# THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES, KOCHI

**DISSERTATION**

**Submitted in partial fulfilment of the requirement for the award of the degree of**
**MASTER OF LAW (LL.M)**


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**ON THE TOPIC:**

# WTO DISPUTE SETTLEMENT REGIME WITH SPECIAL REFERENCE TO INTELLECTUAL PROPERTY DISPUTES

**Under the Guidance and Supervision of**
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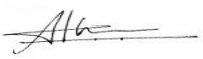
# CERTIFICATE

This is to certify that **Vishishth Malhotra, Reg. No. LM0220014,** has submitted his Dissertation titled "**WTO DISPUTE SETTLEMENT REGIME WITH SPECIAL REFERENCE TO INTELLECTUAL PROPERTY DISPUTES**" in partial fulfilment of the requirement for the award of the Degree of Masters of Laws in International Trade Law to the National University of Advanced Legal Studies, Kochi under my guidance and supervision. It is also affirmed that the dissertation submitted by him is original, bona fide and genuine.



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I declare that this Dissertation titled "**WTO DISPUTE SETTLEMENT REGIME WITH SPECIAL REFERENCE TO INTELLECTUAL PROPERTY DISPUTES**" is researched and submitted by me to the National University of Advanced Legal Studies, Kochi in partial fulfilment of the requirement for the award of the Degree of Master of Laws in International Trade Law, under the guidance and supervision of Dr. Athira P. S., Assistant Professor, and is an original, bona fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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# LIST OF ABBREVIATIONS

| | |
|---|---|
| AB | Appellate Body |
| CL | Compulsory Licensing |
| DSB | Dispute Settlement Body |
| DSM | Dispute Settlement Mechanism |
| DSR | Dispute Settlement Regime |
| DSS | Dispute Settlement System |
| DSU | Dispute Settlement Understanding |
| EC | European Communities |
| EU | European Union |
| HIV | Human Immunodeficiency Virus |
| IP | Intellectual Property |
| IPR | Intellectual Property Rights |

| | |
|---|---|
| ISDS | Investor-State Dispute Settlement |
| LDC | Least-Developed Country |
| LIC | Low-Income Country |
| TRIPS | Trade related aspects of Intellectual Property Rights |
| UDHR | Universal Declaration of Human Rights |
| U.K. | United Kingdom |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| U.S. | United States |
| WHO | World Health Organization |
| WIPO | World Intellectual Property Organization |
| WTO | World Trade Organization |

| | |
|---|---|
| WWW | World Wide Web |

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| **DS160** | **United States — Section 110(5) of US Copyright Act**<br>Consultations Requested: 26 January 1999<br>Current Status: Authorization To Retaliate Requested (Including 22.6 Arbitration) |
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| **DS124** | **European Union (formerly EC) — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs**<br>Consultations Requested: 30 April 1998<br>Current Status: Settled Or Terminated (Withdrawn, Mutually Agreed Solution) |

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| **DS115** | **European Union (formerly EC) — Measures Affecting the Grant of Copyright and Neighbouring Rights**<br>Consultations Requested: 6 January 1998<br>Current Status: Settled Or Terminated (Withdrawn, Mutually Agreed Solution) |
| **DS114** | **Canada — Patent Protection of Pharmaceutical Products**<br>Consultations Requested: 19 December 1997<br>Current Status: Implementation Notified By Respondent |
| **DS86** | **Sweden — Measures Affecting the Enforcement of Intellectual Property Rights**<br>Consultations Requested: 28 May 1997<br>Current Status: Settled Or Terminated (Withdrawn, Mutually Agreed Solution) |
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| **DS50** | **India — Patent Protection for Pharmaceutical and Agricultural Chemical Products**<br>Consultations Requested: 2 July 1996<br>Current Status: Implementation Notified By Respondent |
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# CHAPTER I – INTRODUCTION TO WTO DISPUTE SETTLEMENT REGIME WITH SPECIAL REFERENCE TO INTELLECTUAL PROPERTY DISPUTES

## 1.1 INTRODUCTION

The World Trade Organisation has gained status as a world Government in respect of Trade and Commerce. Studying the relevance of the WTO has thus become increasingly significant. It has been successful in globalising its agreements owing to the binding nature of the agreement and a dispute resolution mechanism which is envisaged for enforcement of rights under these agreements. As a result, if a member nation retains any measure which is consistent with the provisions of the agreement, it is challenged before the WTO's Panel/Appellate Body. The member in question will have to change its domestic law to comply with the Panel/Appellate Body's judgments. This implies that the WTO judiciary's rulings in Geneva have a significant impact on the municipal laws of member nations.

It has succeeded in globalising its agreements through its dispute settlement mechanism, whose decisions are binding in nature. Consequently, if any member nation maintains WTO inconsistent measures, it can be challenged before the WTO's Dispute Settlement Body. The member concerned will have to make alterations in its domestic Law to maintain consistency with the pane Appellate body rulings. This means that the decisions of the WTO judiciary taken at Geneva have profound influence on the civil society of all its members.

This study is a modest attempt to analyze the nature of the WTO dispute settlement mechanism, including dispute rulings related to the TRIPS Agreement. The international agreement on intellectual property rights before the signing of the WTO agreement is a network of treaties, including the Berne Convention and the Paris Convention.

The World Intellectual Property Organization (WIPO) administers a total of 23 intellectual property agreements.[1] Furthermore, the judicial mechanisms contained in these agreements are

[1] WIPO Intellectual Property Handbook, (2021) - available at: (https://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf) (Last Accessed on 3 September 2021).

obviously weak because they lack a robust dispute resolution mechanism and their rulings are not binding. However, by including TRIPS in the covered agreement, the WTO has in fact strengthened the process of multilateralization of intellectual property laws. Therefore, differences in municipal intellectual property law are eliminated. It is often argued that this determination to globalize intellectual property law is forcing the third world to strengthen its intellectual property law, bringing it on a par with the intellectual property law of developed countries. Therefore, as expected intellectual property disputes between developed and developing countries are intensifying before the WTO dispute settlement mechanism. Naturally, this research will allow a deeper understanding of intellectual property law and the dispute settlement mechanisms of the WTO.

## 1.2 STATEMENT OF THE PROBLEM

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the multilateral intellectual property agreement (IP) which protects Intellectual Property Rights and its enforcement across the globe. It is crucial in promoting commerce in knowledge and creativity, resolving trade disputes over intellectual property, and guaranteeing WTO members the freedom to pursue their domestic policy goals. Any member to the TRIPS agreement who has reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement can refer the dispute to consultation and dispute settlement as per Article 64, Part V of TRIPS.[2]

Article 64 of the TRIPS agreement states that the Disputes shall be governed by Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding (DSU) shall apply to consultations and the settlement of disputes under TRIPS. This thesis explores the effectiveness of the WTO dispute resolution mechanism under the Dispute Settlement Understanding for resolution of disputes arising from the TRIPS Agreement.

[2] Article 64, Part V of TRIPS

There are 42 cases in the request for consultation under the TRIPS before the Dispute Settlement Body.[3] The Thesis considers the History of the Dispute Resolution Mechanism, the structure of Dispute Settlement Mechanism in order to analyse the disputes resolved and pending before the Dispute Settlement Body to arrive at findings regarding the Dispute Resolution Mechanism.

One of the recent issues with the Dispute Settlement Mechanism is the vacant positions in the Appellate Body which has brought the Appeal procedures to a grinding halt.[4] In light of the same, the Thesis also evaluates the political background which affects the efficacy of the Dispute Settlement Mechanism.

### 1.3 RESEARCH PROBLEM

1. What is the Dispute Settlement Mechanism and how does it function?
2. How does the Appellate Body function and what are the challenges faced by it? What is the impact of the Appellate Body being non-operational? What are the powers of the Appellate Body?
3. What is the nature of disputes arising from the TRIPS Agreement? How long do DSB procedures take on the average? Is it utilized equally by least developing, developing and developed countries?

### 1.4 SCOPE OF THE STUDY

The study aims to analyze the Dispute Settlement Mechanism under Dispute Settlement Understanding in reference to disputes under TRIPS agreement. It focuses on the history of the WTO Dispute Settlement Mechanism, the Nature, Structure and Procedures of the Dispute Settlement Body along with evaluating its efficacy. The study also analyzes the impact of non-appointment of members to the Appellate Body and the impact of the same on the Dispute Resolution Mechanism and the member states to the TRIPS agreement.

[3] WTO | Dispute settlement - Index of disputes by agreement cited (2021). Available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26 (Accessed: 4 September 2021).

[4] Dispute settlement - Appellate Body (2021). Available at: https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (Accessed: 4 September 2021).

The study is interdisciplinary in its approach relying on the premises of international trade law, international economics, international politics and municipal law. A substantial amount of research is nucleated on WTO law related to 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (Annex 2) and 'Agreement in Trade-related aspects of Intellectual Property Rights') (Annex 1C). To peruse the ramifications of WTO's determinations on municipal laws, the study also relied upon national legislation and the proceedings of legislative process. Since the primary focus of all these aspects is based on trade among nations, the proposed study involved concepts of international politics and economics. Appropriate statistical tools were also used to make derivation from empirical studies. However, the major sources were the Panel 1 Appellate Body Rulings.

## 1.5 HYPOTHESIS

The Dispute Settlement Mechanism is effective with regard to TRIPS Disputes.

## 1.6 RESEARCH METHODOLOGY

The Study employs empirical study to understand the Dispute Resolution Mechanism under the Dispute Settlement Understanding and the rights and obligations of the Parties under TRIPS agreement. The author gathers primary sources of information from the International Agreements and Conventions such as TRIPS Agreement, GATT, Dispute Settlement Understanding and WTO records. The study also employs analytical study to evaluate the challenges and efficacy of the Mechanism and relies on secondary sources of information such as books and articles.

## 1.7 CHAPTER SCHEME

The Study is presented in 5 Chapters, which are described in detail below.

### 1.7.1 CHAPTER I

The Chapter lays out an introduction for the study, discusses the scope of the dissertation, reviews the relevant literature studied and referred and establishes the hypothesis for the study.

### 1.7.2 CHAPTER II

The constitutional framework of WTO's dispute settlement mechanism is given in chapter three. Its framework is contained in Annex 2 of WTO Charter, is., and *'Understanding on the Rules and Procedures Governing the Settlement of Dispute'*. The DSU has 27 Articles intended to secure a positive solution to the dispute. The dispute settlement process starts with consultations. For a proper expedition of dispute, the Director-General can offer his good offices, consultations and mediation.

However, if these efforts fail, the complainant could request for the establishment of a panel. The panel should compose of well-qualified individuals having expertise in WTO law. The panel, after making several deliberations with the disputants, submits its report to the DSB.

However, the parties can appeal before the Appellate Body to review the panel decision. This panel/AB process has to be completed within a stipulated time frame. 'The period from the date of establishment of the panel by the DSB shall not exceed nine months where the panel report is not appealed or twelve months if the report is appealed. After this time frame, the DSB adopts the panel report or appellate body report.

### 1.7.3 CHAPTER III

This Chapter analyses the functioning of the Appellate Body under the DSU. The Appellate Body is a seven-person body established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing Settlement of Disputes.[5] On 11/12/2019, Out of the three remaining members, term of Mr. Ujal Singh Bhatia and Mr. Thomas R Graham came to an end[6], which resulted in a situation where the body is no longer able to meet the quorum as prescribed by the Rules and Procedures Governing Settlement of Disputes.[7] It has brought the dispute resolution mechanism to a standstill.

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[5] Article 17, The Understanding on Rules and Procedures Governing Settlement of Disputes, available at: <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> (Last Accessed on 03/09/2021)

[6] Aarshi Tirkey, Members of the Appellate Body and their respective terms of Office, 2020, available at: (https://www.orfonline.org/expert-speak/the-wtos-appellate-body-crisis-implication-for-trade-rules-and-multilateralism-60198/) (Last Accessed on 03/09/2021); See also, (https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm) (Last Accessed on 03/09/2021)

[7] Supra Notwe 5 - Article 17(1)

The appointments to the Body are paused as the United States is blocking the appointment of new members on the basis of concerns regarding the appellate process. Notably, it has criticized the Appellate Body for deviating from its original mandate by issuing decisions that add or diminish rights and obligations of member states, and hence amounts to judicial overreach.[8]

More than 75 members of the WTO have consistently submitted proposals calling for the appointment of members without delay. Till the Appellate Body is formed, the pending appeals may remain pending for an indefinite period.[9] This would provide India time to prepare and frame a better scheme to replace the existing scheme in case it needs to be replaced.[10]

### 1.7.4 CHAPTER IV

This Chapter analyses the nature of disputes which are referred to consultation to Dispute Settlement Body till 2021. It gives an overview of the complaints that were filed before the WTO till 2021 in relation to TRIPS. As per the statistics 42 requests came up for disputes adjudication.[11] The Chapter analyses the disputes to arrive at conclusions regarding the nature of the disputes.

### 1.7.5 CHAPTER V

This chapter focuses on review of chapters and testing of the hypothesis. Conclusion and suggestions are provided to increase the efficacy of the dispute settlement mechanism.

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[8] *WTO Dispute Settlement Misunderstandings: How To Bridge the Gap Between the United States and the Rest of the World*, available at <https://ielp.worldtradelaw.net/appellate_body/>; See also, *The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead?*, available at <https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/>

[9] WTO Farewell speech of Appellate Body member Peter Van den Bossche (2021), available at: (https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm) (Last Accessed on: 03/09/2021)

[10] The WTO's appellate body crisis: Implication for trade rules and multilateralism, available at: (https://www.orfonline.org/expert-speak/the-wtos-appellate-body-crisis-implication-for-trade-rules-and-multilateralism-60198/) (Last Accessed on: 03/09/2021)

[11] *WTO | Dispute settlement - Index of disputes by agreement cited* (2021), available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26 (Last Accessed on: 03/09/2021)

# CHAPTER II – EVALUATING: WTO DISPUTE SETTLEMENT REGIME

## 2.1 INTRODUCTION

The WTO came into being as a result of the treaty negotiated by multiple countries over a seven-year period of Uruguay Round multilateral trade negotiations.[12] It encompasses agreements of carefully crafted balance of rights and obligations of WTO Members in respect of a vast range of measures such as services, tariffs, textile & clothing, subsidies, investment, sanitary & phytosanitary measures and intellectual property rights, to name a few.[13]

It is pertinent to note that the Members adopted the WTO Agreement as a single undertaking (umbrella agreement), meaning thereby, that all the agreements contained in the WTO Agreement were accepted together and not selectively picked.[14] In this respect, various countries with different socio-economic standing having agreed to the same agreement naturally gives rise to multiple disputes between them, regarding the scope and applications of their rights and obligations.[15]

The WTO agreement binds the parties to the common intentions expressed in it.[16] The complexity of the task of capturing the common intent of parties is relative to the extent and the number of parties to the agreement. The complexities to an agreement, especially in the context of multilateral treaties, is not a case of *the more the merrier* but instead is of *the less is more*. However, such agreements or treaties are common in the framework of international law.[17] In this view, the aspect of compromise becomes inevitable for large-scale negotiations to arrive at a common conclusion.

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[12] Peter Van den Bossche, Zdouc, Werner. The Law and Policy of the World Trade Organization: Text, Cases and Materials, Edn. 2013, United Kingdom: Cambridge University Press, p. 81.

[13] *Id*

[14] World Trade Organization, *A Handbook on the WTO Dispute Settlement System*, second edition 2017, Prepared by the Legal Affairs Division and the Rules Division of the WTO Secretariat, and the Appellate Body Secretariat, Cambridge University Press

[15] *Id*

[16] Autar Krishen Koul Guide to the WTO and GATT Economics, Law and Politics, 6th Edition, 2018, Satyam Law International, Springer, p. 41.

[17] *Id*

The WTO Agreement[18] is also a result of such negotiations. Therefore, a robust dispute settlement mechanism is essential for effective resolution and enforcement of multilateral trade regulations under the WTO umbrella agreement.[19]

The Dispute Settlement System ("DSS")[20] under the WTO is widely recognized as the "Jewel in the Crown" of WTO.[21] Some of the key features of the DSS are: First, the compulsory jurisdiction of the WTO DSS mitigates the imbalance of power between the stronger and weaker nations by establishing a central rule-based system for dispute settlement.[22] Second, time-bound and structured framework of DSS reduces the detrimental effect of unsettled international trade disputes.[23] Third, a permanent Appellate Body provides consistency and certainty to the interpretation and application of international trade rules.[24] On the basis of these and other principles, in the last twenty-five years the WTO DSS has become one of the most controversial and dynamic international dispute resolution mechanism in the world.[25]

## 2.2 WTO HISTORY AND EVOLUTION

### 2.2.1 INTERNATIONAL TRADE RELATION BEFORE WORLD WAR II

Post the First World War, the international economic relations between states were subjected to high trade barriers. In 1920, the Economic Committee of the League of Nations convened the Brussels Conference. It resulted with the recommendation to restore the pre-war trading scenario by eliminating the restrictions on international trade. The conference resulted in two significant recommendations: Firstly, the conference set forth a precedent for future attempts at multilateral

[18] The "WTO Agreement" refers to the Marrakesh Agreement Establishing the World Trade Organization entered into force on 1st January 1995.
[19] Supra note 14
[20] Dispute Settlement System ("DSS"), Dispute Settlement Mechanism ("DSM") and Dispute Settlement Regime ("DSR") all three terms refer to the same meaning in this dissertation.
[21] Supra Note 12
[22] Marco Bronckers and Pierre Larouche, *Chapter 21 - Telecommunications Services*, T Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer, The World Trade Organization: Legal, Economic and Political Analysis, Vol. I, Springer, p. 1020.
[23] *Id*
[24] Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, Michael Hahn, *The World Trade Organization Law, Practice, and Policy*, 3rd Edition, Oxford University Press, p. 86.
[25] *Id*

solution of international issues; and secondly, it came out with a number of principles which later exerted influence on governments and expert opinions. One such example is the conclusion of long-term commercial treaties based on the unconditional 'most-favoured-nations' principle. [26]

In 1927, a Convention on the Abolition of Import and Export Prohibitions and Restrictions was adopted by the League of Nations. It was the most comprehensive multilateral economic agreement ever concluded up till that time. The World Economic Conference of 1927 refuted the imposition of tariffs regarded as a matter of domestic concern and sovereign power. The main focus of the conference was on reductions of tariffs by the nation states individually and collectively which considered was essential for the world economy.[27]

### 2.2.2 INTERNATIONAL TRADE RELATION AFTER WORLD WAR II

Towards the latter half of the Second World War, there was a common thought across the globe that political security could not achieved without due efforts for economic and financial stability. In 1941, the USA took the initiative known as the Atlantic Conference of 1941. This Conference released the Atlantic Charter, that was regarded as a statement of universal basic ideas, that a nation's legitimate trade will not be impeded by towering tariffs, preferences, discriminations or narrow bilateral practices. [28]

Post the Atlantic Charter, in 1942, the Mutual Aid Agreement took place between the USA and the UK. This agreement focused on the promotion of mutually advantageous international economic relations. Early in 1943, the White and Keynes financial collaboration plans were initiated. The White Plan originated in the US Treasury that majorly focused on the future of Anglo-American economic collaboration. The Keynes Plan, originated in the British Treasury, was responsible for devising a mechanism of international financial institutions.[29]

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[26] Supra Note 16

[27] *Id.*

[28] Hunter Nottage, *Trade in War's Darkest Hour*, Churchill and Roosevelt's daring 1941 Atlantic Meeting that linked global economic cooperation to lasting peace and security, History of Trade -available at – (https://www.wto.org/english/thewto_e/history_e/tradewardarkhour41_e.htm)

[29] *Id*

### 2.2.3 BRETTON WOODS CONFERENCE – GATT - ITO

The 1944 Bretton Woods Conference gave birth to General Agreement on Tariffs and Trade (GATT) on November 30, 1947.[30] GATT laid down the foundation for the post-World War II financial system. This led to the creation of International Monetary Fund and the International Bank for Reconstruction and Development (IBRD), also known as the World Bank.[31]

The conference also conceived the formation of International Trade Organization (ITO) as the third leg of the system. The US and the UK proactively initiated a charter for the ITO at the newly formed United Nations. This charter came to be known as the Havana Charter, concluded in March 1948. However, the Havana Charter never entered into force, primarily because the U.S. Senate failed to ratify it. As a result, the idea of ITO remained only on paper. [32]

The GATT (a predecessor of WTO), became the central agreement of international trade, however, it lacked a coherent institutional structure because it was expected to function under the ITO's umbrella. Despite the failure of ITO and the institutional deficiencies of the GATT, it functioned as a de facto international organization, for eight rounds of multilateral trade negotiations. It brought about great predictability to the international trade scenario by the application of such principles as National Treatment and Most Favoured Nation.[33]

### 2.2.4 URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS

The most significant round of negotiation under GATT was the Uruguay round of negotiations. The 1986 Punta del Este Ministerial Declaration had very broad and ambitious mandate for negotiations. As per the Declaration, the Uruguay Round negotiations was supposed to cover, trade in goods, trade in agricultural products, trade in textiles and – for the first time also contained – trade in services.[34] The establishment of a new international organisation for trade, however, was

[30] Supra Note 16
[31] *Id.*
[32] Roy Santana, "70th anniversary of the GATT: Stalin, the Marshall Plan, and the provisional application of the GATT 1947", Journal of Trade Law and Development, Volume 9, pp. 1-20.
[33] *Id.*
[34] Supra Note 24

not in the agenda. The institutional issues identified in the Declaration focused on: periodic supervision of trade policies and practices of Contracting Parties; improving the efficacy and decision making of the GATT; and refining the GATT's relationship with the IMF and the World Bank for greater predictability in international economic policy-making. [35]

In the initial years of the Uruguay Round, major progress was made with respect to most of the institutional issues identified in the Declaration. In December 1988, at the Montreal Ministerial Mid-Term Review Conference, implementation of a trade policy review mechanism was initiated to improve compliance to GATT rules.[36] This Mid-Term Review also focused on increasing cooperation between the GATT, the IMF and the World Bank. In April 1989, it was decided that the Contracting Parties would meet (once every two years) at ministerial level for progressive functioning of the GATT.[37]

In February 1990 the Italian Trade Minister, Renato Ruggiero (later the second Director General of the WTO) proposed the idea of establishing a new international organisation for trade.[38] In April 1990, Canada formally proposed the establishment of what it called a 'World Trade Organization', a full-fledged international organisation which was to administer the different multilateral instruments related to international trade.[39]

Along the same lines, in July 1990, the European Community submitted a proposal calling for the establishment of a 'Multilateral Trade Organization'. The European Community argued that the GATT needed a sound institutional framework 'to ensure the effective implementation of the results of Uruguay Round'.[40]

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[35] *Id.*
[36] Alberto do Amaral Júnior, Luciana Maria de Oliveira Sá Pires, Cristiane Lucena Carneiro, *The WTO Dispute Settlement Mechanism A Developing Country Perspective*, (2019), Springer, p. 36.
[37] *Id.*
[38] WTO | Understanding The WTO: Basics - The Uruguay Round, available at: (https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm)
[39] *Id.*
[40] Supra Note 16

The United States and most developing countries were against these proposals.[41] The developing countries were under the fear of supranationalism. They were reluctant of the developed trading nations to form alliances and dictate the terms of such an organization.[42] They were worried that their domestic needs and sovereign endeavours would suffer badly.[43] The December 1990 Brussels Draft Final Act was the final touch to the plans decided at the start of the Uruguay round. However, the proposal for a new international organisation for trade did not find place in this agreement.[44]

This being one of the reasons the Uruguay Round was suspended. In 1991 the negotiations were taken up again, and this time the European Community, Canada and Mexico tabled a joint proposal for an international trade organisation.[45] It was the joint proposal that was largely instrumental for the draft of the Agreement Establishing the Multilateral Trade Organization. The is draft was commonly referred to as the Dunkel Draft. Named after the then Director General of the GATT.[46]

Although the US opposed the establishment of a multilateral trade organization and campaigned against it throughout 1992.[47] However, by early 1993 most of the participants (especially the other developed nations) were ready for the establishment of a multilateral trade organisation.[48] The US found itself in isolation that perhaps was the reason for its eventual acceptance during 1993 when the new Clinton Administration dropped its opposing agenda.[49]

The United States formally agreed to the establishment of the new international organisation for trade on 15 December 1993.[50] The Marrakesh Agreement Establishing the World Trade

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[41] Ernest H. Preeg, *The Uruguay Round Negotiations and the Creation of the WTO*, Martin Daunton, Amrita Narlikar, and Robert M. Stern, The Oxford Handbook on The World Trade Organization, (2012), Oxford University Press

[42] *Id*

[43] Jayashree Watal and Antony Taubman, *The Making Of The Trips Agreement: Personal Insights From The Uruguay Round Negotiations*, (2015), World Trade Organization.

[44] *Id*

[45] Supra Note 36

[46] *Id*

[47] Supra Note 41

[48] *Id*

[49] Supra Note 22

[50] *Id*

Organization was signed in April 1994, and entered into force on 1 January 1995. This marked the beginning of a new era of Dispute Settlement System.[51]

### 2.2.5 DSM UNDER GATT 1947

The Havana Charter led to the establishment of International Trade Organization (ITO).[52] The ITO contained the provision for compensatory adjustment in the event of a member's non-compliance to the rights and obligations agreed upon while acceding to ITO. Though ITO failed to take birth, similar provisions were included in Articles XXII (Consultation) and XXIII (Compensation) of GATT 1947.[53]

The GATT DSM was primarily established on these two key articles. The cornerstone of the DSM under GATT was the principle of consensus that required each party to the dispute to agree to the outcome of any inquiry for its implementation.[54] In other words, the finding of the panel only came into effect when it received due consensus. So, if the defendant wanted to avoid compliance it could veto the ratification of the finding. The requirement of consensus was an apparent weakness, *inter alia,* causing growing frustration regarding the increasing number of unresolved disputes among GATT members.[55]

The primary challenges of the GATT system were: unclear objectives and procedures, ambiguity pertaining to consensus method, absence of time-bound system of dispute resolution and frequent instances of non-compliances.[56] In addition to the aforesaid issues, the GATT system that was originally designed for regulating trade in 23 countries was proving to be inadequate to deal with rapidly rising member countries and corresponding increase in trade conflicts in the latter half of 20$^{th}$ century. These developments exposed the defects in the DSM under GATT and highlighted the need for reform. In this sense the GATT system had become the victim of its own success.[57]

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[51] Supra Note 16, p. 55.
[52] *Id*
[53] Robert Read, *Chapter 46 Dispute settlement, compensation and retaliation under the WTO*, Handbook on international trade policy, 2007, edited by William A. Kerr, James D. Gaisford, Edward Elgar, p. 498.
[54] *Id*
[55] Supra Note 12
[56] *Id*
[57] Supra Note 24

However, simultaneously, it is important to note that the GATT system subsisted the 50-year period due to its members' commitments to multilateralism and their realisation of the opportunity cost of non-compliance to trade rules could be the loss of long-term benefits of international trade regime.[58]

It is pertinent to note that (in 1948 to 1989) 88% of GATT disputes were settled through full or partial compliance.[59] The compliance rate fell to 81% post 1980 – a period recording more than 50% of the total number of cases.[60] In respect of this scholars have argued that the overall performance of GATT DSM can said to be reasonably successful owing to the fact that the WTO DSS has incorporated in its framework the basic legal principles from its predecessor.[61]

## 2.3 THE KEY ARTICLES, OPERATING PROCEDURES & STAGES OF THE WTO DSM

### 2.3.1 CONSULTATION

The preferred outcome of a WTO dispute is for the Members concerned to find a mutually acceptable solution that is consistent with the WTO Agreements.[62] Consultations between the parties constitute the first stage in a WTO dispute. It is also a pre-requisite for a panel proceeding. Therefore, a complainant may request adjudication by a panel only if the consultations with the respondent have failed to settle the dispute.[63] Consultations between the parties to a dispute are confidential.[64]

Each dispute is assigned a specific "DS" number.[65] The first official document to be issued in connection with a dispute is the request for consultations which will carry the document symbol

[58] *Id*
[59] Supra Note 53
[60] *Id*
[61] Supra Note 22, p. 1233.
[62] Article 3.7 of the Dispute Settlement Understanding – ("DSU")
[63] Article 4.7 of the DSU
[64] Article 4.6 of the DSU
[65] 6.2 *Consultation*, The process — Stages in a typical WTO dispute settlement case, Dispute Settlement System Training Module: Chapter 6 – available at: (https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm)

WT/DS###/1.[66] Consultations provide the parties with an opportunity to discuss the matter(s) at issue and to find a solution to the dispute before resorting to adjudication under the DSU.[67] Through consultations, parties exchange information, assess the weaknesses of their respective cases, narrow the scope of their differences and, in many cases, find a mutually acceptable solution to the dispute. Where no mutually acceptable solution is found, consultations provide the parties with an opportunity to define and delimit the scope of the dispute.[68]

The request for consultations formally initiates a dispute.[69] The complainant has to make the request pursuant to one or more of the covered agreements (Articles 4.3 and 1.1 of the DSU), specifically under the provision on consultations of the covered agreement(s) at issue.[70] Consultations are thus subject to the provisions of Article 4 of the DSU and the relevant covered agreement(s).[71]

The complaining Member addresses the request for consultations to the responding Member, but must also notify the request to the DSB and to the relevant councils and committees overseeing the agreement(s) in question.[72] The request must be made in writing. It shall give the reasons for the request, including the identification of the measures at issue and an indication of the legal basis of the complaint.[73]

Unless otherwise agreed by the parties, the respondent must reply to the request within 10 days, and must enter into consultations in good faith within a period of no more than 30 days, after the date of receipt of the request for consultations.[74] If the respondent fails to meet either of these deadlines, the complainant may immediately proceed to the adjudicative stage and request the

[66] *Id*
[67] Supra Note 22, p. 1197
[68] *Id*
[69] Supra Note 65
[70] *Id*
[71] Supra Note 22, p. 1206
[72] *Id*
[73] Article 4.4 of the DSU
[74] Andrew D. Mitchell, Good Faith in WTO Dispute Settlement, 7 Melbourne Journal of International law, 339 (2006).

establishment of a panel.[75] If the respondent engages in consultations, but such consultations fail to settle the dispute within 60 days after the date of receipt of the request for consultations, the complainant may request the establishment of a panel.[76]

Consultations can also be concluded earlier if both parties consider that they have failed to settle the dispute.[77] However, the parties often allow themselves significantly more time for consultations than the minimum of 60 days.[78] Even when initial consultations have failed to resolve the dispute, the parties may still find a mutually agreed solution at a later stage in the proceedings.[79]

In cases of urgency, including those that concern perishable goods, Members must enter into consultations within a period of no more than 10 days after the date of receipt of the request.[80] In such cases, the complaining party may request the establishment of a panel if the consultations fail to settle the dispute within a period of 20 days after the date of receipt of the request.[81]

WTO Members can join as third parties in the consultations only when consultations are requested pursuant to Article XXII:1 of the GATT 1994, Article XXII:1 of the GATS, or any of the corresponding consultation provisions in other covered agreements. Consultations requested under Article XXIII:1 of the GATT 1994 are not open to third parties.[82]

The choice to request consultations on the basis of Articles XXII:1 or XXIII:1 of the GATT 1994 is a strategic one, and depends on whether the complainant wants to make it possible for other Members to participate.[83] Even if the complainant invokes Article XXII:1, making the participation of third parties possible, the admission of an interested third party in the consultations process will ultimately depend on the respondent, who may or may not accept such a request.[84]

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[75] Article 4.3 of the DSU
[76] Article 4.7 of the DSU
[77] Article 4.7 of the DSU
[78] *Id*
[79] Supra Note 74
[80] *Id*
[81] Article 4.8 of the DSU
[82] Article 4.11 of the DSU
[83] Supra Note 65
[84] *Id*

WTO Members may request to join the consultations if they have a "substantial trade interest" in the matter being discussed, and if consultations were requested pursuant to Article XXII:1 of GATT 1994, Article XXII:1 of GATS or the corresponding provisions of the other covered agreements.[85] The respondent must also agree that the requesting Member has a "substantial trade interest" in the consultations.[86]

### 2.3.2 THE ESTABLISHMENT OF WTO DISPUTE PANEL

If a trade dispute cannot be settled by consultations, a complainant may file a formal motion for requesting the formation of a dispute panel no sooner than 60 days after the consultation request.[87] The Chair of the Dispute Settlement Body receives such a request in writing (DSB). This request serves as the legal foundation for a complaint, and its contents determine the nature and extent of the inquiry and adjudication responsibilities of a dispute panel.[88] The formal request document is then sent to all WTO members, informing the respondent as well as any other interested parties.[89]

A plaintiff has the right to block the formation of a panel the first time a request is made to the DSB. Any such request is automatically approved at a second DSB meeting under the Uruguay Round's negative consensus requirement.[90] Article 9.1 allows for the formation of a single panel 'whenever possible' where there are several plaintiffs in a case or where many Members file similar complaints.[91] Co-plaintiffs, on the other hand, could ask for separate reports to be published. Any third-party nation with a "substantial interest" in a trade dispute has the right to make representations to and be considered by a panel, even though they did not participate in the consultation process.[92] Participation in panel procedures as a third party necessitates notification

[85] Article 4.11 of the DSU
[86] *Id*
[87] Article 6.2 of the DSU
[88] *Id*
[89] Supra Note 22, p. 1207
[90] *Id*
[91] Article 9 of the DSU
[92] (Article 10.2 of the DSU

to the DSB, which must be done within 10 days of the formation of a panel. Third parties can also have recourse to the DSU if their benefits are nullified or diminished.[93]

### 2.3.3 THE FUNCTIONS AND PROCEDURES OF PANELS

Articles 7, 8, and 11 to 15 of the DSU delineates the roles and procedures of WTO dispute settlement panels. Their primary role is to assist the DSB by performing an impartial review of the facts and ensuring compliance with the applicable WTO agreements.[94] Their Terms of Reference[95] require them to investigate the facts of a trade dispute in relation to the case as set out by the complainant in the request for the panel's formation.[96] Panels are therefore expected to examine the facts in light of the applicable provisions of the WTO agreements cited by the disputing parties. They then make suggestions or rule on the related WTO agreements to the DSB.[97]

A panel is usually composed of three members, but in some cases, five members may be present.[98] The WTO Secretariat selects panellists from an indicative list that includes candidates from Member countries.[99] Panellists may have case-specific experience but may not be citizens of the parties or third parties to a conflict.[100] Appendix 3 of the DSU outlines the processes for dispute settlement panels, including a suggested timetable for panel deliberations. This timeline is somewhat variable, depending on the scope and evidentiary requirements of individual cases. Most dispute cases take between nine and twelve months from the formation of a panel to the release of its report.[101] Dispute panels have the authority to obtain information and professional advice from any relevant person or body, and evidence from an Expert Review Group can also be sought. All Panel meetings are private and non-disclosable.[102]

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[93] Articles 10.2 and 10.3 and Appendix 3, paragraph 6 of the DSU
[94] Supra Note 53
[95] Article 7.1 of the DSU
[96] Article 11 of the DSU
[97] *Id.*
[98] Article 8 of the DSU
[99] 6.3 *The Panel Stage*, The process — Stages in a typical WTO dispute settlement case, Dispute Settlement System Training Module: Chapter 6 – available at: (https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p1_e.htm)
[100] *Id.*
[101] Article 12 of the DSU
[102] *Id.*

Panel procedures are typically initiated by the issuance of (often lengthy) written representations from the complainant and respondent, which are then exchanged.[103] Following that, any third parties could make their own submissions.[104] There are usually brief comments on particular aspects of a case. Subsequently, a closed oral hearing is held in which both of the parties exchange written rebuttals to each other's legal arguments.[105] The parties' points and rebuttals are then addressed in a second closed oral hearing. Additional sets of oral hearings can be held if expert testimony, normally of a scientific nature, is needed.[106]

A panel then writes the report's "descriptive" section, which summarises all of the factual and legal claims and is distributed to the parties for suggestions and corrections.[107] This is accompanied by the distribution of the Interim Review, which includes a summary of the case as well as a panel's observations and assumptions about the legality of the complaint.[108] Again, the parties can make remarks, request corrections, and request that a panel review specific points. These amendments and elaborations are then integrated into the Final Panel Report, which is distributed and published to all WTO Members.[109]

### 2.3.4 THE ADOPTION OF PANEL REPORTS

The most important part of the panel report is the section containing the “findings”, that is, the panel’s determinations on the factual and legal issues before it.[110] The DSU requires panels to set out the basic rationale behind any findings and recommendations that they make.[111] If the panel concludes that the challenged measure is inconsistent with a covered agreement, the report will contain a recommendation to the DSB that the responding Member bring the challenged measure

[103] Supra Note 99
[104] *Id*
[105] John H. Jackson, Process and Procedure in WTO Dispute Settlement, 42 CORNELL INT'l Law Journal 233 (2009).
[106] *Id*.
[107] Article 15 of the DSU
[108] *Id*.
[109] William J. Davey, Compliance Problems in WTO Dispute Settlement, 42 Cornell International Law Journal 119 (2009)
[110] *Id*
[111] Article 12.7 of the DSU

into conformity with that agreement[112] unless the measure has since been removed. In its report, the panel may also suggest ways in which the Member concerned could comply with the panel's recommendations.[113]

A Final Panel Report – and therefore its recommendations – have no legal standing until they are accepted at a DSB conference.[114] However, if Final Reports are put on the agenda and sent to the DSB, they are automatically accepted and their decisions become binding under the negative consensus clause. A successful complainant could choose not to add a Report to the DSB agenda, in which case it will not be adopted.[115] This contrasts with the ability of losing respondents in trade dispute cases to use a veto under the GATT dispute settlement scheme, which enabled them to permanently halt the implementation of panel rulings.[116] Once a Panel Report is adopted by the DSB, its recommendations become binding on the parties to a dispute.[117]

### 2.3.5 THE ROLE AND FUNCTION OF THE WTO APPELLATE BODY

A party to a dispute (but not a third party)[118] has 60 days after the release of a Final report to file an appeal.[119] The Report is not submitted to the DSB in this situation until the appeal process is completed. Although respondents and plaintiffs may appeal a dispute panel's decisions in the case at hand, it is not uncommon for parties to seek clarification or reinterpretation of specific legal points in light of their wider consequences for future cases.[120] Following procedural rules that have been modified on a regular basis since 1996, the Appellate Body has the authority to alter or reverse the conclusions and recommendations of a Panel Study.[121]

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[112] Article 19.1 of the DSU, (first sentence)
[113] Article 19.1 of the DSU, (second sentence)
[114] Supra Note 105
[115] *Id*
[116] 6.4 *Adoption of Panel Reports*, The process — Stages in a typical WTO dispute settlement case, Dispute Settlement System Training Module: Chapter 6 – available at: (https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s4p1_e.htm)
[117] *Id*
[118] Article 17.4 of the DSU see also Rule 24 and 27 of the Working Procedures for Appellate Review
[119] Article 17.5 of the DSU
[120] 6.5 *Appellate Review*, The process — Stages in a typical WTO dispute settlement case, Dispute Settlement System Training Module: Chapter 6 – available at: (https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p1_e.htm)
[121] *Id*

The Appellate Body has seven members, three of which (the division) are chosen by rotation to preside over an appeal.[122] An appellant has ten days to file its legal arguments about the appropriate point(s) of law in a Panel Report, which is followed by an oral hearing.[123] The Appellate Body's collegiality is maintained by sanctioning deliberations between the division and its remaining four members in order to ensure jurisprudential continuity and coherence.[124] The Appellate Body's goal is to settle dispute proceedings, which could enable it to complete the legal analysis of a case by reviewing other claims not addressed by the original panel.[125] Following its completion, the Appellate Body Report is distributed to all WTO Members and released. It is also sent to the DSB for adoption, and in the absence of a negative consensus, the parties to a dispute must follow its advice unconditionally.[126]

### 2.3.6 THE IMPLEMENTATION OF WTO PANEL DECISIONS

If the DSB has adopted a Final or Appellate Body Report, its recommendations and decisions become binding on the parties to a dispute, and the losing respondent is obliged to bring its trade regime into accordance with WTO laws.[127] This usually means that the contested steps that were the focus of the initial conflict and were found to be incompatible with WTO rules are removed.[128] Losing respondents have 30 days after the adoption of a Report to notify the DSB of their intentions regarding the implementation of Panel or Appellate Body recommendations under Article 21.[129]

As the emphasis is on ‘prompt enforcement to ensure successful dispute resolution,' compliance must be completed ‘within a reasonable time period,' which is usually no more than 15 months.[130] The DSB is in charge of monitoring the implementation of adopted guidelines and rulings. If a

[122] Article 17.1 of the DSU
[123] Supra Note 105
[124] *Id*
[125] Supra Note 120
[126] *Id*
[127] 6.6 *Adoption of the reports by the Dispute Settlement Body*, The process — Stages in a typical WTO dispute settlement case, Dispute Settlement System Training Module: Chapter 6 – available at: (https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s6p1_e.htm)
[128] *Id*
[129] Supra Note 105
[130] *Id*

complainant is dissatisfied or disagrees with a respondent's compliance with the DSB's recommendations and rulings, he or she can resort to the dispute resolution procedures and a new Panel Report.[131] Actions under this article are not unusual and have been used by both claimants and respondents to determine if any administrative changes made are WTO-compliant.[132]

### 2.3.7 OTHER MEANS OF WTO DISPUTE SETTLEMENT: ARBITRATION AND MUTUALLY AGREED SOLUTIONS

The use of dispute panel procedures is the most well-known method of settling trade disputes between WTO Members, owing to the attention created by high-profile cases such as the EU–US banana and steel disputes. Arbitration is the primary alternative to a dispute panel, and the guidelines for it are outlined in Article 25 of the DSU.[133] Arbitration is used when the parties to a dispute agree to use it. Arbitration results must be WTO-compliant and binding on the parties. Any award for nullity or disability is subject to the same Articles on compensation and concession suspension as a conflict resolved by panel procedures.[134]

Parties to a trade dispute can opt out of the formal dispute resolution process at any time in order to reach a mutually agreed-upon solution.[135] This is usually a bilateral arrangement signed between the disputing parties. The DSU procedures vigorously facilitate dialogue and conciliation to prevent confrontation, so that mutually agreed-upon solutions to conflicts are welcomed as long as they comply with WTO laws. [136]

## 2.4 EVALUATING THE EFFECTIVENESS OF THE WTO DSM

### 2.4.1 THE OBJECTIVES OF WTO DSM

[131] Article 21.5 of the DSU
[132] *Id*
[133] 8.2 *Arbitration pursuant to Article 25 of the DSU*, Dispute Settlement without recourse to Panels and the Appellate Body, Dispute Settlement System Training Module: Chapter 8 – available at: (https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s2p1_e.htm)
[134] *Id*
[135] Supra Note 105
[136] *Id*

In its objectives the DSU declares that for the subsistence of appropriate balance between the rights and obligations of Members and effective functioning of the WTO, prompt settlement of disputes is essential.[137] Additionally, the objectives also include that the DSM must bring security and predictability to the multilateral trading system. Further, it must preserve the rights and obligations of Members under the covered agreements and offer clarifications on the provisions of those agreements.[138] In other words, the WTO DSS is required to provide easy and equitable access to all Member States irrespective of economic stature, to resolve disputes in a short time and to ensure compliance of rulings within reasonable time-period.[139]

### 2.4.2 PROBLEMS OF WTO DSM

The Dispute Settlement Mechanism (DSM) of WTO envisages the provision for Compensation and Retaliatory measures. These measures can be invoked when there is failure to comply with the reports of the Dispute Settlement Body (DSB) or the Appellate Body (AB), by the parties to a dispute.[140] Article 22 of the Dispute Settlement Understanding (DSU) lays down the conditions under which such measures can be invoked. It is laid down that compensation or suspension of concessions or other temporary measures are available in the event of non-implementation of the rulings or recommendations within a reasonable period of time.[141] The aggrieved party can invoke these measures before the DSB for approval after lapse of reasonable time to comply.[142]

### 2.4.3 SUCCESS OF WTO DSM

Whether the WTO DSM has been successful, is a comprehensive question, that has a multifaceted answer. There are various parameters on the basis of which the effectiveness of the DSM can be evaluated. The below-mentioned analysis focuses on the following questions for examining the effectiveness of the DSM: Is the DSM effective in settling disputes? Does the DSM provide equitable opportunity for all Members to approach it? Is the DSM fulfilling the objectives set out

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[137] Article 3.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2 of the WTO Agreement

[138] *Id, Article 3.2.*

[139] Arie Reich, "*The Effectiveness of The WTO Dispute Settlement System: A Statistical Analysis"*, EUI Working Paper LAW 2017/11 Department of Law, European University Institute.

[140] Alan Wm. Wolff, Problems with WTO Dispute Settlement, 2 CHI. Journal of International Law 417 (2001)

[141] *Id*

[142] Article 22.1 of Dispute Settlement Understanding (DSU)

in the DSU Agreement? Is the DSM time-effective in settling disputes? Is the DSM successful in resisting unilateralism? Is the DSM effective in dealing with related non-trade international concerns? Is the DSM over-reaching in its operations?

### *(a) Is WTO DSS Effective in Fending Off Unilateralism?*

One of the reasons the WTO conflict resolution mechanism was created was to prevent unilateralism.[143] In the 1980s, the US, in particular, increasingly relied on unilateral steps mandated by Section 301 of the United States Trade Act of 1974.[144] Scholars have discussed how the United States gradually resisted GATT rulings, using its power to keep panel rulings from being implemented.[145] During the Uruguay Round talks, the US government desired a better dispute resolution mechanism, while the Europeans and Japanese desired the repeal of Section 301 in return. As a result, an important concern is whether or not the WTO has disarmed Section 301.[146]

In this respect, it seems that the United States has gone through a learning process. The auto talks between the US and Japan were one of the first WTO conflicts.[147] The United States was irritated by Japan's recalcitrance in the talks and threatened to place retaliatory duties on Japanese luxury vehicles.[148] As a result, Japan lodged a complaint with the WTO about this unilateral measure.[149] The United States blinked at the last second in this game of "chicken," opting not to retaliate unilaterally.[150]

A similar procedure was followed in a film dispute when Kodak initially lodged a Section 301 lawsuit against Japan.[151] During the investigation, however, the United States Trade

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[143] Keisuke Iida, Is WTO Dispute Settlement Effective, 10 Global Governance 207 (2004)
[144] *Id*
[145] Hudec Robert, Enforcing International Trade Law (Austin, Tex.: Butterworth Legal Publishers, 1993)
[146] *Id*
[147] Cezary Fudali, *A Critical Analysis Of The WTO Dispute Settlement Mechanism: Its Contemporary Functionality And Prospects*, XLIX, Netherlands International Law Review, 2002
[148] *Id*
[149] Donald McRae, *"Measuring the Effectiveness of the WTO Dispute Settlement System",* 3 Asian Journal of WTO & International Health Law and Policy 1 (2008).
[150] *Id*
[151] Office of the United States Trade Representative, "Section 301 Table of Cases," available at [http://www.ustr.gov/html/act30l.htm (accessed 2 December 2003).]

Representative (USTR) agreed to take the conflict to the WTO, fearing that Japan would replicate its strategy during the auto talks and file a WTO lawsuit against any retaliation under Section 301.[152] As a result of this learning process, the USTR began routing most Section 301 cases via the WTO, effectively rendering Section 301 obsolete as a unilateral measure.[153]

Between January 1995 and August 2002, twenty-seven Section 301 cases were filed, seventeen of which were adjudicated at the WTO, and the remainder were resolved bilaterally without WTO interference[154]. More importantly, since the Kodak case, the US has not used Section 301 retaliation without first approaching the WTO.[155]

Another indication that the WTO has tamed US unilateralism is that the majority of recent Section 301 invocations have been self-initiated cases in connection with WTO proceedings. Indeed, following the Kodak case (filed in May 1995), only six Section 301 petitions were filed by the private sector (up to August 2002).[156] The USTR has self-initiated all of the others. During the GATT duration (1975-1994), the private sector filed 98 petitions (70 initiated, 28 denied or withdrawn), or around five cases per year on average.[157]

In summary, the US government has realized that any Section 301 retribution would be the subject of a WTO countersuit and has agreed to route the bulk of Section 301 cases through the WTO.[158] Furthermore, U.S. industry has understood that the US government will take their Section 301 cases to the WTO and has changed its strategy as a result.[159]

### *(b) Is WTO DSS Effective in Assuring a Level Playing Field?*

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[152] *Id*

[153] Shaefer Matthew, "*Section 301 and the World Trade Organization: A Largely Peaceful Coexistence to Date*," Journal of International Economic Law 1, (1998), p. 156-160.

[154] *Id*

[155] Supra Note 143

[156] *Id*

[157] *Id*

[158] Supra Note 153

[159] *Id*

Assume a company in a developing world has a valid concern about a large developed country's trade practises. Will it ask the government to file a WTO complaint? Several negative reasons suggest against it. To begin with, WTO disputes are not cheap. It could be unaffordable for a small business or the government of a developing country.[160] As a consequence, it will actually remain silent. In these circumstances, the safest option will be to discuss these issues bilaterally. However, there is less reason to concede if the government (and firm) on the other side realises that the claimant cannot afford to file a WTO dispute.[161]

These considerations contribute to the following hypotheses: poor developing countries would be underrepresented (as plaintiffs) in the WTO conflict resolution scheme,[162] and any valid complaints they might have would not be resolved by the WTO.[163] None of the above reasons imply that poor countries are immune from being named as defendants in disputes.

Despite the fact that developing countries are given preferential treatment in the GATT/WTO scheme (their commitments are less strict and their implementation has a five-year or longer grace period), many of them have been attacked by developed countries in WTO disputes.[164] It is observed that developing countries were under-represented in the erstwhile GATT DSS: Developing countries accounted for 29 of 223 appearances as defendants (13 percent) and 44 of 229 complaints (19 percent).[165]

However, there has been some change in developing countries' under-representation at the WTO. Until 2000, developing countries were hesitant to file WTO disputes. Just forty-one complaints were lodged (either alone or jointly) by developing countries between 1995 and 1999 (or 27 percent of 149 disputes).[166] They have, however, been more litigious since 2000. Developing

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[160] *The WTO Dispute Settlement System: Issues To Consider In The DSU Negotiations*, Trade-Related Agenda, Development and Equity (TRADE) Analysis Series, TRADE Analysis October 2005, South Centre, available at: (http://www.southcentre.org)

[161] *Id*

[162] Wang Guiguo, Gary N. Horlick & Mateo Diego Fernandez, Reforming the WTO Dispute Settlement Procedures, 6 J. World Investment & Trade 123 (2005)

[163] *Id*

[164] Alan Wm. Wolff, Reflections on WTO Dispute Settlement, 32 INT'l L. 951 (1998).

[165] *Id*

[166] Supra Note 139

countries accounted for up to 51% of all disputes filed in 2000 and 71% of all disputes filed in 2001.[167] Furthermore, developing countries are often targeted: 91 lawsuits (37 percent) were filed against developing countries.[168]

Africa is the only significant exception to under-representation.[169] Despite the fact that Africa currently has nearly a quarter of the membership (thirty-three WTO members), only South Africa (twice) and Egypt (twice) have participated in WTO disputes, and both as defendants.[170] No one has lodged a formal complaint. In other words, Africa is far away from the picture of WTO disputes.

Bringing developing countries before the WTO is complicated by reputational issues.[171] For example, Canada and Brazil have been at odds over subsidies for regional aircraft (or commuter planes), which are mostly sold in American markets. Canada sought WTO permission to retaliate but did not do so. An official from Canada acknowledged that the authorization was highly embarrassing: imposing sanctions on a "weak" country like Brazil would be bad for Canada's reputation.[172]

So far, cost factors and a lack of legal expertise have prevented developing countries from completely using the WTO dispute resolution mechanism.[173] As a result, they are still disadvantaged as WTO claimants, their trade practises are also being challenged at the WTO.[174] While reputational considerations should prevent developed countries from suing developing countries, these considerations have not been strong enough to preclude those countries from doing so.[175]

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[167] *Id*
[168] *Id*
[169] Supra Note 143
[170] *Id*.
[171] Steve Charnovitz, Environment and Health under WTO Dispute Settlement, 32 INT'l L. 901 (1998).
[172] *Id*.
[173] Robert McDougall, *Crisis in the WTO Restoring the WTO Dispute Settlement Function*, Centre for International Governance Innovation, CIGI Papers No. 194 — October 2018
[174] *Id*
[175] Supra Note 171

The developing nations have started to address this problem. At the WTO meeting in Seattle in 1999, some developing country members decided to create the Advisory Center on WTO Law to assist themselves and others in more efficiently using the WTO dispute mechanism.[176] Another issue that concerns developing countries is whether the WTO panels and the AB are genuinely impartial.[177]

Statistically, it is difficult to assess whether WTO decisions are skewed in favour of or against developing countries, partially because the WTO seldom finds no violations until the conflicts enter the ruling stages.[178] The likelihood of the WTO finding violations is marginally higher when the defendant is a developing country, but the likelihood of the WTO finding violations is also higher when they are complainants.[179]

**(c)** ***Is WTO DSS Effective in Reconciling Trade Concerns with Nontrade Concerns?***

For starters, when WTO deals are signed, companies and industries talk loudest and are more likely to be heard.[180] While firms and industries are far from homogeneous, they are united in the fact that economic considerations take precedence. Other considerations, such as environmental concerns, consumer protection concerns, human rights, and cultural and other values, would not play a significant role in their demands and pressures on government officials and diplomats negotiating trade agreements.[181]

Second, since companies are a driving force in the WTO dispute resolution process, the majority of cases are likely to represent significant trade issues.[182] Finally, corporate issues can influence the motivation for retaliation.[183] Both of these variables tend to imply that the WTO conflict

[176] Financial Times, "Legal Centre for Poor Nations to Be Launched," December 1999, p. 12;
[177] Kim Van der Borght, "The Advisory Center on WTO Law: Advancing Fairness and Equality," (December 1999), Journal of International Economic Law, p. 723-728. (http://www.acwl.ch/)
[178] Supra Note 139
[179] *Id.*
[180] Supra Note 171
[181] *Id*
[182] Supra Note 143
[183] *Id*

settlement process would be unfavourable to environmentalists, cultural purists, human rights activists, and other noncorporate actors.[184]

Having said that, the WTO has already, although modestly, opened the door to NGOs. NGOs have also had a major effect on certain government policies. As a consequence, they may be able to affect the course of events, either directly or indirectly. Unfortunately, there haven't been enough cases concerning non-trade issues on the WTO docket to reach definitive conclusions. Some high-profile cases offer contradictory answers to this issue.[185]

Environmentalists have been outraged by two big WTO conflict decisions: the reformulated gasoline case and the shrimp turtle case. In the former case, the decision of the Environmental Protection Agency to enforce differential treatment on international unreformulated gasoline was ruled to be in breach of the concept of national treatment (equal treatment of foreign and domestic goods, once foreign goods have entered the country).[186] The second, more high-profile case of shrimp imports included a US measure to ban shrimp imports from countries that did not need the use of turtle excluder devices. Four Asian shrimp exporting countries filed a WTO complaint against the United States and secured a favourable decision.[187]

While the panel report categorically reprimanded the United States for taking a unilateral action to achieve the environmental protection objective of turtle protection, the AB toned down the criticism of the US strategy by upholding the concept of environmental protection although disapproving the particular measure that the United States took.[188] The most contentious issue was the AB's decision that the word "exhaustible resources" in Article XX included living resources such as turtles, which was supposedly contrary to the drafters' original intent. This "evolutionary"

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[184] Supra Note 171
[185] *Id*
[186] Howard F. Chang, An Economic Analysis of Trade Measures to Protect the Global Environment, 83 GEO. Law Journal 2131, 2194 (1995)
[187] *Id*
[188] Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and Its Role in the "Greening" of World Trade*, 21 Columbia Journal Environmental Law 205 (1996).

("read in light of contemporary concerns") interpretation was heavily criticized by developing counties.[189]

Another intriguing example is the asbestos case, which pits Canada, an asbestos exporter, against France, that had banned the importation of asbestos for public health purposes.[190] The panel and the Appellate Body upheld the French ban in a rare judgement, recognising the general exception of GATT Article XX(b). This shows that the WTO will consider non-trade matters as long as there is solid empirical evidence supporting the trade-restrictive action in question.[191]

Finally, a clash has been avoided in a highly contentious case involving Brazil's drug policy. To combat rising levels of human immunodeficiency virus (HIV) infection, the Brazilian government is encouraging the development of generic acquired immunodeficiency syndrome (AIDS) drugs in the country.[192] Brazil passed a new patent law to secure new drug patents in order to comply with WTO law.[193]

However, by threatening to manufacture generic copies of two new drugs developed by two foreign companies—Merck America's and Switzerland's Roche Holding—by using the new law's local manufacturing provision (to deny patents unless firms agreed to manufacture locally), the Brazilian government threatened to manufacture generic copies of two new drugs produced by two foreign companies—Merck America's and Switzerland's Roche Holding—unless they began producing them in Brazil or importing them at a cheaper rate.[194] The US brought this patent case against Brazil to the WTO in 2000, and the WTO formed a tribunal to hear it. However, in order to prevent needless controversy, the US dismissed the lawsuit in June 2001.[195]

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[189] *Id*

[190] European Communities — Measures Affecting Asbestos and Products Containing Asbestos, DS135/R (18 September 2000), DS135/AB/R (12 March 2001).

[191] *Id*

[192] Jaime Tijmes, *Parallel Reports in the WTO Dispute Settlement*, 10 Manchester, Journal of International Economics Law 187 (2013)

[193] *Id*

[194] Helen Cooper, "*U.S. Drops WTO Claim Against Brazilian Patent Law,"* Wall Street Journal, 26 June 2001, p. B7.

[195] *Id*

The UN and the WTO immediately recognised this issue as politically volatile. The UN Sub-Commission on the Promotion and Protection of Human Rights requested in the summer of 2000 that the secretary-general and the high commissioner for human rights investigate the effect of the WTO's (TRIPS) on human rights.[196] In its August 17 resolution, the sub-commission said that there are apparent conflicts between the international human rights law on the one hand, and intellectual property rights regime embodied in the TRIPS Agreement on the other.[197]

Human rights groups claimed that TRIPS laws requiring countries to patent pharmaceuticals limited the access to medicines in poorer countries. In June 2001, the WTO held a special meeting of the Council on Intellectual Property Rights to address this topic, which coincided with the UN Special Session on AIDS. Finally, the Doha ministerial meeting released a special ministerial declaration on TRIPS and public health, affirming states' wide rights to violate intellectual property rights for the sake of public health security.[198] In August 2003, a definitive agreement was reached after a year of talks. This example illustrates the importance of making important "political" decisions through multilateral negotiations—or through the WTO's legislative function—rather than through dispute resolution.[199]

To summarise, the WTO dispute resolution mechanism can reconcile trade (or commercial) interests with nontrade issues, but only to a limited extent. Many environmentalists, consumer advocates, and others claim that the obstacles to recognising trade restrictions as valid are too high. For example, the precautionary principle, which is gaining traction in international environmental law, has yet to be firmly developed in WTO law.[200] There is definitely space for change in this area, but reform must be enforced through legislative bodies, such as the Committee on Trade and Environment and/or the General Council, rather than through dispute resolution.

### *(d) Is WTO Dispute Settlement Too Effective (Powerful)?*

[196] "UN Calls for Analysis of Human Rights Impacts of TRIPS," Inside US Trade, 25 August 2000
[197] *Id*
[198] Supra Note 143
[199] *Id*
[200] However, the Sanitary and Phytosanitary (SPS) agreement (Article 5.7) of the WTO that incorporates this principle.

There is some overlap between the legislative and judicial branches in a domestic structure of division of powers. Since a court is frequently called upon to settle urgent disputes, it is obligated to "fill the gap" when law is not sufficiently clear on some points in question.[201] In that case, the court acts in a quasi-legislative capacity. However, if a court goes beyond its limit in encroaching on legislative (i.e., political) territory, there would be an outcry, with accusations that unelected judges should not have the authority to write legislation.[202]

A similar issue arises at the WTO. There is cause for concern because the conflict resolution mechanism has become highly automated in making decisions.[203] In case the AB makes a major legal mistake or a new understanding of any WTO agreements that was not expected or planned by negotiators. Such ruling is most likely to be accepted and enforced due to the automaticity of adoption. Although judicial activists would welcome such a result, most governments are becoming increasingly concerned about this risk.[204]

Although the most contentious decision has been the procedural ruling on amicus briefs, which has caused havoc at the Dispute Settlement Body, others have accused the AB of trespassing on statutory ground in interpreting substantive rules as well.[205] For example, Chakravarthi Raghavan argued in an article published by the Third Trade Network that panels and the AB have gone so far as to adjudicate between two contradictory terms of the agreements, citing the Indonesia auto case as an example.[206]

To avoid this type of problem, he proposed that the WTO's General Council, the WTO's legislative organ, issue instructions to the panels and the AB on how to interpret the agreements.[207] The former director of the GATT Legal Division, Frieder Roessler, and current executive director of the

[201] Supra Note 147
[202] *Id*
[203] Supra Note 140
[204] *Id*
[205] Supra Note 162
[206] Chakravarthi Raghavan, *The World Trade Organization and Its Dispute Settlement System: Tilting the Balance Against the South* (Penang, Malaysia: Third World Network, 2000), pp. 15-16.
[207] *Id.*, p. 28.

Advisory Center on WTO Law, was claimed to have drawn attention to the pattern of panels/AB intruding into areas that should rightfully be the domain of various other WTO organs.[208]

A similar problem emerged in the United States Congress, and Congress directed the executive branch to investigate the matter in the Trade Promotion Authority legislation. The Department of Commerce agreed in a subsequent report to Congress that "panels and the Appellate Body shall ground their analyses firmly in the agreement text and recognise fair permissible interpretations of the WTO Agreements by the Members."[209]

Perhaps taking a cue from the American concern, the AB is beginning to put a greater focus on textual analysis than previously. The AB's overturning of the panel decision in the German steel case in late 2002 exemplified the shift most dramatically.[210] However, legal wiggle room for panels and the AB is limited, and a fundamental political settlement is awaited via the decisions of the Ministerial Conference or other "legislative" authorities.[211]

**2.5 COMPENSATION**

Compensation is a voluntary measure, if granted, it shall be considered to be consistent with the other WTO agreements. This measure has been utilized only once since the formation of WTO i.e., in the Japan–Taxes on Alcoholic Beverages Case.[212] Compensation does not refer to monetary payment, rather it means benefit (e.g., tariff reduction) that is equivalent to the impairment or nullification caused to the aggrieved party.[213] Compensation is a mutually agreed measure resulting out of negotiations between the parties to dispute. It is not a result of imposition by the

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[208] *"WTO's Defective Dispute Settlement Process,"* The Hindu, 6 July 2000; Frieder Roessler, *"The Institutional Balance Between the Judicial and the Political Organs of the WTO,"* paper presented at the conference "Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium," J. F. Kennedy School of Government, Harvard University, 1-2 June 2000.

[209] Department of Commerce, "*Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body,"* 30 December 2002, p. 8. See http://www.ita.doc.gov/ReporttoCongress.pdf

[210] United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany WT/DS213/AB/R

[211] *Id*

[212] Taxes on Alcoholic Beverages, Japan v United States (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R)

[213] *6.9 Compensation, The process — Stages in a typical WTO dispute settlement case*, Dispute Settlement System Training Module: Chapter 6 – available at (https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s9p1_e.htm)

DSB or a unilateral demand by the aggrieved party. In essence it is a voluntary measure adopted by the implementing party.[214]

In *Japan Alcoholic Beverages* the European Community brought a complaint before the DSB. The complaints (EC along with US and Canada) contended that the spirits exported to Japan were discriminated under the Japan liquor tax system. The tax levied on vodka, whisky, white spirits and cognac are substantially higher than those on the 'shochu' (an intra-trade Japanese liquor).[215] The DSB Panel and the Appellate Body found the Japanese Liquor Tax system to be inconsistent with the GATT Article III:2. Japan agreed to reduce the tariff rates on specific items as a compensation measure under the WTO DSM until the full implementation of the AB report.[216]

**2.6 RETALIATORY MEASURES**

Another measure that can be adopted under Article 22 is retaliation. An aggrieved party can apply for retaliatory measures, in an event, the DSB Panel finds that the new policies adopted by the implementing party are still inconsistent with WTO rules and non-compliant with the rulings or recommendation of the Panel.[217] The precondition to invoke such retaliatory measures would be failure to mutually agree for compensation. The extent of retaliation is also a question of agreement between the parties. However, when the parties fail to agree, an arbitrator is appointed to determine the amount of retaliation. The first two instances where this provision was applied are the banana and beef hormones case.[218]

In *EC – Bananas III Case*, the Complainants (Ecuador; Guatemala; Honduras; Mexico; United States) brought the dispute before the DSB alleging that the European Communities' system for importation, sale and distribution of bananas is inconsistent with Articles I, II, III, X, XI and XIII of the GATT 1994 as well as provisions of the Import Licensing Agreement, the Agreement on

[214] *Id*
[215] DS8: Japan — Taxes on Alcoholic Beverages – available at - https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds8_e.htm
[216] *Id*
[217] Anderson, Kym, *Peculiarities of retaliation in WTO dispute settlement,* World Trade Review, 2002; 1(2):123-134
[218] *Id*

Agriculture, the TRIMs Agreement and the GATS.[219] The Panel and the Appellate Body issued reports declaring the finding that the EC's banana import mechanism and the licensing measures for the importation of bananas are incompatible to GATT 1994.[220] Following the decision of the DSB and AB, both the parties sought retaliatory measures via arbitration. In cross-retaliatory scenario a peculiar example worth noting was the arbitrator's finding on Ecuador's retaliatory measures.[221] The arbitrator noted that Ecuador imported very few goods from the EC to retaliate just in goods or in goods plus services. Therefore, in this case, Ecuador was granted a suspension of concessions in relation to TRIPS.[222]

In *EC – Hormones Case*, the Complainant (United States) claimed that the EC took measures to prohibit the use of certain substances having a hormonal action in livestock farming.[223] This led to restriction in the importation of meat and meat products from the US.[224] The US claimed that the restrictions to be inconsistent with Articles III or XI of the GATT 1994, Articles 2, 3 and 5 of the SPS Agreement, Article 2 of the TBT Agreement and Article 4 of the Agreement on Agriculture.[225] The DSB Panel found in this regard that the ban imposed by EC on imports of meat and meat products treated with hormones for growth promotion was inconsistent with the Articles 3.1, 5.1 & 5.5 of the SPS Agreement.[226]

The Appellate Body upheld the findings of the Panel that the import prohibitions were inconsistent with the Article 5.1 of the SPS Agreement.[227] However, on the question of inconsistency with Article 3.1 and 5.5 of the SPS Agreement the Appellate Body reversed the findings of the Panel.[228] In an aftermath of compliance proceedings (where the arbitrator allowed retaliatory measures) the

[219] DS27: European Communities — Regime for the Importation, Sale and Distribution of Bananas – available at - https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm
[220] *Id*
[221] Wilfred Ether, *Intellectual Property Rights and Dispute Settlement in the World Trade Organization,* 7 (2) Journal of International Economic Law, p. 449 – 458.
[222] *Id*
[223] DS26: European Communities — Measures Concerning Meat and Meat Products (Hormones), available at: (https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm)
[224] *Id*
[225] Supra Note 162
[226] *Id*
[227] Supra Note 147
[228] *Id*

US and EC informed the DSB of a Memorandum of Understanding pertaining to the importation of beef not treated with growth promoting hormones and the corresponding increased duties applied by the US to certain products of the EC.[229]

The measures for compensation, suspension of concessions or other temporary measures find legitimate standing in Article 22 of the DSU.[230] However, legal and economic scholars have criticised these measures, particularly retaliatory measures as inconsistent with the objectives and purposes of WTO multilateral trading system.[231] Some of the arguments advanced against the use of retaliatory measures are as follows:

First, is that past wrongs go uncompensated. Since the retaliatory measures become valid only after the lapse of the reasonable period to comply to the panel's rulings, the damage done in preceding years to the complaint's export industry remains unrendered.[232] Second, the economy of the complainant is harmed instead of getting aided by retaliation, especially in the case of developing or small economy nations.[233] Third, retaliation does nothing to compensate the specific export industry that has suffered in market access. Instead, the retaliatory measures usually benefit an importing industry of the complainant.[234] Fourth, the respondent industries that are harmed due to the retaliatory measures are not the industries that have benefited from the WTO-inconsistent measures.[235] Thus, in light of all these arguments the validity of retaliatory measures is said to be inherently unjust in view of certain experts.

## 2.7 COMPLIANCE OR EXECUTION OF REPORTS

The US requested talks with India on July 2, 1996, over India's alleged lack of patent protection for medicinal and agricultural chemical goods. Articles 27, 65, and 70 of the TRIPS Agreement were said to have been violated at the time. At its meeting on 20 November 1996, the Dispute

[229] DS26: European Communities — Measures Concerning Meat and Meat Products (Hormones) – available at – https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm
[230] Supra Note 109
[231] *Id*
[232] Supra Note 217
[233] *Id*
[234] Supra Note 53
[235] *Id*

Settlement Body established a panel at its meeting where the EC reserved their third-party rights, and the panel was finally composed in January 1997.

The report of the Panel, which was circulated in September 1997, found that India had failed to comply with its obligations which were listed under Article 70.8(a) or Article 63(1) and (2) of the TRIPS agreement as it had not established structures which would sufficiently preserve priority and innovation for applications under pharmaceutical and agricultural product patents.[236] The report also found India not being in compliance with Article 70.9 of the TRIPS, under which the country did not make adequate arrangements for granting sole marketing rights.[237]

In mid-October 1997, India conveyed its motive to appeal certain issues of legal interpretations which were developed by the Panel. The report of the Appellate Body, which was circulated in December 1997, although with modifications, upheld the original Panel's rulings on Articles 70.8 and 70.9.[238] However, it declared that Article 36(1) was outside of the Panel's terms of reference. On 16th of January 1998, the original and modified reports were both adopted by the Dispute Settlement Board. At the April 1998 meeting of the DSB, both the parties declared that they had come to a consensus of an implementation period of fifteen months, starting from the date of the adoption of the two reports. This implementation period expired on 16th of April 1999, during which India complied with and followed the DSB's recommendations.[239]

Later on, the United States asked for another round of consultations with India on the Patents (Amendment) Ordinance, 1999, after being notified by India to implement the DSB's rulings and recommendations, in accordance with Article 21.5 of the DSU (without prejudice to the US position on whether Article 21.5 requires consultations before referring to the original panel).[240] The European Communities also requested to join the consultations in January 1999. India provided its final status report on implementation of this subject to the DSB on April 28, 1999,

[236] DS50: India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, available at: (https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm)
[237] *Id*
[238] Supra Note 53
[239] *Id*
[240] Supra Note 236

which revealed the adoption of appropriate legislation to execute the DSB's recommendations and decisions.[241]

## 2.8 CONCLUSION

In conclusion, the evolution of WTO and establishment of the DSU created a stable and effective mechanism. It resided over various issues under different agreements. It can be said that the DSU deserves credit for eliminating the need to negotiate multilateral and bilateral agreements between member nations for enforcement of international agreements. This improved efficiency of agreement. The main concern for developing countries was that there would be an influx of disputes against them. However, the establishment was inclusive and it also provided the developing countries an avenue to pursue their disputes and albeit it was used less often by developing countries.

The multi-tiered dispute settlement mechanism may be under threat as the WTO Appellate Body has come to a standstill. Various objections are being raised against the functioning of DSB, which are examined in detail in upcoming chapters. The WTO disputes settlement Body also addresses TRIPS disputes, and reassures that TRIPS could effectively guarantee protection of Intellectual Property Rights in Member Nations. The interrelationship between TRIPS and WTO is also examined in the upcoming chapters of this study. However, only time will tell what happens when and if the dispute settlement system crumbles. Some experts continue to expect that it may give rise to an era of multilateralism and bilateralism in the field of dispute settlement.

[241] *Id.*

# CHAPTER III – ANALYSIS: WTO APPELLATE BODY CRISIS

## 3.1 INTRODUCTION

The Appellate Body is described as the 'Centrepiece' of the WTO's dispute resolution system.[242] It has more than 150 rulings to its credit.[243] It was established in 1995 as per the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[244] The Appellate Body, seated in Geneva, Switzerland, consists of seven persons that hear appeals from reports issued by panels in disputes brought by WTO Members.[245] The Appellate Body can uphold, modify or reverse the legal findings and conclusions of a panel, and Appellate Body Reports are adopted by the Dispute Settlement Body (DSB) unless all members decide not to do so.[246]

At present, the Appellate Body is non operation due to the non-appointment of members.[247] The WTO Appellate Body has no sitting members at the moment.[248] The WTO Appellate Body was effectively defunct since 10 December 2019 when two of the last three members completed their terms.[249] The last member to complete the term as an Appellate Body Member was Hong Zhao on 30 November 2020.[250]

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[242] Sacerdoti, G., A. Yanovich and J. Bohanes (2006), *The WTO at Ten: The Contribution of the Dispute Settlement System*, WTO, Geneva, available at: (https://doi.org/10.30875/e72266c8-en)

[243] WTO Panel Reports - WorldTradeLaw.net available at: (https://www.worldtradelaw.net/databases/wtopanels.php)

[244] WTO | Dispute settlement gateway (2021), available at: <(https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#:~:text=The%20WTO%20has%20one%20of,350%20rulings%20have%20been%20issued)> (Last Accessed: 3 September 2021).

[245] WTO | Dispute settlement - Appellate Body, available at: (https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm) (Last Accessed: 3 September 2021)

[246] Jennifer Hillman, *Three Approaches To Fixing The World Trade Organization's Appellate Body: The Good, The Bad And The Ugly*?, (2021), available at: (https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf) (Last Accessed: 3 September 2021).

[247] WTO | Dispute settlement - Appellate Body Members, available at: (https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm)

[248] *Id*

[249] The World Trade Organization| The Appellate Body Crisis | Center for Strategic and International Studies – available at: (https://www.csis.org/programs/scholl-chair-international-business/world-trade-organization-appellate-body-crisis)

[250] Supra Note 247

The Appellate Body is constituted as per Article of Dispute Settlement Understanding. It states the following:

> *"1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.*
> *2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term."*[251]

The major reason for the introduction of the appeal stage in the WTO is to balance the quasi-automatic adoption system of the panel reports based on the negative consensus method.[252] Unlike the GATT 1947, the panel reports are adopted by the members via a reverse consensus method.[253] It means that, if all the member nations in the DSB agree not to adopt the report (including the party in whose favour the decision is rendered, which is highly unlikely), only then can the adoption of the report fail.[254] Unless the above-mentioned condition is fulfilled, the report is accepted.[255]

The appeal feature helps the disputant member state to counter a legally untenable report in the AB and preclude its adoption in the DSB.[256] Therefore, it helps in establishing a reviewable dispute

[251] Article 1, Dispute Settlement Understanding
[252] Dispute Settlement System Training Module: Chapter 3, *WTO Bodies Involved In The Dispute Settlement Process*, 3.1 The Appellate Body (AB), - available at: (https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm) – (Last Accessed on 07.08.2021)
[253] *Id*
[254] Supra Note 14, p. 125.
[255] *Id*
[256] Supra Note 53, p. 501.

settlement system and prevents the adoption of incorrect panel rulings.[257] However, the AB has been charged with judicial overreach in applying its authoritative power of interpretation, especially by the United States of America (USA).[258] The Present crisis is the result of objections from the United States about the functioning of the Appellate Body.[259]

States rely on the WTO system primarily for resolving their trade and commerce disputes. This can be deduced from the fact that more than 600 disputes have been referred to the WTO's DSB.[260] The member states have the choice to Appeal the report of the Dispute Settlement Panel. The Appellate Body then reviews the findings of the Dispute Settlement Panel. The decisions are then adopted by the DSB. A decision adopted by the DSB is binding in nature.[261] Compliance with the ruling means that the States bring the challenged measures in conformity to the WTO Agreement and remove the inconsistencies.[262] If there is failure to comply, the members face a threat of retaliation and of imposition of compensation.[263] Usually, the member states comply with the rulings.[264]

For past years, the United States has objected to the WTO Dispute Settlement System, especially, the Appellate Body.[265] The objection of the United States has serious consequences as the consensus of all the WTO member states is necessary for Appointments to the Appellate Body.[266] Since the United States has continued to block the new appointments, the WTO's appeals system has become non-operational.[267] This has led to a situation where a decision of the Panel may

[257] *Id*
[258] Clifford Chance, *The WTO Appellate Body Crisis – A Way Forward?* – available at: (https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/06/the-wtos-interim-appeal-arbitration-arrangement-a-bridge-over-troubled-waters.pdf) – (Last Accessed on 07.08.2021)
[259] *Id*
[260] WTO | dispute settlement - chronological list of disputes cases – available at: (https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (Last Accessed: 7th October 2021)
[261] Supra Note 16, p. 75.
[262] *Id*
[263] Supra Note 14
[264] Supra Note 139
[265] Supra Note 258
[266] Aditya Rathore and Ashutosh Bajpai, Edited by: Gabrielle Wast, *The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead?* - available at - (https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/) – (Last Accessed on 07.08.2021)
[267] *Id*.

remain unenforceable till the Appellate Body is constituted and the Panel report is reviewed.[268] For example, the WTO Panel reported that Export subsidies in Indian Special Economic Zones are inconsistent with the multilateral agreements committed by India. India has preferred an appeal over this decision and the same is pending before the Appellate Authority.[269] There is no final ruling yet. Even though this can motivate members to delay the appointment to Appellate Authority and eventually dismantle the Dispute Settlement System, the members are interested in the Dispute Settlement System as it provides stability and effective dispute settlement mechanism.[270]

Though the Appellate Body is not considering cases due to ongoing vacancies WTO panels remain active and continue to be utilised by WTO member states. In 2018, for example, there were more consultations requests (the first step of a WTO dispute) than in any year since 1998.[271] This suggests that, despite the threat posed by the Appellate Body crisis, the members prefer the DSS as an effective tool for dispute resolution.[272] An effective dispute resolution system is necessary for cordial trade relations among the members.

### 3.2 THE APPELLATE BODY

The emergence of WTO recorded a watershed moment in the history of international trade. Prior to the establishment of WTO, international trade was regulated by the General Agreement on Tariffs and Trade (GATT) 1947.[273] The GATT 1947 laid the bedrock for the multilateral trading

[268] Bossche Peter Van den, The WTO at Ten: The Contribution of the Dispute Settlement System, *'From Afterthought to Centerpiece. The WTO Appellate Body and Its Rise to Prominence in the World Trading System'*, p. 289–365 Giorgio Sacerdoti, Alan Yanovitch and Jan Bohanes (eds), (CUP 2006)

[269] Preeti Kapuria, *Special Economic Zones in India: Disputed export subsidies under WTO*, Observer Research Foundation, - available at: (https://www.orfonline.org/expert-speak/special-economic-zones-in-india-disputed-export-subsidies-under-wto/)

[270] Shi Jingxia & Bai Fangyan, *A Practical Response to the WTO Appellate Body Crisis: Utilizing Arbitration to Resolve Trade Disputes*, 9 J. WTO & CHINA 35 (2019).

[271] WorldTradeLaw.Net Database, available at: (http://worldtradelaw.net/databases/searchcomplaints.php)

[272] Peter Van den Bossche *The TRIPS Agreement and WTO Dispute Settlement: Past, Present and Future*, WTI Working Paper No. 02/2020, World Trade Insitute (2021), available at: (https://www.wti.org/media/filer_public/63/33/633360d8-0c5e-4429-8aff-6d30bdf35374/wti_working_paper_02_2020.pdf) (Last Accessed on 03/09/2021).

[273] Supra Note 16, p. 13

system that led to the formation of WTO. The GATT 1947 was successful in bringing together multiple nations on a common agreement to regulate and reduce barriers to international trade.[274]

However, the structural framework of GATT 1947 lacked certainty and was influenced by international politics. For instance, the dispute settlement mechanism under the GATT 1947 was largely dependent on international diplomacy and persuasion.[275] The reasons for this laid in the inadequate structural framework of GATT 1947 that required, *inter alia*, positive consensus for the establishment of panels, their reports and retaliatory measures.[276] This gave leeway to the disputants for frequently blocking the adoption of reports or retaliatory measures.[277]

The WTO, on the other hand, offers a multilateral umbrella trade agreement that covers various aspects of international trade under its canopy, namely, trade in goods, services, intellectual property and dispute settlement mechanism.[278] The DSM under the WTO is composed of a two-tier body system comprising of the Dispute Settlement Body (DSB) and the Appellate Body (AB). The DSB comprises of the representatives from all WTO member countries.[279] The DSB is responsible to carry out the administration of the dispute settlement process based on the Dispute Settlement Understanding (DSU).[280] It has the power to establish panels, to adopt reports of the panel and the AB, and to authorize retaliatory measures. In this regard, the DSB provides an equal footing to all the member nations and ensures a consensus driven process in respect of the settlement of disputes.[281]

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[274] *Id*

[275] Anwarul Hoda, *WTO Appellate Body In Crisis: The Way Forward* – available at - (http://icrier.org/pdf/ES/ES_WTO_Appellate_Body_in_Crisis.pdf) – (Last Accessed on 07.08.2021)

[276] Dispute Settlement System Training Module: Chapter 3, *WTO Bodies Involved In The Dispute Settlement Process*, 3.1 The Dispute Settlement Body (DSB), - available at (https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm) - (Last Accessed on 07.08.2021)

[277] Supra Note 258

[278] Supra Note 16, p. 15

[279] Supra Note 24

[280] Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, The WTO Agreement

[281] Supra Note 24

A vital point regarding the WTO dispute settlement mechanism is that the report of the panel and the AB is applicable only to the parties of the dispute i.e., the disputants.[282] Once the panel issues the report on a dispute before it, the disputants are eligible to appeal against the panel report to the AB. The AB is a unique feature of the WTO system. Such a second stage adjudicatory mechanism did not exist in the old dispute settlement regime of GATT 1947. It was the Uruguay Round of multilateral trade negotiations that led to the creation of the AB.[283]

An appeal to the Appellate Body is the final stage of the WTO dispute settlement process.[284] It has the authority to review the legal standpoints of the reports delivered by the panels. Unlike the panel, the AB is permanent in nature. It is a standing body with a seven-member panel. Each of the seven members are appointed for an initial term of four years with the possibility of a second-term reappointment.[285] Therefore, an AB member can utmost serve for eight years. Although, approximately every two-years a part of the AB membership changes. Another point of significant importance is that only three of these seven members form an AB panel. Thus, a minimum of three and a maximum of seven AB members are required for its continued subsistence.[286] The Appellate Body is governed by the WTO's Dispute Settlement Understanding.[287] It states that panel reports become enforceable and binding on the Parties. However, if an appeal is preferred by the Party, the Panel report is not enforceable till the review is complete and the DSB adopts it as ruling.[288]

When an appeal is filed, the appeal is allotted to three members of the Appellate Body as per the Working procedures for appellate review.[289] The allocation happens by rotation among members. The Appellate Body has the power to uphold, modify or reverse the legal findings and conclusions

[282] *Id*
[283] Supra Note 16, p. 14
[284] Supra Note 120
[285] *Id*
[286] Supra Note 120
[287] Annex 2, Dispute Settlement Understanding, WTO Marrakesh Agreement
[288] Supra Note 14
[289] *WTO | Dispute settlement - Working procedures for Appelate review* (2021), - available at: https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm (Accessed: 1 September 2021).

of a panel.[290] However, it cannot refer the dispute back to the Panel.[291] The DSB can be set aside if all the members of the DSB decide to do so.[292] Thus, it is necessary that there are a minimum of three members at the Appellate Body for the Appellate Body to function. A continuous appointment is necessary considering the fact that the Appeal process shall take no longer than 90 days from the date of appeal.[293] Without an operational Appellate Body, the disputes are indefinitely pending.

### 3.3 REASONS FOR CRISIS

After Donald Trump's administration took office in January 2017, the United States began to take a critical stance towards the WTO, repeatedly condemning the organization's rules of being unfair and stagnant, and even threatening to leave the organization.[294] Additionally, the US began to curb the appointment of several members to the Appellate Body, which led to a reduction in the number of total members.[295]

Two years after being under Trump's rule, the Appellate Body was left with only one member, rather than its requisite seven. Not only did the body's legitimacy vanish, it's real operation and functions had also been severely hampered. The appellate system, at the time, found itself in a life-or-death situation. It was then that the WTO's main members unanimously voiced their worries, while scholars from many countries presented answers one after the other.[296] However, up until the end of 2019, there had been no relief from this problem and many pessimists had predicted that the appellate system could go into "hibernation."[297]

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[290] *Id*

[291] Yuka Fukunaga, *The Appellate Body's Power to Interpret the WTO Agreements and WTO Members' Power to Disagree with the Appellate Body*, Waseda University, Tokyo, Japan Journal of World Investment & Trade 20 (2019) p. 792–819

[292] *Id*

[293] Article 17.5 of the DSU

[294] Guohua Yang, *The Causes of the Crisis Confronting the WTO Appellate Body*, No. 4 of (2019) Vol. 9, Journal of WTO & CHINA, p. 102

[295] *Id*

[296] Alex Ansong, *The Impasse In The Appointment Of Judges To The WTO Appellate Body: Are There Any Viable Solutions?* (November 15, 2018). available at: (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285268)

[297] *Id*

Due to a lack of quorum at the Appellate Body, the WTO tumbled into disarray - becoming non-operations, while at the same time compromising on its 'compulsory' and 'binding' system for dispute settlement.[298] Ad hoc bilateral solutions have fallen short of emulating the same sense of security as the one provided by WTO's system, while majority rule attempts to overcome United States' opposition to the Appellate appointments continue to appear legally fragile and without any political grounding.[299]

### 3.4 CHARGES AGAINST THE APPELLATE BODY

On 10th December 2019, the AB went into crisis. The immediate reason of crisis is the ending of the four-year tenure of the two of the remaining three AB members. This resulted due to the protectionist agenda of the Trump Administration in the USA that blocked the appointment of new AB members.[300] However, objections to the functioning of the AB have been raised by the USA and other nations much prior to the recent collapse of the AB. The Obama administration of the USA blocked the reappointment of two AB members.[301] Further, the Trump administration also blocked the reappointment of another AB member. [302]

#### 3.4.1 JUDICIAL ACTIVISM / OVERREACH

The main charge raised against the AB by the USA is the frequent overstepping of jurisdiction.[303] According to US, there have been various instances of judicial overreach by the AB, such as, the AB's tendency to indulge in issues not in dispute, implicit adherence to previous rulings instead of independent analysis (principle of *stare decisis*), the AB's interpretation-driven approach to WTO agreements and instances of interpreting the municipal law, increasing timelines of reports and the AB's tendency to regulate its own conduct that is allegedly impermissible under DSU.[304]

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[298] Geraldo Vidigal, *Living Without the Appellate Body: Multilateral,Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis*, Journal of World Investment & Trade 20 (2019) 862–890

[299] *Id*

[300] Supra Note 266

[301] The Obama administration, blocked the appointment of Jennifer Hillman (2011) and Seung Wha Chang (2016)

[302] The Trump administration blocked the reappointment of Shri Baboo Chekitan Servasing.

[303] Supra Note 258

[304] *Id*

According to the US, the DSS that was agreed by WTO members was based on the negotiation that it would neither add nor diminish rights and obligations.[305] It would be expeditious, limited and used sparingly. Further, it would help in resolving disputes and not making law.[306] The mandate of 'making rules' or 'filling gaps' is nowhere to be found in the WTO DSU text.[307] Rather, the formal title of the DSU, i.e., "Understanding on Rules and Procedures Governing the Settlement of Disputes", contains the key phrase 'settlement of disputes' that clarifies that the role of AB is not to create regulations for the entire membership but rather to help the disputants reach a 'satisfactory adjustment'[308] of the dispute.[309]

The fact that the Appellate "Body" is intentionally not named as the 'Appellate Court' or the 'Appeals Court' by the WTO members speaks to the intended nature and expected function of the "Body".[310] Further, the standing panellists of the AB are referred to as "members" and not "judges" is another important fact to be considered.[311] These factors point to the fact that the AB is not meant to act as a court of law that has the power to interpret rules or make regulations. The AB members are not judges, that have the liberty to be judicially creative and fill the interstitial gaps in law. Thus, judicial activism in AB is equated to judicial overreach. [312]

### 3.4.2 OBITER DICTA

The US, in a statement before the DSB opposed the reappointment of Mr. Seung Wha Chang and elaborated on its objections on the AB's workings.[313] It stated that the AB has been increasingly

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[305] Kuijper, P. J., From the Board: The US Attack on the WTO Appellate Body. Legal Issues of Economic Integration, (2018) 45(1), 1-11. Available at: (http://www.kluwerlawonline.com/abstract.php?area=Journals&id=LEIE2018001)

[306] Robert E. Lighthizer, Ambassador, United States Trade Representative, Report on The Appellate Body Of The World Trade Organization, February 2020, p. 18. – available at: (https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf)

[307] *Id*

[308] Article XXIII:1, GATT 1947.

[309] Supra Note 306

[310] *Id*.

[311] United States Blocks Reappointment of WTO Appellate Body Member, 110 AM. J. INT'l L. 573 (2016). Available at: (https://heinonline.org)

[312] *Id*.

[313] Statement by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, May 23, 2016 – available at: (https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf)- (Last Accessed on 07.08.2021)

asserting judicial statements that have no direct relation to the dispute at hand.[314] In some cases, *obiter dicta,* is the majority of the content of the AB's report. Such working of the AB is reducing the efficiency of the dispute settlement process and unnecessarily increasing the complexity of reports.[315] Furthermore, the AB is laying down such interpretations that go beyond the context of the issues before it.[316]

The role of the Appellate Body has been overlooked in its approach towards resolving disputes and has an analysis which is more often than not elucidated, according to the US. For instance, citing the Argentina-Financial Services case[317], the US has said that AB's analysis in the case was nothing but *obiter dicta*. It further claimed that the AB overturned the Panel's findings and that the AB's additions to their analysis was 'unnecessary' as it only clarified other clauses of the General Agreement on Trade in Services (GATS).[318]

The United States is of the opinion that the Appellate Body cannot deviate from the issues at hand and provide an absolutely distinctive analysis, nor does it have the luxury to behave like academia.[319] "It is not the responsibility of the panels or the Appellate Body to 'make law' outside of the purpose of resolving dispute," according to the US.[320] The country has repeatedly maintained[321] that any attempt by AB to fill the gap in the WTO agreements is in violation of Article 3.2 of the DSU, which grants the "exclusive competence to adopt interpretations" of Multilateral Trade Agreements to the Ministerial Conference and the General Council.[322]

### 3.4.3 STARE DECISIS

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[314] *Id.*
[315] Supra Note 294
[316] *Id.*
[317] WTO | dispute settlement - the disputes - DS453 (2021). available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds453_e.htm (Accessed: 3 September 2021).
[318] Supra Note 306
[319] Supra Note 305
[320] Amrita Bahri, Forthcoming in Journal of World Trade (53.2) 2019 "Appellate Body Held Hostage": Is Judicial Activism at Fair Trial? (2021) Wtochairs.org, available at: (http://wtochairs.org/sites/default/files/AB%20Article%20%20-%20JWT%20.pdf) (Accessed: 3 September 2021).
[321] Supra Note 313
[322] (2021) Wto.org. Available at: https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf (Last Accessed on: 03/09/2021).

Another charge raised by the US is the strict adherence to the previous rulings of the AB in similar disputes.[323] US states that this is an erroneous application of the precedent rule that finds no legal basis in the DSU.[324] Additionally, since there is no mechanism to challenge the rulings of the AB, this action entails judicial law-making which is contrary to the dispute settlement mechanism laid down under the WTO. [325]

Another issue with the Appellate Body, which the US has raised, is that AB builds compelling precedents, however, this is unsettling at several levels as establishing a 'persuasive' value is at variance from establishing a 'binding' value - which is not the case in WTO's dispute settlement system.[326]

Under Article 3.2 of the DSU, if the arguments of any previous cases are compelling to the Appellate Body in a current case, the AB will add it to the DSS to increase the security and equivalency of the multilateral trading system.[327] Moreover, in the United States-Stainless Steel (Mexico) case[328], the AB has said that the reports are exclusively binding only to those who are party to the ongoing dispute.[329]

Yet, this does not imply that the DSB should dismiss, or in any way disregard, the legal interpretations of such reports as the panels are advised to adhere to reports which have been previously adopted by AB in order to develop a "coherent and predictable" body of jurisprudence.[330] At the same time, it is important to remember that, despite the 'persuasive' value

[323] Supra Note 294
[324] *Id*
[325] United States' Statements at the Meeting of the WTO Dispute Settlement Body, Geneva, December 18, 2018 – available at –(https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB.Stmt.as-deliv.fin.public.pdf) – (Last Accessed on 07.08.2021)
[326] Supra Note 294
[327] WTO | Disputes - Dispute Settlement CBT - Legal effect of panel and appellate body reports and DSB recommendations and rulings - Legal status of adopted/unadopted reports in other disputes - Page 1 (2021). Available at: (https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm) (Last Accessed on: 3 September 2021).
[328] WTO | dispute settlement - the disputes - DS344**,** *WTO | dispute settlement - the disputes - DS344* (2021), available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds344_e.htm (Last Accessed on: 3 September 2021).
[329] Supra Note 291
[330] Supra Note 266

of an argument, there is no legal obligation for the DSS to use arguments from previous cases, which are only relevant for cases where similar issues are being dealt with. [331]

### 3.4.4 OVERSTEPPING INTERPRETATION OF LAW

The US has objected to the AB's intervention in the factual issues.[332] Legally, the AB is suppose to limit itself only to the legal issues before it.[333] In interpreting various cases, especially the ones pertaining to the Agreement on Subsidies and Countervailing Measures, the AB has gone beyond legal issues curtailing the application of agreements by member countries.[334] Moreover, the AB has exerted its power to modify the panels' findings on matters of municipal law, that are considered as factual issues in any international law dispute settlement processes.[335]

### 3.4.5 VIOLATING THE PRESCRIBED TIMELINES AND THE PRINCIPLE OF PROMPT SETTLEMENT OF DISPUTES

Prompt settlement of disputes is a significant feature of the WTO DSM.[336] Article 3 of the DSU clearly enunciates this essential function of the WTO DSS. Further, it also states the importance of prompt settlement in maintaining the balance between the rights and obligations of the Members.[337] The charge against the AB is that, despite the clear rules under DSU, the AB process usually exceeds the 90-day timeline.[338] As per the US Trade Representative the AB has never actually explained the legal footing that permits the extension of timelines set by the WTO member states.[339]

### 3.4.6 ALLEGEDLY ILLEGAL TERM EXTENSIONS

[331] *Id*
[332] Supra Note 298
[333] *Id*
[334] Supra Note 84 - United States' Statements at the Meeting of the WTO Dispute Settlement Body, Geneva
[335] *Id*
[336] Supra Note 294
[337] *Id*
[338] Supra Note 306
[339] *Id*

The AB's working procedures are drawn up by the AB in consultation with the Chairman of DSB and the Director General of WTO.[340] Rule 15 of the AB's working procedure confers the power to the AB to authorise an AB member to continue working on their allocated case even if their tenure has expired. This rule is laid out to ensure there is no delay due to new appointments on the ongoing proceedings.[341] However, the USA has accused the AB of increasing its own term by itself without the consent of DSB.[342] As per US, this is a clear case of judicial law-making and/or judicial overreach that usually leads to delay in rendering reports.[343]

### 3.5 IMPACT OF CRISIS

The Appellate Body crisis would have far reaching consequences on International Trade and traders. The Panel reports attain finality only when it is adopted as ruling by the DSB. It is not enforceable if one of the parties has requested for an appeal.[344] The only requirement to render the panel report unenforceable is that the Party notifies the decision to appeal to the DSB.[345]

The Dispute Settlement Understanding does not provide any solution to a situation arising due to lack of quorum or non-appointment of members.[346] There are no resolutions or amendments to the effect that the Panel reports will become binding as there is no appellate body to review the panel report.[347] The impact of such a situation is that even if there are inconsistencies in the measures taken by member-states, there is no finality to the decisions.[348]

This may lead to the measures being in force for longer periods of time. The indefinite delay in appointment, thus, translates as indefinite delay in adoption of panel reports as ruling by the

[340] Chapter 3.1 - Appellate Review, Dispute Settlement, WTO, United Nations Conference on Trade and Development (UNCTAD), United Nations – Available at: (https://unctad.org/system/files/official-document/edmmisc232add17_en.pdf)
[341] *Id*
[342] Supra Note 305
[343] Article 17.5 of the Dispute Settlement Understanding, Annex 2, WTO Agreement.
[344] Article 16.4 of the DSU
[345] Donaldson, V. and A. Yanovich (2006), "The Appellate Body's working procedures for appellate review", in The WTO at Ten: The Contribution of the Dispute Settlement System, WTO, Geneva, available at (https://doi.org/10.30875/3835898a-en.)
[346] *Id*
[347] Supra Note 298
[348] *Id*

Dispute Resolution Body.[349] Panel reports can neither impose an obligation to implement the panel report nor permit retaliation in case of non-compliance.[350] The Parties are also not bound by any time limit for compliance. If the Appellate Body crisis is unresolved, the Panel reports can be easily rendered unenforceable by requesting for appeal.[351] This will lead to pendency of cases and longer resolving time even when the Panel is constituted.[352]

When GATT was in force, there were unadopted panel reports.[353] Such reports created political effect.[354] However, the Panel reports during the WTO era are of no consequence without finality.[355] It will be considered as pending for an indefinite period without producing any effect. The Appellate Body will hear them if it is reconstituted later.[356]

### 3.6 IMPACT OF CRISIS ON TRIPS AGREEMENT

In the context of Appellate Body reports dealing with TRIPS issues, the United States has not addressed any of its concerns about the AB, whether it be judicial overreach or a disrespect for procedural and institutional rules.[357] The United States was the complainant in two disputes, which are India - Patents (1998) and Canada - Patent Terms (2000) during early years.

In both the above-mentioned cases, the AB found in favour of US and, therefore, the latter obviously did consider the body to be responsible for any form of judicial overreach. The Appellate Body was also, within the mandatory ninety-day timeframe, able to complete the appellate review proceedings for these relatively small appeals. A third case, in which the United States was the respondent - US- Section 211 Appropriation Act ('Havana Club') (2002), the Appellate Body decided on several claims against the US, however, the latter has not included these verdicts in its

[349] Supra Note 270
[350] *Id*
[351] Supra Note 291
[352] *Id*
[353] Supra Note 16, p. 12
[354] *Id*
[355] Supra Note 296
[356] *Id.*
[357] Supra Note 272

examples of instances of judicial overreach by the AB. The report from this dispute was circulated on the ninetieth day, at the end of the review proceedings period. In June 2020, the Appellate Body disseminated the fourth report related to TRIPS issues (Australia - Tobacco Plain Packaging), in which the United States was not directly a party, however, as expected, it was an active third party in the case. In this case, neither parties involved in the case were asked for their agreement to exceed the mandatory ninety-day timeframe.[358]

What is of little relevance to TRIPS dispute resolution, however, is the fact that the United States has, to date, not categorically raised any specific concerns related to the AB's reports which address TRIPS issues.[359] Without a fully working WTO dispute settlement system, TRIPS issues may stay unresolved, fester, and generate unilateral retaliation by WTO Members adversely affected by alleged TRIPS-inconsistent policies.[360]

Additionally, specifically due to the absence of an active Appellate Body, there may be no further clarification of TRIPS provisions through adjudication and as a result, no further evolution of WTO IP law may take place.[361] In the long term, the impact of WTO's settlement system crisis will be felt more acutely by the WTO Intellectual Property law, compared with the other branches of laws under WTO.[362]

### 3.7 THE WAY FORWARD

On 30th November 2020, the term of the last sitting AB member expired.[363] The AB is currently member-less. This has raised multiple problems in the WTO dispute settlement system. Firstly, the issue of automaticity of panel rulings has emerged since there is no system to appeal the panel

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[358] *Id.*

[359] Rochelle C Dreyfuss, *Intellectual Property Law and the World Trading System*, Andreas F. Lowenfeld, International Economic Law, Second Edition, International Economic Law Series, General Editor: John H. Jackson, Oxford University Press, p. 338 - 368

[360] *Id*

[361] Supra Note 296

[362] *Id*

[363] Dispute Settlement: Members, *Appellate Body Members*- available at –(https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm)– (Last Accessed on 07.08.2021)

reports.[364] Secondly, the cases are stalled where parties have restored to AB.[365] Thirdly, there is an increasing rise in non-compliance of panel reports, by stalling the proceedings via opting for appeal under AB, as a strategic move.[366] In light of these issues following alternatives or solutions are underway.

### 3.7.1 MULTI-PARTY INTERIM APPEAL ARBITRATION ARRANGEMENT (MPIA)

The EU along with 15 other WTO Members have developed an interim solution, MPIA, to navigate through the AB impasse.[367] The MPIA is based on the bedrock of the EU's draft text circulated in May 2019.[368] The MPIA finds its legal viability within the WTO framework from Article 25 of the DSU. Article 25 enables the members to use arbitration for settling disputes.[369] The provision further makes the decision binding on the disputing parties. Interestingly, the MPIA is largely similar in functioning to the AB process. The MPIA is a temporary arrangement intended to subsist so long as the AB is in paralysis. According to the proposal, once the AB revives, the MPIA shall turn infructuous.[370]

The MPIA will contain a standing pool of 10 individuals. Each participant of the MPIA can nominate one individual to the pool. These nominations shall be screened by WTO secretariat to ensure fulfilment of minimum selection criteria.[371] Finally, ten individuals will be chosen by consensus out of the qualified nominees. A panel of three shall be formed for adjudication of a

[364] Supra Note 294
[365] Supra Note 258
[366] *Id*
[367] European Commission, News Archive, EU and 15 World Trade Organization members establish contingency appeal arrangement for trade disputes, Brussels, 27 March 2020 - available at- (https://trade.ec.europa.eu/doclib/press/index.cfm?id=2127) – (Last Accessed on 07.08.2021)
[368] *Id*
[369] Article 25, Dispute Settlement Understanding
[370] Lenzu, M. (2021) *Council approves a multi-party interim appeal arbitration arrangement to solve trade disputes*, *Consilium.europa.eu*. Available at: https://www.consilium.europa.eu/en/press/press-releases/2020/04/15/council-approves-a-multi-party-interim-appeal-arbitration-arrangement-to-solve-trade-disputes/ (Last Accessed on 03/09/2021).
[371] *Id*

dispute, on rotation basis. Periodical assessment of membership will also take place post two years of the composition of the pool.[372]

Some of the key features of MPIA are that, post the issuance of a report by a panel, either of the disputing parties can opt to appeal under the MPIA. The MPIA can also prescribe page limits on the submissions in order to facilitate timely resolution of disputes. Further, third parties shall also have the opportunity to be heard before the arbitrators under the MPIA. Additionally, MPIA is designed to allow other member nations to join the arrangement as per their convenience.[373] However, joining the arrangement, post the closing of the window to nominate arbitrators, would make them lose the opportunity to have a say in the pool of arbitrators selected at least for the next two years.[374]

### 3.7.2 WAIVING THE RIGHT TO APPEAL

An alternative to the AB's crisis, adopted by a few member countries, is the alternative to waive off the right to appeal on a bilateral basis between the disputing parties.[375] In March 2019, in the dispute DS496, Vietnam and Indonesia agreed to an understanding that the panel report would be considered as binding between the parties in the absence of the functioning of the AB. [376]

### 3.7.3 REFORMING THE APPELLATE BODY

While few members have opted for the MPIA, others are working towards reforming the AB in furtherance to the objections raised by US. The WTO General Council has employed David Walker to supervise the AB reform process.[377] These reforms are underway, however, limiting the

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[372] WTO, JOB/DSB/1/Add.12, Statement On A Mechanism For Developing, Documenting And Sharing Practices And Procedures In The Conduct Of WTO Disputes – available at – (https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf) – (Last Accessed on 07.08.2021)

[373] *Id*

[374] Supra Note 258

[375] Aarshi Tirkey and Shiny Pradeep, "The WTO Crisis: Exploring Interim Solutions for India's Trade Disputes," *ORF Occasional Paper No. 274*, September 2020, Observer Research Foundation

[376] *Indonesia – Safeguard On Certain Iron Or Steel Products*, Understanding Between Indonesia And Vietnam Regarding Procedures Under Articles 21 And 22 Of The DSU, available at – (https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-)

[377] WTO | 2019 News items - General Council Chair appoints facilitator to address disagreement on Appellate Body. Available at: (https://www.wto.org/english/news_e/news19_e/gc_18jan19_e.htm)

scope of AB reports to only the legal issues raised before it seems to be of key demand. Another issue pertaining to the AB members ruling over their own tenure is likely to be dealt by a proposal that is underway, which expressly limits the taking up of new cases to 60 days prior to the ending of their tenure. Further, China, EU and other states have proposed annual meetings between AB and WTO members to counter the precedent principle.[378]

Although these reforms are ongoing, it remains to be seen in due time whether they would be compelling enough to convince 164 member states to give their consent.[379] On the other hand, alternative temporary mechanism of MPIA, though appears to be appealing as a short-term measure, only time shall unfold the effectiveness envisaged under it.[380] Additionally, since MPIA is a temporary measure, in the event of the AB's revival, how shall the arbitral decisions be brought in conformity with the AB regime is a question still in uncharted waters.[381]

### 3.8 CONCLUSION

This study looked at and discussed bilateral and 'plurilateral' agreements that willing Members could sign to re-establish compulsory dispute resolution, arguing that an ex ante agreement to establish a 'appeal Arbitrator' in the event of a non-operational Appellate Body best fits the letter and spirit of the Dispute Settlement Understanding. Such an agreement, if properly constructed, not only allows interested Members to re-establish a high level of security and predictability in their mutual economic ties, but it also strengthens the incentives for multilateral discussions leading to a lasting resolution of the crisis.

A prolonged period of non-operational Appellate Body would lead to a situation without binding and compulsory dispute settlement mechanism under WTO. The alternative arrangement considered as alternative arrangement may last longer and may replace the Appellate Body till there is a consensus.

The other member states who have not yet entered into an agreement, also may consider arrangements which are either bilateral or multilateral in nature to establish a dispute settlement

[378] Supra Note 306
[379] *Id*
[380] Supra Note 258
[381] *Id*

mechanism. The saving grace for the WTO is Article 25 of the Dispute Settlement Understanding which provides the member states an opportunity to resolve the disputes through Arbitration. The Parties may use the Arbitration as an Appellate Authority to Panel reports or may choose it as sole mechanism for dispute resolution. Another possibility is that the Parties may waive the right to appeal.

The challenge before the Member states is that the multilateral/bilateral arrangement would mean several rounds of negotiations with each other within the context of changed circumstances for the enforceability of WTO obligations. Another development to be anticipated is a discussion among the member states, a consensus is necessary for the appointment or it could be resolved through voting. Various legal interpretations have ensued already proposing that the appointment can be made through voting and without the support of the USA. This crisis will lead to development of Jurisprudence in International Trade Law.

# CHAPTER IV - EXAMINING WTO TRIPS DISPUTES

## 4.1 INTRODUCTION

During the Uruguay rounds, the United States and other first world countries advocated for incorporation of TRIPS into the WTO Agreements as they were concerned about exploitation of their intellectual property by the developing countries.[382] Naturally, the developing countries opposed such incorporation as most of them did not have an intellectual property regime strong enough to withstand the challenge from the richer countries citing lack of protection.[383] As a result of these negotiations, TRIPS was incorporated and Article 64 laid down that a party could invoke WTO's dispute settlement for violation or inconsistencies in measures with reference to TRIPS provisions.[384]

Article 64 of the TRIPS Agreement states:[385]

"*Article 64 - Dispute Settlement*

1. *The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.*

2. *Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.*

3. *During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b)*

[382] Frederick M.Abbot, "Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral framework', and J.H.Reichman, 'Intellectual Property in International Trade: Opportunities and risks of a GATT connection, *Vanderbilt Journal of Transnational Law,* Vol. 22, 1989, pp. 689- 745

[383] Jayashree Watal and Antony Taubman, *The Making Of The Trips Agreement: Personal Insights From The Uruguay Round Negotiations,* (2015), World Trade Organization.

[384] Kumar, R Girish, WTO's Dispute settlement mechanism: adjudication of disputes in TRIPS (1995-99), available at < http://hdl.handle.net/10603/6456>

[385] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C, Marrakesh Agreement Establishing the World Trade Organization

*and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process*."

In addition to Article 64, it was also laid down in Article 63 that all the Member Nations are under obligation to publish and notify all measures to the TRIPS Counsel, thus enabling the Council to examine the implementation of the TRIP agreement.[386] From 1995 to 2021, a total of 42 disputes have arisen from the TRIPS Agreement.[387] A summary of all cases is presented in the following table:

### 4.2 TRIPS DISPUTES ASSESSMENT TABLE[388]

| DS No. | Complainant | Respondent | Subject Matter | WTO Panel Decision | AB decision | Compliance Status |
|---|---|---|---|---|---|---|
| DS-28, 42 | US | Japan | Japan - Measures Concerning Sound Recordings<br><br>Art. 3, 4, 14, 61, 65, 70 Intellectual Property (TRIPS) | NA | NA | Settled Or Terminated (Withdrawn, Mutually Agreed Solution) |
| DS36 | US | Pakistan | Pakistan - Patent Protection for Pharmaceutical and Agricultural Chemical Products<br><br>Art. 27, 65, 70 Intellectual Property (TRIPS) | NA | NA | Settled Or Terminated (Withdrawn, Mutually Agreed Solution) |

[386] Article 63, TRIPS

[387] WTO | Dispute settlement - Index of disputes by agreement cited – available at: (https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26) (Last Accessed: 7th October 2021)

[388] WTO | dispute settlement - chronological list of disputes cases – available at: (https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (Last Accessed: 7th October 2021)

| | | | | | | |
|---|---|---|---|---|---|---|
| DS37 | US | Portugal | Portugal- Patent Protection under the Industrial Property Act<br><br>Art. 33, 65, 70 Intellectual Property (TRIPS) | NA | NA | Settled Or Terminated (Withdrawn, Mutually Agreed Solution) |
| DS50 | US<br><br>Third Party - EU | India | India- Patent Protection for Pharmaceutical and Agricultural Chemical Products<br><br>Art. 27, 65, 70 Intellectual Property (TRIPS) | Panel report found in favour of complainant and against respondent | Panel report Modified | Implementation notified by respondent<br><br>Respondent complied |
| DS79 | EU<br><br>Third Party - US | India | India- Patent Protection for Pharmaceutical and Agricultural Chemical Products<br><br>Art. 27, 65, 70 Intellectual Property (TRIPS) | Panel report found in favour of complainant and against respondent | NA | Implementation notified by respondent<br><br>Respondent complied similar to DS50 |
| DS59 | US<br><br>Third Party - India, Korea | Indonesia | Indonesia - Certain Measures Affecting the Automobile Industry<br><br>Art. 3, 20, 65 Intellectual Property (TRIPS) - among other agreements | The Panel however, found that the complainants had not demonstrated that Indonesia was in violation of Articles 3 and 65.5 of the TRIPS Agreement. | NA | Implementation notified by respondent<br><br>Respondent complied by introducing new policy |
| DS82 & 115 | US | Ireland<br><br>EU | Ireland- Measures Affecting the Grant of Copyright and Neighbouring Rights<br><br>Art. 46, 47, 48, 61, 63, 65, 70, 41, 42, 43, 44, 45, 9, 13, 14 Intellectual Property (TRIPS) | NA | NA | Settled Or Terminated (Withdrawn, Mutually Agreed Solution) |
| DS83 | US | Denmark | Denmark - Measures Affecting the Enforcement | NA | NA | Settled Or Terminated |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | | of Intellectual Property Rights<br><br>Art. 50, 63, 65 Intellectual Property (TRIPS) | | | (Withdrawn, Mutually Agreed Solution) |
| DS86 | US | Sweeden | Art. 50, 63, 65 Intellectual Property (TRIPS) | NA | NA | Settled Or Terminated (Withdrawn, Mutually Agreed Solution) |
| DS114 | EU | Canada | Canada - Patent Protection of Pharmaceutical Products<br><br>Art. 27, 28, 33 Intellectual Property (TRIPS) | Panel report found in favour of complainant and against respondent | NA | Implementation notified by respondent<br><br>Respondent complied |
| DS124 & 125 | US | Greece<br><br>EU | Greece - Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs<br><br>Art. 41, 61 Intellectual Property (TRIPS) | NA | NA | Settled Or Terminated (Withdrawn, Mutually Agreed Solution) |
| DS153 | Canada | EU | European Communities - Patent Protection for Pharmaceutical and Agricultural Chemical Products<br><br>Art. 27.1 Intellectual Property (TRIPS) | NA | NA | In consultations on 2 December 1998 |
| DS160 | EU | US | US — Section 110(5) Copyright Act<br><br>Art. 9.1 Intellectual Property (TRIPS) | Panel report found in favour of complainant and against respondent | NA | Authorization to retaliate requested (including 22.6 arbitration) on 7 January 2002<br><br>Later on, mutually satisfactory temporary arrangement |

| | | | | | | |
|---|---|---|---|---|---|---|
| DS170 | US | Canada | Canada - Term of Patent Protection<br><br>Art. 33, 70 Intellectual Property (TRIPS) | Panel report found in favour of complainant and against respondent | AB upheld Panel report | Implementation notified by respondent<br><br>Respondent complied |
| DS171 & 196 | US | Argentina | Argentina - Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals<br><br>Art. 27, 39.2, 65, 70 Intellectual Property (TRIPS)<br><br>Argentina - Certain Measures on the Protection of Patents and Test Data<br><br>Art. 27, 28, 31, 34, 39, 50, 62, 65, 70 Intellectual Property (TRIPS) | NA | NA | Settled Or Terminated (Withdrawn, Mutually Agreed Solution) |
| DS174 & 290 | US<br><br>Australia | EU | European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs<br><br>Art. 1.1, 2.1, 3.1, 4, 16.1, 20, 22.1, 22.2, 24.5, 41.1, 41.2, 41.4, 42, 44.1, 63.1, 63.3, 65.1 Intellectual Property (TRIPS) | Panel report found in favour of complainant and against respondent | NA | Implementation notified by respondent<br><br>Respondent complied |
| DS176 | EU | US | United States - Section 211 Omnibus Appropriations Act of 1998<br><br>Art. 2.1, 3.1, 4, 16.1, 42 Intellectual Property (TRIPS) | Panel report found in favour of complainant and against respondent | AB further reversed various points and further found the report in favour of complainant and against | Report(s) adopted, with recommendation to bring measure(s) into conformity on 1 February 2002<br><br>US keeps providing status update on compliance |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | | | | respondent | |
| DS186 | EU | US | United States - Section 337 of the Tariff Act of 1930 and Amendments Thereto<br><br>Art. 2, 3, 9, 27, 41, 42, 49, 50, 51 Intellectual Property (TRIPS) | NA | NA | In Consultation |
| DS199 | US<br><br>Third Party - Dominican Republic; Honduras; India; Japan | Brazil | Brazil - Measures Affecting Patent Protection<br><br>Art. 27.1, 28.1 Intellectual Property (TRIPS) | NA | NA | Settled Or Terminated (Withdrawn, Mutually Agreed Solution) |
| DS224 | Brazil | US | United States - US Patents Code<br><br>Art. 27, 28 Intellectual Property (TRIPS) | NA | NA | In Consultation |
| DS362 | US | China | China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights<br><br>Art. 3.1, 9.1, 14, 41.1, 46, 59, 61 Intellectual Property (TRIPS) | Panel report found in favour of complainant and against respondent | NA | Implementation notified by respondent |
| DS372 | EU | China | China - Measures Affecting Financial Information Services and Foreign Financial Information Suppliers<br><br>Art. 39.2 Intellectual Property (TRIPS) | NA | NA | Settled Or Terminated (Withdrawn, Mutually Agreed Solution) |

| | | | | | | |
|---|---|---|---|---|---|---|
| DS408 & 409 | India<br><br>Brazil (409) | EU, Netherlands | European Union and a Member State - Seizure of Generic Drugs in Transit<br><br>Art. 2, 7, 8, 28, 31, 41, 42 Intellectual Property (TRIPS) | NA | NA | In consultation |
| DS434 | Ukraine | Australia | Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging<br><br>Art. 3.1 Intellectual Property (TRIPS) | NA | NA | Authority for panel lapsed on 30 May 2016 |
| DS435, 441, 458 & 467 | Honduras<br>Dominican Republic<br><br>Cuba<br><br>Indonesia | Australia | Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging<br><br>Art. 2.1, 3.1, 15.4, 16.1, 20, 22.2(b), 24.3 Intellectual Property (TRIPS) | Panel report found in favour of respondent | AB upheld Panel report | Report(S) Adopted, No Further Action Required |
| DS526 | Qatar | UAE | United Arab Emirates - Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights<br><br>Art. 3, 4 Intellectual Property (TRIPS) | NA | NA | Panel report pending |
| DS527 & 528 | Qatar | Bahrain<br>Saudi Arabia, Kingdom of | Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights<br><br>Art. 3, 4 Intellectual Property (TRIPS) | NA | NA | In consultations |
| DS542 | US | China | China - Certain Measures Concerning the Protection | NA | NA | Panel Composed |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | | of Intellectual Property Rights<br><br>Art. 3, 28.1(a), 28.1(b), 28.2 Intellectual Property (TRIPS) | | | |
| DS549 | EU | China | China - Certain Measures on the Transfer of Technology<br><br>Art. 3, 28.1(a), 28.1(b), 28.2, 33, 39.1, 39.2 Intellectual Property (TRIPS) | NA | NA | In consultations |
| DS567 | Qatar | Saudi Arabia | Saudi Arabia - Measures concerning the Protection of Intellectual Property Rights<br><br>Art. 3.1, 4, 9, 14.3, 16.1, 41.1, 42, 61 Intellectual Property (TRIPS) | Panel report found in favour of complainant | Panel report under Appeal | Panel report under Appeal |
| DS583 | EU | Turkey | Turkey - Certain Measures concerning the Production, Importation and Marketing of Pharmaceutical Products<br><br>Art. 3.1, 27.1, 28.2, 39.1, 39.2 Intellectual Property (TRIPS) | NA | NA | Panel Composed |
| DS590 | Korea, Republic of | Japan | Japan - Measures related to the Exportation of Products and Technology to Korea<br><br>Art. 3.1, 4, 28.2 Intellectual Property (TRIPS) | NA | NA | Panel established but not yet composed |

### 4.3 FINDINGS FROM THE WTO TRIPS DISPUTES

The WTO dispute settlement mechanism was described as 'Jewel in the Crown' In 1996 by Director-General Renato Ruggiero.[389] The description proved true as years passed. In past 25 years, more than 600 disputes were brought to the Body for resolution.[390] The United States and the European Union were the complainants as well as respondents in more cases than others. The developing-countries have also made use of the WTO dispute settlement system. Some years developing-country Members referred to more disputes than developed-country Members.[391]

IP disputes are of seven categories; copyright and related rights, trademarks, patents, geographical indications, industrial designs, trade secrets and layout designs of integrated circuits. The WTO dispute settlement mechanism along with the TRIPS committee has been successful in institutionalizing and harmonizing a wide array of substantive and procedural IP disciplines at multilateral level.[392]

Through WTO's dispute settlement mechanism, TRIPS imposes enforceable obligations on Member nations to ensure minimum and mandatory IP protection in their territories.[393] It stipulates national treatment and most favored nation treatment regarding acquisition, maintenance and enforcement of all IPRs, inheriting minimal exceptions from certain WIPO conventions.[394] Since, only the WTO member nations can initiate a dispute and the IP holders cannot, the IP holders' resort to lobbying a WTO member country. However, the efforts of these IP holders are likely to result into nothing, as only measures of a WTO member can be challenged in WTO dispute settlement. Infringements caused by private IP operators cannot be challenged, whereas these infringements are usually the main concern of aggrieved private IP holders.[395]

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[389] Supra Note 12, p. 209.
[390] Database - WorldTradeLaw.Net, available at: (http://worldtradelaw.net/databases/searchcomplaints.php)
[391] *Id*
[392] He, J. (2011) "Developing Countries' Pursuit of an Intellectual Property Law Balance under the WTO TRIPS Agreement", *Chinese Journal of International Law*, 10(4), pp. 827-863.
[393] *WTO | intellectual property - overview of TRIPS Agreement* (2021). Available at: https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (Accessed: 4 September 2021).
[394] Ranjan Prabhash, "*The Case for Waiving Intellectual Property Protection for Covid-19 Vaccines*," ORF Issue Brief No. 456, Observer Research Foundation, April 2021.
[395] Supra Note 272

### 4.3.1 STATISTICAL LAYOUT OF TRIPS DISPUTES

From 1995 to 2021, 42 TRIPS related disputes[396] have been initiated by WTO member countries out of total 606 WTO disputes.[397] TRIPS disputes amount to less than 7% of total WTO disputes. It is evident from the table that most of the disputes are filed by developed nations and that the United States and EU are complainants in 18 cases and 8 cases respectively.[398] The US is responsible for close to 50% of the TRIPS related complaints pursued via WTO DSM. They are third parties in one case each. Other than US and EU, WTO members have been complainants only one or two times. Only 7 cases are filed by developing nations as complainants. EU has topped the charts with respect to being the respondent highest number of times in a TRIPS related dispute. Followed by Australia (five) and United States (four).[399]

Contrary to developing member nations' inhibitions, no hurricane of disputes pertaining to TRIPS were launched in the WTO. Rather only in 13 of the 41 TRIPS disputes, has there been a developing country as respondent.[400] Most TRIPS disputes were filed between 1996 to 2000[401] and in the years 2017-2019[402]. The TRIPS disputes in which consultations were initiated pertained to the domestic enforcement of IPRs, copyright, trademarks, patents and the national treatment obligation. One of the reasons for low numbers of cases may be that the remedies available under the DSU are only prospective in nature. It does not remedy damage in the past. In only one TRIPS dispute, the United States paid the European Union, the complainant, € 1.2 million each year for three years as compensation for its continued non-compliance[403] with the ruling in this case.[404]

[396] Supra Note 387
[397] Supra Note 388
[398] Supra Note 272
[399] *Id*.
[400] Argentina (2), Brazil (1), China (3), Cuba (1), India (2), Indonesia (2), Pakistan (1), and Turkey (1).
[401] 23 TRIPS disputes filed
[402] 8 TRIPS disputes filed
[403] (US – Section 110(5) Copyright Act)
[404] WTO | dispute settlement - the disputes - DS160, *WTO | dispute settlement - the disputes - DS160* (2021). Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm (Accessed: 3 September 2021).

### 4.3.2 TRIPS PANEL AND THE APPELLATE BODY REPORTS

From 1995 to 2019, 258 WTO disputes that resulted in panel reports.[405] Only 5% of these (13 panel reports) are regarding TRIPS disputes.[406] Again, the United States[407] and the EU[408] were the complainants in most disputes that resulted in panel reports. Australia & the United States (each 4) and India, the European Union & China (each 2) were respondents in more cases than others.[409]

It must also be noted that it is not usual for TRIPS cases to be appealed. For example, till 2019 only four TRIPS related disputes were referred to the Appellate Body.[410] Only 2% of the 145 Appellate Body reports circulated to date concerned TRIPS disputes.[411] The appeal rate (41%) TRIPS disputes is significantly lower, compared to the normal appeal rate (68%) of the disputes.[412] This may be due to the fact that the Panel reports balanced interests of both sides and neither parties were willing to risk their interest in appeal.[413] As the rulings of AB can lead to formation of principles enforceable by weight of precedent and create hurdles for future.[414]

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[405] Supra Note 387

[406] In chronological order: India – Patents (DS50) (complaint by the United States), Indonesia – Autos (DS54, DS55, DS59, DS64) (complaints by European Communities, Japan and the United States); India – Patents (DS79) (complaints by the European Communities); Canada – Pharmaceuticals Patents (DS114) (complaint by the European Communities); US – Section 110(5) Copyright Act (DS160) (complaint by the European Communities); Canada – Patent Term (DS170) (complaint by the United States); EC – Trademarks and Geographical Indications (DS174) (complaints by the United States); US – Section 211 Appropriations Act ('Havana Club') (DS176) (complaint by the European Communities); EC – Trademarks and Geographical Indications (DS290) (complaint by Australia); China – IP Rights (DS362) (complaint by the United States); Australia – Tobacco Plain Packaging (DS458, DS467) (complaints by Cuba and Indonesia); Australia – Tobacco Plain Packaging (DS435, DS441) (complaints by Honduras and Dominican Republic); and Saudi Arabia – IPR (DS567)(complaint by Qatar);

[407] In 6 Panel disputes

[408] In 4 Panel disputes

[409] WorldTradeLaw.Net Database, available at: (http://worldtradelaw.net/databases/searchcomplaints.php)

[410] In chronological order: India – Patents (DS79) (complaints by the European Communities); Canada – Pharmaceuticals Patents (DS114) Canada – Patent Term (DS170) (complaint by the United States) (complaint by the European Communities); US – Section 211 Appropriations Act ('Havana Club') (DS176) (complaint by the European Communities); Australia – Tobacco Plain Packaging (DS435, DS441) (complaints by Honduras and Dominican Republic). It is at present unclear whether the panel report in Saudi Arabia – IPR (DS567) (complaint by Qatar), which was circulated on 16 June 2020, will be appealed.

[411] WorldTradeLaw.Net Database, available at: (http://worldtradelaw.net/databases/searchcomplaints.php)

[412] Supra Note 272

[413] J. Pauwelyn, 'The Dog that Barked But Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO' (2010), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708026>

[414] *Id*

### 4.3.3 COMPLIANCE RATE IN TRIPS DISPUTES

The compliance rate with rulings of WTO dispute settlement panels and the AB has been consistently high.[415] Nonetheless, it is pertinent to note that the US has consistently failed to comply with a number of rulings which required it to withdraw or amend WTO-inconsistent measures.[416] Out of the total cases referred to WTO only 7% pertain to TRIPS Agreement, of these, the US had initiated majority (almost 50%) of the TRIPS disputes followed by the EU.[417]

It is interesting to note that the overall success rate of consultations in WTO DSM is about 20%. However, 45% consultations pertaining to TRIPS Agreement were settled without referring it to the Panel.[418] This was either due to mutual agreement between parties or due to withdrawal of complaints.[419] The high rate of settlement may be explained by the fact that in a number of TRIPS disputes the TRIPS obligations were unambiguous and with clear TRIPS-inconsistency.[420] The launching of formal consultations by the complainant motivated the respondent to either withdraw or modify the TRIPS-consistent measure.[421]

Time period of compliance is another issue in TRIPS related disputes. In three disputes, the Arbitrator had set the time period for implementation.[422] Further, in one and the only use of Article 25 of DSU till date, determination of compensation for a TRIPS-inconsistent measure was done by Arbitration.[423] Although the DSB authorized the retaliation because the respondent failed to comply, however, the request wasn't subsequently pursued despite the continued non-compliance. In this and another TRIPS dispute, there has been continued failure to comply with the rulings of

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[415] Supra Note 139

[416] Supra Note 272. See Also, WorldTradeLaw.Net Database, available at: (http://worldtradelaw.net/databases/searchcomplaints.php)

[417] *Id*

[418] WorldTradeLaw.Net Database, available at: (http://worldtradelaw.net/databases/searchcomplaints.php)

[419] *Id*

[420] Supra Note 272

[421] *Id*

[422] Canada – Patent Term (DS170) (complaint by the US) (reasonable period of time for implementation: 10 months); [US – Section 110(5) Copyright Act] – (DS160) (complaint by the European Communities) (reasonable period of time for implementation: 12 months); Canada – Pharmaceuticals Patents (DS114) (complaint by the European Communities) (reasonable period of time for implementation: 6 months).

[423] In a complaint by the European Communities, In US – Section 110(5) Copyright Act (DS160)

the panel and the AB.[424] It is pertinent to note that in both the aforesaid disputes it was the US that failed to comply as respondent.

### 4.4 COVID-19 PANDEMIC AND THE AB CRISIS' IMPACT ON TRIPS DISPUTES

It is interesting to note that United States hasn't raised any concern pertaining to Appellate Body reports relating to TRIPS disputes. As aforementioned the AB has ruled on only four disputes since 1995. In two of these disputes, the US was the complainant.[425] Additionally, the AB reports in these cases were found in favour of the US, for obvious reasons the US did not consider the AB guilty of any judicial overreach. Further, the AB was able to meet the 90-day timeline to complete the appellate proceedings.[426]

In the third dispute[427] the US was the respondent, while the AB ruled against the US on a number of claims, it did not include this decision in the list of examples of judicial overreach.[428] Report in this case was circulated on the 90$^{th}$ day. In the fourth TRIPS dispute[429] US was not a disputant party but an active third party. This report is yet to be discussed in the DSB, so only time will tell how the US will respond to this report. The report circulation in this case took 691 days and the mutual consent of parties wasn't procured to exceed the 90-day timeframe. It would be interesting to see whether the US raises any concerns on the functioning of the AB on account of this case. Therefore, in light of the aforementioned points, it may be estimated that the impact of the Appellate Body crisis is not likely to be severe on member countries with respect to TRIPS related disputes.[430]

[424] US – Section 110(5) Copyright Act (DS160) (complaint by the European Communities) and US – Section 211 Appropriations Act ('Havana Club') (DS176) (complaint by the European Communities)
[425] India – Patents (1998) and Canada – Patent Terms (2000).
[426] Note the AB report in India – Patents (1998) was circulated in 65 days post the notice of appeal.
[427] US – Section 211 Appropriation Act ('Havana Club') (2002)
[428] Supra Note 306
[429] Australia – Tobacco Plain Packaging, circulated on 9 June 2020
[430] Supra Note 272

In the wake of the COVID19 pandemic, the long ongoing conundrum of individual rights and public rights, has re-emerged. South Africa[431] and India[432] have presented their statements in favour of IP waiver at the TRIPS Council of WTO.[433] The main contention is the lack of access to medicines, masks, ventilators and other essential equipment faced by the third world countries due to IP protection. This contention is supported by the fact that developing countries have suffered in access, compared to developed nations, even in case of earlier health emergencies such as HIV and H1N1 flu etc. However, developed countries have shown reluctance on the acceptance of this proposal.[434] Therefore, in light of these evidences the question of equal and adequate access to vaccination (for COVID19) across the world becomes increasingly vital.

## 4.5 CONCLUSION

In summary, while certain WTO Members have frequently alleged that other WTO Members routinely violate their responsibilities under the TRIPS Agreement, few TRIPS disputes have been taken to the WTO.[435] Even under those circumstances, they were often settled or withdrawn. Greater use of the WTO dispute settlement system will allow rule-based settlement of TRIPS-specific disputes between WTO members, rather than these disputes deteriorating, politicizing and negatively impacting relations between the WTO members.[436]

More WTO dispute settlement systems will also allow for clarification of existing TRIPS clauses, which will further the development of WTO intellectual property law.[437] Although the WTO dispute settlement mechanism has undoubtedly made a major contribution to the development of

[431] WTO TRIPS Council (October 2020): South Africa issues clarion call urging support for TRIPS waiver proposal | Knowledge Ecology International (keionline.org) - https://www.keionline.org/34235

[432] India's statement regarding TRIPS waiver proposal, available at: (https://pmindiaun.gov.in/statements/MjM2Mg)

[433] IP/C/W/669, Waiver from Certain Provisions of The Trips Agreement for The Prevention, Containment and Treatment of Covid-19, Communication from India and South Africa, Council for Trade-Related Aspects of Intellectual Property Rights, available at: (https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True)

[434] EU Statements at the WTO General Council, on 18 December 2020 - European External Action Service, available at: (https://eeas.europa.eu/delegations/world-trade-organization-wto/90872/eu-statements-wto-general-council-18-december-2020_en)

[435] Supra Note 12

[436] *Id*

[437] Supra Note 272

the law of the WTO agreements outside of the TRIPS agreement, this does not mean that the WTO dispute settlement mechanism has no influence on the development of WTO intellectual property law in the last 25 years.[438]

[438] *Id*

# CHAPTER V – CONCLUSION AND SUGGESTIONS

## 5.1 CONCLUSIONS

By ensuring that there is a stable dispute settlement mechanism in order to challenge any measures which are inconsistent with the provisions of the agreement before the WTO's Panel/Appellate Body, the Dispute Settlement Understanding has been successful in ensuring effectiveness of international agreements. Due to the binding nature of the DSB rules, the members in violation will have to change its domestic law to comply with the Dispute Settlement Body's ruling. It is pertinent to note that the Members adopted the WTO Agreement as a single undertaking or an umbrella agreement, meaning thereby, that all the agreements contained within the WTO Agreement were accepted together and not selectively picked[439]. The final WTO Agreement[440] is also a result of such negotiations. Therefore, a robust dispute settlement mechanism is essential for effective resolution and enforcement of multilateral trade regulations under the WTO umbrella agreement.

The focus of this study has been to analyze the nature of the WTO dispute settlement mechanism with special consideration to dispute rulings related to the TRIPS Agreement which is the multilateral intellectual property agreement which protects Intellectual Property Rights and its enforcement across the globe. An effective mechanism for the enforcement of IPR is essential to promote trade and commerce in a globalized world. This is ensured through Article 64 of the TRIPS agreement, which states that the Disputes shall be governed by Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding, and shall apply to consultations and the settlement of disputes under TRIPS. Panel, which is part of the Dispute Settlement Body, examines the facts in light of the applicable provisions of the WTO agreements cited by the disputing parties. Accordingly, the panel then makes suggestions or gives a ruling on the related WTO agreements to the DSB.

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[439] World Trade Organization, *A Handbook on the WTO Dispute Settlement System*, second edition 2017, Prepared by the Legal Affairs Division and the Rules Division of the WTO Secretariat, and the Appellate Body Secretariat, Cambridge University Press

[440] The "WTO Agreement" refers to the Marrakesh Agreement Establishing the World Trade Organization entered into force on 1st January 1995.

From 1995 to 2021, a total of 42 disputes have arisen from the TRIPS Agreement. Out of 42, only seven of disputes were referred to by developing member nations. While most disputes are filed by developing nations, the United States and EU are complainants in 15 cases and 8 cases respectively. Only 7 cases are filed by developing nations. The nature of 42 cases, which have been raised so far, in the request for consultation under the TRIPS agreement, which have been before the Dispute Settlement Body, was analyzed in the study.

At the outset, it can be confidently stated that the developed countries of the world initiate more complaints than the developing countries. Although there is a shift in the number of complainants towards the developing part of the world, as compared to the early stages of the Agreement, the shift is slow and gradual. A hurdle, which stands in the way of the developing countries, is the cost involved in approaching the dispute settlement mechanism. Up until 2000, developing countries were hesitant to file WTO disputes. This is evident from the fact that these countries accounted for up to 51% of all disputes filed in the year 2000 and 71% of all disputes filed in 2001.

The ongoing Appellate Body crisis, which the study also looked at in depth, is likely to heavily impact the dispute resolution under TRIPS agreement. More than 75 members of the WTO have consistently submitted proposals, calling for appointment of members to the body. As a suggested interim measure, the member nations can choose to prefer Arbitration under Article 25, the rulings and results from which must be WTO-compliant and binding on the parties involved. This is usually a bilateral arrangement signed between the disputing parties. Another suggested measure is the route of multilateral agreements, which many believe can work till the Appellate Body is fully functional again.

The Appellate Body is often described as the 'Centrepiece' of the WTO's dispute resolution system[441]. The WTO Appellate Body, which has no sitting members at the moment, effectively became defunct on 10 December 2019 when two of the last three members completed their terms

[441] Sacerdoti, G., A. Yanovich and J. Bohanes (2006), *The WTO at Ten: The Contribution of the Dispute Settlement System*, WTO, Geneva, available at: (https://doi.org/10.30875/e72266c8-en) (Last Accessed on 03/09/2021)

and no new member appointments were actively taking place due to the United States' stance on the functioning of the body. The last member to complete their term as an Appellate Body Member was Hong Zhao on 30 November 2020.

For the past several years, the United States has objected to the WTO Dispute Settlement System, especially, the Appellate Body. The objection of the United States has had serious consequences, including its current almost defunct status, as the consensus of all the WTO member states is necessary for Appointments to the Appellate Body. Even though a member's strong stance can motivate and influence the other members to delay the appointment to Appellate Authority and eventually lead to the dismantling of the Dispute Settlement System, the other members seem more interested in finding a resolution and saving the Dispute Settlement System as it provides them with stability and an effective dispute settlement mechanism.

Although the Appellate Body is not considering any cases due to the ongoing vacancies, the WTO panels remain active and continue to be utilised by the WTO member states. For example, more consultations requests (the first stage of a WTO dispute) were filed in 2018 than in any other year since 1998. This is testimony to the fact that despite the threat posed by the Appellate Body crisis, the members prefer the dispute settlement system as an effective tool for dispute resolution.

An effective dispute resolution system is necessary for cordial trade relations among the members. Without an operational Appellate Body, the disputes are indefinitely pending. The AB is currently member-less. This has raised multiple problems in the WTO dispute settlement system - such as the issue of automaticity of panel rulings has emerged again since there is no system to appeal the panel reports.

A prolonged period of non-operational Appellate Body would lead to a situation without any binding and compulsory dispute settlement mechanism under the WTO. The saving grace for the WTO is Article 25 of the Dispute Settlement Understanding which provides the member states an opportunity to resolve the disputes through Arbitration. The Parties may use the Arbitration as an Appellate Authority to Panel reports or may choose it as sole mechanism for dispute resolution.

As a result of Uruguay negotiations, TRIPS was incorporated and Article 64 laid down, under which a party could invoke WTO's dispute settlement for violation or inconsistencies in measures with reference to TRIPS provisions.[442] Through WTO's dispute settlement mechanism, TRIPS imposes enforceable obligations on Member nations to ensure minimum and mandatory IP protection in their territories.[443] The WTO's mechanism of dispute settlement[444] was described as 'Jewel in the Crown' in 1996 by Director-General Renato Ruggiero. Between 1995 and 2019, 593 disputes were brought to the WTO for resolution.

As stated earlier, the United States and the European Union were the complainants in more cases than others. The developing countries have also made use of the WTO dispute settlement system. Some years developing country Members referred to more disputes than developed-country Members. The rate of compliance with rulings of WTO dispute settlement panels and the Appellate Body remains consistently high.

In the past few years, around seven percent of the cases referred to the WTO were related to TRIPS.[445] The US initiated around 50% of these TRIPS disputes. Contrary to what developing country Members expected, there was no influx of TRIPS disputes by developed country Members against developing country Members. Only in thirteen of the forty-one disputes the respondents were developing country Members. TRIPS disputes were mostly filed between 1996 to 2000 and in the years 2017-2019.

The TRIPS provisions appear most as an issue in the disputes in which consultations were initiated concerning the domestic enforcement of IPRs, patents, trademarks, copyright and the national treatment obligation. The high rate of settlement may be explained by the fact that in a number of

[442] Kumar, R Girish, WTO's Dispute settlement mechanism: adjudication of disputes in TRIPS (1995-99), available at < http://hdl.handle.net/10603/6456>

[443] *WTO | intellectual property - overview of TRIPS Agreement* (2021). Available at: https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (Accessed: 4 September 2021).

[444] Dispute Settlement System ("DSS"), Dispute Settlement Mechanism ("DSM") and Dispute Settlement Regime ("DSR") all three terms refer to the same meaning in this dissertation.

[445] Supra Note 272

TRIPS disputes the TRIPS obligations were unambiguous and with clear TRIPS-inconsistency. The initiation of formal consultations by the complainant motivated the respondent to either withdraw or modify the TRIPS-consistent measure.

WTO disputes resulted between 1995 and 2019 in 258 panel reports. Of these, only five percent of reports are regarding TRIPS disputes, while only two percent reports of the 145 Appellate Body reports circulated to date concerned TRIPS disputes.[446] The time period of compliance continues to remain an issue in TRIPS related disputes. In three disputes, the Arbitrator had set the time period for implementation.[447]

In summary, while certain WTO Members have frequently alleged that other WTO Members routinely violate their responsibilities under the TRIPS Agreement, few TRIPS disputes have been taken to the WTO. Greater use of the WTO dispute settlement system will allow rule-based settlement of TRIPS-specific disputes between WTO members, rather than these disputes deteriorating, politicizing and negatively impacting relations between the WTO members.

More WTO dispute settlement systems will also allow for clarification of existing TRIPS clauses, which will further the development of WTO intellectual property law. Although the WTO dispute settlement mechanism has undoubtedly made a major contribution to the development of the law of the WTO agreements outside of the TRIPS agreement, this does not mean that the WTO dispute settlement mechanism has had no influence on the development of WTO intellectual property law in the last 25 years.[448]

[446] Supra Note 272

[447] US – Section 110(5) Copyright Act (DS160) (complaint by the European Communities) (reasonable period of time for implementation: 12 months); Canada – Patent Term (DS170) (complaint by the United States) (reasonable period of time for implementation: 10 months); Canada – Pharmaceuticals Patents (DS114) (complaint by the European Communities) (reasonable period of time for implementation: 6 months).

[448] Supra Note 272

## 5.2 WHAT NEXT: POSSIBLE APPROACHES/SUGGESTIONS TO RESOLVE THE APPELLATE BODY CRISIS

The crisis of the Appellate Body has caused the unique contribution of DSS in the WTO to come to a naught. Many experts suggest that in the short-term, the options available for resolution of this crisis include MPIA, a mutual agreement to waive right to appeal and a reformation of the Appellate Body.

1. Resorting to temporary MPIA - Of these, the MPIA or the multi-party interim appeal arrangement seems to be the most constructive and reasonable solution. The EU along with 15 other WTO Members have developed this as an interim solution, to navigate through this AB impasse. The legal basis for MPIA can be found in Article 25 of the DSU, which enables the members to use arbitration for settling disputes and further makes the decision binding on the disputing parties.

   Although the United States has objected to the establishment of MPIA, its objections can be circumvented. However, other issues with the arrangement remain - for example, since a majority of the countries are not party to the arrangement, its effectiveness remains questionable at a global level. Further, the MPIA arrangement does not provide thorough solutions to the objections raised by the US against the AB. Therefore, while it may succeed as a temporary measure it's unlikely to replace the AB in the long-term. MPIA itself proposes to be a temporary arrangement, however, a certain predictable and enduring solution is required to solve the WTO crisis.

2. Alternative of "waive off the right to appeal" - Another alternative to the AB's crisis, adopted by a few member countries, is also the alternative to waive off the right to appeal on a bilateral basis between the disputing parties. As stated earlier in the study, the mutual agreement to waive off the right to appeal was applied in the case DS496 between Vietnam and Indonesia. However, such an arrangement is highly unlikely to be viable for the majority of disputes, as it does not provide any solution to the termination of the 2-tier dispute settlement system of WTO. Therefore, while it may be a suitable approach

depending on a case-to-case basis, it does not provide a durable and all-encompassing resolution to the current crisis.

3. Eventual Solution – Reformation of Appellate Body and DSS - In the meantime, the WTO General Council has employed David Walker to supervise the Appellate Body's reform process. As an attempt to address the concerns which the U.S. has from the AB, as well as improve the AB's functioning, Walker has suggested certain principles of reform. These include, but are not limited to, mandating that the body makes a decision on disputes within 90 days, as well as limit its role in addressing only those issues raised specifically by the parties at dispute. Furthermore, China, EU and other states have proposed annual meetings between AB and WTO members to counter the precedent principle.

   The last suggestion, which is the reformation of WTO DSS, is the eventual aim sought after by most of the WTO member countries. Though multiple reformation proposals have been provided by the appointed counsel of New Zealand David Walker, as discussed in this study, the United States has opposed these proposals as well.

   While it remains to be seen how the reformation unfolds in the near future, it wouldn't be wrong to admit that ultimately, the resolution of the WTO DSS crisis lies less in the hands of the legislative & executive organ of WTO and more in the hands of the political will of the member countries.

4. TRIPS disputes may also enter the controversial list of Appellate Body reports – This study makes peculiar note that though 42 TRIPS disputes have been referred for consultation to the DSM of the WTO, only four disputes have arisen before the Appellate Body. Out of these four disputes, the US was a direct disputant in three and is an active third party in the fourth. No objections have been raised by the US against the AB reports rendered pertaining to the aforementioned three TRIPS disputes. It is pertinent to note that two of these three disputes were found in favour of US and the third dispute that was found against it, all were circulated within the due legislative time frame of 90-days.

The fourth dispute i.e., Australia – Tobacco Plain Packaging has been circulated recently and US's response as an active third party remains to be seen on that. What is particularly important is that this report of the AB was circulated way beyond the prescribed time frame and no consent was taken from the disputants for such extension of time. Therefore, in light of this an intriguing potential research path opens up depending on the US take on this AB report.

However, it can't be denied that at present the TRIPS related disputes remains largely unaffected by the AB crisis. Nevertheless, it would be short-sighted to accept the present status as natural future of TRIPS related disputes in WTO. Rather, in the wake of COVID19 pandemic, the rising support in favour of the TRIPS waiver seems to have brought a new light to the TRIPS Agreement and to the WTO. Thus, a new future of unpredictable turns awaits the TRIPS Agreement, TRIPS concerning disputes and the WTO.

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