO.

Chapter 5: **Conclusion.**

This Chapter summarizes the whole theoretical structure of the thesis and provide a reader a general overview of the structure of the WTO dispute settlement system, as to how the disputes are been settled and what are the problems therein in the system

and what are the reform measures which could be possibly taken for reforming the system. This chapter further provides for the possible suggestion after examining the entire chapter as to how the interest of the developing member nation can be fared and protected within the system.

CHAPTER 2

STRUCTURAL FRAMEWORK OF WTO DISPUTE SETTLEMENT SYSTEM

2.1. INTRODUCTION:

It was with the Uruguay Round negotiations the effective dispute settlement mechanism was established under the auspice of World Trade Organization. It is often been hailed as the 'jewel in the crown' of Uruguay Round negotiations.[56] Dispute Settlement Understanding was the giant leap in the context of international trading system. Peter Sutherland, the director general of the General Agreements on Tariffs and Trade at the time, said "the whole future of the WTO is bound up with the success of the dispute-settlement system."[57]

This Dispute Settlement System has replaced the less structured system of GATT[58]. The procedures that apply to WTO dispute settlement are set out in the Dispute Settlement Understanding, which was negotiated during the Uruguay round[59]. One of the main functions of the WTO is dispute settlement. A trade relation often involves conflicting interests. A healthy way to settle these conflicts is through some neutral

[56] V.S Seshadri, "WTO and its Dispute Settlement Mechanism" in Abhijit Das, James J. Nedumpara (eds.), *WTO Dispute Settlement at Twenty: Insiders' Reflections on India's Participation* ,34 (Springer Nature, 2016).
[57] John Zaracostas, "Dispute Process Crucial to WTO, Sutherland Says,", *Vol.1 Journal of commerce* (1994).
[58] Rao, M.B. and Guru Manjula, *WTO Dispute Settlement and Developing Countries*, p. 10. (Lexis Nexis Butterworths, 2004).
[59] See, Marrakesh Agreement Establishing the World Trade Organization [WTO Agreement], Apr. 15, 1994 in World Trade Organization, available online http//www.wto.org. visited on 31st may 17.

procedure based on the some sound and agreed legal base. This is the purpose behind the Dispute Settlement Process envisaged in the WTO agreements.[60]

The Dispute Settlement Understanding creates three bodies to administer WTO Dispute Settlement System[61]. The first is the Dispute Settlement Body established under Article 2 of the DSU for the purpose of administering rules and procedures as set out in the DSU, subject to the exception as provided in the Covered Agreements. Secondly this Dispute Settlement Body has the power to establish Dispute Settlement Panels under Article 6 of Dispute Settlement Understanding. The panel is constituted on the request of the party after failure of consultation effort. The Dispute Settlement Understanding provides a very detailed and rules based procedures, which consists of several different phases, each of which is subject to mandatory time frames[62].

Hence this chapter will provide an insight bout the structural framework of the WTO dispute settlement system and what are the bodies constituted under the provisions for carrying out the procedures is been discussed elaborately under this chapter.

2.2. DISPUTE SETTLEMENT UNDERSTANDING:

Dispute settlement is one of the important aspects of WTO. The expansion of trade and commerce has increases the possibility of difference and disputes too. The harmonious and amicable way to settle these differences are through some neutral procedure which is based on agreed legal foundation. Hence, it is with this very intent the dispute settlement charter was manifested as a part of WTO agreement during Uruguay Round Negotiation. This Dispute Settlement Charter is generally known as

[60] Kantchevski, P.D., 'The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement', *Vol.3(1):BYU International Law & Management Review* 79, (2006).
[61] Debashis Chakraborty and Amir Ullah Khan, *The WTO Deadlock: Understanding the Dynamics of International Trade,* 175 (Sage publication, New Delhi, 1st ed. 2008).
[62] Supra note 7.

Dispute Settlement Understanding which was concluded in the year 1995 in Marrakesh.[63]

Settlement of dispute under the institution is WTO is basically governed and regulated by the norms and procedure established under the charter of Dispute Settlement Understanding (DSU).[64] The key objective of the DSS under WTO is to settle dispute promptly between WTO Members concerning their rights and obligations under covered agreements, by securing the security and predictability of DSS through satisfactory settlement of disputes.[65]

The charter of DSU is enshrined with 27 Articles defined under 143 paragraphs and 4 appendices. It is perhaps the most significant achievement of the Uruguay Round negotiations.[66] The explanatory role of the WTO dispute settlement system is made explicit in Article 3 (2) of the DSU which provides that the system serve to clarify the provision of the WTO Agreements in accordance with the customary rule of interpretation of public international law.

The understanding provides that if any violation of trade rule is affirmed by any members it shall be determined by the institution and procedure so established under the understanding as provided under Article 1of the understanding.[67] No member shall by themselves contour their own rules and procedures to redress the problem or differences. The understanding also makes special provision for protection of the interest of both developing and least developed countries. The DSU provides a

[63] Henrik, H., 'Remedies in the WTO Dispute Settlement Understanding and Developing Country Interests', (1999). *available at*: http://www.econ-law.se/Papers/Remedies%20990611-1.pdf, visited on 26th july 17.
[64] Annex 2 to the Agreement Establishing the World Trade Organization.
[65] See Article III.2 of the DSU.
[66] Supra note 1.
[67] WTO Analytical Index: Dispute Settlement Understanding, available at https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_01_e.htm, visited on 26th july 17.

number of the special provisions setting out particular procedures, time frames and legal advice and assistance for dispute settlement involving developing countries and least-developed countries, the DSU provides also special provisions as asking compensation, seeking authorization for retaliation.[68]

2.2.1. Procedural Framework under Dispute Settlement Understanding:

The WTO dispute settlement proceeding has four separate stages which can be distinguished as Consultations, Panel proceeding, Appellate Body and an Implementations and enforcement of the recommendations of Panel and Appellate Body. Under the DSU, the dispute settlement proceeding start with consultation stage between the parties of dispute.[69] The consultation stage, it enables the disputing parties to understand better the factual situation and the legal claim in respect of the dispute.[70]

The consultations provide or allow the parties of dispute to resolve the matter without recourse to further proceeding; a member may request consultations when it considers another member to have infringed upon the obligations assumed under a Covered Agreement. The responding Member is required for consultations.[71] The consultations provide or allow the parties to resolve the matter without recourse to further proceeding; a member may request consultations when it considers another member to have infringed upon the obligations assumed under a Covered Agreement.[72]

---

[68] Supra note.32, p. 263.
[69] Article 4 of the DSU available at http://www. WTO.org.net,. Visited on 24th July 17.
[70] P. V. Bossche, *The Law and Policy of WTO, Text Case and Material*, 256(Cambridge University Press, 2005).
[71] See Article 4.2 of the DSU
[72] World Trade Organisation, *A Handbook on the Dispute Settlement System,* 24 (Cambridge University Press, 2004)

The period for consultation is within 60 days, which the complaining parties and responding parties are required to seek agreed solution for their dispute. If the consultation fails to produce agreed solution for dispute, the parties can than ask the WTO director-general to mediate or try to resolve the difference in any other ways. The parties are often provided with the option of good offices, conciliation and mediation for resolving their differences in the most amicable way. No requirements on form, time, or procedure for them exist with regard to the alternative resolution of dispute.[73] Consultation and dispute settlement should be such that they are consistent with covered agreements and do not nullify or impair any benefits of members or the objectives of the agreements.

If the respondent fails to respond within ten days or enter into consultations within thirty days, the complainant may than proceed directly to Dispute Settlement Body (DSB) with the request of establishing a panel. The panel once established is under the obligation of submitting its findings in the form of written report to the DSB.[74]

As a general rule, it shall not exceed six months from the formation of the panel to submission of the report to the DSB.[75] In interim review stage the panel submits an interim report to the parties.[76] If the parties make any written comments, the panel shall hold a further meeting with the parties. If no comments are provided by the parties within the comment period, the report shall be considered as the final report and shall be circulated promptly to the members.[77]The report shall be circulated to the Members within sixty days and the same shall be adopted at a DSB meeting unless a

[73] ibid
[74] Article 12.7 of the DSU.
[75] Article 12.8 of the DSU.
[76] Article 15.2 of the DSU.
[77] Article 15.2 of the DSU.

party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adapt the report.[78]

Once a panel issued its report, the reports or any part of it may be appealed by either party to a standing Appellate Body, so the appeals have to be based on points of law such as legal interpretation. The parties cannot request re-examination of existing evidence or examination of any new evidences. The Appellate Body has 90 days to issue its own reports. The Appellate Body may further uphold, modify or reverse the legal finding and conclusions of the panel in the due course of dispute settlement process.[79]

2.2.2. Dispute Settlement System of WTO: Jurisdiction and Legal Basis

This charter of WTO Dispute Settlement lays down the scope of its jurisdiction and provides that if any disputes and differences arise between the member nations in the context of any "Covered Agreement" so provided in Appendix 1 of the DSU shall be brought up to the multilateral forum of WTO rather than the regional forum.[80]

The WTO dispute settlement system has jurisdiction over any disputes arising between WTO Members under the covered agreements. The DSU provides that, "the rules and procedures of this Understanding shall apply to disputes brought in pursuant to the consultation and dispute settlement provisions of the agreements so listed in Appendix 1 to this Understanding so as the covered agreements".[81]

The members can take recourse to the dispute settlement process for matters falling within the purview of WTO and other agreements on goods, the General Agreement

[78] Article 16.4 of the DSU.
[79] Article 12.7 of the DSU, available at https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm, visited on 25th june, 17.
[80] Supra note.66, p.6.
[81] See Article 1.1 of the DSU.

on Trade in Service, the Agreement on TRIPs, the pluri-lateral agreements as those agreements prescribed it the Dispute Settlement Understanding and the WTO agreements itself within the WTO character stands the preamble and the body of the WTO agreement.[82] The charter is confined to institutional measures, but it explicitly outlines four important Annexes. The different annexes have different purposes and different legal impacts. Annexe 1 contains the Multilateral Agreement, which are all mandatory in the sense that these texts impose binding obligation on all Members of the WTO. Annexe 2 consists of dispute settlement rules; which are obligatory upon all Members. Annexure 3 establishes the Trade Policy Review Mechanism (TPRM), by which the WTO will review overall the trade policy of each Member on a periodic and regular basis and report on those policies. Finally, the Annexe 4 contains four agreements that are optional and termed as pluri-lateral agreements.[83]

The dispute settlement system is compulsory; all WTO Members subject to follow it, for all disputes arising under the WTO agreements. The consent to accept the jurisdiction of the WTO dispute settlement system is already contained in a Member's accession to the WTO.[84]

The compulsory jurisdiction basically implies that, when Member seeks for the redressal of violation of obligations or other nullification or impairment of benefit under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of the said understanding.[85] Hence under this Article, a complaining party

[82] Yerxa, R. and B. Wilson, *Key Issues in WTO Dispute Settlement System, the First Ten Years.* 25-26 (Cambridge University Press, 2005)
[83] P. K. Vasudeva, *India and World Trade Organization: Planning and Development*, 17-18 (A.P.H. Pub. Corp., Delhi, 2000).
[84] Supra note 66.
[85] Article 23.1 of the DSU.

is under the obligation to bring any dispute arising under the covered agreements to the forum of WTO dispute settlement, and also the responding party has no choice but to accept the jurisdiction of the WTO dispute settlement system.

The jurisdiction of dispute settlement system shall be exclusive on it, that Members shall thus have recourse to the WTO dispute settlement system to the exclusion of any other system. For that WTO's Dispute Settlement Understanding was stipulated. Henceforth, the members by themselves cannot make any determination contending that the any benefit under the covered agreement have been nullified or impaired, except through recourse to dispute settlement in accordance with the rules and procedures of the DSU.[86]

The WTO as an international organization does not exercise jurisdiction in the way that any state does: for state, we would have divided jurisdiction in terms of jurisdiction to legislate or to make applicable law, jurisdiction to adjudicate and jurisdiction to force. But in the case of the WTO dispute settlement the jurisdiction to adjudicate and apply law is vested to the bodies so established under the charter of Dispute Settlement Understanding. The main functions of the DSU are not to exercise power per se, but also to preserve the rights and obligations of members and to clarify the existing provisions of the WTO Agreements.[87]

In the WTO, there are number of bodies, and those bodies have jurisdiction according to the WTO Agreements; those bodies are:

(i) dispute Settlement Body (DSB),

[86] Palmeter, D. and P.C. Mavroidis, *Dispute Settlement in the World Trade Organization, Practice and Procedure.* (Cambridge: Cambridge University Press, 2004).
[87] Understanding on Rules and Procedures Governing the Settlement of Disputes, available at http//www.wto.org/english/docs_e/legal_e/28-dsu_e.htm, visited on 27th june 17.

(ii) dispute settlement panels established by DSB to examine the matters referred to the DSB by state complainant,

(iii) a standing Appellate Body to hear appeal from panel report, and

(iv) Arbitrator that may be apprised of particular issues under circumstances specified in the DSU.

It is important to point that decisions by the panels or Appellate Body are not binding per se definitive, but rather only acquired legal effect upon adoption by the DSB.

2.3. DISPUTE SETTLEMENT BODY:

Dispute Settlement Body is considered to be one of the most insignificant amongst all the bodies in WTO Dispute Settlement System, which is responsible for administering the whole Dispute Settlement system.[88] This body is established under Article 2 of Dispute Settlement Understanding.[89] This Dispute Settlement Body is chaired by the General Council who discharges the responsibility provided under the Dispute Settlement Understanding.[90] The DSB is composed of the representatives of all Members. Hence these members receive instructions from their government with regard to the position and stances which they want to take, makes this institution look alike like a political institution.[91] It has its own Chairman, usually with the rank of ambassador, who is elected from among the representatives of Members at the beginning of the year to preside over the proceedings of DSB meetings.[92]

[88] Supra note 7.
[89] See, Dispute Settlement Understanding Module.
[90] See Article IV.3 of the WTO Agreement
[91] Supra note.66
[92] Ibid 9.

The Understanding provides that the Dispute Settlement Body shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.[93] Thus, DSB is also empowered to establish panel, adopt panel and Appellate Body Reports, and further maintain surveillance of Implementation of rulings and recommendations and authorize the suspension of obligations under any covered agreements.[94] However, it is important to note that the DSB's main role is to provide a framework to enable WTO Members to express their views and to provide their comments on the legal interpretations and reasoning of panels and the Appellate Body.[95]

The dispute settlement process is governed by strict deadlines within which the DSB must take action; the DSB meets as often as necessary in order to carry out its functions within the deadlines.[96] There are two types of meetings: regular meetings and special meetings. Dates for regular meetings are set out at the beginning of each year and such meetings are scheduled once a month. Special meetings are convened at the request of a Member in order to meet a particular deadline in case no regular meeting is scheduled during that period of time. On average, there are two meetings of the DSB per month, one regular and one special.[97]

At the first stage of meeting, when the complaining party officially notifies its trade dispute to the DSB and requests consultations with another WTO Member, in the first stage DSB does not play an active role. Once a formal complaint is filed, countries

[93] Understanding on Rules and Procedures Governing the Settlement of Disputes, available at https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm, visited on 25th june 17.
[94] Jeanne J. Grimmett, 'Dispute Settlement in the World Trade Organisation: An Overview', *available at* http://digitalcommons.ilr.cornell.edu/key_workplace/656, visited on 26th june 17.
[95] Autar Krishnan Koul, *Guide to the WTO and GATT: Economics, Law and Politics,* 52 (Satish Upadhay swan press, New Delhi, 2nd ed. 2010).
[96] Van der Borght, K., 'The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate', *Vol. 14, American University International Law Review*, (2010).
[97] Bozena Mueller-Holyst, "The Role of the Dispute Settlement Body in the Dispute Settlement Process", in Rusuf Yerxa and Bruce Wilson (eds.), *Key Issues WTO Dispute Settlement: The First Ten Years,* 26-27, (Cambridge University Press, 2005)

have 60 days to talk to each other to see if they can resolve their differences.[98] If consultations are not successful, the next meeting is where the DSB establishes panel upon the request of complaining parties. This means that, upon request, the DSB must decide to take action within the framework of the DSU rules.[99]

2.3.1. POWER AND FUNCTION OF DSB:

With respect to functions of the DSB, Article 2:1 of the DSU broadly defines these functions as the administration of the dispute settlement system. However, the administration of the dispute settlement system, however, is not limited one particular function rather having the multifaceted role which is hereby explained elaborately.

The DSB has the power to:[100]

- Power to appoint Panelists and adopt terms of reference for Panels
- Power to adopt or reject a recommendation of a Panel or the Appellate Body
- Maintain surveillance of the implementation of recommendations
- Appoint arbitrators to make recommendations on the 'reasonable period of time'
- Appoint a second, 'implementation' Panel to make recommendations on measures to restore conformity with the Agreement(s)

Appointment of panelists and terms of reference: since each Panel is an 'ad-hoc' body, the power to appoint is significant. The DSU gives disputants some power in the appointments, but the ultimate decision rests with the DSB. The power to adopt terms of reference for a Panel is less significant. The terms of reference are very important: they put a perimeter around the matters into which the Panel may enquire.

[98] Supra note 66.
[99] Ibid.
[100] Peter Gallagher, *Guide to Dispute Settlement,* 40-55(Kluwer Law International Geneva, 2002).

The Appellate Body has repeatedly emphasized their importance, too, in ensuring a fair hearing for the complainant and a fair opportunity for the respondent to prepare its case. The parties may agree terms of reference that the DSB may approve, but the DSU provides standard terms if no agreement is forthcoming so that the DSB discretion in this matter is limited.[101]

Adoption of panel and Appellate Body reports: Panel recommendations have no binding force and do not give rise to obligations on the defending party to bring its measures into conformity *unless* they are adopted by the DSB.

A panel report must be adopted at a DSB meeting within 60 days after the date of circulation to the Members, unless a party to the dispute notifies its decision to appeal or if the DSB decides by consensus not to adopt the report.[102] The report submitted by the Appellate Body must be adopted by the DSB and the same should be unconditionally accepted by the parties to the dispute within 30 days after its circulation, unless the Dispute Settlement Body decides by consensus whether to adopt the report.[103]

Surveillance of implementation:

Generally DSB has the power to approve the recommendations of the Panels as amended by the Appellate Body. The responding party is expected to make the appropriate changes, as suggested by the Panel - although so far these have been offered in only one or two cases. In many cases the respondent party informs the DSB at the meeting whether the report of the Panel is adopted or not, that it intends to take

[101] Ibid note 41
[102] See Article 16.4 of the DSU
[103] See Article 17.14 of DSU.

certain steps to implement the recommendations within a period of time that has been agreed in advance with the complainant, or is a period of time acceptable to the DSB. The DSB, after adopting the Panel report, maintains an item on its regular agenda under which it receives reports from the complainant and/or respondent on the status of implementation. The item is removed once both parties signal that the implementation is complete.

Appoint arbitrators or a second Panel:

Once the panel come up with its recommendation it is not always smoothly implemented though. Normally the report proposed by the panel are implemented by the DSB within the reasonable period of time, but sometimes there arises the disagreement within the parties in such case the DSB establish an 'implementation panel' under Article 21.5 of the DSU, to make recommendation within 90 days on implementation.

Decision-making in DSB:

The Dispute Settlement Body is often considered as the decision making body. The general rule of making decision is by way of consensus as provided under Article 2.4 of DSU.[104] The chairperson does not actively ask every delegation whether it supports the proposed decision, nor is there a vote. On the contrary, the chairperson merely asks, for example, whether the decision can be adopted and if no one raises their voice in opposition, the chairperson will announce that the decision has been taken or adopted.[105] In other words, a delegation wishing to block a decision is

[104] See Article 2.4 which provides, that the DSB have a power to take a decision, it shall do so by consensus.

[105] See WTO Website available at https://www.wto.org/, visited on: July 20, 2017]. *See also*, Wilson, B., 'Dispute Settlement System Training Module' (2003).

obliged to be present and alert at the meeting, and when the moment comes, it must raise its flag and voice opposition. Any Member that does so, even alone, is able to prevent the decision. This special decision-making procedure is commonly referred to as "negative" or "reverse" consensus.[106] The rule of negative (or reverse) consensus means that the complainant ultimately has a guarantee that the requested panel will be established if it so wishes. DSB while deciding to establishing the panel and adopting the reports uses this procedure of negative consensus.[107] "Practically this means that the DSB must approve the decision unless there is a consensus against it. Hereby, a member can always prevent this reverse consensus by avoiding blocking the decision. This system of reverse consensus limits the DSB's influence over WTO dispute settlement. But however on the other hand this system also fills the important purpose of keeping the members informed of the disputes and it also creates a political forum for debate concerning the use of the system"..[108]

2.4. DISPUTE SETTLEMENT PANELS OF WTO:

Panels are basically quasi-judicial bodies which is responsible for adjudicating the disputes between the parties at first instance.[109] It is when the Members concerned cannot find a mutually agreed solution through consultations, the DSB must, at the request of a party to the dispute, establish a panel.[110] Such request for the establishment of a panel must be made in writing. It must also indicate whether consultations so held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem

[106] Supra note 13. P.26.
[107] See Articles 6.1, 16.4, 17.14 and 22.6 of the DSU
[108] Supra note 66, p.17-18
[109] Kajsa Persson, The *Current and Future WTO Dispute Settlement System* (2007),unpublished L.L.M thesis, Goteborg University.
[110] See Article 6 of Dispute Settlement Understanding.

clearly.[111] The parties making the request shall also define the limit and scope of the panel's jurisdiction as provided under Article 7.1 of the Understanding. It is thus important to draft the request for the establishment of a panel with sufficient precision so as to avoid the challenges raised by the respondent party and the panel with regard to the certain aspect of the complaint. In *EC-Banana III case*[112]**,** the Appellate Body found that "It is important that a panel request be sufficiently precise for two reasons; first it often forms the basis of the terms of reference of the panel pursuant to Article 7 of the DSU, and second, it informs the defending party and the third parties of the legal basis of the complainant".[113]

Henceforth, once the panel is established it initiates the process of adjudication. It is after receiving the written statement, the panel holds a meeting with the parties where the members can speak their mind and present their point of view. In recent years, the meeting have become more formal and court like.[114] The panel has the authority to ask any WTO member about information in the case. Any WTO member having a substantial interest in a matter before a panel and having notified its interest to the DSB, shall have an opportunity to be heard by the panel and to make written submissions.[115] The panel also has the right to seek information and technical advice about complex issues in the case from any individual, body, or expert which it deems appropriate.[116]

Panel deliberations are confidential, and the reports are drafted in the light of the information provided during the proceedings without the presence of the parties.[117]

[111] See Article 6.2 of Dispute Settlement Understading.
[112] See WT/DS27/AB/RW2/ECU, available at http// www.wto.org>tratop_>dispu_e. Visited on22nd July 17
[113] Ibid note.
[114] Supra note. 103..
[115] See Article 10.2 of the DSU.
[116] See Article 13 of the DSU.
[117] See Articles 14.1 and 14.2 of the DSU.

The panel issues an interim report containing a descriptive section, its findings and its conclusions. The parties may request the panel to review aspects in the report or to hold another meeting. The arguments of the review are included in the final report.[118]

A couple of weeks after the final report has been presented to the members concerned and translated into the three working languages of the WTO, the report is distributed to the rest of the WTO. Within sixty days after the date of the circulation, the report is adopted at a DSB meeting, unless one of the parties decides to appeal or the DSB decides by consensus not to adopt the report. As a general rule, the panel must conduct its examination within six months. However, practically a panel process lasts for over twelve months. The delay is, for example, explained by the complexity of the case, the need to consult experts, and problems scheduling meetings.[119]

2.4.1. COMPOSITION OF PANEL:

Panel as being an ad-hoc body is established by the Dispute Settlement Body. The DSU requires the WTO Secretariat to propose panelists. Generally, the panel are comprise of three members but if the parties to the dispute request for the five member panel bench within the ten days of the establishment of panel than the bench of panel could be organised so forth as requested according to the rules so laid under the Article 8.5 of the Dispute Settlement Understanding.[120]

The DSU contains detailed rules on the composition of panels and clarifies the role of the Director-General if the parties fail to agree on the panel's composition. However, the WTO Secretariat is vested with the power to maintain and select the panelist as provided under Article 8.6 of the Dispute Settlement Understanding. He maintains the

[118] See Article 15 of the DSU.
[119] Supra note. 90, p. 269-270.
[120] Marceau, Gabrielle, *Consultations and the panel process in the WTO Dispute Settlement System,* in *Key Issues in WTO Dispute Settlement System, the First Ten Years,* edited by Rufuf Yerxa and Bruce Wilson , p. 39 (Cambridge university press,2005).

indicative list of governmental and nongovernmental members from which the panelist is selected.[121] The DSU forbids a potential panel member from serving on a panel if he or she is a citizen of a Member-state party to the dispute, or a citizen of a third party, unless the parties agree otherwise.[122] This rule originated from the old GATT dispute settlement process. Because most disputes involve economic powers such as the United States, the European Community, and Japan, P. Pescatore argues that this practice within the GATT acted as a "de facto ban" on publicly known trade specialists from these states.[123] The same argument could be said for the WTO dispute settlement system.

The WTO Secretariat maintains an indicative list of names of governmental and non-governmental persons, from which panelists may be drawn although other names can be considered as well.[124] Traditionally, many panelists are trade delegates of WTO Members or capital based trade officials, but former Secretariat officials, retired government officials and academics also regularly serve on panels. These individuals perform the task of a panelist on a part-time basis, in addition to their usual professional activity.[125] The DSU explicitly provides that panelists shall not serve as government representatives, rather must perform within their own individual capacities.[126] In recent years there has been an increase in the number of academics and legal practitioners serving as panelists. It is also significant that at least half of the

[121] See Article 8.6 of the Understanding.
[122] See Article 8.6 of the Understanding
[123] Pierre Pescatore, 'The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects', 27-30 , *Vol.10, J. INT'L ARB.* (1993).
[124] See Article 8.4 of the DSU.
[125] Ernst-Ulrich Petersmann, Strengthening GATT Procedures for Settling Trade Disputes, *Vol.11 World Economy 55*-74 (1988).
[126] Ibid note 119.

panelists have already served on a GATT or WTO panel before. In other words, many panelists serve more than once as panelist.[127]

When the Secretariat proposes qualified individual nominations as panelists, the parties must not oppose these nominations except for compelling reasons[128]. In practice, many Members make quite extensive use of this clause and oppose nominations very frequently. In such cases, there is no review regarding whether the reasons given are truly compelling. Rather, the Secretariat proposes other names. If, according to this method, there is no agreement between the parties on the composition of the panel within 20 days after the date of its establishment by the DSB, either party may request the Director-General of the WTO to determine the composition of the panel. Within ten days after sending this request to the chairperson of the DSB, the Director-General appoints the panel members in consultation with the chairperson of the DSB and the chairperson of the relevant Council or Committee, after consulting with the parties (Article 8.7 of the DSU). The availability of this procedure is important because it prevents a respondent from blocking the entire panel proceeding by delaying (forever) the composition of the panel, which is what sometimes happens in other systems of international dispute resolution. Of course, the parties are always free to devote more than 20 days attempting to agree on the composition of the panel as long as none of them requests the Director-General to intervene.[129]

The selected panelists must fulfil their task in full independence and not as representatives of a government or other organization for which they might happen to work. Members are prohibited from giving panelists instructions or seeking to

[127] Supra note. 113, p. 39.
[128] See Article 8.6 of the DSU.
[129] Supra note 66.

influence them with regard to matters before the panel as provided under Article 8.9 of the DSU.

Henceforth in accordance with Article 3.1 of the DSU, the WTO continues the GATT practice of providing preferential treatment to developing countries. Upon request, the DSU will require one panelist from a developing country to be included in the formation of a panel in disputes involving a developing country and a developed country. This provision ensures the independence of panel members and further guarantees that the panel will not issue a power-oriented report.[130]

2.4.2. FUNCTION OF PANEL:

Panel is considered as one of the most important channel for initiating the dispute settlement process. The primary function of panels is to provide its assistance to the DSB in discharging its responsibilities under this understanding and the covered agreements as provided under Article 11 of Dispute Settlement Understanding. "Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements and make such other findings as well to assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreement."[131] A panel has to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence. It should perform its duty without any biasness toward any parties and act in accordance with the rule.[132]

---

[130] Kantchevski, Petko D., *The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement, Vol.3 BYU Int'l L. & Mgmt. Rev*. 79, 97 (2006).

[131] Ross Becroft, *The Standard of Review in WTO Dispute Settlement : Critique and Development,* 50-51 (Oxford University Press, 2012).

[132] See Appellate Body Report , EC Hormone case, para 133.

Panel control the settlement of dispute process in accordance with the rules set out of DSB, establishing deadlines for written submission establishing the schedule.

The question related to the burden of proof is another important aspect so handled by the panel juries. It creates many uncertainties in litigation, because it is hard to determine as to whom the burden of proof falls whether on the complainant or the defending party. Hence, the responsibility lies upon the panel to determine the fact and make disposition to Dispute Settlement Body for deriving the legitimate answers to the question.[133]

2.5. APPELLATE BODY:

The Appeals process is the most visible institutional innovation in the WTO dispute settlement system.[134] The establishment of the WTO Appellate Body in 1995 was one of the major reforms brought about by negotiation of the Understanding on Rules and Procedures Governing the settlement the dispute (the DSU). No such institution existed in the GATT system or neither in any international legal context. The rationale behind creating this body was to enhance the model of Dispute Settlement process under the WTO regime. This Appellate Body protects the interest of the members by providing them the platform to question the issues which affects the agreements. It ensures to safeguard the rights of the members. The Appellate Body is considered to be the final stage in the adjudicatory part of the dispute settlement system; once the panel assess the facts and findings it is submitted to the parties and if any member is not satisfied by such recommendations it can appeal to this appellate body for further

[133] Kim, H.C. 2007. Burden of Proof and the Prima Facie Case: The Evolving History and its Application in the WTO Jurisprudence. *Richmond Journal of Global Law & Business* 6: 245.
[134] Supra note 94. p. 36.

consideration. Panel and Appellate body have however illuminated the WTO law and enhance the meaning and scope of international jurisprudence.[135]

Unlike panel, the appellate body is also a standing body established by DSB under Article 17.3 of the Dispute Settlement Understanding. As per Article 17.13 of the DSU, if a party files an appeal against a Panel Report, the Appellate Body reviews the challenged legal issues and may uphold, reverse or modify the panel's findings. Hence this provision allows the parties to ask for the reconsideration of the panel report if they find it unjust or inappropriate with regard to their interest.

The scope of the Appellate Review is provided under Article 17.6 of the DSU which states that an appeal shall be limited to issues of law covered in a panel report and legal interpretations developed by the panel. In *EC hormone*[136] case the Appellate Body stated, Under Article 17.6 of the DSU, appellate review is limited to appeals on question of law covered in a panel report and legal interpretations developed by the panel. Appellate body shall limit itself within the ambit of legal interpretation of fact rather than finding the facts. It was further stated that under Article 17.6 of the DSU, appellate review is just limited to appeals on questions of law which is covered in a panel report and legal interpretation developed by panel. Findings of facts as determined from legal interpretation or legal conclusions by a panel are, in principle, not subject to review by the Appellate Body.[137] Similar assumption was made in the *Korea-Alcoholic Beverages*,[138] the panel has the sole authority of finding fact and assessing it. Panel has a sole discretion of giving the importance and weight to the fact and findings which is outside the ambit of the Appellate Body. Hence what falls under the consideration of the Appellate Body is to determine whether the fact and findings

[135] Isabelle V. Damme, 'Treaty Interpretation by The WTO Appellate Body', 3 (2009).
[136] See para 132 of WT/DS48/AB/R, adopted on 13th Feb 1998, available at http//www.wto.org>cases
[137] Supra note 50
[138] See para 162 of WT/DS84/AB/R, adopted 10th Jan 2001, available at http//www.wto.org>cases

so derived by the panel are meant to be reviewed strictly and precisely by the Appellate Body.

2.5.1. COMPOSITION OF APPELLATE BODY:

Appellate body basically comprise of seven person who serve there at a time to hear any appeal and that the seven Members are to serve in rotation as further specified in the Working Procedures.[139] Article 17.3 provides that the members so appointed in the constitution of Appellate Body shall be from the recognised authority, with demonstrated expertise in law, international trade and the subject matter of covered agreements generally. They shall be unaffiliated to any government. Besides, the Appellate Body Membership shall be broadly representative of membership in the WTO. Although appointment to the Appellate Body is merit-based, the DSU recognizes the need for Appellate Body members to represent the diversity of Members' legal systems and traditions. The success of the WTO will depend greatly on the proper composition of the Appellate Body and the persons of the highest calibre should serve on it.[140]

The Appellate Body Members are required to reside permanently or continuously in Geneva because the headquarter of DSB is located therein. However Article 17.3 of the DSU requires that they be available at all times and on short notice. Members must have to keep the Appellate body secretariat informed of their whereabouts at all times.

However, in pursuance to Article 17.2 of Dispute Settlement Understanding, the DSB shall appoint persons to serve on the Appellate Body for a four year term and each person may be appointed once. Vacancies shall be filled as they arise. A person

[139] Supra note, 66,p. 69
[140] Ibid note, p. 56.

appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.[141]

As per Article 2.4 of the DSU, the DSB take the decision on the appointment of the Appellate body Members by consensus. Members of the Appellate Body are appointed by the recommendation of a selection committee, composed of the chairpersons of the General Council, the DSB, the councils for goods and services, the TRIPS council and the WTO Director General. The selection committee selects from among candidates nominated by WTO Members.

According to the Rule 6 of working procedure Dispute Settlement, three member bench hears and decide the appeal. The Members consisting of a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin. Unlike in the process for Panelist selection, the nationality of Appellate Body Members is irrelevant. Appellate Body Members can and will, sit in cases on which their countries of origin are party.

Appellate Body Secretariat:

Appellate Body has its own separate secretariat to provide legal assistance and administrative support to the Appellate Body. To ensure the independence of the Appellate Body, the Secretariat is linked to the WTO secretariat only administratively, but is otherwise separate. All meetings of the Appellate Body or of Divisions of the Appellate Body, as well as oral hearings in appeal are also held on the premises of Appellate Secretary office.

[141] Supra note, 125.

2.5.2. POWER AND FUNCTION OF APPELLATE BODY:

The DSU prescribes that the Appellate Body must address each of the legal issues and panel interpretations that have been appealed as provided under Articles 17.6 and 17.12 of the DSU. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.[142] However, where certain legal findings of the panel are no longer relevant, the Appellate Body has a power to declare such panel findings as "moot and having no legal effect".[143]

Appellate Body makes a recommendation to the DSB along with the reports and findings of the Panel and reflect the changes, if any that it has made to the Panel report. The decisions of the Appellate Body should be accepted 'unconditionally': which means that there is no further appeal from a decision of the Appellate Body.[144]

2.6. ARBITRATORS, MEDIATORS, AND CONCILIATORS: SOME OTHER BODIES INVOLVED IN DISPUTE SETTLEMENT

In Addition to Panel and Appellate Body, the Dispute Settlement Understanding does lay down the scheme of mutually settling the dispute without any hazy process of adjudication. It is often termed as the alternative dispute resolution. However this scheme of Alternative Dispute settlement should be guided in accordance to the provisions of the Dispute Settlement Understanding. It does not allow the parties to settle their dispute on whatever terms they wish. Solutions should be mutually acceptable to the parties to the dispute; it shall also be consistent with the WTO

[142] Article 17.13 of the DSU
[143] Ibid.
[144] Supra note. 94. p, 38.

Agreement and must not nullify or impair benefits accruing under the agreement to any other Member. [145]

Dispute settlement lays down the provision under Article 5.1 to voluntarily settle the disputes by way of conciliation, mediation and Good Offices. Good offices normally consist primarily of providing logistical support to help the parties negotiate in a productive atmosphere. Conciliation additionally involves the direct participation of an outside person in the discussions and negotiations between the parties. In a mediation process, the mediator does not only participate in and contribute to the discussions and negotiations, but may also propose a solution to the parties. The parties would not be obliged to accept this proposal. This alternative process of dispute settlement can begin any time but not prior to a request for consultations. The proceedings are mediation are strictly confidential, and do not diminish the position of either party in any following dispute settlement procedure as provided under Article 5.2 of the DSU.[146]

As per Article 5.6, the Director-General of the WTO has a power to offer Good Offices, Conciliation, or Mediation. However, there is no specified procedures contemplated under Article 5, the Director-General issues a formal communication to the members of WTO providing the details of procedures so to be followed with regard to mediation, conciliation or good offices.

Unlike panel and Appellate Body proceedings, the process of good offices, conciliation or mediation should not result in legal conclusions, but assist in reaching a mutually agreed solution.

[145] See Articles 3.5 and 3.7 of the DSU.

[146] P. V. Bossche, *The Law and Policy of WTO, Text Case and Material*, 256(Cambridge University Press, 2005)

A request to the Director-General must also identify whether it is for good offices, conciliation

or mediation, even though the Director-General's role may change during the Article 5 procedure or shall remain the same.[147]

Arbitration plays an important role in the WTO dispute settlement system. Article 21.5 states that parties can resort the disputes by way of arbitration. Arbitrators either an individual or group, can be called to adjudicate certain questions at several stages of the dispute settlement process.[148]

The parties are said notify their intent for arbitration to all the WTO members. Before the beginning of the arbitration, the parties must notify their agreement to resort to arbitration to all WTO Members and must be notified to the DSB and the relevant Councils and Committees overseeing the agreement(s) in question as provided under Articles 25.2 and 25.3 of the DSU.

"The parties to the proceeding must agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where in any member may raise any point relating thereto. Moreover, the arbitration result is not appealable but can be enforced through the DSU."[149]

2.7. CONCLUSION:

This Chapter examines the Dispute Settlement Understanding and the bodies involved in the adjudication process. Subsequently, it examines the legal basis for a trade dispute which the Dispute Settlement Body will adjudicate and elaborates on the

[147] Supra note 103.p. 24.
[148] Ibid.
[149] Supra note 92.

stages of a trade dispute for a better comprehension of the procedure. Different Bodies are created in order to regulate the system efficiently. This chapter highlight the power, functions and composition of the adjudicating bodies of WTO.

The WTO DSM foresees up to four steps. First, consultations are carried out with an attempt to settle the dispute amicably. Second, third-party adjudication by a three-member, *ad hoc* appointed panel, who decide whether a WTO Member's conduct violates the WTO treaty. For each case the WTO Secretariat proposes possible panellists who the disputing parties may reject. If there is no agreement on the composition of the panel after 20 days, however, either party may request that the Director General of the WTO appoints the panellists (which, so far, have occurred in 60% of cases). Third, if the party is not satisfied with the panel decision the parties can make an appeal to the Appellate Body (AB), which is composed of seven members, each of whom is appointed for a term of four years (renewable once) but whose examination is limited to legal questions. Fourthly, the implementation and adoption of ruling is undertaken by the Dispute Settlement Body, which ensure its compliance and adoption.

This chapter gives an understanding with regard to the structural framework of WTO Dispute Settlement System and further give a leeway to understand as to what are the problems these bodies are facing and how it affects the whole system of Dispute settlement is further been discussed in next chapter.

CHAPTER 3

DISPUTE SETTLEMENT MECHANISM:

STUDY OF CONSTRAINTS

3.1. INTRODUCTION:

The establishment of WTO was motivated with the intent of rectifying the deficiencies and shortcoming which General Agreement of Tariff and Trade couldn't meet up. It is in the Uruguay Round with the signing of charter called 'Understanding on Rules and Procedures Governing the Settlement of Dispute' a way was forwarded for the effective Dispute settlement system under the WTO regime.[150] However, it has been two decades now, since from the inception of WTO's Dispute Settlement mechanism, and it has undoubtedly complimented and rather enhanced the dispute settlement system of erstwhile GATT regime. The WTO Dispute Settlement Procedure is way more structured and institutionalised as compared to GATT's scheme of Dispute Settlement.[151] Its ideals and institutions have undoubtedly proven its efficiency and hence the statistics of participation of developing nations have also improved but it doesn't mean that it has fared developing nations to the fullest. There are evidences which are studied in this chapter signifying that the developing nations still find constraint to participate in the existing framework of WTO dispute settlement system. [152]

[150] William J. Davey, "The WTO Dispute Settlement Mechanism", (2003) (Research paper No 03-08, University of Illinois, College of Law).
[151] Magda Shahin, "WTO Dispute Settlement for a middle-income developing country: the situation of Egypt" in Gregory Shaffer, Manfred Elsig. (eds.), *The Law and Politics of WTO Dispute Settlement*, 275-276 (oxford University press, California, Irvine, ed. 2016).
[152] Gregory Shaffer, "How to make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies", *Resource paper 5 ICTDS* 16-17 (2005).

This system has however given a voice to the nations which are comparatively smaller and weaker to stand out against the powerful nations but ironical truth is the developed nations are still in the better positioned to access and utilise the disputes settlement system as compared to the developing nation.[153]

Hence, without denying the accomplishment of the WTO Dispute Settlement System, this chapter will highlight the existing constraints which exist within the system and as consequence of which the developing nation's interest often get into the loop. Scholars often classifies this constraints as "capacity constraints" which covers the problem of shortage of skill of human resource or lack of finance for use of outside legal assistance, and "power constraints" which covers the limitation faced by the DSB and how the influential nations affects the decisions and regulate the dispute settlement system of WTO.[154] These constraints have however been summarised by Shaffer as " (i) a relative lack of legal expertise in WTO law; (ii) constrained financial resources, including the hiring of outside counsel; and (iii) fear of political and economic pressure".[155]

These constraints have affected the participation of developing country in the WTO dispute settlement system because their confidence over the system gets affected. This chapter attempts to exemplify and understand these problems debarring the developing nations and the inadequacies within the charter of Dispute Settlement Understanding of WTO.

[153] Ibid.
[154] A Guzman & B Simmons, "Power plays and capacity constraints", WAGE Conference (2005).
[155] Gregory Shaffer "The challenges of WTO law – strategies for developing country adaptation" *World Trade Review* 177 (2006).

3.2. DEVELOPING NATIONS AND DISPUTE SETTLEMENT UNDERSTANDING: AN ANALYSIS

No question can be objected on the contribution made by the Dispute Settlement Mechanism of WTO. It has considerably increased the scope of Dispute settlement system by increasing the scope of law in relation to power politics.[156]

The overview of the statistical data reveals that since 1995-2015, 492 requests for consultations were brought up to the Dispute Settlement Body. However, not all consultations meet up to the panel process. There were 245 panels formed in between 1995-2015.[157] To date, only one least-developed country (as designated by the United Nations[158]) has initiated a complaint through the Dispute Settlement Body (DSB).[159] Up to February 29, 2012, 180 cases were initiated by developing countries. 106 of these cases were against developed countries and 74 were against the developing countries. So far, thirty-six developing countries have initiated complaints. Of these countries 12 countries complained once, 18 complained twice and 7 complained 10 times or more. Regarding developing countries using the DSU, the countries using the process most often were Brazil with twenty-five (25) disputes, then Mexico with twenty-one (21) disputes and India with twenty (20) disputes.[160]

---

[156] Habib Kazzi, "Reshaping the WTO Dispute Settlement System: Challenges and opportunities for Developing Countries in the Doha Round Negotiation", *Vol.11 European Scientific Journal* 199 (2015).

[157] WTO Dispute Settlement Body, Annual Report (2015), online available http//www.wto.org/disputes, visited on 26th Sep 17.

[158] See WTO.org, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Oct. 2, 2017)

[159] In January of 2004 Bangladesh requested consultations with India concerning an Indian anti-dumping measure on lead acid batteries from Bangladesh. Request for Consultations, India – Anti-Dumping Measure on Batteries from Bangladesh, WT/DS306/1 (January 28, 2004). http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm (last visited Oct. 2, 2017).

[160] A.Hoda, 'Dispute Settlement in the WTO, Developing Countries and India', ICRIER No.15 April 2012. *Available at*: http://www.icrier.org/pdf/Policy_Series_No_15.pdf, visited on Sep 12, 2017.

"The ironical revelation is that the developing countries make up the majority of the WTO membership, but contrary to that, minority membership of developed countries initiates more than 80% of the disputes."[161] Hence, very small percentage of developing countries participated in this Dispute Settlement Mechanism, notably Brazil, India, Argentina, Chile, and Mexico. Statistics shows that the United States (US) and European Communities (EC) remain the predominant users of the WTO legal system.[162]

The length of the Dispute settlement proceedings is one of the concerns of developing countries. Several developing countries have stated that the Dispute settlement proceedings are extremely lengthy without offering expeditious solutions.[163] It has been argued that the parties have to wait for long time for getting their dispute settled under the rules and procedures of Dispute Settlement Understanding.[164] Article 3.3 of the DSU recognizes that the system has to lead to a prompt and effective settlement, it is a lengthy process. Indeed, the time period of the DSU process from the request for consultations to the report of the Appellate Body normally takes a period of about 15 months which further keeps on getting extended. It also includes ten months for the 'reasonable period of time' to the implementation of recommendations.[165] Hence it is been found that the delays in settling the disputes do make the system less attractive

[161] Supra note 147.
[162] Supra note 142.
[163] Torres, R. A., '*Use of the WTO trade dispute settlement mechanism by the Latin American countries-dispelling myths and breaking down barriers'*, (2012),
Available on http://www.wto.org/english/res_e/reser_e/ersd201203_e.htm, visited on Sep 26, 2017.
[164] Ibid. Note 13.
[165] World Trade Organization 2015: Understanding the WTO: *available from:* https://www.wto.org/ visited on oct 1, 2017.

to businesses and discourages the developing nations to participate efficiently as expected.[166]

Further, Article 21 provides that the disputes shall be settled within the reasonable period of time. The period shall not normally exceed fifteen months after the DSB adopts the decision.[167] But ironically, the time period depends on the situation and consideration by the panel, so it may be longer depending upon the particular facts and circumstances of the disputes. However, such a long process without a guarantee adopted for safeguarding developing countries' interests will be problematic and dangerous for them and it makes further harder to developing nations to participate effectively.[168]

The participation of the developing nations in the dispute settlement mechanism however may run contrary to the presumed goals of the dispute settlement understanding because of the limited participation of the developing nations in the Dispute settlement system.[169] The WTO negotiators however try to encourage developing countries to use the system, by incorporating several attractive provisions and one amongst them is the "special and differential treatment" within the Dispute Settlement Understanding under Article 21.8 of the Understanding.[170] Provisions

[166] Freneau, A., "WTO Dispute Settlement System and Implementation of Decision: A Developing Country Perspective". Thesis submitted for the Degree of LLM in International Business Law, School of Law, University of Manchester (2001) .
Available online at http://lafrique.free.fr/memoires/pdf/200107AF.pdf visited on Sep 26, 2017.
[167] Ibid.
[168] C. P. Gleason, & P. D.Walther, "The WTO Dispute Settlement Implementation Procedures: A System In Need of Reform", *Vol. 31(3), Law and Policy in International Business*, pp. 714-715, (2005).
[169] Supra note 147.
[170] Ibid.

under these Articles provide special privilege to the developing and least developed[171] But practically the situation is just contrast.

The text of the DSU alone contains at least eleven such provisions by which developing countries should enjoy benefits. For instance, the Article 4.10 requires that special attention should be paid to the particular problems and interests of developing countries during consultation phase. But this article does not point out concretely on what specific aspects and to what extent the "special attention" should be paid. Since there is no specific implementation measure, in practice it is hard to evaluate whether member countries have really and adequately complied with this provision.[172]

Furthermore, Article 21.7 states that the DSB must consider what further and appropriate action it might take in addition to surveillance and status reports, if a developing country has raised the matter. But it has not been used by any developing country. Article 8(10) provides that "when a dispute is between a developing country and a developed country Member, the panel shall, if the developing country Member so requests, include at least one panelist from a developing country."[173]

However the charter of Dispute settlement understanding design and formulate several provisions for effective participation of developing nation in the dispute

[171] WTO.org, Work on special and differential provisions http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#legal_provisions (last visited Oct 12, 2017).

[172] H.Nottage, 'Developing Countries in the WTO Dispute Settlement System', *The Global Economic Governance Programme* (2009). *Available from:* http://www.globaleconomicgovernance.org/wpcontent/uploads/nottage-working-paper-final1.pdf. visited on October 12,17 .

[173] Gosego Rockfall Lekgowe , "The WTO Dispute Settlement System: Does it Work for Developing Countries?", University of Botswana (2012). Available online https://www.researchgate.net/publication/255697342, visited on October 1 2017-10-12

settlement system but however certain limitation keeps on debarring the nations to participate exclusively in the new designed WTO dispute settlement system. [174]

3.3. INSTITUTIONAL CONSTRAINTS:

It is a basic tenet of institutionalist theory that political institutions, once established, tend to be sticky over time and resistant to change and this notion is very much applicable to the institution established under the WTO for resolving the disputes.[175] Hence the establishment of WTO Dispute Settlement System mark its completion of 20 years without any ramifications and significant changes. On November 10th, 2015, WTO celebrating its 20th anniversary the Director General (DG) Roberto Azevêdo pointed out that "the WTO's dispute settlement system enjoys tremendous confidence among the membership, who value it as fair, effective and efficient mechanism to solve trade problems."[176] Hence here the part of the institutionalist theory is to be accepted because the Dispute settlement institution of WTO has become the victim of its own success, the major problem affecting the DSS in 2015 was the delays in proceedings due precisely the increasing number and complexity of disputes brought to the system by an increasing number of members.[177]

With the increasing participation in the WTO dispute settlement system there increase the challenge of meeting those complaints within the time and for this there requires efficient staffing and proper mechanism for dealing with the disputes. "The number of disputes filed at the WTO has increased significantly in recent years and, combined

[174] Valentina Delich, "Developing Countries and the WTO Dispute Settlement System," in *Development, Trade, and the WTO: A Handbook*, ed. Bernard Hoekman, Aaditya Mattoo and Philip English p.73 (Washington: The World Bank, 2002).
[175] James Smith, "Inequality in International Trade? Developing Countries and Institutional Change in WTODispute Settlement", *Vol. 11, No. 3 Review of International Political Economy*, (Aug., 2004).
[176] Giorgio Sacerdoti, "The WTO In 2015: Systemic Issues of The Dispute Settlement System and The Appellate Body'S Case Law", *Vol.16 Italian Year Book of International Law* (2016).
[177] ibid

with shortages in senior Secretariat staff, has led to significant delays in panel proceedings".[178] The institutional shortcoming has led the dispute settlement system of WTO to suffer.

"The delays in the panel process today are attributable to two larger systemic problems faced by the WTO: (i) the increased number, size and complexity of disputes; and (ii) Secretariat resource constraints."[179]

By the end of 2014, 251 panelists had sat in 201 cases during the WTO's first twenty years. With the increase in the number of cases, there increases the complexities within it which gradually affects the panel process because the panelist are not very well equipped with all the agreements and technical differences so presented. In practice, around 88% of WTO panelists have a substantial governmental background.[180] These panelists hardly belong from the legal background, rather most of them are the trade diplomats and ambassadors[181] and because of this their knowledge to the subject might be limited, which gradually affects the efficiency of system in adjudicating the disputes.[182]

The task of a panelist is performed on a part-time basis, so that panelists continue their other ongoing professional activity, and if they are government officials, they are not paid except for a modest per diem if they work outside of normal office hours.

[178] Scott Lincomine and Davida Connon, "WTO dispute settlement—long delays hit the system", (2014). Available at https://www.lexology.com/library/detail.aspx?g=13fe0fa8-2e4c-45ca-b619-c4609ae96797, Visited on 15th Oct 17.
[179] Supra note 174.
[180] Supra note 30.
[181] Ibid.
[182] Ross Becfroft, *The Standard of Review in WTO Dispute Settlement: Critique and Contention*, (Edward Elgar Publishing Ltd., ed. 2012).

This ad hoc nature of the panelist in some way or other affects the efficiency of panel because it makes panel counter-productive while dealing with the dispute.[183]

The lack of legal resources in the Secretariat to staff the panels also lead to delay in the process of dispute settlement. The secretariat constitute of two important divisions, i.e., rule making and legal division. These divisions plays important role in assisting panel and Appellate Body while undertaking the disputes. However there is substantial increase in the dispute inflow but the staffing within these divisions are still limited and consequentially it slow down the process.[184]

The politicization of the WTO Appellate Body selection process is another issue, which have undermined the Appellate Body's legitimacy.[185] The Appellate Body appointment process, being by consensus, leaves room for political meddling, in particular by the more influential WTO Members who have the political strength to block a nomination more easily or to push through a difficult candidacy.[186]

The Appellate Body members are appointed by the Dispute Settlement Body,[187] which comprises the representatives of all 162 WTO Members. DSB decisions are taken by consensus: the formal objection of any Member can block any appointment or re-appointment.[188] This provision has created a space whereby the powerful nation can prevent the appointment of any Appellate Body member whom they feel is not serving to their interest. There is a very recent example where the United States refused to support Professor James Gathii, a Kenyan candidate, a law professor,

[183] Gregory Shaffer, Manfred Elsig, et.al.,*The Law and Politics of WTO Dispute Settlement*, (oxford University press, California, Irvine, ed. 2016).
[184] Supra note 165.
[185] Arthur E. Appleton, 'Judging the Judges or Judging the Members?', in L. Choukroune (ed.), *Judging the State in International Trade and Investment Law,* (Springer Nature Singapore Ltd., ed. 2016).
[186] Ibid.
[187] See, Article 17 of DSU.
[188] See, Art. 2(4) DSU.

despite having the vast majority, this Kenyan candidate was not appointed because US did not concerted its acceptance to his appointment.[189] Richard Steinberg stresses this constraint when he argues that powerful WTO members have a de facto veto over the selection of Appellate Body members.[190] Hence, in this way the influential country regulates the appointment and promotion of the Appellate Body members whom they think would safeguard their interest.

The WTO Appellate Body is one of the international appeal bodies. Its very task is to review the legal interpretations developed by panels and to "uphold, modify or reverse the legal findings and conclusions of the panel".[191] However effectiveness of Appellate Body oftenly comes into question because its reports are non-binding in nature, except with respect to resolving the particular dispute.[192] There is no principle of precedent followed by the Appellate Body. No matter how many times the dispute of same nature is brought up, it start up looking to the relevant treaty text, interprets it according to the Vienna Convention rules, which consequentially results in delaying the process of dispute settlement.[193]

WTO Secretariat has an important role in Dispute settlement system. It assists panel and Appellate Body by staffing them. It is this secretariat who lays down the list of the members which is to be appointed by the DSB,[194] and it is by this way, the secretariat inject politics in the working framework of panel and Appellate Body. In

[189] Ibid note 173.
[190] Goldstein, Judith, et al., 'Introduction: Legalization and World Politics', *Vol. 54 (03), International Organization, 385-99(2000).*
[191] See DSU Article 17 available at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm. Visited on 10th july 17.
[192] See, AB report on US–Stainless Steel (Mexico), para.158.
[193] Joost Pauwelyn, 'Minority Rules: Precedent and Participation Before the WTO Appellate Body", *Institute*
Of International and Development Studies,(2014).
[194] World Trade Organisation, *A Handbook on the Dispute Settlement System,* 20 (Cambridge University Press, 2004).

the WTO, panel is an ad hoc body which is formed to initiate the dispute settlement process.[195] In contrast, the panelists depend on the secretariat to recommend them for selection.[196] They leave after the panel concludes while the secretariat remains, panelist often maintain other full-time jobs while hearing the case and have much less or little incoming knowledge of the jurisprudence and thus depend on the secretariat for certain references, and any panelists that wish to serve on a future WTO panel depends on the secretariat for recommending them to future parties and the Director-General.[197] This certainly reduces the interests of panelist to commit to the dispute with more vitality and determination because they can find no such prospectus of under the WTO dispute settlement system. Hence panelist serve under the institution till the time they enjoy the confidence of the secretariat.

Weiler writes from his experience as an actual panelist working with the legal division, as well as his discussions with others involved in panels, "the views of the secretariat will come out in the panel's way of determination of disputes."[198] By this proposition he means that the panel will someway settle the dispute prospecting the whims of Secretariat affecting the legitimacy of the institution.

3.4. OPERATIONAL CONSTRAINTS

3.4.1. Standard of Review under WTO Dispute Settlement Understanding:

Under the present WTO system, disputes are resolved primarily through panel adjudication and a second tier review by the WTO Appellate Body. It is the role of the panel, to review measures of another member in order to determine measures

[195] James Smith, "Inequality in international trade? Developing countries and institutional change in WTO dispute settlement", *Vol. 11, No. 3, Review of International Political Economy* (2004).
[196] Ibid note.
[197] Supra note 41. P. 13
[198] H. H Joseph Weiler. 'The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', *35 (2) Journal of World Trade,* 191-207 (2001).

consistent with WTO obligation. Hence, the concern here is as to what kind of standard of review a WTO panel should apply is important because it is part of border issue of determining the role of panel in WTO dispute settlement system.[199] If the standard is less intrusive in nature, then panels may not have a great deal of power to review domestic measures. Accordingly, the standard of review may be seen as a procedure that has a number of substantive and institutional consequences.[200] The expression 'Standard of review' refers to the manner in which an adjudicative body reviews a party's compliance with a form of regulation or the correctness of prior decisions made in the same matter.[201]

Generally standards of review are regulated as instruments of legal procedure given that they directly concern or are part of the process by which a proceeding or a review is conducted.[202] The World Trade Organization (WTO), however, defines "standard of review" somewhat differently.[203] Here, the term refers to the review of national decisions or policies by WTO panels or the Appellate Body (AB).[204] The question of applying the standard of review comes into play under the WTO. It is mostly arise at the panel level, specifically when a panel is required to review a domestic administrative determination and decide if such domestic ruling is in compliance with WTO rules and obligations. There are two type of standard for reviewing the decisions, namely *de nova* and total deference. *De nova* generally refers to situation

---

[199] James HeadenPfitzer and Sheila Sabune, "*Burden* of Proof in WTO Dispute Settlement: Contemplating Preponderance of the Evidence*", Vol.* 9 *International Centre for Trade and Sustainable Development,* p.5-6(2009).
[200] Supra note. 169.
[201] Ibid.
[202] Stefan Zleptnig, "The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority" *Vol. 6 European Integration online Papers (EIOP),* p.6,13. (2002). Available online,
http://eiop.or.at/eiop/texte/2002-017a.htm, visited on 10th Oct, 17
[203] Matthias Oesch, "Standards of Review in WTO Dispute Resolution", *Vol.6 Journal of International Economic. Law* P.637-39 (2003).
[204] Ibid.

where the reviewer conducts a full merit of a matter and is not required to defer to or accept any of the findings of the original decision-maker.[205] When a *de nova* review is conducted, usually the degree of intensity of review is not prescribed, but rather the adjudicating body has the role of examining the case as if no prior decision has been made in order to arrive at an independent decision.[206] On the other hand, total deference therefore refers to an avoidance of the responsibility of reviewing the substantive question of law.[207]

Professor Spamann, however contended that the *de nova* review of fact is the most beneficial standard to apply, but he limited the application of this standard to the trade remedy disputes, which in itself limits the whole scheme of this standard of review. However he tries to justifies this standard of review by explaining that the *de nova* review mostly involve a reasoning exercise where more 'complex' fact are inferred from the domestic authority's record and conclusions are drawn from it in a simple way. He argues that it is simpler and it does not focus on procedures but on the rights and obligation of the parties by way of 'reason' and 'relevant factors' and 'adequate fact'.[208]

However this standard was not left alone from the criticism. The expression 'relevant', 'reasoned' and 'adequate' are very broad terms and it does not allow in reality for members to hold the large degree of deference to such expressions. Another major difficulty of *de nova* review is, it does not define the scope of panel and

[205] *De nova* has a literal English translation of ' Anew'. See *Concise Law Dictionary,* Sweet and Maxwell, (2005).
[206] William Wade, *Administrative Law,* 309-10 (Oxford University Press, 10th ed. 2009).
[207] Macquarie Dictionary (5th ed. 2009).
[208] Holgar Spamann, "Standard of Review for World Trade Organisation Panels in Trade Remedy Cases: A Critical Analysis", *Vol. 38(3) Journal of World Trade*, p. 81-82(2004).

Appellate Body for fact finding. There is no guidance on when panel should seek expert evidence and when it should limit to the factual records.[209]

Hence there is a considerable academic debate contending that the existing charter of Dispute Understanding does not prescribe a particular standard of review for settlement of disputes. Similar assertion was made by the Appellate Body who stated that there is no formal doctrine of *stare decisis* in the WTO standard of review for determining the cases and complaints.[210]

Hence, ineffective and complex standard of review result in debarring the members from attaining the ultimate objective of dispute settlement system to provide security and predictability to the multilateral trading system.[211] The faith of members, basically the developing nation members can be attain only if the charter of Dispute Settlement Understanding is well formulated and principally executed by the different organs of authority.

3.4.2. Standard of review and Panel:

WTO dispute settlement involves interpretation of the WTO Agreements. Panel are charged with the responsibility of providing ruling and recommendations in relation to provision of the WTO Agreements. Article 11 of the DSU requires that panels make an objective assessment of the facts. They assess the facts and evidences and submit their reports to the DSB[212] It was for the first time in late 1990s the question of standard of review and role of panel was brought into question in *EC-Hormones*

[209] Ibid note. 74
[210] See Appellate Body Report , *Japan-Alcoholic Beverage II,* 13-14.
[211] See Article 3.2 of DSU
[212] Supra note 180.

case,[213] whereby the Appellate body reviewed a decision of panel concerning whether European Union measures prohibiting the importation of hormone treated meat was consistent with the SPS Agreement. After hearing the contention of both the parties, the Appellate body articulated the standard of review in following terms:

"Article 11 of the DSU should be articulate with great succinctness but with sufficient clarity the appropriate standard of review of panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements."

In applying Article 11, the Appellate body noted that the fact finding by panel and their activities are constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de nova* review as such, nor "total deference", but rather the "objective assessment of the fact". [214] This decision made it clear that objective assessment was the applicable standard of review of both fact and law. But the question which surpasses the realm of this decision is as to what does not constitute the "objective assessment", there is no positive definition of this term is expressly provided. The use of the concept of objective assessment without the addition of further criteria therefore poses a number of difficulties because it does not really signify any particular degree of deference or intrusion for panel to adopt in examining measures. There is therefore an absence of conceptual sophistication that would provide guidance to panel in their review of measures.

Holgar Spamann critically commented that 'objective assessment' principle is not at all helping Appellate Body in ascertaining as to which extreme to lean, either toward

[213] *See* Appellate Body Report, European Community- Measures Concerning Meat and Meat Products (Hormones), 115, WT/DS26/AB/R, WT/DS48/AB/R Jan. 16, 1998).
[214] Ibid. Note 34.

de nova review or total deference.[215] It does not provide any material guidance to panel nor to the Appellate Body in ascertaining the dispute. Other commentators also had a similar concern with regard to the use of Article 11 as a standard of review; it is unclear, misses the mark conceptually and generates confusion.[216]

Gradually an effort was made during` the Post EC-Hormones Case, several other decisions and judgements followed it where an Appellate Body tried to widen up the scope of standard of review and clarify the mandate of Article 11 of the DSU. The Appellate Body in *US-wool shirts and Blouses*[217] ruled that panels "need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".[218] A panel has discretion to determine the claims it must address in order to dissolve the dispute between the parties effectively. The Appellate Body has, however, cautioned panels to be careful when exercising judicial economy. To provide only a partial resolution, a dispute may be false judicial economy since the issues that are not resolved may well give rise to a new dispute.[219]

In *US-Carbon Steel*[220], Appellate Body ruled, Article 11 requires panels to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence. Provided that panel's actions remain within these parameters, however, it been said, "it is generally within the discretion of the Panel to decide

[215] Supra note. 215. p. 540.
[216] Catherine Button, *The Power to Protect: Trade Health and Uncertainty in the WTO,* p.168, (Hart publishing, 2004)
[217] Panel Report, United States-Measure Affecting Import of Woven Wool Shirt and Blouses from India, WT/DS33/R, adopted 23 May 1997, as upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, 343.
[218] See Appellate Body Report, US-Wool shirts and Blouses, para340.
[219]See, Appellate Body Report Japan-Agricultural product II, WT/DS7/R, adopted 19th March 1999, as modified by Appellate Body Report WT/DS7/AB/R, DSR 1999:I, 315.
[220] See,Appellate Body Report, United States-Anti Dumping Measures on Certain Hot-Rolled Steel products from Japan, WT/DS184/AB/R adopted 23 August 2001, DSR2001: X, 4697.

which evidence it chooses to utilize in making findings, and an appeal, we will not interfere lightly with a panels exercise of its direction".

In *US-Cotton Yarn*[221], the Appellate Body drew upon the safeguard decisions of *Argentina-Footwear (EC)*[222], *US-Lamb*[223] and *US Wheat Gluten*[224] and described the standard of review of fact as follows:

The standard may be summarised as follows: panels must examine whether the competent authority has evaluated all relevant factors: they must assess whether the competent authority has examined all pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination: and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panel must not conduct a *de nova* review of the evidence nor substitute their judgement for that of the competent authority.[225]

In *US-Continued Zeroing*[226] the Appellate Body noted that compliance with Article 11 means that a panel must: evaluate evidence in the totality, by which it mean the duty to weigh collectively all the evidence and in relation to one another, even if no piece of evidence is by itself determinative of an asserted fact or claim.

[221] See, Appellate Body Report US-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan. WT/DS192/AB/R, adopted 5th nov 2001: XII, 6027.
[222] See, Appellate Body Report, Argentina-Safeguard Measures on Import of Footwear Footwear(EC), WT/DS121/AB/R, adopted 12th Jan 2000, DSR2000:I,515.
[223] Supra note 43.
[224] See, Appellate Body Report, United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, adopted 19th Jan 2001, DSR2001:II 717.
[225] ibid
[226] See, Appellate Body Report, United States-Measures Relating to Zeroing and Sunset Reviews, WT/DS322/R, DSR2007:I,3.

Hence it has been analyzed that the current standard of review or the mechanics of Dispute Settlement of WTO is inadequate because it imposes obligation on the panel to conduct an objective assessment of the matter before it. [227] This obligation extends both to the fact of the case, and to the ultimate legal question of whether a measure is in conformity with WTO Agreement or not. This standard does not give any material guidance to panel as to how and to what extent they can scrutinize the fact and legal questions. Hence, this could lead panel to 'over' or 'under' scrutinize the cases.

Under the present WTO system, panel proceeding are predominantly adversarial, rather than inquisitorial, in nature.[228] This means that panel adjudicates disputes primarily by reference to the issues and arguments presented by the parties. Panel does not initiate nor maintain the carriage of disputes, as may be the case under more inquisitorial system. The effect of this is that the factual record is likely to be confined to facts and issues that are raised by the parties. A narrower factual record constructed predominantly from material presented by the parties is likely to narrow the standard of review, irrespective of the intensity of review undertaken. Accordingly, the factual record does not need to be curtailed through prescription under the general standard of review. A number of provisions under DSU, and in particular the panel working procedures annexed to the DSU, reflects the basic approach to dispute settlement. These provisions create a structure that gives the parties relatively high degree of control over the process and this ultimately provide a suitable framework for a panel's findings.[229]

[227] Supra note 180.
[228] Supra note 37. P.551
[229] Supra note. 215 p. 551.

The second feature of the dispute settlement system that circumscribes the scope of standard of panel review stems from Article 11[230] which in itself is a source of a general standard of review. Article 11 of DSU envisages objective assessment test but this test suffers from the fact that it has no jurisprudential framework to dictate its functioning or how it may develop in future. Article 11 is incapable of embodying a more generalized standard of review, and it is unclear when and to what extent the objective assessment test should be varied with substantive WTO obligation. Hence this objective assessment test is confusing and it relies upon the Appellate Body decision for its operation. An ordinary reading of this article ensures due process that is concerned with avoiding bias. In EC-Hormones case the Appellate Body applies Article 11 and equated a panel's duty under this Article as a duty to review disputes in good faith.[231] The requirement to examine a matter in good faith is very different proposition from prescribing how panel are to undertake the review task.[232] Hence in many ways Appellate Body has been forced to articulate a standard of review which reflects the language of the agreement being contested because the objective assessment test does not provide any real framework for review. Without the introduction of the general standard of review, there is therefore a risk that the standard will continued to be applied in an unnecessarily ad hoc manner, or that it will continue to split into different WTO agreement-specific standard because of inadequate guidance from the objective assessment test.

[230] Supra note 24
[231] See Appellate Body Report, EC-Hormones (Para 133.)
[232] Andrew D. Mitchell, 'Good Faith in WTO Dispute Settlement', *Vol.7(2) Melbourne Journal of International Law*, 339 (2006).

Thirdly, panel review process requires a difficult factual and legal assessment.[233] It is oftenly pointed out that, whether a panel has given adequate consideration to the issue, whether its reasoning is logical and coherent, or whether it has attached the correct weight or importance to particular pieces of evidence.[234] Hence the review task of panel is therefore complex and it is impossible for panel to avoid criticism that they have 'over' or 'under' reviewed disputes.[235] In objective assessment test its textual reliance is misplaced, and the Appellate Body has been required to develop the doctrine in such a way that it could be applied in disputes under different agreements.[236]

Hence it can be concluded that international tribunals are ill-equipped to examine evidence properly, coupled with the fact that developing nations have difficulties investigating the evidence of the industrialised opposition, provides for an undesirable situation for developing countries.[237] Accordingly, the new standard of review should be formulated which could satisfy three basic criteria: it should be faithful to the fundamental objective of WTO dispute settlement: it should promote legitimacy of the WTO as an institution: and it should be part of more advance and user-friendly dispute settlement procedures.

[233] Tania S. Voon and Alan Yanovich, "The Fact aside :The Limitation of WTO Appeals to Issues of Law' *Vol.40(2)Journal of World Trade* p. 251-258 (2009)
[234] Supra note. 169, p. 207.
[235] Supra note 209., p.42.
[236] Ibid.
[237] D.M. McRae, "The WTO in International Law: Tradition Continued or New Frontier?" *Vol.3(27) Journal of International Economic Law,* pp. 32-33 (2000).

3.4.3. Burden of Proof: issue of contention.

As the WTO dispute settlement regime grows more complex and juridical, the question of burden of proof has become increasingly contentious.[238] The allocation of burden of proof is a critical aspect in WTO dispute settlement. The developing nations while presenting their disputes often get backlogged because of their failure to justify their claims because there is no specified norm under the DSU which could efficiently deal with the matter concerning with burden of proof. The WTO dispute settlement process aims for settling the disputes promptly and this eventually limit the chance of parties for proving the burden.[239] The parties cannot present their case in a sequenced way within a small span of time and hence the process of prima facie often turns into the process of persuasion, whereby the adjudicating authority decides the disputes without ascertaining the facts beyond reasonable doubt.[240]

The burden of proof in dispute settlement basically implies "the law's response to ignorance"[241]. In more simplified term it is an onus of proving the claim. In the WTO panel process, the question of 'who bears the burden of proof' is quite essential because, the allocation of the burden of proof has a substantial impact on the substantive rights and obligations of the parties and may directly determine the outcome of the case.[242]

---

[238] A. Das and J. Raghuram, 'One Too Many: Significant Contributions of India to the WTO Dispute Settlement Jurisprudence', in A. Das and J.J. Nedumpara (eds.), *WTO Dispute Settlement at Twenty,75* (Springer Nature, Singapore, 2016).

[239] See, DSU arts. 3.12, 12.8. the WTO website. World Trade Organization 2015: Understanding the WTO: *available from:* https://www.wto.org/ visited on october 1, 2017.

[240] John J. Barceló III, 'Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement', *Cornell Law Faculty Publications*,Research Paper 119, (2009).

[241] H. Richard, Gaskin, *Burdens of Proof in Modern Discourse,* p.4 (Yale University Press, 1992).

[242] D. Petko Kantchevski, *The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement, 3 BYU Int'l L. & Mgmt. Rev*. 79, 97 (2006).

However, there is no explicit provision in the WTO Agreement which addresses that the party has burden of proof. This is one area where the observations and findings of the panels and the Appellate Body have substantially clarified the concepts. The observations of the Appellate Body in *US—Wool Shirts and Blouses*[243] and *EC—GSP*[244] became the foundation of WTO jurisprudence on burden of proof. In examining this issue in *US—Shirts and Blouses*[245], the Appellate Body observed that "It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is an accepted rule of evidence in civil law, common law, and in fact, most jurisdictions that the burden of proof rests upon the party whether complaining or defending, who asserts the affirmative of a particular claim or defence". The Appellate Body than ruled that, if that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[246]

Hence, it is been contended that determination of the correct burden of proof can be closely linked to the concept of prima facie standard or presumption. Presumption favours the parties to the dispute to shift the burden of proof. The party who is making the claim must have to adduce evidence for justifying their claim and it is than once

[243] Appellate Body Report on *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses*
from India WT/AB/DS33/R.
[244] European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R
[245] Ibid note 250.
[246] Ibid note.p.61

the evidence is adduce by complainant, the party defending its claim must have to assert evidences proving that that the claim is untrue.[247]

In *EC Measures Concerning Meat and Meat Products (Hormones Case)*[248], Appellate body stated that: prima facie case is one in which the absence of effective refutation by the defending party may result the ruling in favour of the complaining party presenting the case. The Appellate Body in this case further classified the burden of proof in WTO dispute settlement proceedings with respect to the disputes related to SPS Agreement, the initial burden lies on the complaining party, which must establish a prima facie case of inconsistency with a particular provision of SPS Agreement on the part of defending party or more precisely of its SPS measure or measures complained about. When that prima facie case is made the burden of proof moves to the defending party which must intern counter or refute the claimed inconsistency.

In *Japan-Measures Affecting Agricultural Products*[249], the Appellate Body was faced with the tension between this principle and the right of panel under Article 13 of the DSU to seek information or advice from any individual or body. Specifically, the question was raised as to whether panel could make a finding based on opinion or advice given by experts on a particular issue, when no party had presented a claim or arguments relating to that issue. The Appellate Body found that the authority of panel to seek information cannot be used to rule in favour of a party which has not

[247] Abhijit Das and Jayant Raghuram, *One Too Many: Significant Contributions of India to the WTO Dispute Settlement Jurisprudence,* p.71-73(Springer Nature, Singapore, 2016).
[248] Supra note 221.
[249] *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, (22 February 1999)

established a prima facie case of inconsistency based on specific legal claims asserted by it.[250]

In a later opinion, however, the Appellate Body directly reversed itself with respect to restraints upon a panel regarding evidence it considers during the application of the prima facie standard to burden shifting. In August 1999, the Appellate Body in *Canada – Measures Affecting the Export of Civilian Aircrafts*[251] determined that a panel is free to request and consider information from parties or anyone else, and specifically the panel is under no obligation to wait until the complaining party presents a prima facie case before it is able to conduct its own investigation. Furthermore, the Appellate Body explained that outside information requested at the prerogative of the panel may indeed be necessary for the panel to determine whether the complaining party has presented a prima facie case.

However, this is not clearly apparent because the Appellate Body in *Canada – Aircraft* seems to have contradicted its statements in *Japan – Agriculture* with respect to a panel's ability to freely conduct an independent investigation during the application of the prima facie standard for the purposes of the burden of production. Confusion becomes further evident with the Appellate Body's opinion in *India – Quantitative Restrictions*[252], whereby Appellate Body reiterates, that a panel should conduct its own analysis considering all evidence presented by all parties before deciding whether prima facie has been reached or not. The Appellate Body observed that "the panel should conducted its own assessment of the evidence and arguments,

[250] Supra note 249.
[251] *Canada – Measures Affecting The Export of Civilian Aircraft*, WT/ DS70/AB/R (2 August 1999)
[252] *India – Quantitative Restrictions On Imports Of Agricultural, Textile And Industrial Products*, WT/DS90/AB/R (23 August 1999)

rather than simply accepting the assertions of either party.[253] In doing so, the Panel took into account and carefully examined the evidence and arguments presented by the European Communities and the United States."[254]

In WTO dispute settlement, direct interaction between the parties and the panel is severely limited.[255] The WTO panel procedure does not contain any similar practice to the common law's formal motion practice which tests the sufficiency of the proponent party's evidence at any point in the procedure.[256] It is because of this procedural limitation in WTO dispute settlement that the application of the prima facie standard to the preliminary shifting of the burden of proof has become such a point of confusion within WTO jurisprudence.

From the developing nation's perspective these confusion and limitation within the constitutional framework of WTO Dispute Settlement Mechanism however restrains the developing and least developed countries because they are unable to cope up with these intrigue procedural technicalities.

3.4.4. Regional Trade Agreement (RTAs)

It is from the mid 90s the world trading system came along with many new developments and one amongst all is the expansion of Regional Trade Agreements.[257] Regional Trade Agreements (RTAs) are basically defined as the groupings of countries which are formed with the objective of reducing barriers to trade between

[253] See Appellate Body Report, *Japan – Apples*, para. 166; and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 82.
[254] See, Appellate Body Report, *United States – Laws, Regulations and Methodology For Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (18 April 2006) Para. 220.
[255] Supra note. 60. P. 135.
[256] Ibid note 66.
[257] Agreement establishing the WTO, or WTO Agreement available at http://www.wto.org/english/tratop_e/region_e/regfac_e.htm, visited on 26/01/2018

member countries.[258] North American Free Trade Area (NAFTA) and the ASEAN Free Trade Area (AFTA) are the good examples of FTAs.

According to the WTO rules, countries within a RTA can trade among themselves using preferential tariffs and easier market access conditions than what is applicable to other WTO Member countries. As a result, WTO Member countries that are not a part of the RTA lose out in these markets. Also trading within the regional trade blocks does not come under the purview of WTO and hence this has created certain amount of apprehension in the WTO trading regime.[259]

Initially WTO encouraged the growth of RTAs because it believed that regional integration initiatives can complement the multilateral trade regime. However, the high proliferation of RTAs in global trade and increased diversion of trade through this route is increasingly becoming a cause of concern for the multilateral trading system under WTO.[260]

It is asserted that the prime reason for the current growth of regionalism is dissatisfaction of certain member nation from achieving the goals and promises so kept in Uruguay Round Agreement.[261] Particularly for developing countries, the promised expansion of trade in three key areas of agriculture, textiles and services has been dismal.[262]

---

[258] Parthapratim Pal, 'Regional Trade Agreements in a Multilateral Trade Regime: An Overview', *Vol.12. Indian Institute of Management Calcutta* (2015), available at https://www.researchgate.net/publication/251808332.

[259] Wilfred J. Ethier, ' Regionalism in a Multilateral World', *Vol.106(6) Journal of Political Economy*,(1998).

[260] Bhagwati, J. "Regionalism and Multilateralism: An Overview," in Melo and Panagariya eds. New Dimensions in Regional Integration, (Cambridge University Press, Cambridge, 1993).

[261] Baldwin, Ricard E , "The Causes of Regionalism", *Vol. 20, No, 7,The World Economy*, p. 865-888, (1997)

[262] Ibid.

However disputes are often taken to alternative regional forum for the redressal these days. Taking the example of North Atlantic Free Trade Agreement (NAFTA), Chapter 20 provides similar mechanisms to that of WTO Dispute Settlement Understanding. NAFTA chapter 20 incorporates a Free Trade Commission and a secretariat that appear similar to the DSB and WTO Secretariat. At least two members of the NAFTA Free Trade Commission are necessarily officials of the governments that are parties to a NAFTA Chapter 20 dispute. Both systems however contemplate a binding international arbitration process using ad hoc trade experts as arbitrators, preceded by mandatory consultations, and voluntary good offices and conciliation. Both are designed to assure a speedy process in which no Party or Member can significantly delay or impede the result. Both require the issuance of opinions or reports that show in detail the rationale for decisions. But certainly the WTO Dispute Settlement mechanism has a better foothold because of its effective implementation. The review process within the WTO dispute settlement system adds to its effectiveness whereas there are no such provisions in Chapter 20 of NAFTA. The NAFTA lacks a detailed mechanism for implementation and lacks provisions to encourage the Parties to comply within a reasonable time.

FTAs were basically carried out to promote and compliment the multilateral trading system but it has somehow affected the institution of WTO. Therefore, divergent approaches for dispute settlement in different FTAs increase forum shopping problems.[263] But however these FTAs too don't have any efficient dispute settlement system. Most of the rules so designed and procedures incorporated within it are borrowed from DSU. It often seems like dispute settlement under FTAs are efficient but it too has its shortcomings. The absence of appellate review, the lack of legal

[263] Baldwin, Robert, "Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade", *The World Economy*, (2006).

secretariats to support dispute settlement, and the panel selection rule to appoint their own nationals in FTAs may aggravate inconsistent jurisdictional problems. Henceforth, the incompetency of many FTAs to actually handle the dispute settlement process alleviates the potential contradictory or inconsistent jurisdictional development among the FTAs.[264]

3.5. RESOURCE CONSTRAINTS:

3.5.1. Financial Constraints.

Participation of developing nations in the WTO Dispute settlement system often gets debarred because of their financial limitation and resource incapacity. It has been argued by the African Group[265] that the WTO dispute settlement body is an "expensive and complicated" system particularly for developing countries.[266] Ujjal Singh Bhatia, former ambassador of India in his presentation in WTO stated that the WTO dispute settlement system is creating the deterrence for the small and large developing countries in participating in Dispute settlement system of WTO.[267] According to Jan Bohanes and Gerhard Erasmus, the high financial cost of using the DSU put its integrity and purpose in jeopardy by handicapping poor countries and preventing them from being financially able to bring or argue cases.[268]

Under the WTO dispute settlement system, the proceedings require human and financial resources to follow a case from the consultation to the appeal stage which

---

[264] Dukgeun Ahn, ' Dispute Settlement Systems in Asian FTAS: Issues and Problems', *Vol. 8,Asian Journal of WTO and Health Law and Policy,*(2009).

[265] Bown, C. & Hoekman, B., 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector', *8.(4) Journal of International Economic Law*, p.861-890,(2005).

[266] Supra note 160.

[267] Presentation at the WTO Public Forum 2008, 24 September 2008, by H.E. Mr. Ujal Singh Bhatia, Ambassador and Permanent Representative of India to the WTO. Online *Available* http://www.wto.org/english/forums_e/public_forum08_e/programme_e.htm. Visited on sep 12, 2017-10-06.

[268] J. Bohanes and G, Erasmus, "Cost-Sharing in International Dispute Settlement", *Trade Briefs No.1* (Western Cape, South Africa, 2002).

may proceed to even three to five years.[269] Banana dispute is a good example of prolonged Dispute settlement procedure of WTO, which made its course for 56 months.[270] Such a long procedure brings great cost burden especially to the nations with a smaller economy like developing nations.

However, there are many developing governments that lack financial and human resources to settle their disputes in the complicated and extended legal procedure of the WTO. Therefore, the developing countries may not be able to recognize their rights, properly defend themselves under the WTO rules and operate as effectively as developed countries.[271] Several developing countries have complained that they cannot bear the high costs of WTO litigation.[272] In the DSU cases, developing countries with less-qualified experts and with little experience may not overcome developed countries with better-qualified experts. As a result of the disproportion in resources between developing countries and developed countries, the 'fight' is not fair. High costs of WTO dispute settlement erode developing countries' capability, especially those weaker ones', to participate in the DSM.[273]

Financial inequality brings developing countries big obstacles of pursuing WTO dispute settlement. Participating in the WTO Dispute settlement system requires skilled personals with expert knowledge of law and procedural framework of the

[269] Zang, M., 'A Legal Analysis of Developing Countries Use of the WTO Dispute Settlement Mechanism to Resolve Their Disputes with Developing Countries', University of Essex, LLM Thesis (2001).
[270] Mauricio Salas and John H. Jackson, "Procedural Overview of the WTO EC – Banana Dispute", *Vol. 3 Journal of International Economic Law,* 145-166 (2000).
[271] H.Pham., "Developing Countries and the WTO: The Need for More Mediation in the DSU", *Vol 9. Journal of World Trade,* p.331.(2004).
[272] Cuba proposal, TN/DS/W/19, (Oct. 9, 2002). "Our experience over the past seven years of the dispute settlement process has been that the cost of litigation before the WTO panels and the Appellate Body is prohibitively high".
[273] Supra note 264.p 870.

system.[274] Some developing countries often use private law firms to help them. However, in recent years, the cost of hiring private legal counsel is high for developing countries.[275] And other institutions such as NGOs can hardly satisfy the increasing needs given the fact that developing countries are more involved in trade disputes and most of them do not have enough resources to invest. [276] For example, in the *Cotton and Sugar Subsidies* cases[277], Brazil hired private law firms to assist in bringing complaints. Brazil's paid a high cost of legal fees, which was over two million dollars. It worked with Sidley Austin Brown & Wood in the cases against the United States and EC.

The high financial costs of the WTO dispute settlement trigger inequality in the DSM. With abundant financial resources, developed countries can better afford the WTO dispute settlement thus may use it more frequently than developing states do. Hence it comes out that developing countries do not make full use of the DSM.

3.5.2. Limited Legal Resources:

Not just the financial limitation constrains the participation of developing nations in the Dispute settlement system of WTO but also the limitation of legal resources. For instance, in the panel phase, the written request for the panel establishment has to precisely define and limit the scope of the dispute; and the parties involved need to exchange multiple sets of written submissions, present views orally in oral hearings, and answer the questions raised by the panel. All these activities require sufficient legal expertise support. Actually, the shortage of special expertise, personnel and

[274] Supra note. 145. p.185-186.
[275] Supra note 20.
[276] Ibid note.270.
[277] *See*, Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, and Corr.1, adopted 21 March 2005, modified by Appellate Body Report, WT/DS267/AB/R.

information for legal activities is an important reason why developing countries are suffering inequality and unfavourable outcomes in the DSM.[278]

Industrialized states such as the US and the EU, also the major players in the WTO, are well equipped with legal experts in the area of the WTO legal system, and they have a worldwide network of commercial and diplomatic representation that feeds their systems with relevant data.[279] In contrast, developing countries have limited legal expertise and it is harder for them to collect data and information because of the lack of networks. Many developing countries have only one or two lawyers to address WTO issues.[280] When small developing countries are involved in disputes with the US or the EU as the other side, the developing ones are obviously in a disadvantageous position concerning legal expertise supply. Though they can buy legal expertise, "scarcity of national administrative resources to identify and prepare cases is a major constraint."[281]

Developing countries, to certain extent, can improve their access to WTO litigation services. For example, according to DSU Article 27.2,[282] developing countries can get

[278] Haider Khan and Yibei Liu, "Globalization and the WTO Dispute Settlement Mechanism: Making a Rules-based Trading Regime Work", *MPRA Paper No. 7613,* available online Online at http://mpra.ub.uni-muenchen.de/7613/ , visited on Sep 29, 17.

[279] Bernard M. Hoekman and Petros C. Mavroidis, "WTO Dispute Settlement, Transparency and Surveillance," in Bernard Hoekman and Will Martin ed. Developing Countries and the WTO: A Pro-active Agenda, 136, (Malden: Blackwell Publishers Inc., 2001).

[280] Supra note 25, p.182.

[281] Ibid note 30. P.139

[282] Article 27.2 of Dispute Settlement Understanding states that "while the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat." , available at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm, visited on 11th sep 17

technical help from the WTO Secretariat.[283] They can also resort to the Advisory Centre on WTO Law (ACWL) for legal assistance for dispute cases. And they can go to NGOs and other issue-based organizations or private firms for help. But the assistance methods' accesses and effects are limited. Taking WTO as an example, its legal assistance services are offered by only two expert attorneys on a limited part-time basis, and the two experts advise developing countries disputants at most one day per week.[284] And the DSU further requires that even the limited assistance can only be provided after a member has decided to bring a dispute into the DSM. Thus developing countries cannot use this assistance to help figure out their "winning probability" thus help decide whether to bring the disputes to the WTO.

3.5.3. Advisory Centre of WTO Law

The charter of Dispute settlement understanding under Article 27.2 however encourages the developing nations to participate and use the system by ensuring the legal and financial help but it has its own limitations and constraints. Therefore, the WTO Members established the Advisory Centre on WTO Law (ACWL) on 1 December 1999 at the WTO Ministerial Meeting in Seattle, Washington.[285] The establishment of ACWL is perhaps considered as an innovative initiative, an independent 'non-governmental' organization and the first 'international legal aid' centre in international domain.[286] This body is primarily aimed at giving legal advice,

[283] G. Shaffer "Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining", paper prepared for *WTO,* presented in Sao Paulo, Brazil (2005).
[284] Supra note163,p 565.
[285] Ibid note. 34.
[286] K. Bohi, 'Problems of Developing Countries Access to WTO Dispute Settlement', *Journal of International & Comparative Law* (2009), Available online http://www.kentlaw.edu/jicl/articles/spring2009/BohlSubmissionWTOFinal.pdf, visited on 29th Sep 17.

aid and training for developing countries and to assist developing countries in the preparation and presentation of their trade cases in WTO disputes.[287]

The ACWL offers high quality expertise for parties to WTO disputes. It has its own investment fund which is devoted in subsidizing the costs of such expertise so provided to the developing countries.[288] However, the ACWL has been rarely used on occasions to assist developing countries in acquiring scientific, economic and domestic law expertise presented when litigating disputes.[289] The membership fee for accessing the ACWL is way higher for the developing and least developed nations. The fees for use of the ACWL may affect the decisions of developing countries to bring complaints under the DSU. As a result of the membership fee, a developing country might wait to join the Centre until it is sure that it can benefit meaningfully from WTO litigation.

The ACWL has its own capacity constraints for developing nations in WTO dispute settlement procedures. It is only after the disputes get started the member nation can come for the assistance. [290] If assistance were also be given before the disputes arose in the DSU process, this would be better for developing countries. In addition, the ACWL has some deficiencies. It has a small number of staff, and few lawyers with distinguished knowledge and skills. Consequently, it does not have "the capacity to handle all cases referred to it".[291]

---

[287] Ibid. Note.37.
[288] H. Nordstrom & G.Shaffer "Access to justice in the World Trade Organization: A Case for a Small Claims Procedure?" *7, (4). World Trade Review* (2008).
[289] Ibid.
[290] R. Abbott,'Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the years 1995-2005', *ECIPE Working Paper No. 01/2007*, p. 12. *Available on* http://www.ecipe.org/media/publication_pdfs/are-developing-countries-deterred-from-using-the-wto-dispute-settlement-system.pdf , visited on Sep 11, 2017.
[291] Ibid note 39.

Furthermore, there are considerable concerns when any developing countries bring a case against another developing country. The ACWL cannot support all developing countries in both sides of a dispute. Indeed, this conflict took place in the *Sugar dispute*[292] when the ACWL refused to support one of the developing country parties.[293]

It is because of all these deficiencies, there are only few developing countries as member participants of the ACWL. The ACWL has failed to address all the constraints so faced by the developing countries in accessing the WTO dispute settlement system. However, the high cost of WTO dispute settlement system litigation is still largely unaddressed and it has also limited the participation of developing countries in WTO dispute settlement proceedings.[294]

3.5.4. Compensatory inadequacy and Lack of Enforcement Capability:

Compensation is one of the remedy for developing countries attempting to make the defending party comply with the DSU's decision.[295] However, according to Article 3.7 of the DSU, compensation is considered as a temporary measure which is to be offered when "immediate withdrawal of the measure is not possible".[296] Furthermore, Article 22 of the DSU does not expressly provide for the compensation of damages

[292] Panel Report, *European Communities–Export Subsidies on Sugar*, WT/DS265/R,WT/DS266/R and WT/DS283/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, and WT/DS283/AB/R.
[293] H.Pham, 'Developing Countries and the WTO: The Need for More Mediation in the DSU', (9) *Journal of World Trade* (2004).
[294] K. Borght, 'The Reform of the Dispute Settlement System of the World Trade Organization: Improving Fairness and Inducting Fear', *4(2) Journal of International Economic Law,* 22 (2007).
[295] N. Alotaibi, 'The WTO (DSU) and Developing Countries: problems and possible solutions', LL.M. dissertation, School of Law, *University of Essex,* p.32-33, (2011).
[296] Ibid.

suffered, rather it provide the arrangement of the compensation as a means of trade sanctions rather than monetary damages as compensation.[297]

Hence, with regard to the compensation remedy, there are three obstacles which developing countries are facing. First, during the period from the start of the dispute settlement process until the final stage of dispute, the process of settlement is often prolonged because of complexity of laws and procedures.[298] There is no compensation granted to the winning party, even when it is a developing country. Therefore, if developing countries are the complainants, there may be negative consequences and economic harm resulting from retention of the inconsistent measures for a long time. Consequently it can also affect the export opportunities for developing country during the time of such settlements.[299]

Second, the export loss during the fifteen months might be significant to a developing country. This can extremely damage the economy of small developing countries which are highly dependent on a limited within a small trading potential.[300] Hence, there is no any rule for compensation for the injury caused even if the WTO laws were violated. Indeed, serious injury will be suffered by smaller developing countries that rely on a few exported goods, service and markets.[301]

Thirdly, the remedy of claiming the compensation for complaining country becomes harder when such country is categorised as a developing or least developing nations.

---

[297] Article 22.2 of the DSU

[298] H. Nottage, (2009), "Developing Countries in the WTO Dispute Settlement System", *The Global Economic Governance Programme*. *Available at* http://www.globaleconomicgovernance.org/wp-content/uploads/nottage-working-paper-final1.pdf visited on sep11,2017.

[299] F.Al Bashar, 'The WTO Dispute Settlement Mechanism and the Reform of Third Party Rights: A Study from the Perspective of Developing Countries', PhD thesis, School of Law, *University of Portsmouth* (2009).

[300] Ibid note. 57.

[301] Ibid note 58.

It is because of "political considerations and the unequal economic relationship".[302] Additionally, a developing country is always dependent on developed countries for growth and development of their economy. Therefore, developing countries may not request compensation against defending developed countries.[303]

It is further argued that developing countries possess inadequate enforcement capability to fully implement the WTO rulings or recommendations even if the results are favourable to them. Under the DSM, the final dispute settlement decisions are supposed to be implemented on a decentralized, bilateral basis. The DSM relies entirely on state power for enforcement of its rulings. It may be hard for a developing country to raise tariff rates on certain products imported from a developed country, even if it is authorized to, since this action may hurt itself in turn at the end.

It has been observed that developing countries may not have the freedom to decide whether to meet or not meet the terms of the DSB decision. They have weak economies and that would place the developing countries in poor position. One of the developing countries' experts has clearly stated that "developing countries do not have the luxury of choosing whether to comply or not".[304] Hence, the enforcement of the DSU through retaliation has been criticized since the retaliation creates exacerbates the problem by decreasing trade for both parties and can even be eventually counterproductive for the winning party.[305] In general, the enforcement

[302] Supra note 163.
[303] G.Shaffer, ' Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining', *based on paper prepared for WTO at 10: A Look at the Appellate Body Sao Paulo, Brazil, May 16-17* (2005).
[304] D. Ierley, , 'Defining the factors that influence developing country compliance with and participation in the WTO dispute settlement system: Another look at the dispute over bananas' (2002).
[305] R. E. Hudec, 'Broadening the scope of remedies in WTO dispute settlement', in Weiss F,& Weiss J. (eds.), Improving WTO Dispute Settlement Procedures, *Cameron May Publishers* (2000). Available at, http://www.peacepalacelibrary.nl/ebooks/files/HUDEC_Broadening-the-Scope-of Remedies.pdf visited on 16th sep,17.

regime "does not restore the trade loss, not does it encourages compliance, but rather tends to inflict greater injury on the complaining party".[306]

3.6. CONCLUSION

The intention of designing this chapter was to provide a critical insight as to how far the developing nation has fared under WTO Dispute Settlement System. It provides evidence that the participation in WTO dispute settlement system is more impressive than that of GATT regime. In general terms, the DSU has substituted a more 'legalised' system of dispute settlement, with new procedural requirements, over the more 'political' system of GATT. In doing so, it has created both opportunities and challenges for developing countries. In one hand, it has helped to level the playing field between weaker and stronger WTO members, while on the other hand, it has raised the bar in terms of resources both human and financial which is required to use the system effectively.

This chapter is classified into different head of constrains whereby an effort is made to exemplify the basic problems and challenges which developing nations are facing under the Dispute settlement system of WTO. Hence it becomes important hereby to resolve these constrains in the best possible way and dictate the reform measures to revitalise the dispute settlement system and ensuring the maximum participation of even the least developed nation will be the goal of next chapter.

[306] Ibid.

CHAPTER: 4

DISPUTE SETTLEMENT UNDERSTANDING:

CONTOURS OF REFORMS

4.1. INTRODUCTION

The success of any institution and organisation can be determined by the participation of its member to it. However, in the preceding chapter possible constraints and challenges have been highlighted, signifying the problems faced by member nations, primarily the developing nation. Hence the possible participation of member nation could be fared only if the system is reformed and revised.

With the very concern of reforming the system, this chapter commence with highlighting the proposal and negotiations which were aimed to revitalise the shortcomings in the Dispute settlement system. This chapter is classified into various sections, preceding the previous chapter where the particular challenges and shortcoming were examined in relation to these classifications.

This chapter aims to present the possible reform measures for improving the developing countries' access to the dispute settlement system and to improve the DSU rules and make them work for developing countries by highlighting possible solutions to tackle some of constraints which limit developing country participation in WTO dispute settlement proceedings.

4.2. DOHA MANDATE: THE PROPOSAL FOR REFORMS:

It was soon after the Uruguay Round Negotiation, the meeting were initiated with the intent of determining the nature, possibilities and effectiveness of the new model of

Dispute Settlement System. As WTO itself being new multilateral trading organisation, its concern was to provide an efficient mechanism which can fare the interest of the entire member nation, basically the developing and the least developed countries. It was in the year 1997 the first ever proposal for reviewing the DSU was introduced under the Ministerial Decision 'whether to continue, modify or terminate such dispute settlement rules and procedure'.[307] However the complete review of the system was unable to process and hence the deadline was extended to 31st July 1999. The issues invoked in the EC-Hormones[308] and EC-Banana[309] created a new area of complication debarring the developing nations to extent their interest in the system. The project of reformation however couldn't be concluded within the stipulated time. Perhaps it gave a leeway to carry out a special session negotiation under separate chair. As of January, 2004, there had been 17 formal meetings of the special session, usually accompanied by an informal session. Each of this session discussed the measures for improvement of DSU.[310]

Hence the concern for these challenges was addressed in the Doha Round, where members agreed to put back the life into the negotiation by reforming the DSU. This was the round of negotiation where the members from the developing nations and least developed nations participated actively and tabled series of reform proposals.

[307] Heinz Hauser and Thomas Zimmermann, 'The Challenge of Reforming the WTO Dispute Settlement Understanding' , *Vol.38(5) Review of European Economic Policy*, 241, (2003).
[308] See, EC—Measures Concerning Meat and Meat Products (Hormones), WTO Doc WT/DS26 (August 1997).
[309] See, EC—Regime for the Importation, Sale and Distribution of Bananas, WTO Doc WT/DS27 (May 1997).
[310] See, TN/DS/9, para .9. pp. 3-19 ,

4.2.1. Developing Countries' Proposals for Reforming Dispute Settlement System:

With the need of improving the multilateral Dispute Settlement System, developing nations came up with several proposals for ensuring the improvement and widening the scope of their participation in the system.[311] The first concern of improvement was with regard to the consultation process which was proposed by India.[312] The countries like Jamaica, Costa Rica, and Chinese Taipei also suggested that the party requesting for the consultation should submit a factual and concise report with regard to the matter for which consultation is proposed for making the system more transparent and efficient.[313] This proposal facilitates the third party to participate in the consultation process simply by showing their interest in to the dispute.

In addition to this, the African Group proposed a requirement to notify measures withdrawn in the course of consultation and to compensate the injury caused by such measures.[314] It was proposed that if member parties couldn't meet the agreed solution to the issue raised than they can extent time for the consultation by issuing the notification to the member nations.[315]

The developing nations were concern with regard to their structural position and their financial capacity with dealing with the disputes against the strong member nations, understanding this constraint, the proposal was brought up by the African Group for the establishment of "WTO Fund on Dispute Settlement" with the intent of bringing

[311] Habib Kazzi, 'Reshaping The WTO Dispute Settlement System: Challenges and Opportunities for Developing Countries in the Doha Round Negotiation', *vol.11, No.31 European Scientific Journal November* (2015).
[312] See TN/DS/M/5, para. 54 (14 October 2002).
[313] See, suggestion made by Jamaica in the proposal TN/DS/W/21.
[314] See also, Proposal by the African Group, WTO Doc TN/DS/W/15 (2002).
[315] Ibid.

financial stability while dealing with the disputes against powerful nations. [316] This proposal made a call for better training for civil servants from LDCs, financial support for legal assistance, and the establishment of a not-for-profit law firm.[317]

It was further asserted that the lack of professionals and expertise for dealing with the dispute often limits the possibility of the developing countries for cheering the participation and using the system to the fullest.[318]

For providing the legal assistance to developing countries the Advisory Centre for WTO Law was established. This proposal was however stressed by African Group but was disregarded by the US France and EU.[319] The concern was further expressed with regard to the provision laid with regard to the special and differential treatment of the developing countries. The member nations belonging from the LDCs asserted that the provision under Article 21.8[320] should be taken into account.[321] The main rationale behind this Article was to support the participants from Developing and Least Developing Countries.

Another important proposal brought up by the LDCs was the call for the introduction of the "collective retaliation" which could favour developing and least developed economy to undertake the dispute efficiently against the developed country

[316] Negotiations on the Dispute Settlement Understanding, *Proposal by the African Group*, para. 2, TN/DS/W/15 (Sept. 15, 2002)
[317] *See* Contribution of Jamaica to the Doha Mandated Review of the Dispute Settlement Understanding (DSU), TN/DS/W/21 (Oct. 10, 2002)
[318] Fabien Besson & Racem Mehdi, *Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis* 9–11 (unpublished paper presented at the International Conference on Policy Modeling, 2004)
[319] Kim Van der Borght, '*The Advisory Center on WTO Law: Advancing Fairness and Equality'*, *Vol.2 Journal on International Economic Law.* 723–28 (1999).
[320] This Article 21.8 provides that ," if the case is brought by a developing nation, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country member concerned."
[321] Proposal by the LDC Group, Negotiations on the Dispute Settlement Understanding, TN/DS/W/7 (Oct. 9, 2002)

members.[322] Mexico stepped up to defend this proposal contending that the lack of sufficient capacity to mount credible retaliation against powerful nation may hurt their own interest and prevent them from using the system.[323] The African Group also called for the introduction of monetary compensation, which is to be paid continually until the withdrawal of the violating measures.[324] Other developing countries proposals were for the retroactive calculation of the level of nullification and impairment, for allowing Members to transfer the right or compensate the loss by suspending concessions or other obligations to other Members.[325] The proposal was not limited to this; it was further proposed that the developed country members should give special attention to the need of developing country. This may involve extending the time for carrying out consultation process, and preparing and presenting the case.[326]

The concern was expressed with regard to the workability of panel and Appellate body. The proposal was tabled for the appointment of atleast one panelist from the developing country when the party to the dispute is the member from developing or the least developing nation.[327] Another proposal was tabled for authorizing a panel

[322] Ibid note 6.
[323] See Proposal by Mexico, WTO Doc TN/DS/W/23 (2002) , refered from ,Bercero Ignacio Gracia and Pablo Garzotti, "Why Have Negotiations To Improve WTO Dispute Settlement System Failed so Far and What Are the Underlying Issues?",*Vol. 6(847) Journal of World investment and Trade* (2005).
[324] Thomas Zimmermann, 'WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation' *Vol 60(1) Aussenwirtschaft* (2005)
[325] Supra not e8. See proposal by Mexico.
[326] Supra note 6.
[327] See proposal TN/DS/W/17. The LDC proposed that Article 8.10 should be modified to read as follows:
"When a dispute is between a developing-country Member and a developed-country Member the panel shall include one panelist from a developing-country Member, and if the developing-country Member so requests, there shall be a second panelist from a developing-country Member."

and Appellate Body to award a litigation cost incurred to them while carrying the complaint or defending it. [328]

Hence, the entire reform proposal couldn't be adjusted within the deadline secured in the Doha mandate. By the deadline of the negotiations at the end of May 2003, there were more than 42 specific proposals so submitted by the Members, covering virtually all provisions of the DSU, starting from strengthening of panel process to allowing amicus curie to participate.[329] Further many of these proposals were incorporated in July 2004; General Council took the cognizance for carrying out the negotiations which couldn't be concluded because of the deadline. A way forward was given in the Hong Kong ministerial meeting for a rapid conclusion of the negotiation.[330] After the Hong Kong Ministerial meeting, several meeting of the Special Session were held in 2006 under the new chair of Ambassador Ronald Soto of Costa Rica. He encouraged the member nations to present their proposal for the reform of DSU and hence consensus was met to several controversial issues.[331]

4.3. REFORM MEASURES FOR STRENGTHENING PANEL AND APPELLATE BODY

The efficiency and effectiveness of any organisation can be determined by examining the functional framework of the bodies working within an institution, and this assertion is not different with WTO's DSU. In the previous chapter it is been examined that the current dispute settlement system and the bodies within it is finding hard to cope with the increasing number of litigation and the complexities within it. It

[328] Supra not e 6.
[329] See The DSB, Special Session, Report by the Chairman, Peter Balas, to the Trade Negotiations Committee, TN/DS/9.
[330] See paragraph 34 of Hong Kong Ministerial Declaration, WT/MIN(05)DEC, adopted on 18th Dec 2005.
[331] George Akpan, 'Reform of WTO Dispute Settlement System', in Gary P. Sampson and W. Bradnee Chambers (eds.), *Developing Countries and the WTO: Policy Approaches*, (United Nations University Press, ed.1st, 2008).

is well known, that the panel bodies are comprised with the members who are either trade experts or governmental experts. Even today, panelist is not a complete professional judges or arbitrator who doesn't even have a legal degree with them. The constitution of panel still beholds the ad hoc nature which is in some way or other is limiting the institution to work effectively. These backlogs have discreetly affected the interest of developing countries and hence prevented them to participate in the dispute settlement system efficiently. The performance of bodies within any organisation is the biggest factor which can encourage and enhance the participation of members in it and when these bodies are not well structured and inefficient than it would ultimately affect the interest of the member nations participating within it. Hence, it becomes imperative for revitalising this institution of the WTO for enhancing their efficiency of dealing with disputes.

4.3.1. Strengthening the Panels:

Panel is one of the most important bodies of DSB and the whole process of dispute settlement gets initiated by them.[332] But under the realm of existing dispute settlement understanding the workload of panel has expanded but the question of reforming it was never touched until before the European Communities introduced a proposal for reforming the WTO panel process.[333]

The draft introduced the proposal for replacing the ad hoc panel body into a permanent professionalised panel body.[334] The ad hoc nature of panel body was under the loop of questions that the panelist so appointed for undertaking the disputes is not

[332] Supra note 339.
[333] Supra note 311.
[334] See TN/DS/W/1, No I and Attachment, No 7 (EC), proposal for establishing a permanent panel body.

well- qualified to deal with the disputes efficiently. The replacement by permanent panelist would increase the chance of settling the disputes on time and more efficiently. This would further lead to the professionalization of panel.[335] The appointment of panel is deemed to be one of the important concerns for reform because the existing constitution of panel in most of the cases comprise of the members holding a chair in government office or private sectors.[336] Most of the panelist does not possess any legal expertise to deal with the complex procedures of WTO laws and agreements and it becomes important that the panellist appointed for the hearing the dispute shall be well versed in WTO law and shall have effective knowledge of the subject. It is therefore important to relook the Article 8.1 of the DSU, which in the simplest expression mandate the appointment of the panels by stating:

'Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.'[337]

There is no specific guidance under this provision as to what essential should meet for an individual for being appointed as a panelist. Hence the appointment of panel

[335] Supra note 338.

[336] Pauwelyn, Joost. "The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators Are from Venus*.", Vol. 109, Iss*. 4 *The American Journal of International Law,* , 2015. Whereby he provides that 80% of WTO panelists have a governmental background, and only 19% come from the private sector' but also that 72% or 18 'members of the constituted AB between 1995 and 2014 were formerly in the service of one of the WTO member governments, and that 29%, or seven, were either academics or former international civil servants'.

[337] *A Handbook on the WTO Dispute Settlement System*, WTO Secretariat Publication, (Cambridge University Press, 2004).

should be more categorically designed, specifying the need and conditions to be fulfilled by the panellist before the appointments.[338]

The important concern which has heralded the functioning of panel is the overloading cases; some of them are technical and complex in nature which often limits the efficiency of panel.[339] Hence it is strongly presented by developing nations that the consultation process should be initiated only after trying the alternative way of resolution i.e. mediation or conciliation. By encouraging the member nations for maximising the use of provision under Article 5 of DSU, would help panel to tackle this problem of overloading cases which are technical in nature too.[340]

It is further asserted that the efficiency of panel can be expanded by improving the work force within the panel system. The secretariat should channelize more budgets for appointment of professionals who could actively and more autonomously perform their task.[341]

It is also contended that the panel proceedings are not fair and transparent and are carried out within the closed doors of WTO.[342] Hence, in order to make this system more fair and transparent the proposal was tabled by the United States that the settlement proceedings should be carried in open forum and the non-parties too can access such proceedings. Hence it is by making system transparent the faith,

[338] Malacrida, Reto. "WTO Panel Composition: Searching Far and Wide for Administrators of World Trade Justice", *A History of Law and Lawyers in the GATT/WTO*. ed. Gabrielle Marceau. Cambridge, (UK: Cambridge University Press, 2015).
[339] Giorgio Sacerdoti, "The WTO In 2015: Systemic Issues of The Dispute Settlement System and The Appellate Body'S Case Law", *16 Italian Year Book of International Law* (2016).
[340] Pham, H., 'Developing Countries and the WTO: The Need for More Mediation in the DSU', *Vol.(9) Journal of World Trade,* p.333-338 (2004).
[341] Ibid note. 91
[342] Supra note 88.

credibility and legitimacy over the system can be sustained and it would eventually safeguard the interest of developing nations participating in it.[343]

4.3.2. Strengthening the Appellate Body:

The Appellate Body within the WTO dispute settlement framework is not fared from the limitation of the panel's while dealing with the disputes. The burdening of disputes in the panel and the complexities therein, consequently affect the Appellate Body too.[344] More appeals are been made and many challenges are been raised and it becomes important to revitalise the Appellate Body, because it is another most important institution of the dispute settlement system of the WTO upon which the whole charter of DSU is based.[345]

However the charter was long drawn before by the Thailand government in 2002, who then expressed in its proposal for the increase in the number of members in Appellate body.[346] But certainly then it was not accepted because the Appellate Body was working efficiently then with its seven member body. However with the increasing workload the proposal was gradually relooked. It is asserted that the number of the Appellate Body should be increased. Generally there are seven permanent members constituting the Appellate Body[347] which is suggested to be increased by nine members.

With regard to the term of the Appellate members, India made a proposal in the DSB to amend Article 17.2 of the DSU, reducing the term of the members to four years. But it was asserted that, in order to make system more impartial and legitimate the

[343] Supra note 85.
[344] Ibid note 415.
[345] Supra note 399.
[346] See The Royal Thai government proposal TN/DS/W/2 (2002).
[347] See Article 17 of DSU.

tenure of the member should be extended for the term of atleast 8 years, so that the member could try and experiment a new mechanism of functioning. It is evident that the judge of International Court of Justice enjoys the long term of nine to ten years, which encourage independence and impartiality in the Appellate Body functioning.

There were several 'working procedure' drafted with the aim for reforming the procedural framework of the Appellate Body. It is proposed that the time frame of initial phase of process shall be reduced.[348] The parties are asked to supply the summaries of their arguments without prior to the request of Appellate body to carry out the task without any delay.[349] Hence this working procedure directs for the increasing the legal staff of the AB.

It is very oftenly alleged that the selection process of Appellate Body is politicised and the judicial independence of the Appellate Body is in question.[350] With regard to this matter, David Unterhalter, one of the Appellate members showed his concern in his speech saying that there should be a proper screening of the member before appointment.[351] If the WTO fails to maintain the judicial independence, this will lead to the questioning of legitimacy and credibility of such institution; hence it is important to maintain the unbiased and justified means of appointment of Appellate Body members.[352]

4.3.3. Strengthening the role of WTO Secretariat:

WTO Secretariat is an important pillar, which holds and regulates important function of appointing panel and Appellate Body. Hence in the previous chapter we have

[348] See Appellate Body Working Procedure of 2010. Available at http//WTO.org.
[349] See Appellate Body Working Procedure of 2014. Available at http//WTO.org
[350] Gregory Shaffer, Manfred Elsig et.al, 'The Extensive (But Fragile)Authority of the WTO Appellate Body', *Vol. 79:237, Duke Law Repository*, 217 (2016), available at http://lcp.law.duke.edu/.
[351] David Unterhaler, Appellate Body Member, WTO Dispute Settlement Body, Farewell Speech in Geneva, (Jan. 22, 2014), http://www.wto.org/english/tratop_e/dispu_e/unterhalterspeech_e.htm.
[352] Ibid.

examined the allegation imposed against the Secretariat, that its decision is politically motivated and the powerful nations indirectly use this secretariat to meet their ends.[353] Perhaps it becomes important that this office functions with utmost neutrality and without any biasness, so that that the faith of its members can be sustain on the working of Dispute Settlement Body, and over the functioning of panel.[354]

First and foremost for strengthening the secretariat it is important to make it totally impartial and its objectives should be clear and precise.[355] The secretariat at all levels has to be careful that it does not itself support or oppose a proposal which is subject to any controversy amongst the member and over which there are no serious differences among the members.

It is evident that the Director General of the WTO is assigned with many other roles and he/she is regarded as the head of other organisations and committees within the WTO framework. Hence it is to be ensured that the decision of the Director General should not be influenced or be affected by his/her participation in some other committees.[356] It is asserted that the Director General of DSB shall hold an independent office having the control over just one institution or the committee and i.e. Dispute settlement body of the WTO, by doing so, it can be efficiently managed and be regulated.[357]

In order to gain the confidence of the members the secretariat should not impose any obligation upon the members under the direction of any powerful nation. It is perhaps important to analyse the process of appointment of the secretariats. In the WTO, the recruitment of the candidate is totally internalised. The candidates are evaluated and

[353] Gregory Shaffer, Manfred Elsig, et.al. 'The Law and Politics of WTO Dispute Settlement' (oxford University Press, 2016).
[354] Jonas Tallberg and James McCall Smith, "Dispute settlement in world politics: States, supranational prosecutors, and compliance", 20 *European Journal International Relation*(2014).
[355] Bhagirath Lal Das, *WTO: Past, Present and Future,* p.227-28 (Bookwell publication, Delhi 2004).
[356] Ibid note 77.
[357] Ibid

interviewed by some of the Directors and Deputy Director General, who further gives the recommendation to Director General, who gradually appoint the one. This process doesn't bring any change in the traditional pattern of appointment. In fact there is a continuation and perpetuation of 'total sameness' in thinking and working approach of the Secretariat.[358]

It is perhaps important to break this change of neutral process of appointment. An external role and support may be introduced for this purpose. For example, there shall be an appointment board, constituted of some insiders and some outsiders. This board may evaluate and interview the candidate and give its recommendation.[359] The role of such board will bring some 'freshness' in the process of recruitment and will allow the secretariat to work and encourage the member nation to participate more efficiently. This will eventually help to retain the faith on the WTO dispute settlement system, and will present a politically free and independent institution.[360]

4.4. OPERATIONAL REFORMS

The Charter of Dispute settlement Understanding is said to be considered as the constitution upon which the whole system of Dispute settlement of WTO is pillared.[361] With the passage of time there arises certain problems which affect the efficiency of whole system and it becomes imperative to reconsider such part and Articles which are in need of reformulation or the change. This section is concern with the possible reconsideration.

[358] ibid
[359] Supra note 79.
[360] ibid
[361] Ross Becfroft, *The Standard of Review in WTO Dispute Settlement: Critique and Contention*, (Edward Elgar Publishing Ltd., ed. 2012).

4.4.1. Reforming the Standard of Review: The Need of an Hour

Standard of review is one of the most important aspects pertaining to effective dispute settlement procedure. It is the ultimate mechanism for enhancing the decision-making in dispute settlement system of WTO and it aims to ensure the better functioning of different institution designed within the constitutional framework of Dispute Settlement Understanding. Hence it is important to design such standard of review with sheer carefulness.

It has been more than two decades using the traditional standard, whereby the panel are charged with the responsibility of providing rulings and recommendation in relation to provisions of the WTO Agreement.[362] It has been examined in the previous chapter that existing standard of review, i.e. objective assessment test is not faring with the need of effective and efficient dispute settlement system because of the complexities within the provision of different Agreements. It is contended that the current standard is confusing, and is particularly unclear as to how far panel can determine its intrusiveness in the particular complaint.[363] This assertion was made by the Appellate Body in *EC-Hormones* case.[364] The inadequacy of the objective assessment test has led to the finding of an alternative standard of review model which can replace the deficient traditional model of review. It is to be kept in mind while drafting the new model, that such standard of review should not favour or disadvantage any particular member nation being as a respondent or a complainant.[365]

[362] Supra note 34
[363] Ibid note.339. Pg. 50-51.
[364] *See* Appellate Body Report, European Community- Measures Concerning Meat and Meat Products (Hormones), 115, WT/DS26/AB/R, WT/DS48/AB/R Jan. 16, 1998), whereby Appellate body stated that: so far as fact-finding by panel is concerned, their activities are always constrained by the mandate of Article "objective assessment of the facts".
[365] Michael M.Du, 'Standard of Review under SPS Agreement after EC-Hormones II', *Vol.59(2) International and Comparative Law,* (2010).

Hence, while taking the measures of reform, it is imperative that a standard of review should support the fundamental aims of the dispute settlement system which principally is provided under Article 3.2 of DSU, which ensures security and predictability, and further preserve the rights and obligation of members.[366] Therefore the panel should be charged with the responsibility of ensuring that members carry out their WTO obligations, and panel must not through their decision-making, change the nature of their rights and obligations contained in the WTO Agreements. This assertion is also supported by Article 19.2 of the DSU[367], and Appellate Body in *US-Certain EC Products*, recognised the important of judicial restraint for proper and unbiased articulation of WTO provisions.[368]

The new model of standard of review should not just enhance the objective of dispute settlement and its adjudicative legitimacy but also lay down the effective procedures appropriate in applying while dealing with the disputes of different nature resulting from different agreements. The important aspect of such procedures should be:[369]

A. Efficiency: Procedural efficiency is an important principle for ensuring that panel proceedings are carried out promptly, and decisions are published in a timely fashion. It generally prioritize the speed of outcomes over due process. Hence the main challenge faced under the *de nova* standard of reviews is, panel would spend an unjustified amount of time reviewing evidences, and ruling would not then be published in time frames stipulated in the DSU.[370] This problem has however

[366] Ibid note 1. Pg. 91
[367] It provides that the finding and recommendation of Appellate Body and panel cannot add or diminish the rights and obligation of the parties, provided under the covered agreement.
[368] See Appellate Body Report, *US- Certain EC Products from the European Communities,* WT/DS/165/AB/R, adopted on 10th January 2001.
[369] Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Supranational Adjudication', *Vol. 107 Yale Law Journal,* (1998).
[370] Holgar Spamann, "Standard of Review for World Trade Organisation Panels in Trade Remedy Cases: A Critical Analysis", *38(3) Journal of World Trade*, p. 551-52(2004)

constraint the participation of developing nation in WTO dispute settlement system because of the long process of adjudication, and no example is better than *EC and Ecuador banana dispute*[371] which took more than five years for its settlement. Similar problem came out in *United States-Subsidies for Upland Cotton* dispute[372] where the member nation waited long for the meeting the possible decision.

B. Procedural fairness: it is one of the important requirement for a dispute settlement process ensure that procedural deficiencies should neither led complainant nor respondent to any disadvantageous position.[373] Hence the effective procedure is required for efficient functioning of panel. Procedural fairness will therefore require balancing the right between parties and in the disputes settlement process. Accordingly the standard of review must retain sufficient elements of procedural fairness. It is therefore intimately connected with the with the question of legitimacy of a dispute settlement system ensuring that the parties involved in the system represent nothing more than the complainant and the aggrieved whose measures are under the review.[374] Therefore, procedural fairness should be taken into account in the formulation of a standard of review.

C. Scope of Fact-finding and expertise: The scope of fact-finding is dealt within Article 13.1 of the DSU, which permits panels to seek information and technical advice from any individual or body as is appropriate.[375] Since from the inception of the WTO there has been a tendency for panel ruling to involve the review of extensive

---

[371] *See* European Communities- Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III). Complainants are Ecuador, Guatemala, Honduras, Mexico and United States. Respondent is EC**,** Dispute DS27, European Communities-Regime for the Importation, Sale and Distribution of Bananas,

[372] See Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, and Corr.1, adopted 21 March 2005, modified by Appellate Body Report, WT/DS267/AB/R.

[373] Andrew D. Mitchell, *Legal Principles in WTO Disputes,* 122-23, (Cambridge University Press, 2008).

[374] Supra Note 12.

[375] See, Appellate Body Report, Canada-Aircraft case, which establish the principal that an adverse inference may be drawn by a panel for a failure to comply with a panel's request to supply information without a good reason.

and complex evidences. However the process of fact-finding does not necessarily need to have any intrusive standard when the disputes and measures are simple in nature because panel just analyse the fact and draw particular conclusion and this standard is usually followed. However there is a direct relationship between the fact-finding process and the standard of review because effective fact-finding process consequently contributes to the efficient standard of review.[376] On the question of expertise, Article 13.2 grants panels the power to consult experts concerning scientific or technical matters. There is certainly no basis for a panel to absolve itself from the review of evidence on the basis that a domestic authority or government has a greater expertise. Therefore, these aspects of procedure is important because it provide panels with considerable flexibility and pose no obvious limitation on the type of standard of review that might be adopted by panels.[377]

Hence, it is important to understand that the above procedural factors, scope of fact-finding, procedural fairness, expertise and efficiency, all influence the workability of any particular standard of review. Standard of review are limited by the design of the dispute settlement system.[378] At the same time, if any model of review is designed which expressly favours particular procedural objectives will have an influence over the operation of the dispute settlement system as whole.[379] For example, a standard of review that emphasizes on the unlimited powers will potentially undermine the dispute settlement system as a panel reports may not be published within the designated timeframes and parties may lose confidence in the system and ultimately debar the participation of member nations. And in contrary to that, if any standard that overemphasises the requirement for the efficiency may lead to allegation of 'rough

[376] Supra note 8.
[377] Supra note. 9.
[378] Supra note 339,p 98-99.
[379] Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement,* 589-93 (Cameron Press , 2002)

justice' which may further lead to the appeals and consequently prolonging the review process.[380]

Perhaps the standard of review that sufficiently accommodates or balances these competing objectives will result in a higher level of consistency between the standard of review and these objectives, and thus in turn is more likely to improve the quality of WTO dispute settlement processes. Hence keeping these principles intact, several approaches and test were formulated for redesigning the alternative model of review.

4.4.2. Deliberation Test:

This test or the approach was formulated by Stefan Zleptnig whereby he suggested that panel should look into the evidence provided by WTO members in order to determine whether a proper deliberative process had taken place prior to the enactment of the national measure or not.[381]

Zlepnig argues that the standard of review should be concerned with promoting the issues such as due process rights, transparency and public deliberation. The very fundamental of this theory is, it understand standard of review as a procedural provisions which plays an important role in WTO dispute settlement system, having a wider impact upon WTO law and policy. [382] Zleptnig is primarily concerned with the question of legitimacy of WTO dispute settlement. In his proposal, he tries to deal with the question as to how greater legitimacy in the WTO dispute settlement system can be achieved. He argues that WTO system has been particularly affected by the trade evolution, in which new policy areas such as environment, health and safety

[380] Ibid.
[381] Stefan Zlepnig, 'The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority', 6(17) *European Integration Online Papers,* available at http//eiop.or.at/eiop/texte/2002-017.htm, visited on 20th Oct 17.
[382] Ibid.

have progressively become part of the international trade agenda. On this basis, it is contended that WTO dispute settlement may intrude into non-economic policy areas and constrain the ability of members to regulate these areas. Henceforth it becomes important for the panel to maintain a balance between the economic and non-economic area in resolving disputes.[383]

The core of his proposal is based on the notion that standard of review is an important mechanism for the constitutionalisation of the WTO.[384] He asserts that the standard of review not just govern the conduct of nation state but also the different organs of the governance within the states but the decision and the settlement so made under the WTO is directly or indirectly going to affect the nation. The best example is the dispute which was brought under the TRIPS Agreement, whereby US challenged India's Patent regime and consequently the amendment was brought in India's Patent Act in 1999.[385] His proposal expressed the concern about the efficiency of panels for adjudicating complex disputes. Hence the standard should be designed in such a way which could positively promote and strengthen the allocation of power between the WTO and its members and enable panels to deal with the dispute of complex nature.[386]

Limitation of this Test:

This deliberative test is based on the notion that it would increase the legitimacy of WTO dispute settlement amongst the members. However this test suffers from number of difficulties. First of all, this theory is based on number of presumption that

[383] Axel Desmedt, 'Proportionality in WTO Law', *Vol. 4 Journal of International Economic Law*, (2001).
[384] Ibid note.353
[385] See Appellate Body Report on India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R.
[386] Scott D. Andersen and Deepak Raju, 'India's Initial WTO Disputes—An Analysis in Retrospect', in A. Das and J.J. Nedumpara (eds.), *WTO Dispute Settlement at Twenty,* 50-51(Springer Nature, Singapore, 2016).

the WTO is suffering with maintaining the legitimacy and, that the dispute settlement functions is somehow eroding the national sovereignty of members. He fails to justify these presumptions with the qualitative reasoning.[387]

The deliberation test speaks of balancing competing trade and non-trade values. Perhaps, balancing the trade policy is not the function of the dispute settlement system. Such process should be the part of WTO negotiating mandate not of dispute settlements system.[388] Zlepnig theory however emphasis on legitimacy, but there is no emphasis on the standard of review supporting the enforcement of the WTO rules.

4.4.3. The Reasonable Regulator Test:

This is another important test or approach suggested by Catherine Button which provides the clear guidance to the panel for undertaking the review.[389] Under this test panel undertake the review by considering the evidences presented before them but certainly a qualitative limit is imposed upon the panel's power to scrutiny. [390] This test is exclusively based upon the approach taken by panel in the EC-Asbestos case, which provides a strong example concerning competing scientific evidence. The case is concern with the matter where scientific question was invoked, and the panel adjudicated it by determining the facts and evidences.[391]

This test provides a stronger conceptual basis for the standard of review than the objective assessment test and also a sufficient amount of flexibility to the regulator for

[387] Supra note 339,p 74-75.
[388] Carol Harlow, ' Global Administrative Law: The Quest for Principles and Values', *Vol. 17(1) Europoean Journal of International Law,* 187 (2006).
[389] Ibid note 25. Pg. 75-78
[390] Catherine Button, *The Power* to Protect-Trade, Health and Uncertainty in the WTO, 217 (Hart Publishing 2004)
[391] Supra note 28.

interpreting the WTO Agreements. It provides much more guidance to the panel as to how intrusive their review should be. [392]

Limitation to this Test:

However, this approach has its own limitation and criticism. Firstly, the standard of review based on the notion of reasonableness is a malleable concept for implementation. Reasonableness may simply be too flexible to be used as a central principle, and therefore it may provide too much deference to the members, with could consequently make WTO Agreements like a regulatory guidelines rather than international agreement.[393]

Secondly, there is no any material guidance as to how this test might apply as a general standard review across all WTO Agreement. Button has only advocated this test in the context of health regulation and it is perhaps hard applying this test under different kind of domestic regulatory processes.[394]

4.4.4. Designing the New General Standard of Review:

However several proposal were made, test were conducted for designing the new general standard of review. It is asserted that the new standard of review should consist of two essential features, the first of which is the requirement of panels to examine all available and sufficient evidence, and the requirement for panel to conduct a comprehensive review of such evidences. These parts when utilised together ensures to compliment the due process of law.[395] These are the essence of designing the new standard of review which allows panels to carry out their review

[392] Supra note 25..
[393] Gary N. Horlick and Peggy A. Clarke, ' Standard for Panels Reviewing Anti Dumping Determination under the GATT' in Ernst-Ulrich Petersmann (eds.), *International Trade Law and the GATT and WTO Dispute Settlement System,* 298, (Kulwer Law International, 1997)
[394] Supra note. 25.
[395] Supra note 8.

function efficiently.[396] It is contended that the general standard is more advantageous model for WTO jurisprudence than the objective assessment test and alternative approaches which have been proposed and suggested.

All Available and Sufficient Evidence Test:

This test is basically concerned with the scope of review rather than the manner in which the review is undertaken. It is therefore a more formal or procedural (i.e., a rule addressed to the panel or AB), rather than substantive (i.e., a rule addressed to the national authorities), aspect of the general standard.[397] This test directs the panel to examine all evidence that has been presented before them and to ensure that the body of evidence comprising the factual record is sufficient to determine the issue of disputes. The most critical aspect of this test is that the panel should gather sufficient amount of relevant evidence for determining the case.[398]

The first feature of the dispute settlement system which regulates the scope of panel proceeding is the efficiency of panel architecture. The existing dispute settlement system is adversarial in nature where the panel has to plays an important role in adjudicating the disputes.[399] In this context there should be provisions in the DSU which could sufficiently guide and direct as to how the factual evidences should be examined and applied and thoroughly examined by the panel.

Comprehensive Review Test:

It is considered to be one of the important test which require panels to conduct a thorough review of factual and legal question so raised in disputes. The major benefit

[396] Oesch Matthias, 'Standard of Review in the WTO Dispute Resolution', *Vol.6(3)Journal of International Economic Law,* (2003).
[397] Supra note 348, p. 5-6.
[398] Ibid.
[399] Supra note 323. Pg.104

of introducing this test is that it would provide clear guidance to panels about their basic standard of review obligation under the WTO Agreement. It directs the panel to take a practical but highly intensive approach to carry out a review task. It further sets out a minimum standard ensuring to the highest quality in panel decisions.[400]

There is often a controversy with regard to the question, whether panel has given adequate consideration to the issue, whether its reasoning is logical or not, or whether it has attached the correct weight or importance to the evidences to derive.[401] Further, panels are required to make findings on legal questions as to whether the facts fall within the scope of the WTO provisions, and while doing so, the meaning and limitation of provisions are clarified.[402] This comprehensive review test, challenge the criticism of 'over' and 'under' scrutinising the fact by the panel, by prescribing the criteria's which panels must satisfy while dealing the with the disputes.[403] This test is also easy for the Appellate Body to adopt because it does not compel panel to create any new legal concepts.[404] Hence it is one of the most recommended tests or the feature of the new general standard of review.

4.5. Burden of Proof

The issue of Burden of Proof is considered to be one of the major challenges in the WTO jurisprudence. The developing nations while presenting their disputes often get backlogged because of their failure to justify their claims because there is no specified norm under the DSU which could efficiently deal with the matter, concerning the burden of proof.

---

[400] Supra note 339, p. 108-10.

[401] Tania S. Voon and Alan Yanovich, ' The Facts Aside: The Limitation of WTO in Trade Remedy Cases', *Vol.40(2) Journal of World Trade,* 251 (2006).

[402] Supra note 32.

[403] These are basically the criteria of adjudicative legitimacy, procedural fairness, efficiency and precise determination of facts and evidences. See, David Bentham, *The Legitimization of Power,* 20 (Macmillan press, 1991).

[404] Supra note 32.

The developing nations are not structurally well positioned as compared to that of developed nations which have already affected their stance in the Dispute settlement process of WTO and if this deficiency is coupled with the constitutional limitations of justifying their burden may significantly affect their proportionality of accessing dispute settlement system. Hence it becomes imperative to deal with this issue with utmost efficiency, because the question of burden of proof is the most important question of law which can affect the whole process of claim and compensation.

The existing standard which is applied in the settling the disputes is looking onto the prima facie facts and evidence where, if the parties fail to refute their defences, than it would result in their failure for justifying the claims.[405] There is no proper definition to this concept of prima facie standard. In EC-Hormones case, the Appellate body defined prima facie as ' one which in absence of effective refutation by the defending party, requires panel to rule in the favour of complaining party presenting the prima facie case.'[406] It is been stated that each case are different in nature and it would be difficult for panel and Appellate body to precisely determine as to what kind of evidence will be required to establish the claim.[407]

It is because of these difficulties in prima facie standard the new approach is designed which is considered as the 'holistic approach' or 'weighing of all evidence approach'.[408] In this approach the burden of proof doesn't keep on shifting. It is with the same party from the beginning till the end and such party must do more than merely providing the evidence for supporting its proposition which it has advanced. However it doesn't mean that the panel will remain passive and only examined the

[405] Appellate Body Report, *European Communities- Measures Concerning Meat and Meat Products (Hormone),* WT/DS26/AB/R, adopted 13th Feb 1998. 135 at para 104.
[406] ibid
[407] See Appellate Body Report , *US- Measures affecting the Import of Wool and Blouses from India ,* WT/DS33?AB/R, adopted on 23rd may 1997.
[408] Michelle.T Grando, *Evidence, Proof and Fact Finding in Dispute Settlement' ,* 130-134(Oxford University Press, 2009)

evidence adduced by the party bearing the burden to proof rather panel will participate actively in finding facts and seeking information from the experts if required. It is than after considering the evidences the panel will make and analysis whether the evidences supports the claim advanced by the party. It is than the conclusion is drawn in the panel's report justifying the judgement. If any evidences so presented by the claimant brings uncertainty to the panel than the panel will question the claimant who presented the evidences to justify it and hence the burden lies upon them for proving the same.[409]

In *Korea-Definitive safeguard measures* case, whereby Korea contended that the panel must make a finding, whether the member with the burden of proof has established a prima facie case of violation. However panel retaliated by stating that it would 'weigh and assess the evidence and argument submitted by both the parties in order to reach conclusion as to whether the claim advanced by the complainant were well-founded.[410]

The panel in *Canada-Wheat Export and Grain Import* made no reference to the notion of a prima facie case when examining the evidence. This was the case where Canada has violated the GATT and TRIMS Agreement. The panel while adjudicating the case weighed all the evidence and concluded that US was inconsistent with Article III: 4 GATT Agreement and under TRIMS Agreement. [411]

The *Korea-Alcoholic Beverage*[412] is another dispute where panel adopted the approach of examining and weighing all the evidence on record. It was the case where panel determine whether the product at issues- imported vodkas, whiskies, rum, gin,

[409] Supra note 46.
[410] See Korea-Definitive Safeguard Measure on Import of Certain Dairy Products, WT/DS98/P/R., Para 7.24-7.25.
[411] See Panel Report, Canada- Measures Relating to Export of Wheat and Treatment of Improved Grain, WT/DS/27/R, adopted 27th sep 2004, para 6.375. see also Panel Report, Brazil- Export Financing Programme for Aircraft, WT/DS26?RW, adopted 4th Aug 2000, para 6.92-6.106.
[412] See, Panel report on Korea-Taxes on Alcoholic Beverages, WT/DS/75/R, adopted 17th Feb 1999

brandies and tequila in one hand and Korean soju on the other, were directly competitive or substitutable. In making this determination the panel examined the evidence presented by the complainants and the defendant concerning the physical characteristics, the end-uses, the channel of distribution and the point of sale were in question. The panel weighed and balanced all the evidence regarding each of those factors presented by the parties. It was concluded by the panel that 'overall' or 'on balance' the evidence supported a finding that the domestic and imported product were competitive and substitutable.[413] Further it concluded that the holistic approach of examining the fact and evidence supports the finding that the imported and domestic product in issues is directly competitive or substitutable.[414]

Similar view was given in *Chile Alcoholic Beverage*, where panel carry out the comprehensive examination of the facts and evidences. Even in this case, panel was said to examine whether the Chilean wine 'pisco' was affected by the any other like product under the Article III: 2 of the GATT Agreement. The panel ruled out its conclusion by looking onto the facts and merits of a dispute.[415]

In the recent judgement in US-Upland Cotton, even the Appellate Body justified the panel's way of examining the facts and evidence presented before it. The Appellate body accepted the assertion of panel that decision should be made out only after the proper examination of the facts and evidences. Even in the US – Zeroing case, the Appellate Body stand out by stating that a panel should conduct its own analysis considering all evidence presented by all parties before deciding whether prima facie has been reached:[416]

[413] See ibid note 49, paras 10.67, 10.82
[414] See Ibid note 49, para 10.95.
[415] See panel report on Chile-Taxes on Alcoholic Beverage , WT/DS87/R, adopted on 12th Jan 2000.
[416] Appellate Body Report, *United States – Laws, Regulations And Methodology For Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (18 April 2006) para. 220

"The panel rightly conducted its own assessment of the evidence and arguments, rather than simply accepting the assertions of either party.[417] In doing so, the Panel took into account and carefully examined the evidence and arguments presented by the European Communities and the United States."[418]

In all these above discussed cases one derivation can be drawn out that the panel did not refer to prima facie standard for determining whether the measures and provision are in consistent with the claim, rather they have explicitly embraced the preponderance of evidence standard or rather we can call it as a holistic approach while examining the facts and evidences.

This approach will eventually bring a better chance for the developing countries for bringing up their cases because such approaches will make the dispute settlement process more transparent, impartial and accountable. In the prima facie standard, if the nation fails to shift the onus, they shall meet the failure in justifying the burden and ultimately bear the loss. The best example justifying this statement is *India—Agricultural Products* dispute, where the measures under SPS Agreement taken by developing nations particularly India was challenged by the U.S.A. In this case the measure taken by India in the context of preventing the spread of avian influenza was challenged on the ground that India failed to maintain the international standard for exporting such product. This was the first scientific case involving scientific question, hence the India failed to justify its claim and refute the onus because of scientific challenges and technicalities.[419]

[417] See Appellate Body Report, *Japan – Apples*, para. 166; and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, WT/DS302/R, adopted on19th may 2005, para. 82.
[418] Ibid note 53
[419] See Panel and Appellate Body Reports, India—Measures Concerning the Importation of Certain Agricultural Products, WT/DS430/R & WT/DS430/AB/R (Hereinafter India—Agricultural Products).

Hence the proponent of this standard contended that the application of this method of justifying the claim would enhance the overall dispute settlement process and widen the scope of developing nation's participation on the system.[420]

4.6. MEASURES FOR REFORMING THE RESOURCE CAPACITY

The success of any system can be determined by examining as to how efficiently the members are participating in it and how effectively their grievances are been addressed. However in the WTO dispute settlement system the members nation often get constrained because of their own structural limitation, either it be financial or economical. Hence it becomes imperative for a multilateral organisation like WTO to help each member to cope up with such limitation and participate to the fullest. There structural limitation are been discussed in the previous chapter and in this part certain reform measures are proposed for enhancing the structural stance of the nation.

4.6.1. Enhancing the financial Capacity:

As examined in chapter 3, financial unsoundness is seen as one of the major challenge which the developing nations have been facing under the DSU. Hence the nations known with the small economies have to bears a great cause while undertaking the disputes or defending it against the developed nations in particular. This burden however prevents nations from initiating a dispute rather they tend to accept an existing violating measure which is perhaps more economically viable option than going through an expensive and resources exhausting dispute settlement process,

[420] James HeadenPfitzer and Sheila Sabune, "Burden of Proof in WTO Dispute Settlement: Contemplating Preponderance of the Evidence*" Vol*. 9 *International Centre for Trade and Sustainable Development*(2009). Available online, http// www.ictsd.org/downloads/2012/02/burden-of-proof-in-wto-dispute-settlement.pdf, visited on 18th April 17.

especially when the implementation of a possible favourable ruling is not guaranteed in the first place.

Hence with of addressing this issue, one particular funding proposal was introduced by Kenya, which highlighted the need to create a body within the WTO framework which could finance the dispute settlement process of Developing countries.[421] Further, it was suggested by the African Group that the payment of fees to the pool of lawyers and experts shall be compiled by the WTO secretary, so that the one particular amount can be fixed for making such payment to the experts and layers and this would reduce the monopoly of such personal for demanding the high fees, which ultimately affect the interest of developing nations.[422]

It is further proposed that the WTO budget should provide for assisting poorer and developing countries to meet human and financial resources of the DSU process that limits the participation of developing nation. The fund will help poor and developing nation to employ individual and hire external counsels. It will help to train domestic legal capacities in order to deal with the WTO law.

In order to deal with the high procedural cost in DSU process, it is amplified that it can be reduced by establishing a small claim procedure.[423] The benefit of such a procedure would be to carve out a less costly, less time-consuming procedure for

[421] *See*, Kenya Proposal, TN/DS/W/42, at 2,5 (Jan. 24, 2003); the African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002).
[422] This was highlighted by the African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002). For more details, *see*, Bown, C. & Hoekman, B., 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' , *42(1)* *Journal of World Trade* ,.p.875 (2005).
[423] Hakan Nordstrom & Gregory Shaffer, 'Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure?', *Vol. 7 World Trade Review* 587 (2008).
(unpublished manuscript, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=983586).

smaller-stakes claims at the WTO, with the aim of facilitating more developing country access to dispute resolution.[424]

Shaffer made a recommendation that the provision under Article 5 should be promoted and applied by the nations struggling with weak economy, which provides the procedure of good offices, mediation and conciliation.[425] Each of these methods would provide a less costly route to dispute resolution if successful.

4.6.2. Revitalising the ACWL

The Advisory Centre of WTO Law is considered to be one of the most thoughtful innovations created for ensuring the legal aid and advice to the countries in need of such aid, particularly developing and least developing nations.[426] However, in the previous chapter we examined the defects which this institution is undergoing with. This part provides some proposals for reforming the ACWL.

The ACWL is known for its contribution made in broadening the potential for developing countries to access to WTO dispute settlement.[427] To further enhance this potential, the ACWL should hire full-time economic expert. This economist will aid developing countries to make intelligent and strategic decision as to how the claim should be made out in WTO Dispute settlement system. The ACWL has to make more offers for training activities to delegates from developing countries.

---

[424] Ibid.

[425] See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments, Article 5.1.

[426] Al Bashar, F., 'The WTO Dispute Settlement Mechanism and the Reform of Third Party Rights: A Study from the Perspective of Developing Countries', PhD thesis, School of Law, *University of Portsmouth* (2009).

[427] Advisory Centre on WTO Law, Legal advice on all WTO legal matters http://www.acwl.ch/e/legal/legal_e.aspx (last visited Nov 4, 2017).

It is provided that the WTO should allocates budget and fund to the ACWL which further allow this centre to support and handle the situation which developing nations tend to struggle while dealing with the dispute settlement process. If the institution is financially sound, it could employ large number of staff with distinguished knowledge to handle the case referred to it by the developing nations which will enhance the efficiency of this Advisory Centre.

The main drawback with this ACWL is: first, there is only one location where ACWL is located and the demands for accessing it are from many. Second, the ACWL's mandate is limited. For reasons of impartiality and conflict, it cannot initiate disputes. Hence it is been proposed for the establishment of ACWL in geographical region which could be accessible for the developing nation to use it.[428] It could help them to participate more viably to this centre and meet the issues which they are undergoing with. Hence establishment of more ACWL like institutions are to be encouraged which could help the developing nation to cater their need and demand in more efficient way. Proposal is tabled with regard to meet the challenge of staffing and expertise in the ACWL[429]. Several training programmes were initiated for widening the scope of expertise. The public private partnership however aims to bring government and private parties together collaborating for enhancing the ACWL.[430]

4.6.3. Strengthening the legal expertise:

The major constraint which contributes to the financial difficulties for developing countries in their participation in the dispute settlement system is significantly related

[428] Gregory Shaffer, 'The challenges of WTO law: strategies for developing country adaptation', *Vol. 5 World Trade Review*, 189(2006).
[429] See, Cuba proposal, TN/DS/W/19, at 2 (Oct. 9, 2002).
[430] Gregry C. Shaffer and Ricardo Melendez, *Dispute Settlement at the WTO: The Developing Country Experience*, 344-45(Cambridge University Press, ed.1st, 2010).

to their lack of sufficient WTO legal expertise.[431] Developing Members lack domestic resources of highly qualified legal experts due to a range of factors, such as their preference for the private sector or skilled migration to wealthier countries.[432]

Developing countries must have to bear the huge expenses to meet the legal expertise to carry out their disputes.[433] In this context, it becomes imperative to increase the capacity building for enhancing the in-house lawyers and attorneys, and introducing the programme which are aimed to train the legal officers of the developing countries. It is also important to improve and increase the legal assistance provided by the Secretariat in the pre-dispute stages.[434]

The proposal was made by the Mexico for paying the attorney fee of the least developed country if the developed nations lose the case against any least developed member.[435] Certainly Cuba proposed for the cutting the high litigation cost.[436] The rationale behind this proposal is to create a fair DSB system. It has been observed that developing countries may not be in the position to pay attorneys' and experts' fees if they don't obtain it back from the developed countries.[437] Therefore, the "fee guidelines could be agreed upon and attached as an annex to the DSU and amended from time to time"[438]. This method of supporting developing countries reduces the high cost of the DSU procedure but has to be set out in WTO law.

---

[431] Ibid.
[432] Supra note 87.
[433] In the case *Chile—Price Band System and Safeguard Measures relating to Certain Agricultural Products*, the Association of Argentine Edible Oil Industries paid a law firm US $400,000 just to write the legal brief for consultation.
[434] Bown, C., & Hoekman, B., 'Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is not Enough', *Vol. 42(1), Journal of World Trade* (2008).
[435] Shaffer, G., 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies'; See Mexico Proposal, TN/DS/W/23 (4 Nov. 2002).
[436] Ibid note 88.
[437] Supra note 414,p 332-33.
[438] Ibid notr 89.

Another proposal was made in the context of reading of Article 27.2 of the DSU for providing greater access to developing countries. Under this Article Secretariat is responsible for providing help to the member nation but with the condition that, such technical and legal help will only be provided only at the time of litigation.[439] It was proposed that such developing and least developed nation need proper assistance before presenting the case for proper representation in the system. With regard for meeting of such demand the secretariat has proposed to raise the size of legal expertise and established the institute of Training and Technical and Cooperation which aims to focus on e-learning courses, academic program and workshops for developing countries.[440] The very objective of these activities is to enable participants to understand the fundamental principles of the WTO in relation to the matters dealt with.[441]

Hence for carrying out such programmes and courses the WTO secretariat has to employ a large number of staff with full-time jobs to help the participating member nations and with regard to this a permanent legal division is directed to be established by Venezuela.[442] The African Group further tabled the requests that the payment of lawyer and attorneys of least developing countries shall be given by the trust fund established by the Secretariat for financial support.[443] The legal division will help catering the need of developing countries for carrying out the process of litigation in an effective and efficient way.

[439] Naïf Nashi Alotaibi, 'The WTO's Dispute Settlement Body and Its Impact on Developing Countries: Problems and Posssible solution', Phd. Thesis, School of law (University of Essex, 2015).
[440] Supra note 311.
[441] Ibid.
[442] Venezuela made this proposal, see The LDC Group proposal, TN/DS/W/17, at 1 (Sept. 19, 2002)
[443] *See* the African Group Proposal, TN/DS/W/15, at 2 (Sept. 25 2002).

4.6.4. Promoting Mediation and Alternative Dispute Mechanism:

Increasing workload in the panel and Appellate body can be best resolved by maximising the use of alternative means of dispute settlement.[444] Hence mediation is one of the most recommended, influential effective and easy ways of meeting the conclusion within limited time. It prevents the member nation, basically the developing and least developed country from getting webbed in the consequential proceedings, casting a huge financial and structural loss to them. So in order to tackle these issues and encourage the developing nation alternative way should be used for maximising the prospects of using of the WTO dispute settlement system. [445]

There is the provision laid under Article 5 of the DSU with regard to alternative means of dispute resolution.[446] However this provision is oftenly used by the members, and disputes are barely taken to the alternative agency of conciliator or mediator. It was for the first the mediation was used in 2003, in the dispute of *Thailand/Philippines/E.U. tuna dispute*[447]. Hence, Philippine and Thailand requested for the consultation under DSB but consequently it failed for three times. Hence disputing parties requested the WTO Director-General Supachai to assist in resolving the dispute.[448]

Mediation is highly been encouraged for a better participation and effective resolution of disputes for a developing nations.[449] Hence many diverse developing nations like Paraguay, Haiti, and Jordan were univocal for making mediation as a mandatory mean

[444] Supra note 414, p.333-338.
[445] Supra note 103.
[446] Article 5 of the DSU provides provision in the form of good offices, conciliation, and mediation.
[447] *See* The Thailand/Philippines/E.U. canned tuna dispute of 2002. The Cotonou Agreement, June 23, 2000, available at http://europa.eu.int/comm/development/body/cotonou/index_en.htm. [Accessed: Nov 5, 2017].
[448] Supra note103
[449] Ibid.

for dispute resolution.[450] If mediation is been carried out efficiently, it will tackle the enforcement problem, will save time and cost of the members which are not finically, legally and structurally sound. Therefore, mediation might be a good method to resolve many obstacles which face developing countries in the DSU.

4.6.5. Encouraging Public-Private Co-operation:

This is one of the effective proposals designed with regard to bring the collaboration between public and private partner while defending the case.[451] The scheme of this partnership will widen up the scope of developing countries in participating to the system. It would eventually lessen the burden over the government while dealing with the disputes. The participation of the private agencies will help the government to design and present their case more efficiently.[452] The private sector agencies are better option for collecting the information, facts and evidence of the cases which will directly or indirectly help the government presenting their dispute.[453] However collaboration can be anticipated only when the government utilize the organized information to defend its interest and the industry's interest.

In this process of collaboration, the private sector tries to convince its government, how to carry out the necessary pre-litigation legal and economic research, how it would benefit the government undertaking the case and what would be the merit.[454] If government find it necessary to carry out the case than the private sector utilises the

[450] See Haiti Proposal, TN/DS/W/37, at 3 (Jan. 22, 2003); The LDC Group proposal, TN/DS/W/17, at 1 (Sept. 19, 2002); proposal by Jamaica, TN/DS/W/21, at 1 & 2 (Oct. 10, 2002); proposal by Paraguay, TN/DS/W/16, at 1 (Sept. 25, 2002).

[451] Kristin Bohl, 'Problems of Developing Country Access to WTO Dispute Settlement', *Vol 9, Iss.1 Journal of International and Comparative Law,* (2009).

[452] Gregry C. Shaffer and Ricardo Melendez, *Dispute Settlement at the WTO: The Developing Country Experience*, (Cambridge University Press, 1st ed., 2010).

[453] Bown, C. & Hoekman, B., 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector'.p. 875*, 8.(4)*.*Journal of International Economic Law*, (2005).

[454] Chad Bown and Bernard Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector', 8(4) Journal of International Economic Law 861, 869 (2005).

resources and assist government to design the merit of the case.[455] Hence these sort of partnership, if designed and carried out by the developing countries, it would enhance the scope of their representation in dispute settlement system.

4.7. CONCLUSION:

In this chapter an effort is made to examine the proposal and negotiation carried out in order to reform the Dispute Settlement Understanding. It envisages several proposals and negotiation made by developing countries during the Doha round and how far those proposals have fared and benefited the developing countries is been critically examined.

This chapter highlighted the possible measures to meet the constraint and challenges which is categorically defined under different heads. The constitutional problem of panel and limitation within the Appellate Body of the Dispute Settlement Understanding has affected the whole process of WTO adjudication because of the vagueness and procedural uncertainty within the Articles of DSU. It sets out the test for a specific standard of review and advance the reason why it should be adopted and what is the limitation within it. It provides guidance for drafting the new standard of review of examination and dictates as to what are the essential which should be there within the new standard of review.

Another important constitutional challenge of burden of proof is been dealt in this chapter. The question of determining as to whom the burden the lies has affected the interest of developing nations because there was no specified rule and approach which could help the developing nation for answering this. However this chapter advance the approach for questioning the answer of burden of proof.

[455] Ibid.

The interest of the developing nation often gets limited because of the limitation within the WTO framework. Panel, Appellate Body and Secretariat are considered to be one of the most important organ upon which the whole phenomena of Disputes settlement is pillared. But these organs have its challenges and constraints which are examined and studied in the previous chapter. Henceforth the answer to such problem and reforming these organs is dictated in this chapter. Some proposal suggested for making the panel as a permanent body of DSU and some suggested the reformation in the appointment process of panelist and Appellate Body.

The concern of Structural limitation is further been discussed which has been one of the major constraint limiting the participation of the developing countries in the Dispute settlement process of WTO. The developing nations are not structurally sound because of their financial and legal limitations which significantly affect their stance while taking on with any disputes. Hence this chapter provides the deterrence to such problems and challenges by highlighting some proposals and measures like establishing a different dispute settlement fund for developing countries, carrying out various programmes and training measures ensuring the capacity building of in-house lawyers, measures for strengthening the Advisory centre of WTO Law.

It is perhaps important to understand that the dispute settlement has a complicated process in the way it is operated. It is a fact that the major developed countries still have a substantial influence over the routes that the WTO needs to take, and the way it conducts its business. Therefore, it is hard to imagine reforming the dispute settlement system of the WTO in a way that addresses developing countries 'participation issues in the system unless these reforms have the blessing of their developed counterparts. Hence, in this case the WTO as an independent organisation, should take a strong initiative without any biasness for maintain its credibility by

ensuring the protection of interest of developing nations. The legitimacy of WTO as a multilateral organisation can sustain only if it ensures to safeguard the interest of all members rather than some of its members.

CHAPTER 5:

CONCLUSION& SUGGESTIONS

Conclusion:

The General Agreement on Tariff and Trade was the first agreement which incorporated the provisions for dispute settlement for regulating international trade. Article XXII and XIII were considered as the heart and soul of GATT dispute settlement system. However the GATT's reliance on consultation and adoption of decision by consensus could not secure the interest of many member nations with small economies. Any party to a dispute could at any stage block the process. There were no deadlines for the settlement process, for example on how long consultations should last. The binding nature of the rulings could be disputed and their quality was often considered inadequate. The GATT dispute settlement was perhaps power-oriented, where powerful nation dictated their terms by using veto while mending the decisions. These shortcomings affected the dispute settlement process of GATT. All these shortcomings and challenges of GATT dispute settlement system were discussed in the Uruguay Round negotiation. With the creation of World Trade Organisation, international trade rules became more detailed and workable. The Dispute Settlement Understanding added more effectiveness and acceptability to the dispute settlement mechanism of WTO as compared to the GATT. However with the passage of time the effectiveness of the DSU diminished with the emerging problems. It eventually affected the participation of developing nations in the dispute settlement system of the WTO. The existing WTO dispute settlement system fails to deal with issues relating to the participation of developing country Members in every stage of

the dispute settlement system, placing them in a less advantageous position as compared to the developed country. They lack the ability to initiate disputes; in the absence of financial and legal resources to effectively pursue dispute settlement process. This acts as a deterrent for developing countries in participating in the dispute.

The new system (the dispute settlement mechanism of WTO) reversed the positive consensus rule to introduce an automatic transition of the procedures, provided for an interim review at the panel stage and created a new litigation stage by establishing an Appellate Body to examine appeals on the point of law in panel reports. The mandatory, rule-oriented dispute settlement system of the WTO added the predictability and security that were missing under the old system.

The WTO dispute settlement proceeding has four separate stages which can be distinguished as Consultations, Panel proceeding, Appellate Body and an Implementations and enforcement of the recommendations of Panel and Appellate Body. The proceedings for settling the disputes gets initiated by calling a disputing party for consultation and once the consultation fails the party further proceeds to the dispute settlement body with the request of establishing a panel. The panel than gives its findings and recommendation. If any party to the dispute is not satisfied, an appeal can be filed to the Appellate Body of the WTO. This body has seven persons on a standing basis out of which a group of three form the bench of the Appellate Body for an appeal. The Appellate Body after determining the facts and evidences gives its findings and recommendations to the Dispute Settlement Body. Thereafter the role of DSB comes into the foreplay for implementing and enforcing the findings.

The rationale behind establishing this Appellate Body was to protect the interest of the member nations and giving them a platform for making an appeal if they feel or find that the panel decision was unfair or biased. But this organ has been affected by the political influence of the secretariat and influential member nations, hence the making an appeal becomes hard for the member nations when there is no fairness in the system.

Another important aspect of the mechanism is the promotion of alternative modes for dispute settlement. It is provided in the second chapter of DSU that parties can voluntarily settle their disputes by way of conciliation, mediation, and Good Offices. This provision was basically incorporated with the intention of making the system more user-friendly and helping the developing member nation to resolve their difference in the more peaceful and amicable way without any hassles and burden. It was perhaps in the DSU such provisions for alternative dispute resolution was incorporated with the aim of increasing the participation of the developing nation to the system.

The panel and Appellate Body are the integral parts of dispute settlement system. Hence effectiveness of this organ determines the efficiency of the WTO dispute settlement system as whole. But it has been seen that the dispute settlement system has been affected by the political outsourcing of members by the developed nations. The selection process of panel, Appellate Body and secretariat is carried out by the Director General of WTO and the Director General who is basically the guardian of developed nations. The Director General is always appointed from the developed nations like US, UK or Japan. Hence the decision taken by him is always in some way or other inclined in the favour of developed nations which affect the legitimacy of the system.

The panel is an ad hoc body which generally comprise up of the diplomats and ambassadors other than the law graduates. These panellists possess the knowledge about case but they hardly have any understanding about the WTO principles, laws and customs. The intricate nature of law affects their understanding as to how the cases should be taken and presented in the forum like WTO. The panellists being ad hoc members hold some parallel posts in their respective countries and hence they know that the post of panel in the WTO is for time being and hence they do not pro-actively participate in the panel process too. On the other hand the task of panel is the most important in the context of fact finding and bringing the process in motion hence if panelist is not well versed with the system than it would eventually affect the system at large and interest of developing nations in particular.

Appellate Body is not free from the political influence of the developed nation. The selection of an Appellate member is done by the committee which is chaired by the Director General and five other officials appointed by the Director General. However, powerful nations have a de facto control the selection process of the Appellate members.

Specific standard for carrying out an adjudicative process in the Dispute Settlement Understanding are lacking. Panel is charged with the responsibility of initiating the process of adjudication. They are responsible for finding facts and making assessments and submitting the report to the dispute settlement body. After taking the consideration of such facts and evidences the dispute settlement body passes its decisions. The approach which has been adopted by the panel for finding the fact is objective assessment test but it do not guide the panel as to how they should carry out the process of fact finding, and in the absence of the proper guiding procedure the panel often over scrutinise the fact or under scrutinise dispute settlement it.

The shifting of burden of proof is a critical aspect in WTO dispute settlement. There are no guiding rules to justify the claims in the provisions of Dispute Settlement Understanding. The developing nation often finds hard to justify their claims because of the complex nature of Dispute Settlement Understanding. Hence the responsibility of the panel and the appellate body becomes very important in arriving at the cause of grievance. There are ruling, for instance in *Wool and Blouse Case*[456], where the panel stated that the party making a claim should prove the prima facie of the case, or meet out the burden of proof. The strict application of a prima facie case entails upon the complaining party the burden of proof and requires that, to satisfy the prima facie standard, that party must adduce evidence which discharges the burden such that in the absence of evidence in rebuttal, the decision-maker must determine the case in its favour. In more simplified terms, if the party fails to provide the evidences the case might go against it, this observation was made by the Appellate Body in *EC Measures Concerning Meat and Meat Products (Hormones Case)*[457].

The biggest hurdle which developing nations face while presenting their case is the resource inefficiency. The developing countries are not economically sound and cannot afford the expenses to make it out in the international organisation for addressing their grievances. Financial inequality thus gives a cutting edge to the Developed countries over developing countries. A number of WTO Members and commentators argue that WTO dispute settlement system is 'overly complicated and expensive.'

The developing countries are not well equipped with the legal expertise. The lack of financial resources affects negatively to the availability of legal experts too. For

[456] United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R.
[457] *EC—Measures Concerning Meat and Meat Products (Hormones),* WTO Docs WT/DS26/R.

participating in the WTO litigation process they need to hire legal professional experts from developed countries. However, in recent years, the cost of hiring private legal counsel is high for developing countries, which prevent them from encouraging such legal professional to undertake the cases. Brazil while undertaking the *Cotton and Sugar Subsidies*[458] cases paid a high cost of legal fees, which was over two million dollars to Sidley Austin Brown & Wood, a legal firm.

Therefore, the developing countries are not able to pursue their rights, properly defend their interest under the WTO rules. Developing countries with less-qualified experts and with little experience fails to confront the developed countries with better-qualified experts. As a result of the disproportion in resources between developing countries and developed countries, the 'fight' is not fair.

The success of any organisation can be determined by examining the participation of the weakest member to it. However in the context of WTO dispute settlement system, the participation of the weakest members is still limited. From 1995-2005, there were 492 request for consultation out of which 180 were initiated by the developing nations, 106 out of these were against developed nations and 74 were against the developing nations. Talking about the least developed nations there in only one dispute initiated by Bangladesh. There are only countable countries who have exclusively participated to the system like India, South Africa, Argentina, Thailand, etc. The empirical evidences shows that the developing nation makes the majority of membership in the system but not many member nation ever dared to bring up their dispute to this forum of WTO because of these limitations and shortcomings. The developing nation often refrains from initiating the dispute settlement process because the DSU provisions are complex and often unclear. The lack of guiding principles in

[458] United States – Subsidies on Upland Cotton, Report of the Panel, WT/DS267/R (Sept. 8, 2004).

the DSU has significantly affected the effectiveness of the Dispute Settlement Understanding and consequently the participation of the member nation also gets affected.

1. For maximising the participation and gaining faith of the member nations to the system, it is important that the organs within the system must be uninfluenced by political considerations. They should be fair, unbiased and efficient. The procedures also should be fair and unbiased against any member nation. It should be designed in such a way that it ensures the objective and amicable solution. Hence it is by reforming the DSU certain change could be brought up for enhancing the participation of developing nation in WTO dispute settlement process.

2. It becomes difficult for the developing countries to take retaliatory action on the approval of DSB so there should be a mechanism of collective retaliatory action on the part of developing countries and the provision of espousing the cause of developing countries by other developing countries should also be evolved

3. The preponderance of evidence approach would provide a degree of clarity by obliging a panel to consider all offered evidence at the same time, thus allowing proper examination of facts and evidences by the panel. This standard of preponderance of evidence is said to be the holistic approach where burden keep on shifting. Under the situation the panel do not remain passive they play an active role in deriving the evidence.

4. It is important to reformulate the standard of review in order to ensure that the dispute settlement system contributes in attaining the fair, unbiased and rule based system for redressing the grievances.

5. The Advisory Centre of WTO law should enhance its performance and carry out certain programmes and training modules for enhancing the understanding of developing nation's members with regard to the legal complexities of WTO law.

6. It is suggested that there should be a permanent panel body. The appointment of permanent panellist would prevent the politicisation in the system. The selection and appointment of panelist should be on the basis of their merit and capabilities. The panelist and Appellate Body member should be well versed in law and should be the men with integrity. Not just this, but there should be a limitation on the role of Director General.

7. Alternative dispute settlement process should be more encouraged for carrying out the hassle free and easy redressal of disputes. An effective use of these tools by developing countries is more likely to improve their representation, ease the pressure on their financial resources, and enhance their prospects of achieving compliance by developed countries.

BIBLIOGRAPHY

A. Das and J.J. Nedumpara (eds.), *WTO Dispute Settlement at Twenty,* (Springer Nature publication, Singapore, 2016).

A Handbook on the WTO Dispute Settlement System, WTO Secretariat Publication, (Cambridge University Press, 2004).

Bhagirath, L. D., *WTO: Past, Present and Future*, (Bookwell publication, Delhi 2004).

Bossche P. V., *The Law and Policy of WTO, Text Case and Material*, (Cambridge University Press, 2005).

Becroft Ross, *The Standard of Review in WTO Dispute Settlement: Critique and Development,* (Oxford University Press, 2012).

Buckman Greg, *Global Trade,* (Fernwood Publishing, 2nd ed. 2005).

Chakraborty Debashis and Amir Ullah Khan, *The WTO Deadlock: Understanding the Dynamics of International Trade,* (Sage publication, New Delhi, 1st ed. 2008).

David Palmeter ,and Petros.C. Mavroidis , *Dispute Settlement in the World Trade Organization: Practice and Procedure,* (Cambridge University Press, New York, 2004).

Gregry C. Shaffer and Ricardo Melendez, *Dispute Settlement at the WTO: The Developing Country Experience*, (Cambridge University Press, ed.1st, 2010).

Hudee Robert, *The GATT Legal System and World Trade Diplomacy*, (Butterworth, London, 1990).

Hoda, A., *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices,* (Cambridge University Press, Cambridge, 2001).

Lester, S., Mercurio, B., Davies, A. & Leitner, K., *World Trade Law; Text, Materials and Commentary,* (Hart Publishing, Oxford, 2008).

Koul.A.K, *Guide to the WTO and GATT: Economics, Law and Politics,* (Satish Upadhay swan press, New Delhi, 2nd ed. 2010).

Mitchell D. Andrew, *Legal Principles in WTO Disputes,* (Cambridge University Press, 2008).

Marceau, Gabrielle, *Consultations and the panel process in the WTO Dispute Settlement System,* in *Key Issues in WTO Dispute Settlement System, the First Ten Years*, edited by Rufuf Yerxa and Bruce Wilson , (Cambridge university press,2005).

Petersmann Ernest, *International Trade Law and the GATT/WTO Dispute Settlement System*, (Kluwer Law International, London,1997).

Peter Gallagher, *Guide to Dispute Settlement*,(Kluwer Law International Publishing House Geneva, 2002).

Palmeter, D. and P.C. Mavroidis, *Dispute Settlement in the World Trade Organization, Practice and Procedure.* (Cambridge: Cambridge University Press, 2004).

Rao.M.B and Guru Manjula, *WTO Dispute Settlement and Developing Countries*, (Lexis Nexis Butterworths, 2004).

Rao M. B., *WTO and International Trade*, (vikash publishing, 2nd ed. 2003).

Shahin Magda, "WTO Dispute Settlement for a middle-income developing country: the situation of Egypt" in Gregory Shaffer, Manfred Elsig. (eds.), *The Law and Politics of WTO Dispute Settlement*, (oxford University press, California, Irvine, ed. 2016).

Shaffer G., Manfred Elsig, et.al. *The Law and Politics of WTO Dispute Settlement*, (oxford University press, California, Irvine, ed. 2016).

Shaffer, C., *Defending Interests: Public-Private Partnerships in WTO Litigation*, (Washington: the Brookings Institution Press, 2003).

V.S Seshadri, "WTO and its Dispute Settlement Mechanism" in Abhijit Das, James J. Nedumpara (eds.), *WTO Dispute Settlement at Twenty: Insiders' Reflections on India's Participation ,* (Springer Nature, 2016).

Vasudeva P. K., *India and World Trade Organization: Planning and Development*, (A.P.H. Pub. Corp., Delhi, 2000).

Valentina Delich, "Developing Countries and the WTO Dispute Settlement System," in *Development, Trade, and the WTO: A Handbook*, ed. Bernard Hoekman, Aaditya Mattoo and Philip English, (Washington: The World Bank, 2002).

Wade William, *Administrative Law*, (Oxford University Press, 10th ed. 2009).

ARTICLES/JOURNALS/WEBSITES:

Baldwin, Ricard E , 'The Causes of Regionalism', *Vol. 20, No, 7,The World Economy*,(1997).

Bown, C. & Hoekman, B., 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector', *8.(4) Journal of International Economic Law,*(2005).

Bown, C., & Hoekman, B., , 'Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is not Enough', *Vol. 42(1) Journal of World Trade* (2008).

Busch L. Marc and Eric Reinhardt, 'The Evolution of GATT/WTO Dispute Settlement', (2003), available at

http://www.georgetown.edu/users/mlb66/TPR2003_Busch_Reinhardt.pdf.

Busch L.Marc and Eric Reinhardt, 'Developing Countries and the GATT/WTO Dispute Settlement', *Vol.37 (4) Journal of World Trade,* (2003).

Bohl K., 'Problems of Developing Countries Access to WTO Dispute Settlement', *Journal of International & Comparative Law* (2009).

Bjørndal, Ole Michael, **'**Does Legalization Matter? : Comparing Compliance with Dispute Settlement under the GATT and the WTO',

available at https://www.duo.uio.no/handle/10852/15022 visited on 5th oct 17.

C. Petros Mavroidis,, "Emerging Issues In International Arbitration: Arbitrating Trade Disputes (Who's the Boss?)", *Vol. 23 American Review International Arbitration,*(2012).

Carol Harlow, ' Global Administrative Law: The Quest for Principles and Values', *Vol. 17(1) Europoean Journal of International Law,* (2006).

Carmody, C., 'WTO obligations as collective', *Vol. 17(2), European Journal of International Law,* (2006).

Debra Steger and Natalia Shpilkovskaya, "Internal Management of the WTO: Room for Improvement" in Debra P. Steger (eds.), *Redesigning the World Trade Organization for the Twenty-first Century,* (The Centre for International Governance Innovation (CIGI) and Wilfrid Laurier University Press, 2009).

Desmedt Axel, 'Proportionality in WTO Law', *Vol.4 Journal of International Economic Law,* (2001).

Davey, W., 'The WTO Dispute Settlement System: The First Ten Years', *Vol.8 (1) Journal of International Economic Law* (2005).

Available at: http://jiel.oxfordjournals.org/content/8/1/17. [visited on November 9, 2017].

Elsig, Manfred, 'Legalization Leap in Context: The Design of the WTO's Dispute Settlement System', Manuscript, University of Bern (2015).

Elsig Manfred & Mark A. Pollack, 'Agents, Trustees, and International Courts: Nomination and Appointment of Judicial Candidates in the WTO Appellate Body', *Vol.20 European. Journal on.International law Review.*(2014).

Garvery, Jack J.,'Trade Law and Quality of Life'-Dispute Resolution under the NAFTA side; Accord on the Labour and the Environment', *Vol. 89, American Journal of International Law,*(1995).

Gosego Rockfall Lekgowe , "The WTO Dispute Settlement System: Does it Work for Developing Countries?", University of Botswana (2012).

Giorgio Sacerdoti, “The WTO In 2015: Systemic Issues of The Dispute Settlement System and The Appellate Body’S Case Law”, *Vol.16 Italian Year Book of International Law* (2016).

Gleason C. P., & P. D.Walther, “The WTO Dispute Settlement Implementation Procedures: A System In Need of Reform”, *Vol. 31(3), Law and Policy in International Business,* (2005).

Goldstein, Judith, et al., 'Introduction: Legalization and World Politics', *Vol.54(03), International Organization,* (2000).

Giovanni Carratù, ‘The International Investment Regulation’, available at http//http://diposit.ub.edu/dspace/handle/2445/101940, visited on 2nd oct 17.

H. H Joseph Weiler. 'The Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', *Vol. 35(2) Journal of World Trade,*(2001).

Holgar Spamann, “Standard of Review for World Trade Organisation Panels in Trade Remedy Cases: A Critical Analysis”, *Vol.38(3) Journal of World Trade,* (2004).

Habib Kazzi, “Reshaping the WTO Dispute Settlement System: Challenges and opportunities for Developing Countries in the Doha Round Negotiation”, *Vol.11 European Scientific Journal,* (2015).

Heinz Hauser and Thomas Zimmermann, ‘The Challenge of Reforming the WTO Dispute Settlement Understanding‘ , *Vol.38(5) Review of European Economic Policy,* 241, (2003).

Hakan Nordstrom & Gregory Shaffer, 'Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure?',*Vol. 7 World Trade Review* (2008).

Huang. Siwen, 'Conflict of Norms in International Law', available at http://urn.nb.no/URN:NBN:no-60054, visited on 28th sep 17.

Henrik, H., 'Remedies in the WTO Dispute Settlement Understanding and Developing Country Interests', (1999). *available at*:

http://www.econ-law.se/Papers/Remedies%20990611-1.pdf,

James HeadenPfitzer and Sheila Sabune, "*Burden* of Proof in WTO Dispute Settlement: Contemplating Preponderance of the Evidence*", Vol.* 9 *International Centre for Trade and Sustainable Development*,(2009).

John Zaracostas, "Dispute Process Crucial to WTO, Sutherland Says,", *Vol.1 Journal of commerce* (1994).

Jeanne J. Grimmett, "Dispute Settlement in the World Trade Organisation: An Overview", *Vol.12, International Law Review*, (2009).

James Smith, "Inequality in International Trade? Developing Countries and Institutional Change in WTODispute Settlement", *Vol. 11,No.3,Review of International Political Economy*, (2004).

John H. Jackson, 'The Jurisprudence of International Trade: The Disc Case in Gatt', *Vol. 72, No. 4 The American Journal of International Law*, (Oct., 1978). Available at http://www.jstor.org/stable/2199776

Kufuor K., 'International Trade from the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes', *Vol.31 (5) Journal of World Trade,* (1997).

Kantchevski, P.D., The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement. *Vol.3(1):BYU International Law & Management Review,* (2006).

Leitner, Kara and Lester, Simon, 'WTO dispute settlement 1995-2007: a statistical analysis', Vol.11(1) Journal of International Economic Law (2008).

Lira Delpiano, 'The Mechanism of Dispute Settlement System of WTO', available at http://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-97532011000100009, visited on 24th Aug 17.

Matthias Oesch, 'Standards of Review in WTO Dispute Resolution', *Vol.6 Journal of International Economic. Law,* (2003).

Michael M.Du, 'Standard of Review under SPS Agreement after EC-Hormones II', *Vol.59 (2) International and Comparative Law,* (2010).

Mauricio Salas and John H. Jackson, "Procedural Overview of the WTO EC – Banana Dispute", *Vol.3 Journal of International Economic Law,* (2000).

Mitchell D. Andrew, 'Good Faith in WTO Dispute Settlement', *Vol.7(2) Melbourne Journal of International Law*,(2006).

Mougios, Isabel Andersen, 'The Principle of Proportionality A comparative study of its application in WTO law and EU law',

University of Oslo Library available at https://www.duo.uio.no/handle/10852/42908, visited on 3rd oct 17.

Oftedahl, Thomas, 'The World Trade Organization : A Developing Country Perspective on the Law and Practice of Negotiations', available at http://urn.nb.no/URN:NBN:no-17235, visited on 5th sep 17.

Nordstrom H. & G.Shaffer "Access to justice in the World Trade Organization: A Case for a Small Claims Procedure?" *Vol7,(4). World Trade Review* (2008).

N. Alotaibi, 'The WTO (DSU) and Developing Countries: problems and possible solutions', LL.M. dissertation, School of Law, *University of Essex*,(2011).

Pierre Pescatore, *The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects, Vol.10 Journal of International Arbitration* (1993).

Available online https://www.researchgate.net/publication/255697342, visited on 1st October 12./

Porges, Amelia, 'Settling WTO disputes: What Do Litigation Models Tell Us', *Vol.19, Ohio State Journal on Dispute Resolution*, (2003).

Posner, E., & Yoo, J.C. "Judicial Independence in International Tribunals*", Vol. 9(1),California Law Review*,(2005).

Parthapratim Pal, '*Regional Trade Agreements in a Multilateral Trade Regime: An Overview', Vol.12. Indian Institute of Management Calcutta* (2015).

Pham. H.., "Developing Countries and the WTO: The Need for More Mediation in the DSU". *Vol 9 Journal of World Trade*,(2004).

Presentation at the WTO Public Forum 2008, 24 September 2008, by H.E. Mr. Ujal Singh Bhatia, Ambassador and Permanent Representative of India to the WTO. *Available at.* http://www.wto.org/english/forums_e/public_forum08_e/programme_e.htm.

Shaffer.G., "The Challenges of WTO Law: Strategies for Developing Country Adaptation",*Vol.5(2)World Trade Review*,(2006),

available at https://works.bepress.com/gregory_shaffer/7/.

Stoler, A. L. 'The WTO Dispute Settlement Process: Did the Negotiators Get What They Wanted? ', *Vol. 3 (1) World Trade Review* (2004).

Scott Lincomine and Davida Connon, "WTO dispute settlement—long delays hit the system", (2014). Available at https://www.lexology.com/library/detail.aspx?g=13fe0fa8-2e4c-45ca-b619-c4609ae96797, visited on 25th sep

Stolpestad, Ingrid Westgaard, 'Challenging US cotton subsidies", *University of Oslo Library*, available at http://urn.nb.no/URN:NBN:no-29606, visisted on 17th Sep 17.

Tania S. Voon and Alan Yanovich, "The Fact aside :The Limitation of WTO Appeals to Issues of Law' *Vol.40(2)Journal of World Trade*, (2009).

Unterhalter David, "What Makes the WTO Dispute Settlement Procedure Particular: Lessons to be Learned for the Settlement of International Disputes in General?", in Wolfrum. R. Gatzschmann, (eds.), International Dispute Settlement: Room for Innovation?",Springer publication (2013). Available online at http://www.springer.com/978-3-642-34966-9, visited on 16th Aug 17.

Van der Borght, K., 'The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate', *Vol. 14, American University International Law Review*, (2010).

Wilfred J. Ethier, 'Regionalism in a Multilateral World', *Vol.106 (6), Journal of Political Economy*, (1998).

William J. Davey, 'Dispute Settlement in GATT', *Vol.11, Iss.1 Fordham International Law Journal*, (1987).

"WTO dispute settlement—long delays hit the system", available at https://www.lexology.com/library/detail.aspx?g=13fe0fa8-2e4c-45ca-b619-c4609ae96797, visited on 24th nov 17.

Weisser, Henrik Howlid, 'The WTO public morals clause. An analysis of whether a trade ban on farmed salmon would be justified under GATT Article XX (a)', *University of Oslo Library*, available at https://www.duo.uio.no/handle/10852/49484. visted on 25th Aug 17.

Zleptnig Stefan, "The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority" *Vol. 6 European Integration online Papers (EIOP),*(2002). Available online,

http://eiop.or.at/eiop/texte/2002-017a.htm, visited on 10th Oct, 17

Discussion Papers/Working Papers

Adelbukola, E, 'WTO Dispute Settlement Remedies: Monetary Compensation as an Alternative for Developing Countries' (Working Paper No 1378, Bepress Legal Series, 18 May 2006, available at http://law.bepress.com/expresso/eps/1378/, visited on 10th oct 17.

Bossche, P, 'Dispute Settlement of the World Trade Organisation' (Paper prepared at the request of the United Nations Conference on Trade and Development, 2003), available at

https://academic.oup.com/jiel/article/1/1/161/867718, visited on 14th oct 17.

Busch, M and E Reinhardt, 'The WTO Dispute Settlement Mechanism and Developing Countries' (Trade Brief prepared for the Swedish International Development and Cooperation Agency, April 2004),

Available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.537.1581&rep=rep1&type=pdf. Visited on 17th sep 17.

Davey, W, 'Implementation in WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions' (Illinois Public Law Research Paper No 05-16, The University of Illinois College of Law, 2005),

available at https://www.rieti.go.jp/jp/publications/dp/05e013.pdf, visited on 25th oct 17.

Ewelukwa U, 'African States, Aggressive Multilateralism and the WTO Dispute Settlement System: Politics, Process, Outcomes and Prospects' (University of Arkansas School of Law, 2005),

available at https://www.carnegiecouncil.org/.../articles.../5213_fellowPaper_ewelukwa.pdf , visited on 20th oct 17.

Haider Khan and Yibei Liu, "Globalization and the WTO Dispute Settlement Mechanism: Making a Rules-based Trading Regime Work", *MPRA Paper No. 7613,* available online Online at

http://mpra.ub.uni-muenchen.de/7613/, visited on Sep 29, 17.

R. Abbott,'Are Developing Countries Deterred from Using the WTO Dispute Settlement System? Participation of Developing Countries in the DSM in the years 1995-2005', *ECIPE Working Paper No. 01/2007*, available at

http://www.ecipe.org/media/publication_pdfs/are-developing-countries-deterred-from-using-the-wto-dispute-settlement-system.pdf , visited on Sep 11, 2017.

Robert Read, 'Trade Dispute Settlement Mechanism: The WTO Dispute Settlement Understanding in the Wake of the GATT', (Working Paper No 12, Lancaster University Management School, 2005), available at http://www.lums.lancs.ac.uk/publications/, visited on 10th sep 17.

Documents, Cases and Reports:

Decision on Dispute Settlement Procedures of 30 November 1984, GATT BISD, 31st Supplement, 9 (1984).

Decision on Improvements to the GATT Dispute Settlement Rules and Procedures, GATT BISD, 36th Supplement, 61 (1989).

The Decision on Procedures under Article XXIII, GATT BISD, 14th Supplement, 18 (1966).

Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, (L/4907), Adopted on 28 November 1979.

Ministerial Declaration of 29 November 1982, GATT BISD, 29th Supplement, 13 (1982).

Appellate Body Report, European Community- Measures Concerning Meat and Meat Products (Hormones), 115, WT/DS26/AB/R, WT/DS48/AB/R Jan. 16, 1998).

Appellate Body Report Japan-Agricultural product II, WT/DS7/R, adopted 19th March 1999, as modified by Appellate Body Report WT/DS7/AB/R, DSR 1999:I, 315.

Appellate Body Report, United States-Anti Dumping Measures on Certain Hot-Rolled Steel products from Japan, WT/DS184/AB/R adopted 23 August 2001, DSR 2001: X, 4697.

Appellate Body Report US-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan. WT/DS192/AB/R, adopted 5th nov 2001: XII, 6027.

Appellate Body Report, Argentina-Safeguard Measures on Import of Footwear Footwear(EC), WT/DS121/AB/R, adopted 12th Jan 2000, DSR2000:I,515.

Appellate Body Report, United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, adopted 19th Jan 2001, DSR2001:II 717.

Appellate Body Report, United States-Measures Relating to Zeroing and Sunset Reviews, WT/DS322/R, DSR2007:I,3.

Appellate Body Report on United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India WT/AB/DS33/R.

Appellate Body Report, Japan – Apples, para. 166; and Appellate Body Report, Dominican Republic – Import and Sale of Cigarettes, para. 82.

Appellate Body Report, United States – Laws, Regulations and Methodology For Calculating Dumping Margins ("Zeroing"), WT/DS294/AB/R (18 April 2006) Para. 220.

Appellate Body Report on India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R.

Panel Report, European Communities–Export Subsidies on Sugar, WT/DS265/R,WT/DS266/R and WT/DS283/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, and WT/DS283/AB/R.

Panel Report, United States-Measure Affecting Import of Woven Wool Shirt and Blouses from India, WT/DS33/R, adopted 23 May 1997, as upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, 343.

Marrakesh Agreement Establishing the World Trade Organization [WTO Agreement], Apr. 15, 1994 in World Trade Organization, available online http//www.wto.org. ,visited on 31st may 17.