THE APPLICATION OF GOOD FAITH PRINCIPLE IN WORLD TRADE ORGANIZATION'S (WTO) DISPUTE SETTLEMENT

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ABSTRACT

The World Trade Organization (WTO) is the only international organization with a global vocation that deals with the rules governing trade between countries. At the heart of the Organization are the WTO Agreements negotiated and ratified by members. **The main aim is to promote predictability in free flow of goods and services with legal guarantees in disputes settlement between member countries through the principle of "*good faith*"**.The current WTO dispute settlement mechanism, characterized by the considerable and automation of procedures as compared to its pre-inception or the era of the General Agreement on Tariffs and Trade (GATT) has proven at least effective and efficient. It is fair to say that the WTO Dispute Settlement System as it stands today remains *ipso facto* a well-respected international regime and has over the past two decades remarkably active. For instance, more than 551 disputes have been initiated by WTO Members, resulting in more than 230 circulated panel reports and 136 circulated AB reports. More than 65% of WTO Members have engaged in dispute settlement as complainant, respondent, or third party. However, as any other human endeavor, the DSB is confronted with certain deficiencies or conflicts as far as the respect of "*good faith principle"* in dispensing WTO Rule of Law is concerned starting from its interpretation; some provisions are not clear as to what they mean in practice. Secondly, DSB encounters new issues during proceedings that were not foreseen at the time the rules were drafted and this has been a major cause hindering DSB many times to completely exhaust a case despite the well-structured stages (Panel and Appellate). There is also an overriding force of "*political will"* propelled by some stronger economies through the "*Green Room Theory*" that under minds the smooth application of *"Good faith principle*" during dispute proceedings.

This has caused some members to rather seek solutions to their differences in other regional courts or trade disputes centers.

Keywords: World Trade Organization (WTO), Member countries, Principle of good faith, Dispute settlement.

INTRODUCTION

Principles and concepts of general public international law. The introductive text Chapeau of Article XX expresses the principle of *"good faith*" as general legal principle and a general principle of international law, governing the exercise of rights justify by States. One of its applications, known as the doctrine of abuse of rights, prohibits the abusive exercise of these rights and prescribes that; when the claim of a "*conventional right*" encroaches on the domain covered by an obligation, the right must be exercised in "*good faith"* that is to say in a reasonable manner. The abusive exercise by a Member of its own treaty right therefore results in a violation of the treaty rights of other Members as well as in a breach by the Member in question of its treaty obligation[i]. The DSU obliges WTO Members, if a dispute arises, to initiate dispute settlement proceedings in good faith in an effort to resolve such dispute. This is another concrete manifestation of the principle of good faith which, as we have already indicated, is at the same time a general legal principle and a general principle of international law[ii]. The principle "*jura novit curia*" "the court knows the law", means that the parties in a trial do not have to prove the existence of a rule of law, but they must prove the facts. In accordance with this principle, the court therefore held that the European Communities must prove that the Drug Arrangements meet the conditions set out in the Enabling Clause, the European Communities does not have the responsibility to provide us with the legal interpretation to give a particular provision of the Clause; rather, they bear the burden of producing sufficient evidence to support their assertion that the Drug Arrangements conform to the requirements of the Enabling Clause. The first part of this work will lead us to see WTO Dispute Settlement Body as a well-structured Judicial Body using *the "Principle of Good faith*" as a general principle in International Law in handling dispute between members states (I). Meanwhile the second part will bring to light some obstacles ranging from interpretative problems and the manifest overriding force of

political will of some member states, followed by unequal economic strength of developing economies *(*II).

THE RESPECT OF GOOD FAITH PRINCIPLE INDISPUTE PROCEEDINGS

No doubt, regarding the implementation of the rules, the dispute settlement process has been substantially rigidified and « *automated* » under the WTO Dispute Settlement Understanding (DSU). Today WTO has a mechanism for implementing a whole set of procedures, from the filing of complaints to judicial rulings to the enforcement of panel and Appellate Body rulings, that ensures neutrality and impartiality without intervention by the parties concerned. The current WTO dispute settlement mechanism, characterized by the considerable jurisdiction and automation of procedures as compared to the era of the General Agreement on Tariffs and Trade (GATT), has proven at least effective and efficient. It is fair to say that the WTO dispute settlement mechanism as it stands today is an extremely well respected international legal regime.

SOURCES OF LAWS GOVERNING WTO (WORLD TRADE ORGANIZATION DSB

Section 1: WTO substantive laws.

Paragraph 1-Marrakesh Agreement.

A-Marrakesh Agreement.

It is the Principal source of law governing WTO concluded on 15 April 1994, entered into force on the 1er of January 1995.It is the most far reaching Agreement in international trade ever concluded[iii].This agreement consists of short basic agreements of sixteen articles with many annexes to. Article 11 of the WTO Agreement states**:(**1)The Agreements and associated legal instruments included in annexes 1;2 and 3 referred to as multilateral trade agreement are

integral part of this agreement and binding on all members.(2) The Agreements and associated legal instruments included in Annexes 4 referred to as plurilateral Trade Agreements are also part of this agreement and are binding on all members[iv] WTO Agreement consist of many agreements, that is why in the case concerning **Brazil Desiccated coconut**, the Appellate Body stressed that the WTO agreement had been accepted by WTO members as a **single undertaking**[v] **provisions; presenting an inseparable package of right and disciplines which have to be considered in conjunction**[vi].This attests to the fact that WTO agreements is a **single treaty** .Most of the substantive WTO law is found in the agreements contained in Annex 1.This annex is consisted of three parts;1.A Contains thirteen multilateral agreements on trade in goods(GATT),Annex1B contains the General Agreements on Trade in Service(the GATS), Annex 1C the Agreement on Trade Related Aspect of Intellectual Property Rights (TRIPS Agreement).

However, it is important to note that it was only at the end of Uruguay Round that some efforts were made to coordinate and harmonized various agreements but for fear of seeing some texts changed created tension among members and inconsistencies in some of the texts that have prevail till date. For example, Article XVI: 3 of WTO Agreement provide that: "In the event of conflict, between a provision of this Agreement and provision of any of the multilateral Trade agreements, the provision of this agreement shall prevail"[vii].

Paragraph 2 –Annexes

1- General Agreement on Tariff and Trade 1994.

The General Agreements on Tariff and Trade (GATT) 1994 sets out the basic rules for trade in goods. Paragraph 1 of the introductory text of the GATT 1994 states: The General Agreements on Tariff and Trade 1994 (GATT) shall consist of (1) the provisions in the General Agreements on Tariff and Trade dated October 1947 (2) the provisions of legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO agreements (3) the Marrakesh protocol to GATT 1994.

The current arrangement obliges one to consult :(1) the provision of the GATT 1947 (2) the provision of relevant GATT 1947 legal instruments and (3) the understandings agreed upon during the Uruguay Round in other to know what the GATT 1994 rules on trade in goods are.

The GATT 1994 contain rules on the Most Favoured Nation treatment(Article 1)Tariffs Concession (Article II)National Treatment on internal taxation and regulation (Article III)Anti–Dumping and Countervailing Duties(Article VI)Valuation for customs purposes(Article VII) Customs Fees and Formalities (Article VIII)Marks of Origin(Article IX) the Publication and Administration on Trade Regulations(Article X) Quantitative Restrictions (Article XI) Restriction to Safeguard the Balance of Payment (Article XII)Administration of Quantitative Restriction(Article XIII)Exchange Arrangements(Article XV)Subsidies (Article XVI)State Trading Enterprise(Article XVII)Governmental Assistance to Development(Article XVIII) Safeguard Measures(Article XIX)General Exceptions (Article)Security Exceptions(Article XXI)Dispute Settlement(Article XXII and XIII)Regional Economic Integration(Article XXIV) Modification on Tariff Schedules(Article XXIII)Tariff Negotiations(Article XXVIII)Trade and Development(Article XXXVIII).The Marrakesh Agreement is an important part of GATT 1994 and contains National Schedule of Concession of WTO members ,any commitment made either to eliminate or reduce concessions by a member is recorded[viii].

2 –General Agreement on Trade in Services.

The General Agreements on Trade in services Annex 1B (GATS) is the first ever multilateral agreement on trade in services[ix].It entered into force in January 1995 as a result of the Uruguay Round negotiations to provide for the extension of the multilateral trading system to service. All members of the WTO are signatories to the GATS and have to assume the resulting obligations[x].On the same manner, signatories are permitted to enter into subsequent round of trade negotiations[xi].The first such rounds started in January 2000 and was integrated later in Doha development Agenda (DDA).The GATS serve as a guide for members to undertake and implement commitments for the liberalization on trade in services. Trade in services is defined in Article 1:2 of the GATS as the supply of a service :(1)in the territory of one member into the territory of any other member(cross-border supply)(2)in the territory of one member to a service consumer of any other member (consumption abroad)(3)by a service supplier of one member through a commercial presence in the territory of any other member(supply through commercial presence)(4)by service supplier of one member through the presence of natural

persons of a member in the territory of any other member(supply through presence of natural persons)[xii].

3–Agreement on Trade –Related Aspect of Intellectual Property Rights.

The Intellectual property rules negotiated in 1986-1994. Uruguay Rounds was introduced in the multilateral trading system with one of the main objective that of facilitating trade and production[xiii].It enforces legally binding agreements on trade in goods, services and trade related-related aspect of intellectual property rights to manage global trade efficiently. The IPR rules are important in terms of encouraging creativity and innovation, to transfer technologies on commercial terms of business enterprises to developing countries, **to protect consumers by controlling the trade of counterfeit goods, to improve international trade activities**[xiv] through interdependent channel in goods, foreign direct investment (FDI) within multinational enterprises, contractual licensing and trade marks to unaffiliated firms. Economic theory on the other hand observes that technology transfers through each channel partly depend on local protection of the IPR's and that countries with weak IPR could be isolated from modern technologies and be forced to develop technological knowledge using their own resources.

4–Annexes II, III and IV. Annex II puts down rules that governs Memorandum of Agreement and procedures for Dispute Settlement (Legal Control of the rules' enforcement).Annex III put down rules that governs Trade Policy Review Mechanism(Political Review of rules' enforcement). Annex IV Plurilateral Agreement[xv].

5- Multilateral Agreements on Trade in Goods GATT 1994.

It also accompanied with other multilateral agreements on trade in goods: Agreement on Agriculture which requires the use of tariffs instead of quotas or other quantitative restrictions to impose minimum market access requirements and provide for specific rules on domestic support and export subsidies in the agricultural sector[xvi];

i-The Agreement on the Application of sanitary and phytosanitary Measures (The SPS Agreement) which regulate measures adopted by WTO members to ensure food safety and protection of life and health of humans, animal and plants from pests and disease. The

Agreement on Textiles and Clothing which provided for the gradual elimination of quotas on textiles and clothing by January 1 2005 that is no longer in force.

ii-The Agreement on Technical Barriers to Trade (TBT Agreement) to regulates the use by WTO Members of technical regulations and standards. The Agreement on Trade-Related Investment Measures (TRIMS Agreement) which stipulates that WTO Members regulations dealing with foreign investment should scrupulously respect the obligations in Article III (National Treatment Obligation) and Article XI(prohibition on quantitative restrictions) of GATT 1994.

iii-The Agreement of implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Dumping Agreement) providing for a detail rules on the use of Anti-Dumping measures. The Agreement on the implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Custom Valuation Agreement) stating out in detail the rules to be applied by national custom authorities for valuating goods for customs purpose. The Agreement on **pre-shipment Inspection which regulates activities relating to verification of the quality, quantity, the price and the customs classification of goods to be exported**.

iv-The Agreement on the **Rule of Origin which provides for negotiations aimed at the harmonization of non –preferential-rules of origin**; it sets out disciplines to govern the application of these rules both during and after the negotiation on harmonization and sets out disciplines applicable to preferential rules of origin. The Agreement on Import Licensing Procedures to sets out rules on the use of import licensing procedure. The Agreement on Subsidies and Countervailing Measures (ASCM) on detail rules on subsidies and countervailing measures. The Agreement on Safeguard provides rules on the use of safeguard measures and prohibit the use of voluntary export restraints.

Section 2: Other sources of law

A- Modern discussion of the sources of international law takes reference from Article 38(1)[xvii] of the statute of the International Court of Justice (ICJ)[xviii] which provides:

> "*The court whose function is in accordance with International law to decide the dispute which have been submitted shall apply ;(1)international convention whether general or*

> *particular establishing rules recognized by the parties to dispute(2)international customs as evidence of general practice accepted as law,(3)general principal of law recognized by civilized nations(4)subject to the provisions of article 59 from judicial decisions and teachings of highly qualified publicist of various nations as subsidiary means of determining rule of law*[xix].

1- The WTO is therefore a particular international convention within the meaning of Article 38(1).The agreement annexed to the WTO agreements are known as the WTO agreements or covered agreements. The Dispute Settlement Understanding (DSU) governs resolution of Disputes concerning the substantive right and obligations of the WTO members under the covered agreements. Flowing from Article 38(1) contesting members recognizes these rules and dispute settlement procedures as binding. The fundamental source of law in WTO is the "***Marrakech Agreement***" and relevant covered agreements (Annexes) themselves meaning that all legal analysis begins there as stated by Appellate Body which was established by Article 17 of DSU "***The proper interpretation of the Article is first of all a textual interpretation***"[xx] .

2-The agreements however do not exhaust the source of potentially relevant law, on the contrary all of the subparagraph of Article 38(1) are potential sources of the law in WTO dispute settlement. Article 3.2 specifies that the purpose of dispute settlement is to clarify the provisions of the WTO Agreements in accordance with customary Public international law interpretation. Article 7 specifies that the terms of reference for panels shall be to examine in the light of the relevant provisions in the covered agreements cited by the parties to the dispute.[xxi]The DSU is the dispute settlement Body established by DSU with the Authority to establish Panels, adopt Panel and Appellate Body reports, maintains surveillance of implementation of rulings and recommendations, authorize the suspension of concession and other obligation under the covered agreements[xxii].

3-WTO also has four level of international trade relationship; Unilateral measures (National Treatment law), bilateral relationship[xxiii],plurilateral agreements and multilateral arrangements[xxiv].As already mentioned the principal source of law in WTO is the Agreement created since 11 of January 1995(Marrakesh Agreement) this Agreement contains in its annexes ; with a significant number of agreements with substantive and procedural provisions such as GATT 1994, the TRIPS, General Agreement and the DSU.

B-The last but not the least are laws emerging from the DSB dispute settlement reports "***jurisprudence***", acts of the WTO bodies, agreements concluded in the context of the WTO, customary international law, general principle of law, other international agreements, subsequent practices of WTO Members, teachings of the most highly qualified publicists and the negotiations history can also play a role to reshape WTO laws. The only difference is that all WTO Agreements and annexes provide a specific legal right and obligations for WTO members meanwhile other sources act just to guide, define and clarify laws applicable to members.

SELECTED RULINGS OF DISPUTE SETTLEMENT BODY (DSB)

Section 1: Panel rulings

Paragraph 1–Under National Treatment Art. 17

"*In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers*."[xxv].

A-Under Regulatory issues-The case between Argentina and Panama over Argentina's imposed tax on stock exchange.

On 12 December 2012, Panama asked for consultations with Argentina with respect to certain measures imposed by Argentina that affected trade in goods and services. Panama alleges that various Argentine measures are applied exclusively in respect of certain countries listed in the Regulations to the Income/Profit Tax Law, Decree 1344/98, as amended by Decree 1037/00[xxvi].

This case concerned measures taken by Argentina regarding access to its stock market and reinsurance sector, the allocation and valuation of transactions for tax purposes, the registration of branches ,and controls over the market for foreign exchange, of special interest in the context of the GATS coverage of prudential measures.[xxvii].The Annex on Financial Services gives

WTO members, regardless of other GATS provisions, to take measures for "***prudential***" reasons so long as these are not used to avoid a member's GATS commitments or obligations.

The Panel concluded that two of the challenged measures cannot be justified by the prudential exceptions, the WTO judges agreeing with the Panel's view that the prudential exception covers all types of measures affecting financial services supply within the meaning of the GATS[xxviii].

B- National Origin in the US-Tuna case on rules of origin. It was agreed under WTO/GATT rules that members have considerable freedom to set their own rules of origin but the complex nature of Uruguay Round includes the agreement on the rules of origin setting standard rules of origin for non-preferential purpose to be followed as general principles when it comes to the application of rules of origin.

The Panel examined a US requirement that Tuna could not be labelled as **"Dolphin Safe"** unless certain conditions were met including conditions specific to tuna from the Eastern Tropical Pacific .The Panel found that since US considered tuna to originate in the Country where the fishing boat was registered and not geographical area where the fish was caught, there was no violation of Article 1[xxix].

Paragraph 2- Preferential tariff treatment

1- US –Textiles Rule of origin

United States in respect of its rules of origin applicable to imports of textiles and apparel products amended Section 334 of the Uruguay Round Agreements Act and Section 405 of the Trade and Development Act of 2000 and the customs regulations implementing these provisions. India the complainant party contended that the changes introduced by Sections 334 and 405 resulted in extraordinary complex rules under which the criteria that confer origin vary between similar products and processing operations. India argued that the structure of the changes, the circumstances under which they were adopted and their effect on the conditions of competition for textiles and apparel products suggest that they serve trade policy purposes. On those grounds, India questioned the compatibility of those changes with paragraphs (b), (c), (d) and (e) of Article 2 of the Agreement on Rules of Origin[xxx].

On 20 June 2003, the Panel Report was circulated to Members.

The Panel found that: India failed to establish that section 334 of the Uruguay Round Agreements Act was inconsistent with Articles 2(b) or 2(c) of the RO Agreement, India also failed to establish that section 405 of the Trade and Development Act is inconsistent with Articles 2(b), 2(c) or 2(d) of the RO Agreement; India failed to establish that the customs regulations contained in 19 C.F.R. § 102.21 are inconsistent with Articles 2(b), 2(c) or 2(d) of the RO Agreement[xxxi].

2-Under Terms of reference and Scope of Panel review in EC-Banana case.

From a textual standpoint, "***terms of reference***" is referred to as the issue before the panel, determined by the complaining Member's demanding that a panel be formed to rule on a particular matter dividing them[xxxii]. Article 7.1 of the DSU states that unless the parties otherwise agree, a panel's terms of reference are: to examine, in light of the relevant provisions in (name of covered agreement(s) cited by the parties to the dispute, the matter referred to the DSB by name of party in the document and to make such findings as will assist the DSB in making the recommendations or giving the rulings as provided for in that agreement[xxxiii]., The EC contended that the request did not meet the requirements of Article 6.2 because the request simply listed the measures involved and listed the provisions of the agreements allegedly violated without providing an argument as to which aspects of the EC measures violated specific provisions of the agreements[xxxiv].

The panel took a flexible approach to this issue by discussing first the ordinary meaning of the DSU's terms and found that if a panel request were to identify a measure and specify the provision with which it is alleged to be inconsistent, it would be out of limits in what is acceptable under Article 6.2[xxxv].However, the panel rejected the claims based on the Agreement on Agriculture and other WTO agreements, because in these two situations, it was not possible at the Panel request stage, even in the broadest generic terms, to describe what legal problem was said to be[xxxvi].The panel inter alia support its finding by stating that the first written submission of the Complainants cured that uncertainty according to Article 6.2[xxxvii].

Section 2: Appellate rulings

Section 1-Performance of WTO Obligations in court rulings: "Pacta Sunt Servanda"

Paragraph 1 - Under Anti-dumping or countervailing

1-US — Offset Act (Byrd Amendment)[xxxviii]

The case concerned the Continued Dumping and Subsidy Offset Act of 2000 ('CDSOA')[xxxix], which provides for the distribution of anti-dumping or countervailing duties to affected domestic producers who supported the application for the initiation of the investigation that led to the imposition of those duties. The complainants (Australia, Brazil, Canada, Chile, the EC, India, Indonesia, Japan, Korea, Mexico and Thailand) challenged the CDSOA under art 5.4 of the Anti-Dumping Agreement and art 11.4 of the SCM Agreement, among other provisions. These provisions relate to the initiation of investigations to determine whether to impose anti-dumping or countervailing duties respectively. Essentially, they preclude domestic authorities from initiating investigations on the application of the domestic industry unless the application is supported by a sufficient proportion of domestic producers determined according to certain statistical thresholds. The complainants argued: When a treaty provision specifies that actions of private parties are necessary to establish a member's right to take action, government provision of a financial incentive for those private parties to act one way rather than another is inconsistent with the requirement that members perform their treaty obligations in good faith[xl].

The Panel read the text of the relevant provisions as merely imposing ***"statistical thresholds"*** rather than a requirement that the investigating authorities inquire into the motives or intent of a domestic producer in electing to support a petition'[xli]. In consequence the CDSOA was regarded as having undermined the value of AD Article 5.4/ SCM Article 11.4 to the countries with whom the United States trades, and regarded as not having acted in good faith in promoting this outcome[xlii]. The Panel supported this conclusion by reference to "***the principle of good faith***" as a general rule of conduct in international relations, which requires a party to a treaty to refrain from acting in a manner which would defeat the object and purpose of the treaty as a whole or the treaty provision in question[xliii].The Panel went ahead to characterize the object and purpose of art 5.4 of the Anti-Dumping Agreement and art 11.4 of the SCM Agreement as follows:

> *"To require the authority to examine the degree of support which exists for an application and to determine whether the application was thus filed by or on behalf of the domestic industry ,the Panel concluded that the CDSOA is inconsistent with those provisions because it effectively 'mandates domestic producers to support the application and renders the threshold test completely meaningless*[xliv].

The Appellate Body affirmed the USA act as not being taken in good faith but reversed the Panel's finding that the CDSOA was inconsistent with art 5.4 of the Anti-Dumping Agreement and art 11.4 of the SCM Agreement[xlv] . In its view, however, the Panel dismissed all too quickly the textual analysis of those provisions as irrelevant[xlvi], it considered that the Panel failed to apply correctly the **"principles of interpretation codified in the Vienna Convention**[xlvii]**"**.The Appellate Body went ahead to query the Panel's reference to the "***Object and purpose"*** of the relevant provisions. The Appellate Body stated that the matter at issue before the Panel included whether the CDSOA was inconsistent with the Anti-Dumping Agreement and the SCM Agreement in the light of their object and purpose, since interpreting Articles 5.4 and 11.4 involves an inquiry into the object and purpose of those Agreements.

2- Safeguard Measures under United States-Wool Shirts case (Burden of Proof).

This is whether the complaining party always has the burden of proof in WTO dispute settlement, or whether the burden may shift to the challenged Member in certain conditions, and if so, when[xlviii]. Several WTO decisions have tried to address this issue, reaching at least consistent results, and therefore our area of concern here is United States-Wool Shirts. An important issue in the **"*Wool Shirts***" case was whether the ATC was an "***exception*****"** to WTO obligations such that the United States had the burden of proving that the conditions for the exception were met. Meanwhile the United States argued that, based on GATT 1947 dispute settlement practice, India had the burden to make a "***prima facie****"* case that the U.S. safeguard measure was inconsistent with its obligations[xlix].India agued ***a contrario*** that it did not have to prove that the United States had violated the Agreement on Trade in Cloth (ATC), but that instead the United States had to prove that the United States was justified in relying on the *"**exception***" to WTO disciplines created by the safeguard procedure of Article 6 of the ATC[l].

The panel on it part agreed with the United States and stated that because India had initiated the proceedings, India had to establish that the U.S. restriction was inconsistent with the United States' obligations. The panel went on explaining that India had to make a "***prima facie***" case of violation, which would shift the burden to the United States to prove the contrary but provide much explanation of the reasoning underlying this decision[li]

The Appellate Body after affirming the panel's conclusion provided a different reason that it was then up to the United States to bring evidence and argument to rebut the presumption and cited the international law rule that a party asserting a fact must prove that fact[lii].The Appellate Body confirmed that the ATC was a free standing transitional arrangement rather than an exception to WTO disciplines as the panel had held, and emphasized that the ATC balance of rights and obligations could be upset by requiring the United States to demonstrate that it had not violated its commitments[liii].Thus, the Appellate Body essentially reasoned that the substantive deal struck in the ATC required the allocation of the burden of proof to complaining countries.

Paragraph 2–The respect of Terms of reference and Scope of Panel review

1- EC-Beef Hormones case (SPS).

The "***standard of review***" issue is whether a WTO panel should make a strictly objective determination of whether a Member's action is consistent with its WTO obligations, or whether a WTO panel should grant some deference to the factual findings and interpretations of WTO obligations made by a Member in the course of deciding to take the challenged action. If some deference is granted, then questions arise as to how much deference is appropriate, and whether different levels of deference are appropriate for different contexts, particularly for "***questions of fact versus questions of law***[liv]".

EC argued through it appeal that the Panel had failed to apply an appropriate standard of review in assessing various EC acts and certain scientific evidence[lv].The EC argued that WTO panels should adopt a "***deferential reasonableness***" standard when reviewing a Member's decisions to adopt a particular **"*science policy*"** because past GATT' panels had rejected "***de novo***" review, and that the "***Deferential reasonableness***" standard embodied in the WTO

Antidumping Agreement should be applied to all highly complex factual situations as well. The United States agreed that a panel was not to conduct a *de novo* review, but said that "***nothing in the SPS Agreement or the WTO Agreement requires a Panel to defer to the Member maintaining the SPS measure***," pointing out that the standard used in the Antidumping Agreement did not apply in this context[lvi]

Article 11 of the DSU states that:

> "*The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements"*[lvii].

In the context of fact finding by panels, the Appellate Body interpreted Article 11 as requiring neither *"**total deference***" to the national determination nor a "***denovo review***" but rather an objective assessment of the facts[lviii]. The Appellate Body provided some guidance later in its opinion stating that:

> "*In the present appeal, the European Communities repeatedly claim that the Panel disregarded or distorted or misrepresented the evidence submitted by the European Communities and even the opinions expressed by the Panel's own expert advisors. The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in the ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice*[lix].

The Appellate Body in considering and rejecting the EC's claim on this issue reasoned that the Panel acted in good faith by engaging in an objective assessment as far as procedural issues in WTO dispute resolution are concerned.

2-Terms of reference and Scope of Panel review in EC-Banana case.

From a textual standpoint, "***terms of reference***" is referred to as the issue before the panel, determined by the complaining Member's demanding that a panel be formed to rule on a particular matter dividing them[lx]. Article 7.1 of the DSU states that unless the parties otherwise agree, a panel's terms of reference are: to examine, in light of the relevant provisions in (name of covered agreement(s) cited by the parties to the dispute, the matter referred to the DSB by name of party in the document and to make such findings as will assist the DSB in making the recommendations or giving the rulings as provided for in that agreement[lxi].,

The EC contended that the request did not meet the requirements of Article 6.2 because the request simply listed the measures involved and listed the provisions of the agreements allegedly violated without providing an argument as to which aspects of the EC measures violated specific provisions of the agreements[lxii].

The Panel took a flexible approach to this issue by discussing first the ordinary meaning of the DSU's terms and found that if a panel request were to identify a measure and specify the provision with which it is alleged to be inconsistent, it would be out of limits in what is acceptable under Article 6.2[lxiii].However, the Panel rejected the claims based on the Agreement on Agriculture and other WTO agreements, because in these two situations, it was not possible at the panel request stage, even in the broadest generic terms, to describe what legal problem was said to be[lxiv].The Panel inter alia supported its finding by stating that the first written submission of the Complainants cured that uncertainty according to Article 6.2[lxv].

The Appellate Body rejected Panel's decision while stating that it is unclear what purpose is served because complaining members could re-file it request for a panel in response to the panel's ruling. This problem could arise again given the rather minimal requirements for specificity that are imposed on requests.

Section 2: Good faith as a fundamental principle in WTO rule of law.

Paragraph 1: Under the guide of Vienna Convention 1969.

A- General principle of good faith as underlining all treaties.

This suggests that good faith may underline the WTO agreements as a whole; this could be the reason for the Appellate Body to refer to the *"**general principle of good faith***" as underlining all treaties[lxvi].In addition, the requirement in art 31(1) of the VCLT to interpret treaties in good faith, as incorporated in art 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ('DSU') influences the interpretation of every WTO provision[lxvii]. Good faith might be described as a principle of WTO law on either of these bases. Although not referring on the meaning of good faith, several WTO provisions refer specifically to "***good faith****"*. The absence of any definition of *« good faith »* in the WTO agreements supports the view that it is not a specific rule but a broader principle of WTO law as manifested in WTO provisions, most significantly in WTO disputes, arts 3.10 and 4.3 of the DSU. In art 3.10, stating that members set out their understanding that, *"if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute".* Article 4.3 creates a more specific good faith obligation in relation to the consultation stage of disputes. The first sentence of this provision reads:

> "*If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution*".

B- Articles 3.10 and 4.3 of the DSU.

It provides examples of how principles of good faith may underlie claims in WTO disputes. For instance, a complaining Member could claim in the course of a dispute that the respondent had failed to comply with the good faith requirement in art 4.3 by attending consultations without being willing to attempt to find a "***mutually satisfactory solution"***. A responding Member could as well claim that the complainant was using the dispute settlement mechanism

as a mere strategy or tactics to achieve some unrelated result instead of an effort to resolve the dispute as required by art 3.10.

Paragraph 2: The recognition of good faith as a general principle of all international treaties by members.

1-Article XXIV of the General Agreement on Tariffs and Trade 1994.

Another reference to good faith is found in the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994[lxviii], which relates in part to the requirement to provide for compensatory adjustment when increasing bound tariffs in the process of forming a customs union or free trade area. Members are to enter negotiations in good faith with a view to achieving mutually satisfactory compensatory adjustment[lxix]. Thus, this good faith obligation is similar to the DSU requirement to engage in consultations and dispute settlement procedures in good faith.

2- Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS Agreement').

Good faith is also found in the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS Agreement')[lxx]. Article 24, which relates to negotiations to increase the protection of individual geographical indications, contains three references to good faith[lxxi]. These references relate to the "*good faith*" of the nationals or domiciliaries of WTO Members in applying for or registering trademarks, and in using trademarks or geographical indications[lxxii]. Articles 48.2 and 58(c) of the TRIPS Agreement refer to the *"good faith"* of public authorities or officials in administering laws for the protection or enforcement of intellectual property rights. The references to good faith in the TRIPS Agreement are therefore less relevant to the principle of good faith examined in this article, because they concern the good faith of persons within WTO Members rather than the good faith of WTO Members themselves.

CHALLENGES

The reasons for Panel and Appellate Body to have failed many times to instill judicial guarantee on International business community and to bring defaulters to book stems from many factors. This new body came with a lot of enthusiasm to expand the work of defunct GATT and to give a face lift particularly in the area of trade dispute settlement ,*à contrario* it has met with many setbacks; there are rules that did not match the expanding scope of international trade environment making it application pretty difficult (Section I) Followed by, structural problems like the political weight of some WTO members both in the secretariat (Green Room Theory) or during dispute proceedings leaving little or no autonomy to the Adjudicating Body, also of important are difficulties faced by some members to sue and challenge DSB decisions due to their economic seize(Section II).

HINDRANCE TO THE APPLICATION OF GOOD FAITH PRINCIPLE BY DSB

Applicability problem has caused the DSB to faced numerous problems as result of inability to interpret some legal issues thus leaving many dispute unsolved.

SECTION 1: Interpretative issues

Paragraph1– Obstacles born from the inception of WTO substantive laws.

A- Inseparable package of right and discipline to be considered in conjunction[lxxiii]*.*

From the Marrakesh protocol to GATT 1994, it was obvious that there was going to be confusion in the basic rules drafted by negotiators. This is because they failed to draft texts reflecting a friendly legal instrument on trade in goods as was agreed during the Uruguay Round[lxxiv].More so it is important to highlight that the Agreement making up the WTO Agreement were negotiated in multiple separate committees which operated quite separately and independently without much coordination and was therefore presented to members for validation. That set the fear or tension amongst negotiators; the inconsistencies were adopted and carried forward known as "***single undertaking***"[lxxv].

It is also assumed that most multilateral agreement on trade in goods provide for rules that are more detailed and sometimes possible in conflict solving with rules contained in GATT 1994 as stated in the interpretative note to annex I A addressing the relationship between the GATT 1994 and other multilateral agreements on trade in goods;

"*In the event of conflict between a provision of General Agreement on Tariffs and Trade 1994 and provision on another agreement in annex I A to the agreement establishing the World Trade Organization (the agreement in I A as the WTO Agreement) the provision of the other agreements shall prevail to the extent of the conflict*"[lxxvi].

Unfortunately, it is only where a provision of GATT and provision of another multilateral agreement on trade in goods are in conflict that the provision of the latter will prevail.

Another bone of contention is that most of these provisions are in conflict themselves, at times caused by ***"Exceptions***" to the very rule put in place. Provisions are in conflict where adherence to the one provision wills necessary lead to the violation of the other provision and provision cannot therefore be read as complementing each other. So it is undisputable that conflict exists in WTO laws[lxxvii].

B-Interpretation of Technical Barriers Agreement (TBT) by the DSB.

1- Articles XXII and XXIII of GATT 1994 specify rules and procedures that are designed to deal with the particularities of case under TBT Agreement[lxxviii].Article 1.2 of the DSU stated that "***Where the provision of the DSU and special or additional rules and procedures of a covered agreement cannot be read as a completion to each other'*** 'This exception has become the rules in DSB. Some cases have been selected to illustrate this procedural obstacles in DSB **for example in the EC-Abestos[lxxix],** brought by Canada in 1998 and EC-Sardines brought by Peru in 2001[lxxx].However only the later was decided as spelt out by TBT Agreement which stated that the panel may establish a technical expert group in question of a technical nature with a view to submit it report to the panel[lxxxi].This dual application of GATT Article XXIII and TBT Agreement Article XXII in dispute settlement is a great hindrance in dispute settlement procedures that this book has failed to lay emphases on**.**

2– Provision of SPS agreements.

The case of barriers to U.S. apple exported to Japan by calculating tariff-rate equivalents[lxxxii].Due to differences in climate, existing pests or diseases, or food safety conditions, it is not always appropriate to impose the same sanitary and phytosanitary requirements on food, animal or plant products coming from different countries. The SPS Agreement, while permitting governments to maintain appropriate sanitary and phytosanitary protection tries to reduce possible arbitrariness of decisions and encourages consistent decision-making. Sanitary and phytosanitary measures, by their very nature, may result in restrictions on trade.

For example, all member states and governments accept the fact that some trade restrictions may be necessary so as to ensure food safety, animal and plant health protection. However, governments are sometimes pressured by the civil societies or business sectors to go beyond what is needed for health protection and to use sanitary and phytosanitary restrictions to shield domestic producers from economic competition. Such pressure is likely to increase other trade barriers. A sanitary or phytosanitary restriction which is not actually required for health reasons can be a very effective protectionist device and because of its technical complexity becomes a particularly deceptive and difficult barrier to challenge.[lxxxiii].

Paragraph 2- The legal nature of WTO obligations on members and the consequences of their violation.

This Article discusses the extent to which the notion of indivisible or ***"erga omnes"*** **obligations** which has made its entry into WTO case law is welcomed by some members and how it can be applied and enforced by the WTO DSB[lxxxiv].

1–The notion of *"erga omnes"* as elaborated by the International Court of Justice (ICJ).This book takes an example from legal features of indivisible obligations as elaborated by the International Court of Justice (ICJ) in the field of Human Right obligations given their inherent nature. In **the case of South Africa's mandate over South West Africa the ICJ rejected the third preliminary exceptions in which South Africa claimed that there was no material interest of the applicants nor their nationals[lxxxv].**Therefore members of League of Nation had legal interest in the observance of South Africa's ***"erga omnes"*** obligations

,hence ICJ insisted that there is no need to resort to the believe that there is exception between subjective right and objective right nor any need to resort to the legal fiction of relationship between a state and international community or to the notion of ***actio popularis***[lxxxvi]***;***right to defend collective or common interests in court[lxxxvii].On the other hand,the character of *"**erga omnes"***obligation forbid the application *of* ***"inadempleti non est adimplendum principle"*** which claims that ***"there is no need to perform for one who has not performed"***[lxxxviii],because these may lead to the violation of subjective right which state that countries are bound to comply with ***"erga omnes" obligation*** regardless of the behaviour of other states Article **50(5) Vienna Convention**[lxxxix].

2-WTO obligations and International trade obligations are legally divisible in many ways; they allow selective compliance and are capable of affecting or threaten the right of one or more but not all members[xc].For example these obligations can split into a bunch of bilateral agreement like the Most Favoured Nation treatment Article 1(1) of GATT.This stems from the treatment member "*A*" can accord to member "*B*" due to their bilateral relations; take the case of **Canada Automobiles** where the Appellate Body held that a violation of MFN arise when the advantage of import duty exemption is accorded ***de jure de facto***[xci] to same product originating in certain countries without being accorded to like product from other members[xcii].This follows same in Regional Economic Agreement where a country can be given privilege[xciii]Looking from **the case pitting United State against European Union** it is clearly understood that a country can wilfully target the product imported from designated states and intentionally violate Article II of GATT[xciv].as well as Special and Differential Treatment accorded to developing country member derogating from Article 1[xcv].Extending to WTO obligations the legal regime of indivisible obligations therefore is inadaptable so the legal consequences of their breach therefore are limited to wrongful member and the member suffering from the adverse effect contrary to the observation of International Law Commission[xcvi].

3- Loco standing to challenge an Act before the Panel, EC -Bananas case against US.

Despite the mounting criticism, on October 7, 1994, the USTR initiated an investigation under Section 302 of the Trade Act against the EU.(4) On January 9, 1995, the USTR issued a preliminary determination that the EU banana regime did adversely affect US economic

interests with an impact of several hundreds of millions of dollars. Both the EU and Caribbean producers immediately criticized the USTR decision.

The regime was defended by the EU as a valuable foreign aid policy tool, and by the Caribbean nations as the mainstay to their economies, the elimination of which would lead to political and economic instability.

Some critics released a study one the time, identifying the chairman and CEO of Chiquita International Brands and affiliated companies executives as among the largest contributors to the Democratic and Republican parties in the 1993-94 election cycle. This revelation raised questions as to the true motives of the Administration in pursuing Chiquita's case. Particularly, in light of the fact much noted by critics, that the Chiquita facilities allegedly injured by the EU banana policy are located outside the US and have a largely non-US workforce.

The case raised serious questions about "***good faith***" whereof some members decide which trade disputes to pursue in the WTO DSB and specifically whether the system provides too much discretion to the court Administration and thereby favoring the politically connected countries. Although WTO DSB entertain the matter, the uproar raised questions about international obligations, interpretations of WTO dispute settlement mechanisms and whether the banana dispute was at all a case the United States should have challenged.

SECTION 2-Due process in judicial proceedings

A – Before the establishment of Panel

1-Right to counsel in Korea - Taxes on Alcoholic Beverages.

Korea indicated prior to the Panel process that it wished to have the right to private counsel at the substantive meetings of the Panel. In order to fully defend its interests and match the much greater resources of the complaining parties. Korea drew inspiration from the recent opinion of the Appellate Body in *Bananas III*, in which the Appellate Body stated that it found nothing in the **WTO Agreement, the DSU, its Working Procedures, in customary international law or the prevailing practice of international tribunals**, which prevented a Member from determining its delegation to the Appellate Body's proceedings. Korea went ahead defending her view that representation by counsel of a government's own choice in proceedings before it (the Appellate Body) might well be a matter of particular significance to enable WTO Members

to participate fully in WTO dispute settlement proceedings as spelt out under customary international law and due process principles, implicit in the DSU. Korea assured the Panel that it would ensure that any member of its delegation, including private counsel, will fully respect the confidentiality of the proceedings in accordance with applicable rules.

According to European Communities there was no objection to the Korea's view in principle to the presence of private counsel as part of Korea's delegation during substantive meetings of the Panel. However, the EC acceptance was therefore conditional upon Korea assuming full responsibility for any breach of confidentiality which may result from the presence at the Panel meetings of non-governmental.

"A contrario", the United States express fears that, this practice may increase the routine presence of private lawyers in panel proceedings. The United States asserts that the GATT and WTO practice reflects the dual nature of the dispute settlement rules in the DSU; reaching mutually agreeable solutions and adjudicating disputes. In the view of the United States, a decision by the panel to permit participation of private lawyers in panel meetings is not a good step. The effectiveness of WTO dispute settlement is a major accomplishment of the WTO as an international organization. It is also in the US view that if the Panel wishes to permit private lawyers or non-lawyer advisors to be in this proceeding, the Panel should consider this decision with greater care, and impose appropriate safeguards with respect to the conduct of such persons[xcvii].

2–Judicial economy in United States-Wool Shirts case

India argued that Article 11 of the DSU entitled India to a finding on each of the issues raised. The panel disagreed and cited the consistent GATT panel practice of "***judicial economy***"[xcviii].

The issue here is to know whether a WTO panel should refuse to decide on issues that were not be decided in order to dispose of the dispute for reasons of "***judicial economy***"?. According to Professor Hudec, the normal practice of GATT panels was to decline to decide such unnecessary issues. However, he states that panels did depart from this rule where a broader

ruling would serve some purpose, such as providing guidance on the panel's view of the meaning of an important GATT provision[xcix].

The panel disagreed and cited the consistent GATT panel practice of ***"judicial economy"***. The panel stated: If we judge that the specific matter in dispute can be resolved by addressing only some of the arguments raised by the complaining party, we can do so[c].Instead, the Appellate Body said that panel need only address those claims which must be addressed in order to resolve the matter at issue in the dispute[ci].From the **wool shirts case**, panels are allowed to address issues that are not strictly necessary to resolving the dispute depending on its will.

This result may be questioned on legal and policy grounds. First instance, DSU Article 7.2 states that panels "***shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute***"[cii]. The Appellate Body did not address Article 7.2 in Wool Shirts, even though India referred to Article 7 in its appeal of this issue. According, Professor **McGovern** argues, if the Appellate Body were to reverse the panel's decision on the issue that the panel deemed decisive, further progress on the remaining claims might be difficult in the absence of findings by the panel[ciii].

B- Overlapping between WTO and other jurisdictions.

1– Regional Trade Agreement (RTA) and the WTO.The need to recognize and respect of exclusion clause by the DSB Panel (MOX Plant case).

The WTO Panel and AB have been criticised for not considering exercising comity towards RTA tribunals. It has been suggested that "***for the sake of judicial comity and coherence, WTO Panels ought to recognise and respect exclusion clauses in Non-WTO agreements"***[civ].But considering the way the AB defined the scope of a Panel's discretion in terms of its jurisdiction it is very unlikely that an exclusion clause would have any effect in the WTO dispute settlement. Regarding a choice of forum clause such as Article 1 of the Olivos Protocol or Article 2005 of the NAFTA, it was argued that it could fall under the inherent powers of a WTO Panel to recognise a choice of forum clause in an RTA. By that it has been suggested that if such a clause exists in an RTA, a panel could decline jurisdiction in a case where it is evident that the same facts between the same parties of a particular dispute have already been decided or if proceedings are pending before such an RTA tribunal.

However, although it might not always be entirely clear whether a particular dispute is based on exactly the same facts as a parallel or previous one, if an exclusive jurisdiction clause exists in an RTA (such as Article 292 TEC), a WTO Panel might be in a position where to exercise judicial comity by suspending proceedings before it and refer the case to the RTA tribunal. Afterwards it could decline jurisdiction or take the case again, depending on the outcome of the proceedings before the RTA tribunal. Some pundit may suggest that there might be legal impediments under the WTO as well as under the RTA, which would hinder such an approach. The fact that the WTO obligations of the NAFTA Members are confirmed in several passages of the NAFTA has possibly contributed to this approach[cv]. Lavranos, for example, contends that the ECJ "***should show more respect and comity towards the jurisdiction of other international courts and tribunals***"[cvi].Comity principle is no doubt a discretionary principle, due to the fact that there is no legal certainty whether and how a WTO tribunal would exercise that principle. However, in the absence of any norms it might be better for a tribunal to exercise comity compared to applying its own norms in clinical isolation and not taking the obligations of the disputing parties under other jurisdictions into consideration at all.

2-Application of the WTO agreements by national courts.

In the context of globalisation in the modern world, international trade remains one of the most important and dynamic factors in the global economy as has been highlighted by various researchers ; no country in the world can, in the current climate, achieve economic growth without being active in the processes of international trade[cvii].From a legal perspective, the specific public relationships linked with international trade and its associated regulations are based on the mutual compatibility of various states and are addressed by all global trading partners in line with certain general principles[cviii].We are to answer the question here as to whether the external WTO legislation should be recognised as legal acts in the national legal system, with the capability for "***direct application"*** in judicial proceedings[cix]. We will also consider at this level whether individual persons can invoke the WTO agreements at a national level (in national courts) to protect their legitimate rights and interests in international trade operations. In addition, it includes an analysis of practices followed by judicial authorities in the EU, other regions, including the individual EU member states. Thus, the international law of treaties obliges participants such as countries and/or international organizations in

international relations to follow the major contemporary principle of "***Pacta sunt servanda***", which means that every treaty in force is binding on the parties to it and must be performed by them in good faith[cx].Ipso facto, the doctrine of international law states **« *the implementation of any international treaty and its impact on the national legal system depends on the legal nature of the treaty itself* »** [cxi].Some treaties can be directly applied in national legal systems (including national courts), ensuring that their rights and obligations are provided to individual persons, whereas the application of other treaties requires the adoption of specific national legislation. In this regard, both legal theorists and practitioners widely debate whether the national (domestic) law of individual states can ensure the direct effect of WTO agreements. According to some empirical analyses this issue is usually linked to the application of WTO law by domestic authorities and national courts in relation to restrictive trade measures contested at a national level[cxii].

LACK OF COMITMENT FROM MEMBER STATES

If WTO dispute settlement body is unable to uphold the principle of good faith during dispute resolution between members as hoped for, it is thanks to lack of commitment by some members holding influential positions in the Club " idem " members who feel less privileged for numerous reasons.

SECTION I: Sovereign right over WTO legal obligations.

Instances in court proceeding have proven that the court lacks judicial autonomy depending on cases brought before it by members.

Paragraph 1: National security interest

A – Sovereign interest over WTO legal rules

1-Case between France and Djibouti under Technical assistance Scheme.

This is in connection of a case filed in by the Republic of Djibouti on 9 of January 2006, against the French Republic in respect of a dispute concerning the refusal by the French governmental

and judicial authorities to execute an international "***letter rogatory***" about the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the Case against X for the murder of **Bernard Borrel**. Following this assertion the act was in violation of **Mutual Assistance Convention on Criminal Matters** between the Government of Djibouti and French, on the 27 September 1986, and in breach of other international obligations borne by France[cxiii].

It is stated that no Member is required to disclose information which may be contrary to the public interest. Art. III bis equally envisages a general exception to all GATS substantive obligations. It may reasonably be argued that essential security interests constitute a subset of the broader concept of public interest by referring to disclosure which a Member considers contrary to its essential interests, Art. XIV bis: 1 lit. a, implies a broader margin of discretion for members[cxiv].

In this case, France argued that it could not transfer the judicial record to the Djiboutian government because doing so was going to create public disorder and put the states under security threat although she knew quite well that the act constituted violation in mutual Assistance convention on criminal matters[cxv].

2- US embargo against Cuba on February 24, 1996.

It came as a result Cuba shooting down two American civilian airplanes[cxvi]. President Clinton's response was immediate: "*I condemn this action in the strongest possible terms*". It was followed by Congress passing the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 three weeks later[cxvii]. On signing the LIBERTAD Act, President Clinton stated:

> "*This Act is a justified response to the Cuban government's unjustified, unlawful attack on two unarmed U.S. civilian aircraft that left three U.S. Citizens and one U.S. resident dead. It is a clear statement of our determination to respond to attacks on U.S. nationals and of our continued commitment to stand by the Cuban people in their peaceful struggle for freedom*"[cxviii].

The Act imposed severe economic sanctions, including new sanctions on any foreign individual or corporation who traffic in property which was confiscated by the Cuban Government on or

after January 1, 1959. Trade was broadly defined to include any commercial activity relating to the expropriated property, there by imposing liability on many foreign corporations conducting business with Cuba. The European Community filed a request for WTO consultations in regard to Article XXI OF GATT, expressing their profound concern about the lack of conformity of certain aspects of the Act to the international obligations of the United States under GATT 1994 and GATS[cxix]. Panel review was to be tested under the strict new dispute settlement procedures where this time around major powers were on opposite ends of a security dispute[cxx].

At the Dispute Settlement Body (DSB) meeting on October 16, 1996, the United States pointed what was at stake: Essential security interests. 12 of November 1996, a WTO panel was automatically established, consistent with the Dispute Settlement Understanding rules. The United States re-emphasized that the dispute was not fundamentally a trade issue and rejected the idea of Panel examining the matter[cxxi].On April 25, 1997; the European Community notified the WTO that it had requested the Panel to suspend proceedings while a "***Mutually agreed solution***" was negotiated. The parties reached a final settlement of the dispute following President Clinton's promise to amend the LIBERTAD Act to remove the provisions most offensive to Europe. The European Community was still not willing to respect the date line and quietly let the deadline lapse for pressing its case before the WTO**.**

3-China's Status in WTO.

During China's accession into WTO it's benefited from United States technical assistance including Special and Differential treatment as developing country status. China was and continues to be entitled to certain rights under special and differential (SDT) treatment, among other provisions in WTO agreements "*Treatment of Developing Countries*". United States Trade Representative (USTR) has pointed out that "***China's persistence in claiming to be a developing Member in future negotiations at the WTO pose a problem to WTO rule of law***" [cxxii].During accession protocol, China sought to enter the WTO as a developing country, while U.S. trade officials insisted that China's entry into the WTO had to be based on "*commercially meaningful terms*" that would require China to significantly reduce trade and investment barriers within a relatively short time. On the reverse and as some major economies hold a compromise was reached that required China to make immediate and extensive reductions in

various trade and investment barriers, while allowing it to maintain a transitional period of protection for certain sensitive sectors[cxxiii]. Some stakeholders have expressed concerns over China's mixed record of implementing certain WTO obligations and asserted that, in some cases, China appeared to be abiding by the letter but not the "*spirit*" of the WTO[cxxiv].The United States and other WTO members have used dispute settlement procedures on a number of occasions to address China's alleged noncompliance with certain WTO commitments. Despite some effort made by China to address these issues The United States alone has brought about 23 dispute cases against China at the WTO on issues including IPR protection, subsidies, and discriminatory industrial policies, and has largely pre

B- Overriding political will over the rule of law.

1 -Role played by the General Secretariat in decision making.

a-The composition of the General Secretariat.

It has attracted the criticism of several developing countries, while the actual scope and debates about expansion of its powers are fraught with controversy. Although greater proportion of the staff is recruited from developed countries, there is imbalance ; **Of the 512.5 posts in the Secretariat (with 39.5 posts vacant or under recruitment), 410.5 are occupied by individuals from developed countries and 94 from the developing ones**[cxxv].Other developing countries decry the fact that the problem is not only unequal representation of nationalities but also ideological and sociological, whereby only certain kinds of professionals are recruited, e g. neo-liberal economists whose views are to reinforce the interests of the great powers. Allegations of bias by the staff have been directed at different levels of the WTO's workings, from the more administrative functions of organizing meetings, assisting the chairperson in making lists of invitees, setting the agenda and publication of minutes after the meetings, to more substantial functions of giving legal and technical advice (on a case-by-case basis as well as through general technical assistance programs).

Given the importance that procedural matters (e.g. schedules, invitations and publication of minutes) can have on developing country participation, let alone the critical role that technical assistance can play in facilitating effective participation, these are serious allegations[cxxvi].Many developing countries assert that such open advocacy by the Secretariat of a position on which

there is no consensus among the majority of the members themselves considerably undermines the status of the WTO Secretariat as a neutral broker.

b- Informal Procedures in WTO Decision Making "Green Room Theory".

On comparing the rigid memberships and voting structures of the International Financial Institutions (IFIs) with the informally constituted and ad hoc **Green Room** hierarchies of the WTO. However, evidential problem with informal consultations is that they can lack transparency, and most developing countries have argued that such was indeed the case with both the GATT and the WTO. Informal meetings were often by invitation only, or through a process of self-selection by a small clique within the WTO; the Green Room meetings, where the Secretariat often treated the list of the invitees as confidential in order to avoid a flood of requests for participation from the excluded[cxxvii].

The second problem with informal processes in WTO decision making is that it places substantial reliance on the role and discretion of the Chairperson as the broker, mediator and facilitator of the negotiations. The chairperson enjoys considerably leeway in setting the perimeters of the agenda and in deciding the frequency and invitations to the informal meetings. Given the frantic pace of meetings and the over-taxed delegations, these decisions are more than ones of mere procedure and can exercise considerable impact on the de facto exclusion of certain members and their interests. Developing countries have more often been more selective in their acceptance of chairmanships of the subsidiary bodies as proposes by WTO General Secretariat because of lack of resources[cxxviii]. Resource constraint is not the only cause of developing countries' exclusion; The WTO Guidelines for appointment of official state that Representatives of Members in financial arrears for over one full year cannot be considered for appointment automatically disqualifies some of the LDCs[cxxix].It goes same that a presence in Geneva is almost a necessary condition for appointment, although Non-residents may be appointed in exceptional circumstances due to the necessary expertise needed[cxxx]. The chairperson can provide the fulcrum of the negotiation, and many LDCs find themselves excluded from this key position. Finally, many developing countries have pointed out that the lack of clarity on the exact procedure for selection of chairs leaves immense scope for Chair persons to suit the interests of the powerful and exclude the opinions of the weak[cxxxi].

Paragraph 2- Luck warm attitude of less developed country members

A-Doubts in the effectiveness of the WTO rulings and continued misunderstanding as to the content and relevance of « travaux préparatoires » vis-a-vis developingcountries.

Some powerful members have not internalised the WTO Framework in their national laws like in the **case of Chile and Price band**[cxxxii],and ***US-Gazoline***[cxxxiii] .There are difficulties in implementing certain panel and Appellate Body's rulings and recommendations and in bringing the law of such powerful members into conformity with WTO rules, especially if it involves enacting new legislation in order to comply with the a WTO ruling or recommendations[cxxxiv].The risk here is that some of the powerful States use the WTO when it suits them and disregard it when their interest is not at stake. Thirdly, although there is some ***case law***, the WTO adjudicating bodies are continuing to struggle with inconsistencies as we can see. Secondly, the WTO settlement bodies identify but rarely classify; the case of ***Korea –Diary***; Only few occasions WTO adjudicating bodies have explicitly stated the heading under which they have examined various interpretive elements which they have used[cxxxv].For example, in Korea Diary, the Appellate Body discussed a GATT adopted panel report to support its implementation of the term "***unforeseen developments***". However, the Appellate Body did not classify the GATT panel report under the heading of the VCLT[cxxxvi], the Appellate body referred to a series of its previous reports when discussing the term so as to afford protection[cxxxvii]. However, the Appellate Body did not mention what was the VCLT relevance of the reports.

B-Controvercies over the concept of "developing countries".

Of the total ninety-nine (99) members that have appeared at the Appellate Body, thirty-two were developing countries. Based on this statistic, one could argue that developing countries have been taking part in the WTO Dispute Settlement proceedings. However, two things need to be examined; the meanings of developing countries which at the same time make up majority in the system and the participation. The precise number of developing countries in WTO is unclear because there is no clear-cut definition of the word "***developing country***".

The term is used extensively, but is neither defined in the WTO Agreements nor was defined under the GATT regime. Normally, such definition is made on ad hoc basis and members can announce it case-by-case, whether they consider themselves developed or developing countries

like the case of China. Accordingly, the status of certain members has been controversial especially in the recourse to BoP measures under Article XVII of the GATT and in accession of China which wanted a developing country status. Neither a panel nor the Appellate Body has to date define the term and to apply it to a specific case.

Based on the World Bank classification system of differentiating between countries based in number, it could generally be argued that African countries are developing countries. Countries such as, **Mexico, Turkey, Hong Kong, Singapore, Malaysia, South Korea, Brazil and OECD members** are advanced and actively in international trade so it would not be right to categorise them as developing countries in the WTO.

Participation in the WTO dispute settlement covers a lot of activities so it is surprising to many that international trade scholars viewed the dispute settlement system of the World Trade Organization (WTO) as a successful; the success depends wholly on the perspective and experience of each Member state. Developed and some developing countries such as the United States, the European Union EU, Brazil, and India utilize the system with varying degrees of frequency[cxxxviii].Members states with smaller economies or in differing stages of development have their own view precluding them from participating in disputes settlement.

SECTION 2: RECOMMENDATIONS

Paragraph 1: Rendering the DSB more efficient and trust worthy

A-Ensuring its autonomy

1-The establishment of a permanent panel roster[cxxxix], or a panel chair body[cxl].

According to this idea, the panel roster was to replace the current indicative list with a roster of qualified governmental or non-governmental candidates nominated by Members; each Member could nominate only one candidate, using qualifications similar to those of the Appellate Body. WTO panellists would be selected from this roster; composition would otherwise remain the same as under current DSU rules. The Panel chair body proposal would create a group of persons from which all panel chairs would be selected and all other panellists would be selected pursuant to existing DSU rules. This proposal is somehow complex in our view because the panel roster proposal would not provide major gains in terms of time savings and efficiencies and current DSU procedures and practices on composition of the panels would continue to apply. Also, a panel roster would not ensure the same level of expertise and

experience or collegiality, consistency, and coherence that a standing tribunal would provide. Although a panel chair body would have the advantage of greater experience for one person on each panel as compared with the current system, it would not result in significant time savings and efficiencies because the rest of the members of the panels would still have to be composed under existing DSU rules. Moreover, the panel chair system could undermine collegiality among the panel members. The panel chair would have more experience, possibly more expertise, and a closer working relationship with the Secretariat, giving him or her more influence than his or her colleagues in the final decision in the case.

Looking into all these reasons enumerated, a dispute tribunal would be a far superior alternative than a panel roster or a panel chair body.

2- Strong Two-Tier System.

The WTO needs a strong, two-tier dispute settlement system by establishing a dispute tribunal is imperative because there is a looming fear that the Appellate Body may incrementally become a one level tribunal. The Appellate Body inter alia is increasingly reviewing facts and evidence that are reserved for the Panel and taking more time to hear cases. There is near risk that the panel system will become weaker and also weaken the DSB's credibility, if the first instance level is not strengthened. The Appellate Body according to many has become the tribunal of choice. The de jure reasoning demands that a strong, two-tiered system dispute tribunal should be adopted (separating between Panel and Appellate). To savage this situation, there is need for DSB reform that takes into consideration the improvement of the quality of First Instance Court, limiting access to appeals, increase representation because for now our findings show that the Panel has only three members and lastly they should be transparency.

3-Drawing a line between WTO political organs and the judicial organ (DSB).

a –Review decision making procedure.

Before a new round of trade talks begins the agenda is first of all established by a group of nations called ***"the Quad"*** **; the United States, the European Union, Canada and Japan**. The Green Room, in other words, is the WTO's Security Council, and the Quad is its permanent

membership. The WTO is as exclusive, in practice, as the United Nations. Even so, smaller countries which are permitted by the Quad to attend the Green Room negotiations are treated by the more powerful players just as the temporary members of the UN Security Council are treated by the residents. By the time the formal, constitutional trade talks are ready to begin, the key decisions have already been made; agenda and declaration has been drafted, and all the nations which were excluded from the Green Room meetings can do is seek to block the rich nations' proposals. They are presented with a stark choice: either they accept the declaration drafted in their absence, more or less in its entirety, or they reject it. Although in principle, the WTO grants the governments of the poor world more collective decision-making power than the governments of the rich world[cxli],this in practice, stronger states have devised a means of bypassing collective decision making, while the weak states have proved reluctant to use their constitutional powers to stop them, for fear of punishment[cxlii].

b- Making the renewing of DSB panel and Appellate mandate inclusive to all members. It has been proven that the recruitment of judges in both the Panel and Appellate Body passes only through the hands of "**green room members**" who may either chose to block proceeding if their point of view is not considered .This practice is not in the spirit of good faith principle.

B- Considering Human right (Jus Cogens) as a useful tool in WTO Legal System

Some international law expert have earmarked that, legitimacy of the WTO as a juridical system depends on the transformation of what he calls market freedoms into fundamental rights[cxliii]. Petersmann is also well aware that in the Covenant on **Economic, Social and Cultural Rights,** the right to property and freedom of contract have not been recognized as human rights, and attributes this fact to « ***anti-market bias*** »[cxliv].Human rights need to be legally concretized, mutually balanced and implemented by democratic legislation which tends to vary from country to country. European Coal and Steel Community (ECSC), not a free market project, but a "**dirigiste**" one, premised on the gains to social and political stability of industrial planning at the European level; and the early failure to transform the ECSC into a constitutional European project resulted in two tracks, a human rights track represented by the European Convention on Human Rights and the European Court of Human Rights, as well as a common market track, the latter entailing not only the protection of market freedoms but also supranational economic regulation, underpinned by institutions of governance[cxlv]. The existing

exceptions in Article XX of the GATT, in the category of public interest clauses, refer to a range of public policy objectives, which may be conceived in human rights terms including the protection of animal, human life and plant health (XX)(b),the conservation of exhaustible natural resources (XX) (g)), the effective enforcement of domestic laws and regulations (XX(d).

Institutionally, there is still significant scepticism within WTO about the expanding nature of human rights understandings, and even about economic**, social and cultural rights as well**[cxlvi].In some cases the Appellate Body of the WTO confirmed "***that import restrictions may be justifiable under WTO law for protecting human rights values***" but failed in scope[cxlvii].

Paragraph 2- Encourage active participation of less developed countries in the System.

A-Reviewing of existing trade and partnership agreements between developed and less developed countries.

1- The revision Technical Assistance Schemes[cxlviii].

a- Technical Assistance and Capacity Building (TACB) under WTO has to be intensified and well orientated.

Developing countries need to be assisted in order to maximise the potential gains of their participation in the multilateral trading system. Since the launch of the Doha Round in 2001, there has been a sizeable increase in both developed country commitments to trade-related technical assistance and capacity building (TACB) and in debates about the appropriate purpose and nature of that assistance. However, a series of complaints about the effectiveness of assistance have emerged[cxlix].There is therefore urgent need for TACB to enhance developing countries with trade capacity ; this calls for greater critical attention to another major dimension of trade-related TACB, this is in relation to the participation of developing countries in the world trading system dispute settlements proceedings, regulatory and policy aspects of implementing trade agreements[cl].The largest benefits for LDCs in Bali was believed to be on the agreement on trade facilitation although the idea did not originate from them and finally was not endorsed [cli].Furthermore, simplified custom procedures and lower transaction cost can

be the most significant gains likely to arise from a possible boost in intra-regional trade[clii], but that is not enough as some countries still have real difficulties in implementing certain elements of the agreements due to absence of technical assistance and capacity building. That said, developing and least developed countries need to be assisted in some areas to enable them defend their right in international trade dispute.

b- The revision of United Nations' resolution on Technical Assistance Resolution 52[cliii].

The Technical Assistance Resolution put in place by the United Nation General Assembly to enhance transfer of knowledge and technology to poor economies by developed countries has recently witnessed some mutations in favour of political and economic gains to major powers, abandoning the primary objective which was aimed at transferring knowledge and technology from North to South. This operation is mostly finalized in internal relations of multinational enterprises guided by the "*Umbrella Clause"*[cliv].Diplomatic missions of developed countries are in total support of this. The is evidenced by the fact that in 2004, the Secretary of State in charge of "*la Francophonie*" became the head of Public Aid and French development Commission under the authority of Ministry of External Relations in France.

2-Lome Convention: European Union – Bananas III case (1998).

This was a regime put in place by European Commission on Import, sales and distribution of bananas duty free in favour of 71 African countries, Caribbean and Pacific countries (ACP) excluding other developing countries. Although this was in line with the Lome Convention aimed at developing the economy of developing countries through preferential treatment, Ecuador, Guatemala, Mexico and USA considering it as discriminatory against other colonies like theirs and that it violated Art I, II, II, X, XI, and XIII of GATT 1994, they filed a complaint in 1996.

Panel and Appellate Body brought out the various elements as justification for EC inconsistency vis-a-vis its WTO obligation; first that the annual duty free tariff quota of 775,000 mt of imported bananas from ACP countries leaving out other non ACP WTO members violated Art. I of GATT 1994. Secondly, that with the expiration of the Doha Waiver in I of January 1996 on bananas and with the establishment of panel right to when the report will be issued, there is no evidence that there will exist any Art I (I) of the GATT 1994 to cover

the preference granted by EC to duty free tariff quota of Import bananas from ACP countries. That EC current bananas Import regime, its tariff quota reserved for ACP countries was inconsistent with Art XIII (I) and Art XIII (2) of the GATT.

B-Encourage the creation of more regional and Continental Free Trade Zones and custom unions to boost developing countries participation at the international trade dispute level through;

1- The creation of Africa Free Trade Area.

Its objective is to extend the Internal Market of the African countries to creating a homogeneous African Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement at the judicial level. It will guarantee equal rights and obligations within the Internal Market for individuals and economic operators in Arica. For instance, EU permit industries and companies of the twenty-five members' states to bring cases against illegal trade measures or actions between EU members. The EU had as motive to bridge the gap that existed between the private party right and the WTO Dispute Settlement Body processes by adopting a formal EU instrument that allowed the EU Institutions precisely the European Commission to act as liaison between EU Industries, Enterprise and international trade dispute claims against EU trading partners who were not living up to their commitment with WTO Agreement[clv].

2-To have double weight within WTO.

Any WTO member belonging in a Regional or continental groupings stand to benefit more in terms of voting .She stands first as a state with full sovereign power and secondly as member of its regional or continental groupings .Many developing countries mostly in Africa are still lagging behind due to low representation at the decision level in WTO.A glaring example is EU's participation in WTO.

ENDNOTES

[i] États-Unis — Crevettes, paragraphe 158 (WT/DS58/AB/R)
[ii]P.3.1.2 États-Unis — FSC, paragraphe 166 (WT/DS108/AB/R)
[iii] The official version of WTO Agreements and its annexes is published by the WTO and Cambridge University Pres as the Results of the Uruguay Round of Multilateral Trade Negotiations:The legal texts.The WTO Agreement and its Annexes are also available on the WTO website at :*www.wto.org/english/docs-e/legal-e.htm.*
[iv] Van D. B. P.,Zdouc W. "*The law and politics of World Trade Organization*" page 14 (2013).
[v] Appellate Body report Brazil- Desicated Coconut page 177(1997).
[vi] Appellate Body report Argentina –Food wear (EU) para 81(2000).
[vii] Article XVI: 3 of the WTO. Available at :*htt://www.wto.org/ENGLISH/res-/booksp-e/analytic-index-e/wto-agree-04-e.htm*articleXVI.*
[viii] Zdouc W. and Bossche P. V. D. "*The Law and policy of the World Trade Organization*" page 317 published in 2013.
[ix] General Agreement on Trade in Services .Available at :*www.wto/English/docs-e/legal-e26-gats.pdf*
[x] General Agreement on Trade in services ,page 41 published in Geneva in July 1996 .Available at *:htt://www.wto.org/English/docs/e-/legal-e/gatt47-e.pdf*
[xi] Article XIX of GATS.
[xii] Article 1:2(a)-(d)of the GATT.Available at :*https://www.wto.org/english//res-e/booksp-e/analytic-index-e/gats-01-e.htm*article 1*
[xiii] Understanding the WTO. 3rd edition .World Trade Organization page 42 (2003).
[xiv]*See* WIPO (2009).
[xv]See WTO Texts reported in the law of the WTO-Final Text of the GATT Uruguay Round Agreements Summary .The practitioner 's Destbook Series Ocean Publications (1995).
[xvi] Mcmahon J. "*The Agreement on Agriculture: A comment*" page 42 (2003).
[xvii] Mavriodis P. C. and Palmeter N. D. "*The WTO Legal System ! Source s of Law*" .Am.J.Int' L…..P. 92:398 1998.
[xviii] Statute of International Court of Justice ,26 June 1945 59.sta. 1055,T.S NO.993(1945) at www.icj cij.org/ibasicdocuments/ibasictext/ibasicstatute.htm.
[xix] Ian B. *"Principle of Public International Law*" ICJ Statute Art .38(1) 15.5th Edition 1998.
[xx] Appellate Body report, Japan-Acoholic everages,at Part G ,para.1.
[xxi] Article 7.1and 7.2 of the DSU.available at :*htt://www.wto.org/ENGLISH/tratop-e/dispu-e/repertory-e.htm*S.7.2*
[xxii]*Id* Dispute Settlement Article 2.1 Available at *:https://www.wto.org/english/docs-e/legal-e/28-dsu-e.htm*
[xxiii] Canada –United States Free Trade Agreement.
[xxiv] GATT.
[xxv] "Nationals" here shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.
[xxvi]Appellate Body Report DS453
[xxvii]*Ibid*
[xxviii] WTO Appellate Body Reverses Panel Findings in Argentina-Panama Financial Services Row21 April 2016.
[xxix] See Reihart note 4,70.
[xxx]WTO Dispute Settlement proceeding DS243.
[xxxi]DSB Report adopted by Panel on the 21 of July 2OO3.
[xxxii]See DSU, supra note 5, art. 7. As one author notes, Article 7 allows the com-plaining Member to "unilaterally define[] the subject-matter of litigation." Pierre Pescatore, Drafting and Analyzing Decisions on Dispute Settlement, in HANDBOOK OF WTO/GATTDisPuTE SETTLEMENT 3, 24 (Pierre Pescatore et al., eds. 1997). This may give the com-plaining Member a significant advantage in the litigation, insofar as the Member is able toframe the terms of the panel's consideration of the issue
[xxxiii]DSU, supra note 5, art. 7.1.
[xxxiv]Ibid.Lichtenbaum P.
[xxxv]*Ibid*. para. 7.29.
[xxxvi]Id. para. 7.30
[xxxvii]Id. para. 7.44.

[xxxviii] [xxxviii]United States — Continued Dumping and Subsidy Offset Act of 2000, WTO Docs WT/DS217/R, WT/DS234/R (16 September 2002.
[xxxix]Continued Dumping and Subsidy Offset Act of 2000, HR 4461, 106th Cong (2000).
[xl]US — Offset Act (Byrd Amendment), WTO Docs WT/DS217/R, WT/DS234/R (16 September 2002) [7.54] (Report of the Panel).
[xli]Ibid [7.63].
[xlii] Ibid
[xliii]Ibid [7.64] (citations omitted).
[xliv] Ibid [7.66].
[xlv]US — Offset Act (Byrd Amendment), WTO Doc WT/DS217/AB/R, WT/DS234/AB/R, AB-2002-7 (16 January 2003) [294] (Report of the Appellate Body).
[xlvi]Ibid [285]
[xlvii]Ibid [281]
[xlviii]*See* Joost Pauwelyn "The concept of burden of proof only applies to facts, not to issues of law. Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?" 1 J. INT'L ECON. L. 227, 242. However, most contested issues are mixed questions of fact and law, making this distinction problematic to apply in practice (1998).
[xlix]See id. paras. 5.4-5.6.
[l]See United States-Wool Shirts (Panel Report), supra note 153, Paras. 5.2, 5.3.
[li]See id. para. 6.7.
[lii]United States-Wool Shirts (Appellate Body), supra note 94, at 1
[liii]See id. at 16. The Appellate Body recognized that Members asserting an affirmative defense, such as a GATT 1994 Article XX defense that a measure is justified onenvironmental grounds, should have the burden of proof. Id.
[liv]A separate "standard of review" issue arises with respect to Appellate Body review of panel decisions. See infra Part V.C. Also, antidumping decisions are subject to a specific standard of review. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, reprinted in H.R. Doc. No. 316, 103d Cong., 2d Sess. 807 (1994) art. 17.6 [hereinafter Antidumping Agreement]. See generally Croley & Jackson, supra note54; see also McGovern, supra note 53, §§ 12.141, 12.143.
[lv] WTO Secretariat, EC Measures Concerning Meat and Meat Products (Hormones):AB-1997-4, WT/DS26/AB/R and WT/DS48/AB/R, paras. 13-15 (Jan. 16, 1998) (last down-loaded May 20, 1998)<http://www.wto.org/dispute/bulletinl.htm> [hereinafter EC-Beef Hormones (Appellate Body)]. For instance, the EC argued that the panel had not accorded deference to the EC's decision to set and apply a level of sanitary protection higher than the relevant international standard. Id. para. 13
[lvi]Id. paras. 41-42.
[lvii]DSU, supra note 5, art. 11.
[lviii]Id. Para. 117. The Appellate Body stated that de novo review would be inappropriate because "Under currentpractice and systems, [panels] are in any case poorly suited toengage in such a review." Id. The Appellate Body rejected "total deference" because it wouldnot ensure an "objective assessment" as required by Article 11 of the DSU. Id. (citing UnitedStates-Underwear, WT/DS24/R Para. 7.10 (Feb. 25, 1997).
[lix]Id. para. 133
[lx]See DSU, supra note 5, art. 7. As one author notes, Article 7 allows the com-plaining Member to "unilaterally define[] the subject-matter of litigation." Pierre Pescatore, Drafting and Analyzing Decisions on Dispute Settlement, in HANDBOOK OF WTO/GATTDisPuTE SETTLEMENT 3, 24 (Pierre Pescatore et al., eds. 1997). This may give the com-plaining Member a significant advantage in the litigation, insofar as the Member is able toframe the terms of the panel's consideration of the issue
[lxi]DSU, supra note 5, art. 7.1.
[lxii]Ibid.Lichtenbaum P.
[lxiii]*Ibid*. para. 7.29.
[lxiv]Id. para. 7.30
[lxv]Id. para. 7.44.
[lxvi]United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WTO Doc WT/DS192/AB/R, AB-2001-3 (8 October 2002) [81] (Report of the Appellate Body) (emphasis in original).
[lxvii]Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) 1869 UNTS 401.
[lxviii]GATT Doc LT/UR/A-1A/1/GATT/U/4 (15 April 1994).

[lxix]Ibid [5].
[lxx]Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights) 1867 UNTS 299.
[lxxi]Ibid art 24.1.
[lxxii]Ibid arts 24.4, 24.5.
[lxxiii]*See* Appellate Body report on Argentina –Food Wear(EC) para 81. (2000).
[lxxiv]*Ibid* GATT 1994.
[lxxv]*See* Appellate Body Report in Brazil –Desiccated Coconut page 177.(1997).
[lxxvi] Uruguay Round Agreement:Multilateral agreements on trade in goods.*Avalable at://www.wto.org/English/legal-e/05-anxla-e.htm*
[lxxvii]See Article XVI:3 of the WTO.
[lxxviii]See Van de Bossche page 824 (2017).
[lxxix] WT/DS135 « *European Communities -Measures affecting Abestos and product containing Abastos* »(1998).
[lxxx] WT/DS231 « European Communities –Trade Description of Sardines »(2001).
[lxxxi] See TBT Annex 2 (Paragraph 6).
[lxxxii] Werner Z. Van P. D. B. "*The law and policy of World Trade Organization"(2017)*
[lxxxiii] International Trade Forum Magazine "The SPS: WTO Agreement on the Application of SPS Measures." Issue 3 WWW.tradeforum.org (2010).
[lxxxiv] Gazzini T. « The legal nature of WTO obligations and the consequences of their violation » The European Journal of International Law n° 4 (2006).
[lxxxv] South Africa Cases, preliminary Objections (1962).
[lxxxvi] The existence of action popularis was rejected in both South West Africa Decision supra notes 9and 10 as observed by Judge Mrelli Supr note 8 at 60.
[lxxxvii]Cibert A. (Paris-Saclay) 26 January 2020.
[lxxxviii]Fellmeth A. X. and Horwitz M.*"Guide to latin in international Law*"2011.
[lxxxix] Vienna Convention (1155UNTS 331).
[xc] Pauwelyn ,supra notes 1 at 934 that « *While breach of human rights necessarily violates the rights of all parties,breach of WTO treaty can be limited to one single party »* European Journal of International Law (2006).
[xci] Canada –Certain Measures Affecting the Automotive Industry Report of the Appellate Body , May 2000 WT/DS139/AB//R at para 78.
[xcii] See Indonesia –Certain Measures Affecting the Automotive Industry WT/DS55/R,Panel Report , para 14 ,145 2 July 1998 .
[xciii] See Article XXIV GATT.
[xciv] US-Import Measures on Certain Products from the EC,WT/DS165/R, para.654 17July 2000.
[xcv] Decision of 28 November 1997 (L/4903) known as enabling Clause ;Decision on water adopted on 4 November 2001 (WT/MIN(01) 15).
[xcvi] See YBILC Part 26 (1985-II).
[xcvii]United States — Continued Dumping and Subsidy Offset Act of 2000, WTO Docs WT/DS217/R, WT/DS234/R (16 September 2002)

[xcviii]India argued that Article 11 of theDSU entitled India to a finding on each of the issues raised. The paneldisagreed and cited "the consistent GATT panel practice of judicial economy.
[xcix]WTO Secretariat, United States-Measure Affecting Imports of Woven Wool Shirtsand Blouses from India: Report of the Panel, WT/DS33/R, Para. 6.6 (last downloaded May20, 1998) <http://www.wto.org/dispute/bulletinl.htm> [hereinafter United States-WoolShirts (Panel Report).
[c]Id. Michigan Journal of International Page 1230
[ci]See also United States-Gasoline (Panel Report), supra note 85, para.6.43 (concluding that it was not necessary to decide whether the U.S. measures violated theAgreement on Technical Barriers to Trade, in view of the panel's findings that the U.S. measures violated Article 111:4 of GATT 1994.).
[cii]DSU, supra note 5, art. 7.2.
[ciii]McGovern, supra note 53, § 2.2321.
[civ]See supra note 104, at 13.
[cv]Seesupra note 23.
[cvi]See Lavranos, supra note 133, at 491.

[cvii]See Bernatonytė, 2011; Laurinavičius et al., 2014.

[cviii]Uruguay Round in 1994 ,enshrined in the provisions of international economic law in the form of the WTO agreement and its annexes (see the Law of the Lithuanian Republic on the ratification of the General Agreement on Tariffs and Trade (GATT 1947) and the Final Act of the Uruguay Round of multilateral trade negotiations, 2001), particularly the General Agreement on Tariffs and Trade (GATT), which presents a single regulatory framework for international trade (WTO law).
[cix]Katuoka S. Valantiejus G. «*Application of the WTO Agreements in National Courts: Comparative Aspects of Worldwide and lithuanian judicial practices* » Mykolas Romeris University, Vilnius, Lithuania *E-mails: skatuoka@mruni.eu; gvalantiejus@mruni.eu Received 16 June 2019.*
[cx]See Jakulevičienė, 2011.
[cxi]See economides(2004).
[cxii]See Herdegen (2013).
[cxiii]Cour Internationale de Justice recueil des arrêtes, avis consultatifs et ordonnance affaire relative avec certaines questions concernant l'entraide judiciaire en matière pénale(Djibouti c. France)arrêt du 4 juin 2008.
[cxiv] See Cottier, Delimatsis & Diebold, Article XIV GATS, Para. 80.
[cxv]See International Court of Justice France v.Djibouti judgment June 2008
[cxvi]Larry Rohter, Exiles Say Cuba Downed 2 Planes and Clinton Expresses Outrage, N.Y. TIMEs, Feb. 25, 1996.
[cxvii]22 U.S.C. § 6021 (2006).
[cxviii]Remarks on Signing the Cuban Liberty and Democratic Solidarity (LIBERTAD)Act of 1996, 32 WEEKLY COMP. Press Doc. 478, 478 (Mar. 12, 1996)
[cxix]Request for Consultations by the European Communities, United States-The Cuban Liberty and Democratic Solidarity Act, WT/DS38/1 (May 13, 1996).
[cxx] Understanding on Rules and Procedures Governing the Settlement of Disputes art.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annexe 2, 33 I.L.M. 1125, 1228-29 [hereinafter Dispute Settlement Understanding], available *athttp://www.wto.org/english/tratop e/dispu-e/dsue.htm*
[cxxi]Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rap pardon 20 November 1996, at 2, WT/DSB/M/26 (Jan. 15, 1997)
[cxxii]Congregational Research Service "World Trade Organization: Overview and Future Direction Updated February" (2019).
[cxxiii]Morrison M.W. "China –U.S. Trade Issue" CRS Report RL33536.
[cxxiv]For example, see Written testimony by the U.S.-China Business Council, "China's Implementation of its World Trade Organization Commitments," Submitted in response to the Office of the US Trade Representative's Request for Comments and Notice of Public Hearing Concerning China's Compliance with WTO Commitments, September 21, 2016; and Atkinson et al., Stopping China's Mercantilism: A Doctrine of Constructive, Alliance-Backed Confrontation, Information Technology and Innovation Foundation, 16 March 2017.
[cxxv]Article VI.4 of the Agreement establishing the WTO states, 'The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials.'
[cxxvi]They further emphasises that even a relatively small Secretariat like the WTO's enjoys considerable power that derives from its role as overseer of major processes that underlie its functioning.
[cxxvii]See Background Paper, Commonwealth Secretariat, 21 January 2000.
[cxxviii]See Michalopoulos (1999).
[cxxix]Guidelines for the Appointment of Officers to WTO bodies approved by the General Council on 31 January 1995, WT/L/31, 7 February 1995.
[cxxx]Ibid.
[cxxxi]The Guidelines (WT/L/31, 7 February 1995) clearly state that 'There should be no atomicity in succession to posts,' but are ambiguous on the actual procedure for appointment. Requirements such as 'Appointments must be acceptable to the membership as a whole and not only to regions or groupings that may have proposed them,' or the importance of consultations on matters of appointment, leave considerable scope for the manipulation of the process of appointment.
[cxxxii]Appellate body referred to a series of its previous reports when discussing the term "*so as to afford protection",* appearing in Article III:2 GATT.
[cxxxiii]The Appellate Body called for no derivations from VCLT, but failed to commit itself as to which interpretative element came under which heading.Fourthly, the DSB adopts the international law approach of

persuasion designed to encourage WTO members to participate in the regime created rather than award huge amount of compensation to the members which are victims of violation of WTO law.

[cxxxiv]- Yildirim, A. « *From Trade with Love: Compliance with International Law and the Impact of Trade. The University of Edinburgh »* (2O13).

[cxxxv]The covered agreements have always been discussed under the ordinary sense of the term featuring in Article 31:1 VCLT; travaux preparatoires of the covered agreements have consistently discussed under Article 32 VCLT.[58]For example, in Korea ? Diary.

[cxxxvi]See Chile price band.

[cxxxvii]Article III : 2 GATT.

[cxxxviii]Bohl K. «*Problems of Developing Country Access to WTO Dispute Settlement »*Chicago-Kent Journal of International and Comparative Law Volume 9|Issue 1 Article 4 (2009).

[cxxxix]Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/ W41, 24 January 2003; 3-5.

[cxl]Contribution to Clarify and Improve the Dispute Settlement Understanding: Panel System, Communication from Thailand, TN/DS/W31. 22 January 2003.

[cxli]World Trade Organization (2003). "Report By The Director-General To The Fifth Ministerial Conference." Available online at http://docsonline.wto.org/DDFDocuments/t/WT/Min03/1.doc 12 Fatoumata, Jamara and Kwa, Aileen.(2003). Behind the Scenes at the WTO: the Real World of International Trade Negotiations. New York: Zed Books.

[cxlii]Ibid, p2 05-107.

[cxliii] Howse R. "*Human Rights in the WTO:Whose Rights,What Humanity?Comment on Petersmann*"(200).

[cxliv]Although, perhaps tellingly, the section of the article entitled 'The Need for WTO Competition and SocialRules as Necessary Complements to Human Rights' deals only with competition rules and never actuallydiscusses social rules.

[cxlv]See, generally, P. Magnette, L'Europe, l'Etat et la democratie (2000).

[cxlvi] At the World Trade Forum in Berne last August, where many of the leading traditional WTO experts gathered to address the question of WTO law and human rights, several of the most eminent of them evenquestioned whether any human rights were sufficiently well understood or clearly embodied ininternational law so as to be relevant to the operation of the WTO.

[cxlvii]In the Shrimp/Turtle case the Appellate Body of the WTO '*confirmed that import restrictions may be justifiableunder WTO law for protecting human rights values'* (at 645). But, in fact, in thatdecision, the Appellate Body did not link the notion of conservation of exhaustiblenatural resources to human rights values.

[cxlviii]United Nations General Assembly Resolution 52(1).

[cxlix]Deere C. « Changing the Power Balance at the WTO: Is the Capacity-Building Agenda Helping? » Background Paper for the Human Development Report 2005.

[cl] The challenges related to improving capacity to trade (including institutional capacity to administer agreements) are taken up in a related background paper also commissioned for the 2005 Human Development Report. See, Jensen (2005).

[cli] Bellmann C.«The Bali Agreement: Implications for Development and the WTO » 2014.

[clii]Article V, involving freedom of transit; Article VIII, which deals with limiting border fees and formalities; and Article X, regarding publication and administration of regulations.

[cliii]United Nations General Assembly Resolution 52(1).

[cliv]FEUER « Les aspect juridique de l'assistance technique »LGDI p.234 (1987).

[clv]Maclean R. M. Crowell and Moring "*EU Trade Barrier Regulation: Tackling Unfair Foreign Trade Practices*" Second Edition Brussels 2006.