# THE WORLD TRADE ORGANISATION (WTO) AND ITS DISPUTE SETTLEMENT SYSTEM – POLITICAL AND LEGAL IMPLICATIONS FOR SOUTH AFRICA.

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A minithesis submitted in particular fulfilment of the requirements for the degree of Magister Philosophiae in the Department of Law, University of the Western Cape

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**KEYWORDS**

World Trade Organisation

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**ABSTRACT**

**THE WORLD TRADE ORGANISATION (WTO) AND ITS DISPUTE SETTLEMENT SYSTEM – POLITICAL AND LEGAL IMPLICATIONS FOR SOUTH AFRICA.**

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MPhil minithesis, Department of Law, University of the Western Cape.

In this minithesis, I explore the new WTO Dispute Settlement System in relation to developing countries' and South Africa's access to this system. I argue that this new system, as a rule based system allows for greater access for developing countries and South Africa, however there are a number of problems associated.

I explore the change from GATT to the WTO and how these changes have facilitated the access of developing countries. During this process I analyse the positive and negative aspects of the system in relation to developing countries.

I critically investigate developing countries access to the Dispute System, and in particular South Africa's access to the system. In this section I base my investigations on the view of Alban Freneau in his LLM paper, *WTO Dispute Settlement System and Implementation of Decisions: a Developing Country perspective* and BM Hoekman and PC Mavroidis paper called *Enforcing Multilateral Commitments: Dispute Settlement and Developing Countries.* In this section I deal with issues of retaliation, compensation, implementation of panel rulings, financial problems and transparency. Furthermore, I look at what the Department of Trade and Industry have achieved with regard to access to the dispute system. Lastly I address new negotiations that are occurring within the WTO in relation to the Dispute Settlement Understanding and how this could affect developing countries and in particular South Africa.

Lastly the minithesis is concluded with recommendations for developing countries and South Africa if they are to access the system. I suggest that developing countries should lobby to start an investigation to whether developing countries could have shorter periods of time to process their cases as well as gaining increased financial support. I finally support Hoekman in his statement that it is important to educate commercial business and government institutions in WTO laws and regulations, as this will lesson the need for cases to be filed at the WTO as well as create less of a burden on the developing country.

May 2004

## DECLARATION

I declare that *The World Trade Organisation (WTO) and its Dispute Settlement System – political and legal implications for South Africa* is my own work, that is has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Bonita Donelle Berkowitz 24th May 2004

Signed..........................................

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**CONTENTS**

## CHAPTER ONE

### Introduction

1. Aim

The aim of this work is to provide the academic community with an in-depth look at how the WTO's Dispute Settlement System works and what the problems are with this system with regard to access to the system by South Africa and other developing countries, specifically the application of the outcomes of the resolutions by the panels, and the monitoring of the compliance to decisions passed down by the panel.

Furthermore, this report will have a strategic aim in that it will seek to provide research that will indicate to the South African Trade and Industry Department on how to access the World Trade Organisations' Dispute Settlement System. The paper will give direction on how we need to prepare ourselves to use this system, and what the pitfalls are.

With regard to the legal and political implications stated in the topic, this can be explained in the following way. The legal implication is that of the process of the Dispute Settlement Unit and the procedure that the DTI has to take to enter such a dispute. This is established in Chapter Two. Furthermore, this is expanded in the Chapter Four presenting the recommended changes to the Dispute Settlement Understanding articles that will change the way countries negotiate with the unit. Political implications are developed along the hypothesis that as a developing country it is necessary to utilize a rule-based system that will facilitate the closing of the trade imbalances between the developed and transitional/developing and least developed countries, as well as keep a check on how globalisation allows for abuse.

2. Motivation

The motivation behind this study is that South Africa has become a fully-fledged member of the WTO and will increasingly find itself in situations of conflict with other countries with regard to trade issues. Added to this, the WTO's new dispute system is regarded as one of the most important aspects of the Uruguay Rounds of talks and it is significant in its attention to developing countries. In many cases, this system of dispute settlement brings important issues to the fore for developing countries issues a voice.

## 3. Methodology

Initially the methodology was based on the premise that South Africa had filed a complaint and with that knowledge I could analyse the panel findings and complete a comparison with other developing panel decisions. However, South Africa had not filed a complaint and had only been a respondent. Thus it was difficult to achieve what was initially aimed at. Therefore the second part of the paper is based on what is occurring within the Dispute Settlement Unit and the changes that are being made so as to facilitate developing countries. Furthermore, recommendations are made on how South Africa can gain further assistance within this system. The first part of the paper is still based on the initial proposal indicating how the Dispute Settlement System works. Added to this, through the help of WTO information from their website, one is able to ascertain the extent of participation by developing countries and the outcome of the panels.

## CHAPTER TWO

## From GATT to WTO and the formation of the Dispute Settlement Understanding

[1]The basic principle of international trade is that goods, when exported from a country, should generally have a certain amount of freedom when gaining entry into the importing country. Customs duty (tariff) can, however, be imposed at the border. GATT/WTO has provided a framework for negotiations on the levels of tariffs. This new more viable and durable trading system, the WTO, encompasses the liberalisation efforts of GATT, however it calls for efforts to improve the coherence of global economic policy-making as well as adding a sense of responsibility and consultation to the trading world. This responsibility is created within the new Dispute Settlement Understanding (DSU), a rule-orientated approach to dispute settlement within the WTO. Consultation refers to the process and panels set up by the agreements covering the WTO. The WTO's DSU also provides an acid test regarding the commitment of the major trading nations to this new rule-based trading system.[2]

This research paper focuses mainly on the Dispute Settlement Understanding (DSU). It will take its reference point from the change over from GATT to WTO and then aims to ascertain how this new (DSU) is beneficial for the new global order in which developing countries and countries in transition have entered. Recommendations will be made with direct reference to South Africa[3] and her access into this Unit if the need ever arises.[4]

[1] The General Agreement on Tariffs and Trade will be represented by the acronym GATT and The World Trade Organisation as WTO.
[2] Schott, Jeffrey J. (2000), *The WTO after Seattle*, in The WTO after Seattle. Ed. Schott, Jeffrey J. Institute for International Economics. USA.
"Ruled-based system" – this reference is made in respect to the kind of system that was created within GATT. The WTO Dispute Settlement Unit has specific timeframes and rules that have to be adhered to in order for the process to work and a resolution determined. The GATT system was more flexible. This will be explained in more detail in the paper.
[3] South Africa entered the WTO in January 1995
[4] This paper is to be utilised as a working document. Therefore, within the paper procedures will be explained in detail as well as how South Africa can access the system.

## 1. GATT to WTO and the changes in policies

### 1.1 GATT to WTO – their history

Although one assumes that the WTO is a separate organisation with a separate set of agreements, it is in fact made up of a number multilateral trade agreements, one of them being the GATT 1994. This agreement (GATT) existed as the only multilateral agreement regulating trade between nations. Its aim was to reduce the protectionism between countries so as to increase trade.[5] The first attempt at any multilateral trading system was after the Second World War, from 1946 to 1948, where over 50 countries negotiated the creation of an International Trade Organisation (ITO), which was the third leg of the Bretton Woods post war order together with the World Bank and International Monetary Fund. In March 1948, the Havana Charter was signed in Cuba. This described the intended function of the ITO and also covered issues such as rules of employment, restrictive business practices and international investment. However when taken back to individual countries for ratification, it failed and the ITO never came into being.[6]

However, during these negotiations, 23 of the participating countries[7] entered into widespread discussions on tariffs. These rules were written up as the GATT. It included promises to reduce 45,000 individual tariffs, affecting about one-fifth of the total world trade. GATT was signed by these 23 contracting parties and came into force on January 1, 1948.[8]

GATT achieved trade liberalisation through a number of methods. The first set of rules in the GATT agreement itself, such as the "most favoured nation (MFN)[9]" rule and the

[5] Ferguson, Keith. The World Trade Organisation (WTO) and its Multilateral Trade Agreements. (GATT,GATS,TRIPS,TRIMs, etc). PPJC (Online). Available http://www.peaceandjustice.org/issues/econjustice/gl_wto2.html
[6] Ibid
[7] Some of the countries included in these discussions were; Australia, Brazil, Canada, China, Cuba, France, India, South Africa, UK and USA.
[8] Ferguson, Keith. The World Trade Organisation (WTO) and its Multilateral Trade Agreements. (GATT,GATS,TRIPS,TRIMs, etc). PPJC (Online). Available http://www.peaceandjustice.org/issues/econjustice/gl_wto2.html
[9] MFN means that signatory countries must treat imports from all other signatory countries equally, applying the same tariffs to particular imported goods no matter what the country of origin.

"national treatment" rule[10]. During the early years of the GATT, negotiations focused primarily on making concessions to reduce tariffs that applied to particular imports. Subsequent to these negotiations was an increase in other forms of protectionism, thus in the Toyko round of talks in the 1970's, negotiations were expanded to include "non-tariff barriers" such as subsidies and issues such as anti-dumping. Some of the Tokyo negotiations resulted in agreements that only some of the GATT contracting parties would sign. Hence they were "plurilateral" rather than multilateral and as a result were known as codes rather than agreements. The Tokyo Rounds also saw the first time that special attention was given to individual sectors such as agriculture and textiles and specific agreements were signed.[11]

These new codes[12] caused fragmentation in the multilateral trading system and some governments responded by implementing bilateral market sharing agreements and agricultural subsidies. These new forms of protectionism and their affects on the trading system resulted in a major round of negotiations called the Uruguay Round. [13]

Given its provisional nature and limited field of action, the success of GATT in promoting and securing the liberalisation in trade of much of the world over the 47 years is incontestable. It was able to reduce the world tariffs from 40% to 4% during its reign[14]. GATT's success in reducing tariffs to such a low level, combined with a series of economic recessions in the 1970s and early 1980s, drove governments to devise other forms of protection for sectors facing increased overseas competition. High rates of unemployment and constant factory closures led governments in Europe and North America to seek bilateral market-sharing arrangements with competitors and to embark

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[10] National Treatment means that signatory countries must treat foreign goods, after they have been imported and tariffs paid, the same as similar domestically produced goods.
These methods of trade liberalisation have been a series of eight rounds of multilateral trade negotiations.

[11] Das, Bhagirath Das (1998) *An introduction to The WTO Agreement.* New York: Zed Books Third World Network

[12] The "Codes" included the following agreements: Subsidies and countervailing measures; Technical barriers to trade; Import licensing procedures; Government procurement; Customs valuation; Anti-Dumping; Bovine Meat Arrangement; International Dairy Agreement and Trade in Civil Aircraft. Several of these Codes were amended in the Uruguay Round and many of them are now multilateral commitments within the WTO Agreement.

[13] Uruguay Rounds lasted from 1986-1994

[14] The Roots of the WTO in Internet Resource:
http://www.econ.iastate.edu/classes/econ355/choi/wtoroots.htm

on a subsidies race to maintain their holds on agricultural trade. Both these changes undermined the credibility and effectiveness of GATT.[15]

Apart from this deterioration in the trade policy environment, it also became apparent by the early 1980's that GATT was no longer as relevant to the realities of world trade as it had been in the 1940's. For a start, world trade had become far more complex than fourty years prior; the globalisation of the world economy was underway, international investment was exploding and trade in services – not covered by the rules of GATT – was a major interest to more and more countries. In other respects, the GATT found that it had not been very successful in liberalising agricultural trade and trade related issues with regard to textiles and the clothing sector.[16]

The Uruguay Round Agreement of the GATT/WTO has been described as, "the most important event in recent world economic history". This was due to the fact that for twelve years, preceding 1995, 120 nations of the world participated in the largest and most complex negotiation in history concerning international economics.[17]

From the beginning, a most important objective of this trade round was to extend a GATT type treaty rule orientated discipline to three new subject areas: trade in services, agricultural product trade, and intellectual property matters. In addition, the declaration expressed priority for subsidy rules, changes in the dispute settlement procedures, new attention to the problems of textile trade and more elaboration of rules relating to product standards.[18]

### 1.2 The WTO and its structure.

Perhaps the most dramatic result of the Uruguay Round negotiations was the establishment of a new organisation to replace the GATT institutional function. The

[15] Ibid
[16] Ibid
[17] Jackson, John H. (1998) *The World Trade Organisation.* The Royal Institute of International Affairs. Cassel Books. UK.
[18] Ibid

following will introduce and give a short description of the legal structure of the WTO, its organisation and structure, decision-making and its membership.

The GATT legal structure was always clouded by its "provisional" status and significant ambiguities concerning the legal status of the particular texts. It was a complex mixture of almost 200 treaty text and affected by numerous decisions and waivers of the contracting parties of the GATT acting jointly. In the WTO, the substantive treaty obligation texts are appended to the WTO Charter; in particular Annex 1A, which embodies the GATT and Tokyo Round side agreements modified by the Uruguay Round. The structure of the treaty is technically as follows. The overall treaty is the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Organisations", and is the first element in the WTO Charter. This Charter contains four important annexes which comprise of the treaty pages that deal with institutional and procedural matters.

One possible reason for this structure may be to suggest that the processes for changing the annexes might be more flexible and efficient than for changing the Charter, so that the institution could keep abreast of fast developing changes for economic circumstances.[19] The four annexes include the following: Annex 1 – GATT 1994, TRIPS[20] and GATS; Annex 2 – Dispute Settlement Understanding (DSU); Annex3 – Trade Policy Review Mechanism (TPRM) and Annex 4 – Plurilateral Agreements. Added to these Annexes are



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[19] Jackson, John H. (1998) *The World Trade Organisation.* The Royal Institute of International Affairs. Cassel Books. UK

The Uruguay Round had the following achievements:

i. GATS – General Agreement on Trade and Services.

i. TRIPS – Trade Related Intellectual Property. This brought new international rule discipline to the level of protection for patents, copyrights, trade secrets and similar intellectual property subjects.
ii. Agriculture
iii. Subsidies/countervailing duties. This resulted in a new subsidies Code.
iv. Textiles.
v. Standards.
vi. Safeguards.
vii. Market access.
viii. Integration of developing countries
ix. Preshipment and rules of origin
x. Regional trade agreements
xi. GATT grandfather rights
xii. Dispute settlement procedures
xiii. WTO Charter

[20] TRIPS – Trade-related Aspects of Intellectual Property.

two objectives that make the WTO more far reaching and all encompassing than the GATT. The first is found in the WTO's Preamble in which an important statement is made in respect of measures favouring least-developed countries. The central point is that these countries, as long as they remain in the least-developed category, will only be required to undertake commitments and concessions under the Uruguay Round agreements, "to the extent consistent with their individual development, financial and trade needs, or their administrative an institutional capabilities", and that the rules and transitional arrangements in the agreements, "should be applied to them in a flexible and supportive manner".[21]The second objective to make reference to is that of coherence. The second test bearing on the functions of the WTO is a declaration on its role in achieving "greater coherence in global economic policymaking[22]". The latter part of this paper will concentrate predominantly on the second Annex, that dealing with the Dispute Settlement Understanding (DSU).

### *1.2.1 Organisation and Structure*

At the top of the body is a Ministerial Conference which meets at least every two years. This consists of all the members of the WTO. Next there are four councils. These include one General Council which seems to have overall supervising authority and carry's out many of the functions of the Ministerial Conference. This General Council meets every two months. In addition, there is a Council for each of the Annex 1 Agreements. There is also established a "Dispute Settlement Body" (DSB) to supervise and implement the dispute settlement rules in Annex 2.[23]

### *1.2.2 Decision making*

An important provision of the WTO agreement states that, except as otherwise provided, the WTO is to be "guided by the decisions, procedures and customary practices followed under the old GATT.[24] Furthermore, the WTO would continue to continue the practice of decision-making by consensus followed by GATT. Votes were seldom taken in GATT.

[21] Guide to the Uruguay Round Agreements – The WTO Secretariat, (1999). WTO, Geneva.
[22] Ibid
[23] Jackson, John H. (1998) *The World Trade Organisation*. The Royal Institute of International Affairs. Cassel Books. UK
*Find Appendix One: Structure of the WTO*
[24]WTO Secretariat (1999) *Guide to the Uruguay Round Agreements*. Kluwer Law International. London

The tradition was that decisions were normally taken only when an issue had been discussed to the point at which an agreement had been developed which all countries were ready to support, or oppose. Voting, when it took place was a mere formality. The WTO is different in that rules on decision-making seem likely to lean in practice even more heavily towards the use of consensus rather than formal voting. As far as formal voting is concerned, each WTO member has one vote. The general rule is that decisions of the Ministerial Council and General Council shall be by a majority of votes cast. Even when an amendment is submitted to a particular annex or agreement, a three-fourths majority of membership is needed.[25] Moreover, certain key articles cannot be changed unless all members agree. These are Articles 1 and II of the GATT, Articles IX of the WTO, Articles II:I of the GATS and 4 of the TRIPS. These voting requirements, tougher than the old GATT, were introduced because of fears that a number of countries might otherwise be tempted to join forces to vote through waivers or other decisions that would deprive the outvoted minority of rights under the WTO.

### *1.2.3 Membership*

The WTO membership provides for two ways of becoming a member of the organisation. The first covers governments that were Contracting Parties to the old GATT. The second approach to membership is by accession, which means by negotiating the terms of membership with the governments that are already members[26].

For one to fully understand the changes in international trade policy from GATT to WTO, it is important to establish the main differences between these two bodies.[27] As a member of the WTO, that country has automatic access to the Dispute Settlement Body (DSB) either as a complainant or respondent or an interested party. With regard to South Africa a dispute may arise if she believes that another WTO member is violating its (the member's) obligations and commitments under various WTO agreements or nullifying/impairing benefits under these agreements. In the next few sections this new dispute system will be discussed.

[25] Ibid
[26] Ibid
[27] A diagram of the differences between the WTO and GATT can be found at the end of the paper under Appendix Two.

## 1.3 GATT to WTO – The Dispute Settlement System

### *1.3.1 GATT to WTO DSU*

In this section the focus will be on the evolution of the Dispute Settlement System from pre-Uruguay days to the present WTO structure. The original dispute settlement provisions of GATT 1947 were limited to two brief Articles – Articles XXII and XXIII. This lack of substantive dispute settlement procedures can be attributed primarily to the intended temporary nature of the GATT, which was to remain operational only until such time as the ITO came into play. Due to the fact that this did not occur, Contracting parties were left to address dispute settlement as best they could within the existing provisions of Articles XXII and XXIII of the GATT.[28]

The first process to be used was so-called "working parties". If one contracting party was concerned with a measure of another, a working party was formed to review and clarify the situation. These working parties were small groups of interested contracting parties, including the disputing countries themselves, which would review the situation and attempt to develop an appropriate negotiated solution. These working parties never had the ability to render binding decisions or enforce compliance, but rather were used to clarify the issues involved.[29] A new approach was taken in the 1950's. A "panel of experts" procedure was gradually replacing the working group process. Under this procedure, ad hoc panels of trade diplomats, stationed with contracting parties in Geneva, would review and report on individual disputes. This new process also took on arbitration that also included the presentation of written and oral argument to the panel. The panel would then draft a report that would for presentation to the Contracting parties. The development of the panel was the first process towards the legalisation of the GATT's dispute settlement process.

During the 1960's, in response to concerns expressed by developing countries, the panel procedures were supplemented by the adoption of certain special procedures that could be

[28] Thomas, Jeffrey S Meyer and Michael A, (1997) *The New Rules of Global Trade – A Guide to the World Trade Organisation.* Carswell Publishing Canada.
[29] Ibid

employed when a developing country was one of the disputing parties.[30] By the beginning of the Tokyo Round negotiations, many flaws in the panel process had been exposed. Perhaps most problematic was the fact that the entire process was based on consensus. The process could not move forward unless there was a consensus among all contracting parties to do so. If one of the disputing parties was intent on delaying the establishment of a panel or the adoption of a panel report, it could do so by blocking any consensus. Consequently, losing parties often blocked the formation of panels, or the implementation of panel reports. While the Tokyo Round did serve to clarify many procedural aspects of the panel process, some contracting parties refused to accept any changes to the consensus requirements. Additional procedural improvements were made in 1982 and 1984, in particular the inclusion of non-governmental experts on the panel and allowing the Director-General to select and appoint panelists in the event that the dispute parties were unable to agree on the composition of a panel. Furthermore, where written submissions were involved, panels were directed to set precise deadlines and disputing parties were expected to respect these deadlines.[31]

During the Uruguay Rounds negotiations, the Dispute Settlement Understanding (DSU) was established under the WTO. The next section will focus on the main elements of the WTO DSU and thereafter the DSU system and its procedures will be explained.

### *1.3.2 Main elements of the WTO DSU*

According to the WTO Secretariat, "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". [32]Furthermore, the Secretariat states that the System serves to preserve rights and obligations under the agreements it covers, and to clarify those rights and obligations. Among other principles set out in the understanding are many based on GATT experiences. These include the importance of prompt settlement of disputes to effective functioning of the WTO and a proper balance of rights and obligations; the objective of achieving a satisfactory settlement of disputes in accordance with those rights and

[30] Ibid
[31] Ibid
[32] Guide to the Uruguay Round Agreements – The WTO Secretariat, (1999). WTO, Geneva

obligations; and the understanding that requests to consult and use the dispute settlement procedures should not be considered contentious acts. Members are to use their judgment as to whether action under the procedures would be fruitful, and are reminded that the aim of the dispute settlement mechanisms is to secure a positive, and if possible mutually acceptable, solution to a dispute. The preferred solution to a dispute is usually withdrawal of measures found inconsistent with agreements under the WTO. Failing withdrawal, provision of compensation is a less satisfactory substitute. The least desirable outcome is retaliation, in which the injured member country may, after authorization, suspend trade concessions or obligations towards the other member concerned.[33]

A further, very important set of principles is set out in the understanding's Article 23, titled "Strengthening of Multilateral System". This effectively prohibits unilateral actions by member countries to redress what they see as violations of obligations, or nullification or impairment of benefits, under any of the WTO agreements. Members are required to use he WTO dispute settlement procedures to settle grievances related to these agreements. In particular, they may not determine that violations, nullification or impairment have taken place, except in accordance with approved panel or appellate findings, and must follow other rules in the understanding that give a reasonable time for panel recommendations to be followed and govern resort to retaliation.[34]

### *1.3.3. Systems*

#### *a. Institutions:*

The WTO's dispute settlement arrangements are placed under the supervision of a single Dispute Settlement Body (DSB). The DSB has the sole authority to establish panels, adopt panel and Appellate reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspensions of concessions and obligations.[35]

The second institutional element in the Dispute Settlement system is the panel set upon to examine a particular matter. A panel is brought into existence by the DSB to carry out a

[33] Ibid
[34] Ibid
[35] WTO Secretariat (1999) *Guide to the Uruguay Round Agreements*. Kluwer Law International. London

specific task, and ceases to exist when that task has been completed. The understanding includes elaborate provisions on the composition, mandate, tasks and procedures of panels.[36]

*b. Panel Composition:*

The Dispute Settlement Understanding says that panel members be "well qualified governmental or non-governmental individuals", listing as appropriate persons those who have previously been panel members, or have served officials or with the Secretariat, or have taught or published on international trade law or policy. A panel's three or five members are to be independent, of diverse background and wise experience; are not drawn from the countries involved in the dispute under review unless those countries so agree, and if a developing country is involved in the dispute it can request that the panel include at least one member from a developing country."

Unless the parties agree otherwise, a panel will normally be given standard terms of reference, which require it to examine the matter referred to it, 'in the light of the relevant provisions" of the agreements cited by the parties, and "to make findings that will assist the DSB" in making recommendations or rulings under those agreements. The panel will be expected to assess the facts of the case and the extent to which the agreements concerned apply and have complied with.[37] An important requirement, reflecting the traditional GATT priority of settling the trade problem at issue, is that panels should give parties to the dispute "adequate opportunity to develop a mutually satisfactory solution".[38]

Panel procedures are set out in detail, with a set process to be followed, as well as guidance on establishing an overall timetable and on the points to be covered in panel reports, deadlines for each stage in the process, and a requirement of confidentiality.

[36] Ibid

[37] Das, Bhagirath Das (1998) *An introduction to The WTO Agreement.* New York: Zed Books Third World Network

[38] This means that both parties come to an agreement that has been discussed and researched by each party and that both parties feel is mutually acceptable.

Panels make seek information from any source, and on scientific or technical matters can request advice from an expert review group.[39]

Parties to a dispute are given the right to appeal against the panel report, the appeal being limited to issues of law covered in the panel report and to legal interpretations developed by the panel. An appeal on a particular case will be heard by three members of the seven-person Appellate Body. They can uphold, modify or reverse the legal findings and conclusions of the panel, and their report, once adopted by the DSB, is to be unconditionally accepted by the parties to the dispute. The Appellate Body, established by the DSB, consist of persons of recognized authority and who demonstrate expertise in law, international trade and the subject matter of the covered agreements generally, and unaffiliated with any government and is a member of the WTO. Members are appointed for four years, except that to spread the rotation of members, appointments of three of the initial members were for two years only.[40]

c. *Decision-making:*

Perhaps the most important difference between the GATT and WTO dispute settlement rules is the change introduced into the decision-making procedures. Under GATT, key decisions depended on consensus agreements to move ahead. Therefore there could be blocking. The WTO process the consensus requirement has been turned around and progress cannot be blocked unless there is consensus to do so. A panel report shall be approved by the DSB unless appealed or the DSB decides by consensus not to adopt it. In the case of an appeal, the Appellate Body's report must again be adopted by the DSB unless there is consensus agreement in the DSB not to do so. These provisions effectively remove the opportunities that existed under the GATT procedures for blocking the multilateral dispute settlement process. Combined with the system of deadlines introduced to govern how a dispute is handled under the WTO, the new consensus rule should ensure that the whole dispute settlement procedure moves forward in the future more rapidly and automatically than in the past.[41]

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[39] Ibid
[40] WTO Secretariat (1999) *Guide to the Uruguay Round Agreements*. Kluwer Law International. London
[41] Ibid

*d. Retaliation:*

The first objective in dispute settlement is to reach a mutually agreed settlement, or failing that, to secure the withdrawal of measures found inconsistent with a WTO agreement. The next best solution is to have the offending member provide appropriate compensation for whatever injury has been caused. A member at fault has within 30 days of the adoption of the report, of the action to comply with the report's recommendations and rulings. It is given, "reasonable period of time" for compliance. In the absence of agreement in the DSB or between the parties to the dispute, this period may be determined by arbitration and will not be more than 15 months. If the member government found at fault fails to implement the recommendations and rulings, it may voluntarily grant compensation to the injured party to the dispute. If, however, no agreement on compensation is reached, the injured party may request the right to retaliate, and again the rule that consensus is needed to block progress applies: the request will be granted unless there is consensus to reject it.[42]

Elaborate rules govern the form which retaliation may take place, their purpose being on the one hand to restrict action as far as possible to the same area of trade as that in which injury has been caused and on the other to permit the injured party to find adequate compensation. The general principle is that the complaining party should first seek to retaliate in the sector in which its rights have been found to be nullified or impaired.[43]

*e. Arbitration, good offices, conciliation and mediation:*

Arbitration can also be used in other circumstances than a disagreement over the amount of compensation. When clearly defined disputes arise, and the parties agree, it is open to them to report to arbitration, provided they also agree to accept the arbitration award. Another means of stepping outside the panel and appeal procedures is by asking a third party to offer good offices, conciliation or mediation. The Director-General may offer good offices, conciliation or mediation *ex officio* and, along with the chairman of the DSB, is required to give such help if so requested by a least-developed country involved in a dispute. The new dispute settlement rules have also reasserted the possibility that the

[42] Ibid
[43] Ibid

Director-General may be called on to lend his good offices in any dispute in a developing country, making use of procedures drawn up in the GATT in 1966.[44]

*f.* *Non-Violation complaints:*

A complaint may also be brought, and be found justified, even if no actual violation has occurred. This may happen if the government complained against has taken a measure that nullifies or impairs a benefit which the complainant can show it had reason to expect to receive under the provisions of a WTO agreement. In such cases, the normal dispute settlement rules apply, except that the member complained against cannot be forced to withdraw the measure. Mutually satisfactory adjustment, possibly including compensation, is regarded as normal means of settling the matter.

### *1.3.4 The dispute settlement process*[45]

*a. Consultations:*

The first layer of dispute settlement under the Understanding is a consultative process whereby the disputing members first attempt to negotiate mutually acceptable settlement of the problem at hand.[46] *Article. 4.2* of the Understanding provides that each Member is required to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation any Agreement.[47] Upon receipt of a written request for consultation, the Member to which the request is made must reply within 10 days of receipt of the request and enter into good faith consultations within 30 days of its receipts. A failure to respond to such a request, the requesting Member may immediately request the establishment of a panel. Any Member making a request for consultations must notify the DSB and any Council or Committee responsible for the relevant



[44] In 1966 it was recognised that special recognition should be given to a situation when a developing country and a least-developed country Member were involved in a dispute. Developing countries may choose a faster procedure, request longer time-limits, or request additional legal assistance.

[45] *Appendix 3 – Panel Procedure.*

[46] WTO Secretariat (1999) *Guide to the Uruguay Round Agreements*. Kluwer Law International. London

[47] Thomas, Jeffrey S. and Meyer, Michael. A (1997) *The New Rules of Global Trade – A Guide to the World Trade Organisation*. Carswell Press. Canada

agreement. The request must include the reasons for the request, the measure at issue and the legal basis for the complaint.[48]

Consultations are without prejudice and are confidential. Through the consultation process, the disputing Members are to attempt to reach a mutually satisfactory resolution of the matter. If consultations fail to resolve the dispute within 60 days of receipt of the request, the complaining Member may then request the establishment of a panel. In cases where a third Member considers that it has a substantial trade interest in the consultations, it may notify the consulting Members of its desire to join the consultations. If the responding Member does not consider that this third Member has a substantial interest in the matter it may refuse that request to participate. If its request is refused the third Member remains free to initiate its own consultations on the matter.

A panel shall be established no later than the second meeting at which the DSB considers the request: the second meeting shall be convened within 15 days of a request for it to be held. The panel is to be constituted (i.e. its members are to be chosen) within 30 days of its establishment.[49]



*Article 7* of the DSU sets out the panel's standard terms of reference. The composition of panels is addressed in *Article 8.*[50] In order to facilitate the panel selection process, the WTO Secretariat is directed to maintain an "indicative list" of qualified individuals who are available to serve as dispute settlement panelists. This list includes the pre-existing roster of qualified individuals that was compiled for use under the GATT procedures, as well as the names of other individuals that may periodically be provided by Members.

In *Paragraph 5 of Article 8*, panels are comprised of three, unless disputing Members agree to a panel of five within 10 days of the establishment of the panel. Upon the establishment of a panel by the DSB, the WTO Secretariat proposes panelist nominations to the disputing Members. [51]With respect to the function panel's play under the DSU,

[48] Ibid
[49] WTO Secretariat (1999) *Guide to the Uruguay Round Agreements*. Kluwer Law International. London
[50] Thomas, Jeffrey. S and Meyer, Michael. A (1997) *The New Rules of Global Trade – A Guide to the World Trade Organisation*. Carswell Press. Canada
[51] Ibid

*Article 11* provides that they are to assist the DSB in discharging its responsibilities under the Understanding. As a result, panels are to make objective assessments of the matter before them, and make such findings as will assist the DSB in its rules and recommendations.[52]

There are fixed time period for the completion of panel reviews. *Article 12* of Understanding says that a panel shall sit for a period between 6 and 9 months for the completion of panel reviews. If a panel believes that it cannot issue its report within the specified time, it must inform the DSB in writing of the reasons for the delay and provide an estimate of the additional time.[53] This article also sets out the panel working procedures. One week after establishment of the panel the terms of reference agreed upon. Thereafter the panel is expected to set deadlines for written submissions and Members are expected to meet those deadlines.

All meetings of the panel are held in closed session, with the disputing Members and any third parties being present only upon invitation of the panel. Deliberations of the panel and documents submitted to it are to be kept confidential, except that Members are permitted to disclose their own submissions to the panel if they choose.



*Article 13* authorizes panels to seek information from relevant outside source, although if a panel wishes to seek information or advice from any individual or body within the jurisdiction of any Member, it must inform the authorities of the Member before doing so. Confidential information submitted to the panel may not be publicly disclosed without the formal authorization of the individual body or authority that submitted that information. The panel then prepares an interim report following the submission of written arguments and the presentation of oral arguments. The deliberations of the panel are confidential and panel reports are drafted outside of the presence of the disputing Members. Panel opinions are anonymous.[54]

[52] Ibid
[53] Ibid
[54] Ibid

The Interim review stage is set out in *Article 15* and has a two-step process. The panel first drafts the factual and argument portions of its report and circulates these portions to the disputing Members for their review. The review ensures that the panel properly understands the facts of the case and the arguments put before it. After the review, panel completes the drafting and circulates the entire document, including the findings to the Disputing Members for review and comment. The disputing Members are then permitted to request that the panel revisit precise aspects of its report. [55]

The interim review discloses the panel's decision to the disputing Members on a confidential basis and thereby provides one last opportunity to settle dispute before a final report is circulated among WTO members. It also acts as an informal appeal process by ensuring that the panel has not made basic errors based on a misunderstanding of the facts or the arguments before it. If the disputing Members fail to reach a mutual settlement following this interim stage, the panel will issue its final report to the DSB.[56]

*b. Adoption of the report:*

The DSB adopts the panel report within 60 days if its issuance, unless one party appeals, or there is consensus not to adopt it. Adoption cannot take place until 20 days after circulation of the report. Members must state any objections to the report in writing, before the DSB meeting that considers it.[57]

*c. Appellate Review:*

Appeal proceedings, if requested, should as a rule not take more than 60 days. At most, they should take 90 days. The Appellate Body report should be adopted by the DSB, unless there is consensus not to adopt it, within 30 days of issuance, and should be unconditionally accepted by the parties. An appeal is asked for when the disputing Members consider that the panel has made a legal error.[58] The Appellate Body consists of seven people, each of whom serves a four-year term. Three members of the Appellate Body serve on each case on a rotating basis.

[55] WTO Secretariat (1999) *Guide to the Uruguay Round Agreements*. Kluwer Law International. London
[56] Thomas, Jeffrey. S and Meyer, Michael. A (1997) *The New Rules of Global Trade – A Guide to the World Trade Organisation*. Carswell Press. Canada
[57] WTO Secretariat (1999) *Guide to the Uruguay Round Agreements*. Kluwer Law International. London
[58] Ibid

*d. Implementation:*

The party concerned must state its intentions on implementation of recommendations of a panel or the Appellate Body at a DSB meeting held within 30 days of adoption of the report concerned. If immediate compliance is impracticable, a "reasonable period of time" for it to act will be determined. If the member fails to act within this period of time, the complainant may request it to enter into consultation in order to determine mutually acceptable compensation.[59] If after 20 days no satisfactory compensation is agreed, the complainant may request authorization for the DSB to suspend concessions or obligations against the other party. Unless there is consensus against the request, the DSB shall authorize the suspension within 30 days of expiry of the "reasonable period of time". If the member concerned objects to the level of suspension requested, the matter will be referred to arbitration, which should be completed within 60 days of expiry of the "reasonable period of time". The arbitrator's decision is final. The DSB keeps under surveillance the implementation of the rulings and recommendations it has adopted, and the case remains on its agenda until it has been resolved.[60]

Since this research paper concentrates predominantly on what is occurring within the Dispute Settlement Unit in relation to developing countries it is important that the positive and negative aspects of this relationship is addressed. Chapter Three provides an analysis of the above mentioned.

[59] Ibid
[60] Ibid

## CHAPER THREE

**The positive and negative aspects of the new Dispute Settlement System, specifically relating to developing countries.**

Since the WTO Agreement came into effect in January 1995, the number of dispute settlement cases increased significantly as compared to experience under the GATT.[61] The growing number of disputes presently in the consultation and panel phases provides convincing evidence of the importance of the WTO dispute settlement to the multilateral trading system.[62] The following is a table of the number of cases filed at the WTO DSU since 1995.

**Annual progress of disputes**

| | |
|---|---|
| 1995 | 25 cases filed |
| 1996 | 39 cases filed |
| 1997 | 50 cases filed |
| 1998 | 41 cases filed |
| 1999 | 30 cases filed |
| 2000 | 34 cases filed |
| 2001 | 23 cases filed |
| 2002 | 37 cases filed |
| 2003 (till 11 September) | 22 cases filed [63] |



Developing countries gain from the strengthening of the rules-based multilateral trading system. As the weaker partners in the trading system, they benefit the most when the major trading powers play by a common set of rules. In the Uruguay Round, the willingness of the USA and Europe to accept dispute rulings and constrain their unilateral trade actions provided a major benefit for developing countries. The need to ensure compliance with those rulings is, in turn, of critical importance for the integrity of the WTO system and for the developing countries in particular.WTO accords could help advance agricultural liberalisation in the OECD area, especially cuts in subsidies and

[61] According to the WTO official website, 301 disputes have been initiated under the WTO DSU. This compares to the roughly 300 disputes brought to the GATT's 50 year existence. Furthermore, since 1995, 40% of the complaints filed in the WTO have been from developing countries and since 2000, developing countries have brought nearly 60% of the complaints.
[62] Jackson. John H. (2000) *The Jurisprudence of GATT and the WTO.* Cambridge University Press. UK
[63] WTO Website

high tariffs, which would be difficult to achieve outside in the context of a large trade bargain.[64]

1. **Transitional and developing counties and the WTO.**

The WTO has conferred four key advantages for policymakers struggling to change the economies in transition. First, the WTO is a forum where trade problems in bilateral or multilateral relations can be negotiated and the implementation of obligations undertaken and agreed upon by members can be monitored.[65] For example, there are a number of products in world trade where bilateral policies of large countries can have serious consequences for the exports of economies in transition. This is especially true for clothing, footwear, and agricultural products. There are significant barriers in the European Union, the United States and other countries. Developing economies or those in transition are relatively small and are unlikely to be able to affect their trading partners' treatment of those imports in bilateral negotiations. The WTO, as a multilateral forum, provides the representatives of these economies with considerably more ability to raise these issues and perhaps influence policy.[66] More generally, the fact that large trading countries are bound by WTO rules provides protection for relatively smaller economies in the international market.



Secondly, and area of great concern for developing countries and those in transition is that of agriculture and textiles. With the WTO, there are greater obligations for these countries through the Agreement on Agriculture and the Agreement on Textiles and Clothing.[67] The success of these agreements can be measured by how the developing countries have used the dispute settlement system to defend themselves in this regard.

[64] Schott. Jeffrey J. (2000), *The WTO after Seattle*. Ed. Jeffrey J. Schott. Institute for International Economics. USA
[65] Pietras, J. (1998) in The WTO as an International Organisation, Ed. Anne O Krueger. Chicago Press. USA
[66] Ibid
[67] Chaytor, Beatrice (1997), in International Law and the GATT/WTO Dispute Settlement System. Ed. Petersmann, EU. Kluwer Law International. London

Thirdly, the Trade Policy Review Mechanism (TPRM) [68] is valuable, both for what the reviews accomplish for the trade policies of the economies in transition and what can be learned about the policies of the trading partners. The review of the policies of the economies in transition enables reflection and re-evaluation of current trade practices. The review of trading partners' policies has enabled policymakers in the economies of transition to learn more about those policies and how they work. In addition, the ability to ask questions about other countries' policies is useful. [69]

Finally, members of GATT/WTO receive benefits from relatively low protection levels that existed and were further reduced under the Uruguay Round. While negotiations were predominantly between the larger economies, and certainly not focused on products of particular interest to economies in transition, those eligible for MFN treatment nonetheless benefited by tariff reductions and other Uruguay Round results.[70]

Added to this, developing countries gain from the strengthening of the rules-based multilateral trading system. As weaker partners in the trading system, they benefit the most when the major trading powers play by a common set of rules. Furthermore, the WTO negotiations helped developing countries undertake and "lock in" reforms needed to advance their development objectives.[71]



Although these are advantages to developing countries and those in transition, the greatest advantage that they have is their access to the Dispute Settlement System.

[68] The objectives of the TPRM are stated in its opening paragraph: "The purpose of the Trade Policy Review Mechanism is to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members". Although it is, "not intended to serve as a basis for the enforcement of specific obligations", it is to regularly survey the trade polices of WTO members, every two years in the case of the Quad nations (US, Canada, EU and Japan), and every four to six years for the others. Together with the requirements in most of the WTO agreements that member governments disclose their relevant policies and practices publicly within the country or at least by notifying the WTO, the TPRM is intended to improve "transparency".

[69] Pietras, J. (1998) in The WTO as an International Organisation, Ed. Anne O Krueger. Chicago Press. USA

[70] Ibid

[71] Schott. Jeffrey J. (2000), *The WTO after Seattle*. Ed. Jeffrey J. Schott. Institute for International Economics. USA

With respect to developing countries, a number of provisions in the Understanding which refer to procedures or time-frames have been established. Panel issues have been discussed already and the availability of good offices. In consultation, members are called on to give special attention to developing country problems and interests, and extra time may be allowed. Panel procedures call for sufficient time to be given to a developing country to prepare its case, and for the panel's report to state how special and differential provisions for developing countries have been taken into account. In implementation, the DSB is to pay particular attention to developing country interests and, if a case has been brought by a developing country, must consider what further action beyond normal surveillance may be required, taking into account the trade coverage of the measures complained of and their economic impact. The developing countries may also draw on the Secretariat for legal help. [72]

## 2. The Positive aspects of the DSU

There are a number of positive aspects of the DSU. Firstly, of the most notable and positive developments since the establishment of the WTO has been the increased propensity for parties to reach mutually agreed solutions to disputes. The binding nature of decisions, the short time frames, the automaticity of the steps in the process and the strengthened mechanisms for surveillance and enforcement of rulings all seem to contribute to the mutually acceptable resolution of disputes.[73]

This new system lends itself to a stronger incentive for parties to negotiate mutually acceptable solutions. This tendency bodes well for the multilateral trading system because, because after all, the objective of dispute settlement is prompt resolution of disputes between parties. It is also clear that WTO Members, particularly the major players, are demonstrating a strong inclination to use the system rather than resorting to unilateral measures or bilateral negotiations to resolve their disputes.[74]

[72] WTO Secretariat (1999) *Guide to the Uruguay Round Agreements*. Kluwer Law International. London
[73] Steger, Debra P (1999) *WTO Dispute Settlement* in The WTO and International Trade Regulation. Ed Ruttley, P, Macvay, I and George, C. Cameron May Publications.London
[74] Ibid

Secondly, a further positive aspect of this system is the elimination of blocking when the DSB considers the report. Previous dispute processes relied on voting procedures and this led to the blocking of decisions as countries could "gang" up on others. In the new procedure, consensus is needed for approval or disapproval.[75]

Thirdly, although the WTO is aimed to build multilateral trading relationships, sovereignty of each country is still very important. This sovereignty is protected through the rule-based system of the WTO. The dispute procedures of the WTO have a number of features that are designed to protect sovereignty of the WTO members and to prevent too much power being allocated to the dispute process. Many different illustrations could be described here, including (1) the obligation to comply with a dispute ruling; (2) the legal precedent effect to a dispute report; (3) the standard of review by which the WTO panels examine national government actions; and (4) the broad question of 'judicial activism" or worries about panels stretching interpretations to achieve certain policy results which they favour. These are all positive aspects of the system.[76]

The fourth point is that the credibility of the results and procedures of the dispute system lies with who actually sits on the Appellate Body and procedure of the Appellate Body. Firstly, the Appellate Body is made up of seven people, three from large trading powers and four from lesser trading powers. Of these seven, three are chosen for a particular appeal. This allows for greater debate within the body. Secondly, the procedures set out for the appeal are very specific so that no other issues can impact on the appeal in question. Examples of this is that the appeal shall be limited to issues of law covered in the first level panel report and the legal interpretations developed by the initial panel in the case; that the appellate division shall consider only issues that are appealed; and that a result of an appeal may be to uphold, to modify or to reverse the legal findings and conclusion of the panel. Furthermore, opinions expressed in the appellate report shall be anonymous, and the proceedings shall be confidential. [77]

[75] Ostry, Sylvia. *WTO-Institutional Design for Better Governance*. Online: http://www.ksg.harvard.edu/cbg/Conferences/trade/ostry.htm
[76] Ibid
[77] Ibid

The process of designating which three of the seven Appellate Body members will sit on a particular appeal has purposely been kept very secret. The process appears partly random, but is influenced in some way to share the caseload burden roughly evenly. It clearly is not just a rotational basis. A potentially significant practice for the appeals work that has developed is something described as the "collegiality principle". While only three Appellate Body members sit on any division, all the other four members are kept informed, receive the relevant documents, and at a certain point in the proceedings gather together in Geneva to discuss the case. By this means, the appeal division members receive the advice and judgment of the combined wisdom of the other Appellate Body members. This process can also be important not only to developing a spirit of valuing high quality legal work but also to promoting an important sense if consistency and continuing among appellate members for the future. [78]

Fifthly, the DSU also provide for appropriate administrative and legal support. A separate secretariat was established for the Appellate Body, separate from the WTO secretariat so as to make the appeal as impartial and uninfluenced by the proceedings prior to appeal as possible.



### 3. Negative aspects of the DSU

There are a number of negative aspects to the DSU. These refer to the actual Articles and its interpretations as well as to the procedures and make up of the dispute settlement body.

Firstly, the DSU is designed to provide a single unified dispute settlement procedure for almost all the Uruguay Round texts. However, there remain some potential disparities. Many of the separate documents entitled agreements, including GATT 1A and certain other texts such as subsidies codes or the textiles text, have clauses in them relating to dispute settlement. But the DSU Article 1 provides that the DSU rules and procedures shall apply to all disputes concerning covered agreements listed in a DSU Appendix, so presumably this trumps most of the specific dispute settlement procedures.

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[78] Ibid

However, even the DSU provisions allow for some disparity. For example, parties to each of the plurilateral agreements (Annex 4) may make a decision regarding dispute settlement procedures and how the DSU may apply or not. In addition, another DSU appendix specifies exceptions for certain listed texts. Thus, the goal of uniformity of dispute settlement procedures may not be 100% achieved. Actual practice will determine to what degree this may be a problem. [79]

Secondly, one of the most glaring problems involves ambiguities in the DSU compliance provisions (Articles 21 and 22)[80], which were highlighted in the US disputes with the EU on bananas and beef hormones.[81] Panels are authorized to condemn practices but not allowed to rule whether proposed remedies are consistent with WTO obligations; the WTO system breaks down when countries found to be in violation of their obligations undertake changes in their practices that do not redress the problem.[82]

Thirdly, a problem arrives when there are more than one party to a dispute and a panel selection process needs to take place. More than two parties reduce the number of sources



[79] Ibid

[80] *Article 21 - Surveillance of Implementation of Recommendations and Rulings*. This article deals with the fact that prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members. In particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

*Article 22 - Compensation and the Suspension of Concessions*

1.Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

[81] EU-US Banana Dispute and Beef Hormone Dispute as Appendix Five

[82] Jackson. John H. (2000), *Dispute Settlement and the New Round*, in The WTO after Seattle. Ed. Jeffrey J Schott. Institute for International Economics. USA

of potential panelist available as members sitting on the panel cannot be party to any member of the dispute.[83]

Fourthly, with regard to the panel process, there have been a number of issues raised. For example, it has been suggested that plaintiffs or complainants have a great advantage, since they have the time to prepare exclusively, whereas once the complainant actually start a procedure submitting the necessary documents, the respondents have an extremely limited time to address to the allegations. Furthermore, the process of convening the first level panel has been worrisome to a number of observers, partly because it depends on ad hoc participation of voluntary panelists and it gives the disputing parties a large measure of autonomy to determine who the panel will be. If they fail to come to an agreement, however, the director general is authorized to step in and impose a panel. There have been many suggestions for improving the first level panel personnel and convening process, possibly establishing a permanent roster analogous to that of the Appellate Body. Various proposals have been put forward for a permanent roster of people who agree to serve as needed.[84] Added to this there has been controversy about whether governments should be entitled to choose and hire private counsel to represent then or assist in their dispute settlement cases. They should be allowed, however The WTO should develop methods to reduce the cost burden on developing countries of participation in the dispute proceeding.[85]

A fifth and important issue within the dispute system is the issue of compensation in lieu of performance. There has been some controversy concerning "compensation". When an Appellate Body or adopted panel report mandates that a government change its activities, can the government choose to accept or provide "compensatory measures" instead of making the change? Although the DSU is not free from ambiguity on this point, that the DSU believes that compensation is only a fallback in the event of non-performance and

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[83] Steger, Debra P (1999) *WTO Dispute Settlement* in The WTO and International Trade Regulation. Ed Ruttley, P, Macvay, I and George, C. Cameron May Publications.London
[84] Jackson. John H. (2000), *Dispute Settlement and the New Round*, in The WTO after Seattle. Ed. Jeffrey J Schott. Institute for International Economics. USA
[85] Ibid

that compensation does not relive the respondent from an obligation to change its behaviour.[86]

Lastly, transparency can be seen as a negative. There is a concern that the amount of secrecy and confidentiality involved in WTO dispute settlement. Many have strongly recommended that panel hearings be open to include not only member government observers but also nongovernmental observers, including probably the press. This does not seek participation or the right to speak in the dispute settlement proceedings, but just open hearings. [87]



[86] Ibid
[87] Ibid

## CHAPTER FOUR

**Developing countries access to the Dispute System, with particular reference to South Africa.**

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There are a number of issues that could affect developing countries when implementing WTO Dispute Settlement findings. It is important to look at these issues as they can play an important part in future negotiations between the WTO and developing countries in order to make the playing field more even. The following section will be divided into three areas: Developing countries and issues affecting implementation of findings; South Africa and its' access to the DSU; New negotiations at the DSU and its relevance to South Africa.

### 1. Issues that could affect South Africa when implementing WTO Dispute Settlement Findings.

One of the issues that is very relevant with regard to developing countries and the WTO DSU is the issue of retaliation. According to Alban Freneau[88], retaliation may play a central role in the WTO DSM because it is designed to act as the ultimate safeguard for complainants willing to obtain satisfaction. Furthermore, since blockage can no longer be used by reluctant respondents, avoiding compliance is the only option left to them and certain countries such as the EU have a record of non-compliance. He asks the questions whether retaliation is an option for Developing Countries? He answers in the negative. This is due to the fact that retaliation is an instrument of economic power to be used ultimately against a reluctant respondent. The threat and effectiveness that counter-measures represent highly depend on the existence and repartition of concessions between the countries involved in the dispute as well as the quality if the concessions.[89] Furthermore, it is argued that the unfairness arises as there is only limited threat and economic impact in a Developing Country raising barriers against a developed country. It is evident that two thirds of the complaints have been against developed countries, and in

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[88] Freneau, Alban (2000-2001) LLM Paper for the University of Manchester. *WTO Dispute Settlement System and Implementation of Decisions: a Developing Country Perspective.*
[89] Ibid

many cases these developed countries do not abide by panels or appellate body decisions. Developing Countries can hardly have an impact or represent a serious threat for developed countries.[90] In many cases Developing Countries do not risk retaliation for the fear of subsequent actions the developed country may take, as the developed country may be their major source of trade.

Hoekman states that pressure to comply with panel rulings is largely moral in nature.[91] According to him, the classic recommendation by economists to address asymmetry in power is to share the cost of retaliation by use of collective enforcement. There is nothing to prevent multiple countries from initiating a joint action where all Developing Countries can join together to prosecute a case.[92]

Another issue for Developing Countries is the absence of provisions for compensation for export loss during the duration of the dispute. In many Developing Countries their trade base is very narrow and they could suffer heavy losses during the course of the dispute. South Africa has a wider trade base, however a lengthy dispute could affect it in the long term.[93]



With regard to compensation if a Developing Country wins a case, it is observed that the panels do not often use their ability to suggest the manner in which the losing party should implement the ruling. He stated that the panel normally sticks to rather innocent recommendations as the outcome of a diplomatic process. This can be explained by the fact that panels are often composed of governmental members who are mainly concerned with diplomatic and pragmatic considerations. According to Freneau, in the absence of any suggestions and as far as they may represent an "obligation", parties are basically free to choose the method to be used in order to bring the measure at issue into

[90] Ibid

[91] Hoekman, BM and Mavroidis, PC (1999) "*Enforcing Multilateral Commitments: Dispute Settlement and Developing Countries*". Paper delivered at the WTO/World Bank Conference on Developing Countries' Round. WTO Secretariat, Centre William Rappard, Geneva. 20-21 September 1999.

[92] Ibid

[93] [93] Freneau, Alban (2000-2001) LLM Paper for the University of Manchester. *WTO Dispute Settlement System and Implementation of Decisions: a Developing Country Perspective.*

compliance.[94] It is suggested that the most panels can do is to make specific suggestions regarding the way a losing party can bring its measures into conformity.[95]

Within the DSU system the majority of the cases are settled in consultations. This may be potentially problematic as settlements are essentially non-transparent, no rules dictate how they should occur, and there is no control over the merits of the settlement. The only obligation of the WTO member is to notify that outcome of the settlement under *Article 3.6* and the ensuing obligation that all settlements to be "MFN" friendly in accordance with *Article 3.5.* However, the notification record is very poor and does not allow a determination of whether *Article 3.5* has been complied with. Settlements occur behind closed doors with the WTO rarely finding out about them. Thus, with the absence of a proper discovery process the WTO is helpless to deal with this non-compliance. [96]

The next section will address new negotiations at the DSU, with specific reference to South Africa.

## 2. South Africa and access to the DSU

According to the Department of Trade and Industry (DTI), the Department is prepared to access the DSU.[97] At present South Africa has not been the complainant, however has been the respondent to two complaints.[98] Both have been complaints by member countries that feel that South Africa's anti-dumping measures against them are unfounded. Both were settled outside the DSU.

[94] Ibid

[95] Hoekman, BM and Mavroidis, PC (1999) *Enforcing Multilateral Commitments: Dispute Settlement and Developing Countries.* Paper delivered at the WTO/World Bank Conference on Developing Countries' Round. WTO Secretariat, Centre William Rappard, Geneva. 20-21 September 1999.

[96] Ibid

[97] The following statement is a collation of questions and answers to Francis Moloi of the South African Department of Trade and Industry

[98] 9th April 2003 - The government of Turkey requested consultation with the Government of South Africa. The measure at issue was an anti-dumping duty that resulted from an investigation initiated and concluded by the Board on Tariffs and Trade (BTT). The BTT initiated an investigation into the alleged circumvention of the anti-dumping duties on blankets originating in or imported from Turkey by the importation of blanketing in roll from 15th December 2000.
1st April 1999 – The government of India requested consultation with the Government of South Africa. The measure at issue was anti-dumping proceedings against the import of ampicillin and amoxycillin.

The first procedure when such a complaint is received is for the DTI to prepare a cabinet memorandum to inform cabinet about the dispute and get the mandate/authority to prosecute the case in the WTO.[99] Once there has been an agreement on the process, the dispute would be taken up by a unit within the DTI. The respondent at the DTI stated that they would also look for outside counsel if needed.

The DTI have stated that the cost of a panel process costs many thousands of US dollars and this is a huge hurdle for South Africa at the present exchange rate. The best result, according to the DTI, would be that the dispute be settled at the consultative stage. It is thus relevant that South Africa utilize the WTO Advisory Centre in Geneva for any legal support during the different stages of the process.[100] Furthermore, the DSU also hosts specialized courses on the WTO Dispute Settlement Rules and Procedures for developing countries.[101]

### 3. New negotiations at the DSU and how it is relevant to South Africa.

As a developing country, South Africa has certain advantages when accessing the DSU. In May 2003 a special session on the DSB was held and recommendations were made. These recommendations are still in the process of being negotiated, however the proposed amendments give greater support to the developing countries and the help that can be accessed. These proposals have been given a year to be negotiated and must be completed by May 2004.[102]

In *Article 4, paragraph 10*, a proposal has been made that if a party complained against is a least-developed country Member, there must be the possibility of holding consultations

[99] Questions answered by Francis Moloi from the Department of Trade and Industry – Question attached as Appendix Six
[100] Article 27.2 of the DSU foresees additional legal advice and assistance in respect of dispute settlement to developing country Members, and provides that the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests.
[101] This is also within the understanding, sited in Article 27.3 where the Secretariat is to organise special training courses to enable Members' experts to be better informed about the rules and practices of dispute settlement in the WTO. These four-day courses include a detailed presentation of the rules and procedures as well as practical simulation exercises.
[102] Proposed Amendments to the DSU handed out by Dr. Edwini Kwame Kessie (Counsellor for the Council and TNC Division of the WTO) at a meeting at The University of The Western Cape, May 2003.

in the capital of that Member. Although South Africa is not a least developed country, by supporting this proposal, gives the developing nations greater access into the process.

An important issue for South Africa to take note of is that which is stated in *Article 8, paragraph 10.*[103] This Article deals with the panel composition. It is stated at present that when a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country so requests, include at least one panelist from the developing country. This is very important for South Africa and other developing countries as it is these panelists who make decisions on the dispute and having an "ear" with the knowledge of the problems faced by developing countries is an advantage.

One of the issues that have been commented on in many papers as well as in the proposed amendments to the DSU is that of the role of third parties in the panel submission process and the appellate review process. This issue can be a double-edged sword. The US has been the strongest proponent of "opening up" the WTO dispute procedure including the right of private parties to submit amicus briefs to panels and the Appellate Body. This proposal is supported not only by environmental, labour and human rights groups but also by lawyers who specialize in international trade and by the international businesses who are their clients. Since amicus briefs can only carry little weight in judicial decisions, it is likely that the next step for all non-governmental actors would be a demand to bring cases directly.[104] These demands are strongly rejected by developing countries and their NGO's. They feel that the present legalistic system as being biased against them. They feel that the right to appear before an international tribunal is a partial repudiation of the role being performed by national governments in those proceedings.[105]

This double-edged sword is problematic in so far as it is a problem in the definition of what a third party is and its role. A third party can be the added support and legal help

[103] Ibid
[104] Ostry, Sylvia. *WTO-Institutional Design for Better Governance.* Online: http://www.ksg.harvard.edu/cbg/Conferences/trade/ostry.htm
[105] Ibid

given by a further submission in support of a developing country. It may also be a party who has vested interest in the dispute at hand and will submit its submission as well. Proposals to the DSB state in *Article 10, paragraph 3*[106], that each third party shall receive, at the time such a submission is made, a copy of the submission to the panel of the parties to the dispute and of other third parties, except for information designated as such by the party that submitted it. Furthermore, the submission of third parties shall also be given to the parties to the dispute and shall be reflected in the panel report.[107] In *paragraph 2,* it is asked that all third parties also have an opportunity to be heard by the panel. In this way, all briefs are open to both parties and there is transparency in the process even if there is added advantage.

With regard to the appellate review procedures and third parties, changes have been made to the working procedures. The revised Appellate Body's Working Procedures came into effect on the 1st May 2003. These revisions contemplate three ways in which third parties may participate at the oral hearing in an appeal. As before, third parties that file a written submission within 25 days of the filing of the Notice of Appeal will have the right to appear at the oral hearing, make an oral statement, and respond to questioning. Secondly, third parties will have the same rights if they file, within the same 25-day period, a written notification of their intent to appear at the oral hearing and make an oral statement. Thirdly, after the 25-day deadline has passed, third parties may notify the Appellate Body Secretariat that they intend to appear at the oral hearing, and may also request to make a statement at the oral hearing. Such third parties will automatically be entitled to attend the oral hearing, but their entitlement to make an oral statement and respond to questioning will be subject to the discretion of the Appellate Body Division hearing the appeal, which will tale account of due process in deciding upon the request.[108]

What is positive in this regard is that third parties that are in support of the developing country can further its support through an appeal. The reverse is for third parties that have vested business interests.

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[106] Proposed Amendments to the DSU handed out by Dr. Edwini Kwame Kessie (Counsellor for the Council and TNC Division of the WTO) May 2003

[107] Ibid

[108] Internet Resource: http://www.wto.org/english/tratop_e/dispu_e/working?proc_app_rev_1may03_e.htm

In *Article 12, paragraph 10* of the proposals, a suggestion is made with regard to the timetable set out for panel submissions of developing countries. Here the proposal asks that where the party complained against is a developing country Member, the panel shall, in determining, take due account of any particular problems faced by that Member, and afford it sufficient time to present its written submissions, normally no less than 15 additional days for the first submission and 10 additional days for the rebuttal submission. [109] This is important factor as the time frame is short and developing countries may need extra time for submissions due to lack of funding and support.

One of the most important proposals is that which deals with the compliance issue. Many developing countries feel that in certain circumstances when they are the complaining Member and they win a case, the developed country Member does not comply to the recommendations set out by the panel or appellate panel, they (the developing country member) should have some recourse to instruct compliance or for this issue to be re-visited. *Article 21, paragraph 2*, it is suggested that the complaining party may also request the establishment of a compliance panel at any time if it considers that the Member concerned has taken a measure to comply with the recommendations and rulings of the DSB which is inconsistent with the covered agreements. Added to this, the proposal also lays down a strict timetable for this consultation as well as a compliance panel to be set up that should be composed of the members of the original panel.[110]

Finally, with regard to *Article 22* and Compensation, *new paragraph 2(*c) suggests that where a complaining party is a developing country Member, the proposal should take into account all relevant circumstances and considerations relating to the application of the measure and its impact on the trade of that developing country Member. In such cases, the suitable form of compensation should also be an important consideration. Where the complaining party is a least developed country Member, special consideration shall be

[109] Proposed Amendments to the DSU handed out by Dr. Edwini Kwame Kessie (Counsellor for the Council and TNC Division of the WTO) at a meeting at The University of The Western Cape, May 2003; pg 4
[110] Ibid

given to the specific constraints that may be faced by such countries in finding effective means of action through the possible withdrawal of concessions or other obligations.[111]

One can thus see that there are some positive proposals up for negotiation and that in the long term make the chances for a more fair and equal system to be established which is still run along strict rules and regulations set out by the DSB. It is thus up to South Africa to be aware of these proposals and to be a proponent for change and the advancement of developing countries participation in the DSB.



[111] Ibid

## CHAPTER FIVE

### Recommendations and Conclusion

This final section provides some recommendations with regard to how developing countries and in particular South Africa could lobby for changes within the system so as to create greater access for them. Hoekman suggests that to enhance the legal enforceability of WTO agreements in the domestic arena, one could create a national institution that has the mandate to monitor and contest government actions. An example of this could be a national ombudsman or a competition authority in South Africa. While such agencies may be prohibited from taking direct action against the government, they can facilitate the debate on the magnitude and distribution of the benefit and costs of government policies and help transmit information to affected parties, which can then be used in the political process.[112]

A further recommendation is that due to the fact that cases brought to the WTO are so costly and can have negative effects on the developing countries' economy, only major cases that cannot be resolved through alternative private mechanisms should be brought to the WTO. Thus it is suggested that there are "high entry" barriers or thresholds for cases.[113] South Africa could lend its support for such a suggestion.

A further suggestion in reverse is that there be "light" dispute settlement procedures for some cases where, for example, less than $1 million of exports is involved. In such cases, Hoekman suggests, a single panelist should be appointed and the whole judicial review process be required to be completed within three months. This could be beneficial to South Africa as the bulk of litigation involving developing countries are "small" cases and the cost of litigation could be substantially lower.[114]

[112] Hoekman, BM and Mavroidis, PC (1999) *Enforcing Multilateral Commitments: Dispute Settlement and Developing Countries*. Paper delivered at the WTO/World Bank Conference on Developing Countries' Round. WTO Secretariat, Centre William Rappard, Geneva. 20-21 September 1999.
[113] Ibid
[114] Ibid

In relation to this, it could be beneficial to create mechanisms that provide for rapid review cases that are large in relative terms for the country bringing the case. This could help the country that was bringing the case, in respect of losses in trade during the panel process.[115]

One of the issues brought up earlier in the paper was the fact that an Advisory Centre had been created to help developing countries. Freneau, in his paper makes further suggestions in relation to this and suggests that these reforms should pursue a threefold objective to ensure equal access to the WTO DSM. Firstly he suggests that Article 27.2 of the DSU should be given an effective and efficient dimension. The legal assistance has the advantage to be directly integrated in the DSU and more particularly in the framework of the DC's special treatment. He suggests that more resources should be made available to developing countries in order to provide immediate short term assistance to developing countries. Not to encroach on the Advisory Centre's role, Article 27.2 assistance could be limited to purely technical and procedural matters.[116]

Secondly, outside assistance should be provided in order to deal with the commercial and legal issues as such involved in the disputes. Furthermore, in his paper he suggests an efficient substitute for private counsels. Ideally the Advisory center could fulfill this duty, if more developed countries contributed financially to the running of the Centre. Thirdly, the latter should be able to provide training and internships for developing country officials. This is occurring at present.[117]

In conclusion there are a number of legal and political implications for South Africa when entering the DSU, especially if they were to file a complaint against another country. The WTO brings out the different playing fields of the trading nations. It has in some cases created greater divides amongst nations, as the wealthier countries have been able to manipulate the system so to gain the outcome that is required. By this I mean extended panel times, high cost of litigation and the mockery of true and relevant

[115] Ibid
[116] Freneau, Alban (2000-2001) LLM Paper for the University of Manchester. *WTO Dispute Settlement System and Implementation of Decisions: a Developing Country Perspective.*
[117] Ibid; pg. 72

compensation. On the other hand it has also provided a place for these issues to come to the fore, for scholars and students to write about these issues that hopefully lend to change.

In the case of South Africa, they would have to be aware of a number of things. Firstly, the cost of litigation with the knowledge that these panels can be extended. Secondly, it is important that South African businesses and workers know what South Africa is bound to and try not to violate these treaties. I say this, as it is better to prevent than to spend. Thirdly, South Africa has to support other developing countries in making sure that the proposed changes to the DSB are made and that a stronger voice from the developing countries is heard at the WTO. Fourth, that there is a realisation that there is a two-fold obligation to the WTO DSU. One is the obligation by the member country and the other is that of firm, company, and worker to have the knowledge and understanding of the WTO. Thus, CEO's need to be convinced there is value to devoting resources to training. This could be done through the Chamber of Commerce or industry associations. This is important due to the fact that if companies know what the WTO is about and what agreements, specifically South Africa, is bound to, there are fewer chances of violations.



Lastly, South Africa and all other countries have to make sure that this rule-based system continues to perform its duty. Although there are many negative issues about the system and many more teething problems, it is better to have this system, that not to have it at all. Rather one acknowledges that there are problems within this dispute system try and solve them in the confines of a rule based system than have a system that has weaker by nature and does not benefit the developing countries at large.

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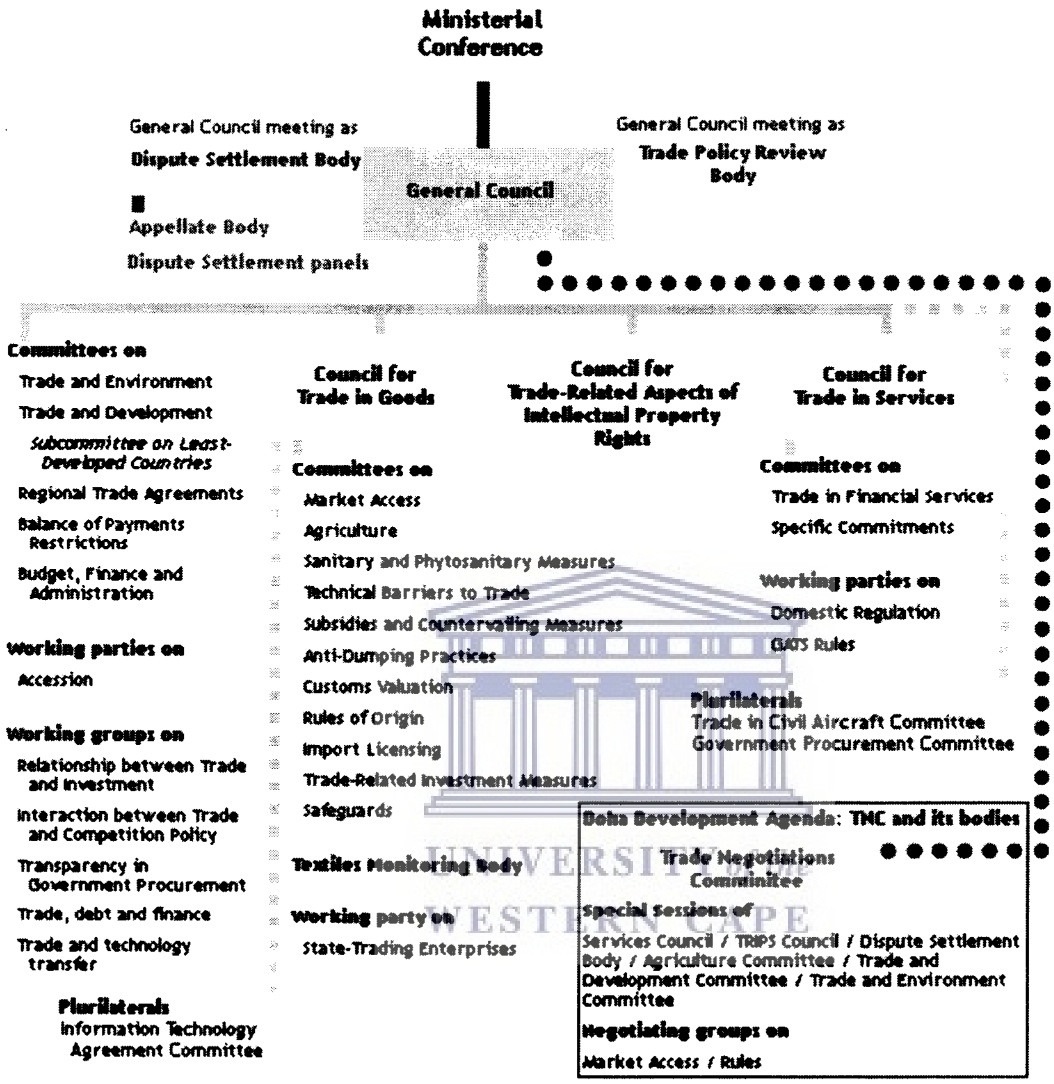





**Appendix One**

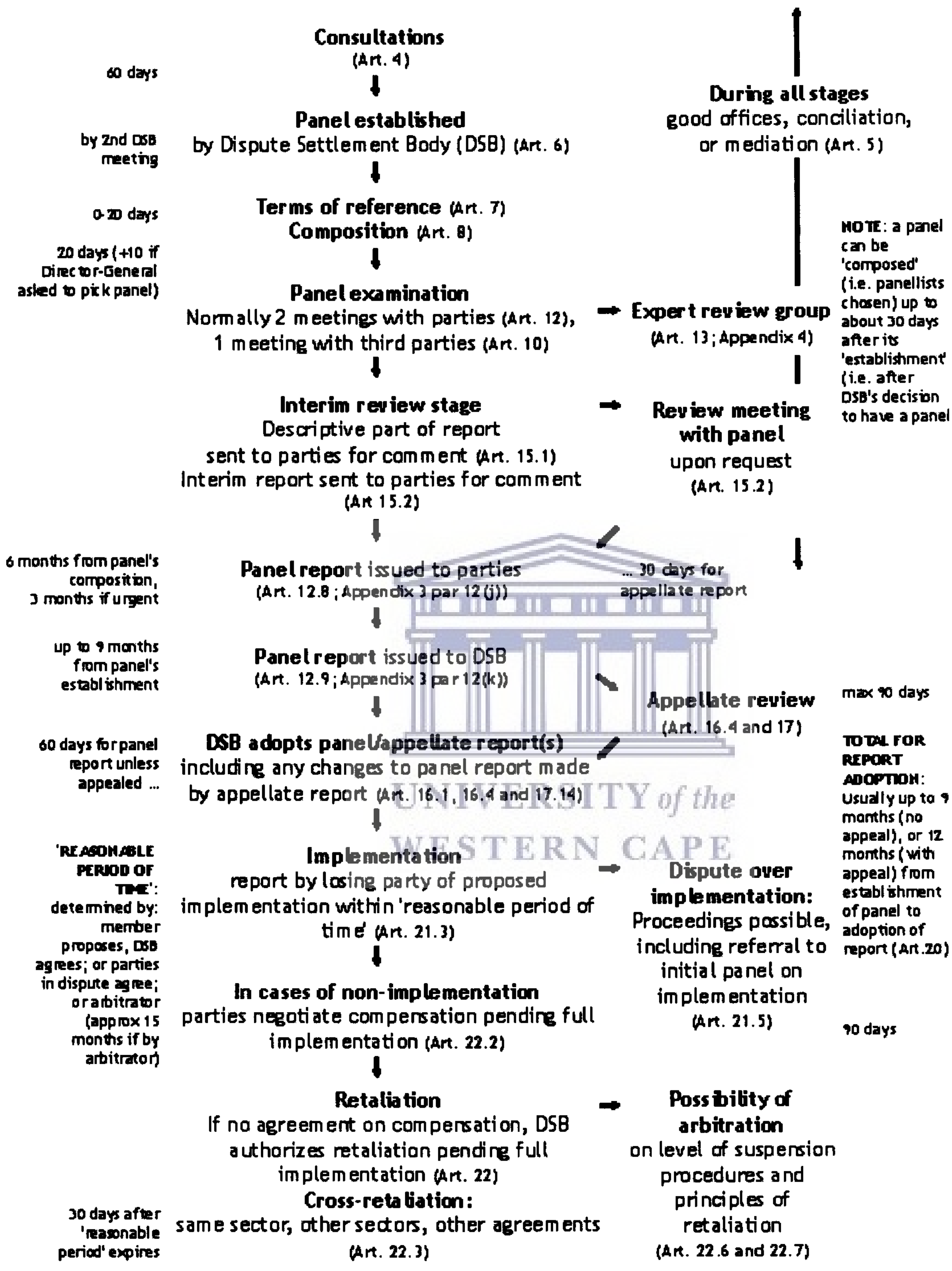
| GATT | WTO |
|---|---|
| Was a set of rules, a multilateral agreement with no institutional foundation and only a small associated secretariat which has its origins in the ITO. | This is a permanent structure with its own secretariat. |
| It was applied on a provisional basis, even if after forty years, governments chose to treat it as a permanent commitment. | Its commitments are full and permanent. |
| Its rules applied to trade in merchandise goods. | In addition to goods, trade in services and trade related aspects of intellectual property are also covered. |
| It was a multilateral instrument and by the 1980's many new agreements had been added of a plurilateral and selective nature. | The agreements are almost all multilateral and involve commitments for the entire membership. |

[118]

**Appendix Two**



[118] The World Trade Organisation – reference documents (Online) http//:www.mbendi.co.za/import/sa.wto.htm




**Appendix Three**

| Number of cases by country Country | Complainant | Respondent | Country | Complainant | Respondent |
|---|---|---|---|---|---|
| Antigua and Barbuda | 1 | 0 | Mexico | 13 | 10 |
| Argentina | 9 | 15 | Netherlands | 0 | 1 |
| Australia | 7 | 9 | New Zealand | 6 | 0 |
| Belgium | 0 | 3 | Nicaragua | 1 | 2 |
| Brazil | 22 | 12 | Norway | 1 | 0 |
| Canada | 24 | 12 | Pakistan | 2 | 2 |
| Chile | 8 | 10 | Panama | 2 | 0 |
| China | 1 | 0 | Peru | 2 | 4 |
| Colombia | 4 | 1 | Philippines | 4 | 4 |
| Costa Rica | 3 | 0 | Poland | 3 | 1 |
| Croatia | 0 | 1 | Portugal | 0 | 1 |
| Czech Republic | 1 | 2 | Romania | 0 | 2 |
| Denmark | 0 | 1 | Singapore | 1 | 0 |
| Dominican Republic | 0 | 1 | Slovak Republic | 0 | 3 |
| Ecuador | 2 | 2 | South Africa | 0 | 2 |
| Egypt | 0 | 2 | Sri Lanka | 1 | 0 |
| European Communities | 62 | 47 | Sweden | 0 | 1 |
| France | 0 | 2 | Switzerland | 4 | 0 |
| Greece | 0 | 2 | Chinese Taipei | 1 | 0 |
| Guatemala | 5 | 2 | Thailand | 10 | 1 |
| Honduras | 5 | 0 | Trinidad and Tobago | 0 | 2 |
| Hong Kong, China | 1 | 0 | Turkey | 2 | 7 |
| Hungary | 5 | 2 | United Kingdom | 0 | 1 |
| India | 15 | 14 | United States | 75 | 81 |
| Indonesia | 2 | 4 | Uruguay | 1 | 1 |
| Ireland | 0 | 3 | Venezuela | 1 | 2 |
| Japan | 11 | 13 | | | |
| Korea | 10 | 12 | | | |
| Malaysia | 1 | 1 | | | |
| | | | TOTAL | | 301 |

**Appendix Four**

WTO dispute settlement statistics – as at 11 September 2003

| Action | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Requests for consultations | 25 | 39 | 50 | 41 | 30 | 34 | 23 | 37 | 22 | 301 |
| Panels established by DSB [1] | 5 | 12 | 15 | 14 | 20 | 11 | 15 | 11 | 15 | 118 |
| Number of disputes covered by panels established [2] | 9 | 12 | 22 | 15 | 23 | 12 | 16 | 18 | 19 | 146 |
| Panels composed [3] | 4 | 9 | 13 | 11 | 19 | 7 | 12 | 8 | 8 | 91 |
| Number of disputes covered by panels composed | 8 | 9 | 20 | 12 | 22 | 8 | 13 | 15 | 8 | 115 |
| DG composition [4] | – | 3 | 7 | 4 | 9 | 4 | 9 | 6 | 6 | 48 |
| Mutually agreed solutions | 3 | 7 | 10 | 11 | 1 | 7 | 10 | 5 | 3 | 57 |
| Panel Reports circulated [5] | – | 4 | 10 | 10 | 13 | 18 | 7 | 10 | 7 | 79 |
| Panel Reports adopted | – | 2 | 5 | 12 | 9 | 15 | 13 | 11 | 6 | 73 |
| Appeals notified [6] (not including 21.5 appeals) | – | 4 | 6 | 8 | 9 | 11 | 5 | 6 | 3 | 52 |
| Appellate Body Reports adopted | – | 2 | 5 | 8 | 7 | 8 | 9 | 6 | 3 | 48 |
| Article 21.3 Awards circulated | – | – | 1 | 3 | 2 | 3 | 4 | 2 | 2 | 17 |
| Article 21.5 Panel Reports circulated | – | – | – | – | 2 | 5 | 5 | 2 | 0 | 14 |
| Article 21.5 Panel Reports adopted | – | – | – | – | 1 | 4 | 4 | 1 | 2 | 12 |
| Article 21.5 appeals notified | – | – | – | – | – | 2 | 4 | 1 | 1 | 8 |
| Article 21.5 Appellate Body reports adopted | – | – | – | – | – | 2 | 3 | 1 | 2 | 8 |
| Article 22.6 Arbitration Decisions circulated | – | – | – | – | 3 | 2 | 0 | 1 | 1 | 7 |
| Article 25 Arbitrations Award circulated | – | – | – | – | – | – | 1 | 0 | 0 | 1 |
| Mediation | – | – | – | – | – | – | – | 1 | 0 | 1 |



## Appendix Five

*EU-US Banana Dispute*

In 1993 the EC adopted a Common Market Organization for bananas. The import regime consisted of:

- a tariff quota of 2 million tonnes (increased in 1994 to 2.1 million tonnes and to 2.2 million tonnes in 1995, following the Banana Framework Agreement. Also in 1995, following enlargement, the EC introduced an additional tariff quota of 353000 tonnes) for Latin American countries and non-traditional ACP bananas; and
- quantities allocated to traditional ACP banana suppliers totaling 857 700 tonnes at zero duty;
- a within quota duty of 75 €/t for Latin American countries and zero duty for ACP countries, in line with our obligations under the Lomé Convention.

This import regime was found to be illegal by the WTO in 1997. A revised scheme was implemented on 1 January 1999, also based on a 2.553 million tonnes tariff quota with an additional quantity assigned globally to the ACP. This was also found to be WTO-illegal. The main criticisms were the setting aside of a quantity reserved solely for ACP imports, and the system of allocation of licenses which did not completely eliminate discrimination vis-à-vis third-country operators.

In April 1999, the WTO authorized the US to impose trade sanctions for an annual value of $191 million. The US carried this out by setting 100% customs duties on an equivalent amount of trade. The US has now been applying these prohibitive duties to a number of products from EC Member States (excluding Netherlands and Denmark) since 3 March 1999.

*Beef Hormone Dispute*



This dispute dealt with whether the countries of the European Union must accept American beef produced with growth hormones.

As much as 90 percent of U.S. beef is produced with the aid of growth hormones, a federally approved and monitored treatment that enables ranchers to produce meatier and leaner cows. Hormone-treated beef is now shipped to 138 countries, but since 1989 the countries of the European Union have refused to accept beef with hormones. The Europeans have attributed their refusal to accept the beef to consumer concern about the potential human health impacts of hormone-treated beef; the Americans allege that the Europeans are really just trying to protect European beef producers.

In 1995, in one of the first cases before the WTO, the United States challenged Europe's right to ban U.S. beef. Before the establishment of the WTO, the United States had been imposing duties against European products in retaliation for the beef ban.

The WTO ruled in 1997 that the beef ban was not based on scientific evidence, as required under international trade rules. The ruling was upheld on appeal in 1998.

The European Union, as is its right under international trade law, has continued to refuse to accept U.S. beef. The United States, as is its right, was therefore entitled to impose retaliatory tariffs worth $117 million a year, which is the estimated value of the lost U.S. beef exports. In July the United States imposed 100 percent duties on a variety of European products, including European pork and French mustard, truffles, Roquefort cheese and fruit juices.



**Appendix Six – Questions and answers from Francis Moloi, Department of Trade and Industry.**

1. As a member of the WTO, does the SA government have to put in place directives, regulations etc, within the DTI, if it wished to access the DSU and send a dispute through to them? If so, does the DTI have the means, capacity or resources to do so?

**Reply**

**SA as a member of the WTO has "automatic" access to the dispute settlement process. In other words, SA has the right to go to the Dispute Settlement Body (DSB) of the WTO anytime it feels the need to do so, either as a complainant or respondent or an interested party. Obviously, should SA be a party to any dispute settlement proceedings we (DTI) will need to prepare cabinet memorandum to inform cabinet about the dispute and get the mandate/ authority to prosecute the case in the WTO.**

**SA has the resources to prosecute a dispute in the WTO.**

2. Emanating from the above questions, what would be the procedure within DTI as well as between DTI and DSU to produce and send a dispute?

**Reply**

**Well, there will have to be a dispute in the first place. SA should have a case or complaint against another WTO member. This dispute may arise in situations where SA believes that another WTO member is violating its (that member's) obligations and commitments under various WTO agreement or nullifying/impairing benefits under these agreements. Or another WTO member(s) may complain that SA is violating its (SA's) obligations and commitments under various WTO agreements or nullifying/ impairing benefits under these agreements.**

**In terms of the procedures, SA will have to first enter into consultations with the offending country to try to settle the matter before going to the DSB. If no agreement is reached at these consultations, then the aggrieved party in the matter will write to the DSB and request the establishment of a Panel. The Panel will then set the matter down for hearing. Through out the consultations, the parties can always resort to the "good offices" of the Director-General of the WTO.**

**The Panel then makes its final determination; after which the parties may appeal. The decision of the Appellate Body (AB) is final. The offending party will be requested to bring its offending measures in compliance with the WTO rules.**

**If the offending party does not comply with the ruling of the AB, then the DSB can authorise the use of sanctions (withdrawal of concessions).**

**This is a very cursory account of the Dispute Settlement process. For detailed procedures, you will need to read the Dispute Settlement Understanding (the**

**agreement).**

3. If the SA government were considering accessing the DSU, what would be the areas of conflict? i.e dumping etc. Has the DTI identified any potential areas?

**Reply**

**The dispute cam arise from any of the 27 different agreements of the WTO; antidumping, subsidies, SPS, TBTs, TRIMS, TRIPS, telecomms, services, etc.**

**South Africa has not been a party to any dispute. But there was a time when we thought we were on the brink of either going to the DSB (on antidumping vs US) or been taken to the DSB (on TRIPS, telecomms). South Africa has ensured that all its laws and regulations are in conformity with our obligations under the WTO. By virtue of the fact that we are a member of the WTO, other countries have the right to take us to the DSB for whatever valid complaint they may have. We have the same right too,**

4. Has the DTI done studies on how effective the DSU has been in allowing access for developing countries to use this system?

**Reply**

**No. But what is common knowledge is that developing countries do not have the capacity or expertise to prosecute a case in the WTO. These cases cost millions of UD Dollars. Even if a developing country should win a case, this country will not be able to "force" the other country, say a developed country like the US, to comply with the ruling of the DSB. Because the developing country cannot impose "sanctions" against a developed country.**
**That is why some member countries of the WTO contributed money to fund the establishment of the WTO Advisory Centre in Geneva to address some of the challenges facing developing countries in the WTO dispute settlement system.**