

The WTO's Dispute Settlement Understanding (DSU) and Bangladesh: a Critical Review

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Abstract:

This research is divided into Seven Chapters. This enumerated the historical background of WTO and its covered areas and legal personality in the international arena. Moreover, analyzed the agreement establishing the WTO as an international organization and principles it followed for the Member States. WTO's Rules and Procedures Governing the Settlement of Disputes (DSU) among the Member States including various mechanisms available for the dispute settlement containing in Annex 2. Whether the Bangladesh is getting any benefit as a Member state of the WTO. Analysis of my findings critically and concluded with any recommendations available to update the system.

Keywords: Background of WTO, Agreement establishing WTO, Rules and Procedures Governing the Settlement of Disputes (DSU), LDCs like Bangladesh, Analysis of findings with recommendations.

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I. Introduction

1.1 Introduction

The irony in the world of international trade is that every state wishes other states to open their doors as widely as possible by pursuing policies of trade and economic liberalization; conversely, states may also try to close their own doors as tightly as possible by pursuing protectionist policies. Here, indeed, is where the law is needed: to intervene to ensure fair play, and fairly to settle disputes in the case of foul play.¹ Hence, the WTO came into being for ensuring fair play by removing trade barriers through negotiations among member states and settling disputes in the case of foul play.

At the heart of the system – known as the multilateral trading system – are the WTO's agreements, negotiated and signed by a large majority of the world's trading economies and ratified in their parliaments. These agreements are the legal foundations for global trade. Essentially, they are contracts, guaranteeing WTO members important trade rights. They also bind governments to keep their trade policies transparent and predictable which is to everybody's benefit. The agreements provide a stable and transparent framework to help producers of goods and services, exporters and importers conduct their business. The goal is to improve the welfare of the peoples of the WTO's members.²

1.2 Aim and Objective of the research

A critical review of the research regarding the WTO's Dispute Settlement Understanding and Bangladesh has some definitive aims and objectives. Firstly, to know about the WTO and its mechanism like different provisions of WTO agreement and its Dispute Settlement Understanding contained in Annex 2. Secondly, how friendly it is for the LDC like Bangladesh? Thirdly, how far reforms must be done by a member nation in line with the WTO agreements? Fourthly, what are the challenges or obstacles (if any) faced by the country while implementing WTO agreements? And is the World Trade Organization acting proportionately while settling disputes among its member states? Finally, I have strong willingness to pursue higher degree from abroad which is another main aim and objective of selecting this research topic and doing this research.

¹ Surya P. Subedi, *International trade and business law*, 1st Edition, the people's public security publishing house, Hanoi, 2012, Pg- 7

² <https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> Accessed on 3 April 2019

1.3 Research Methodology

Methodology is the systematic, theoretical analysis of the methods applied to a field of study. It comprises the theoretical analysis of the body of methods and principles associated with a branch of knowledge. Typically, it encompasses concepts such as paradigm, theoretical model, phases and quantitative or qualitative techniques.³ There is no single or universal approach to legal research methodologies. The legal research may be a combination of methods for interpreting and applying legally relevant information. There are several approaches to research methodologies such as analytical, empirical, quantitative, qualitative, comparative and historical. Here in the said research at first I have followed the historical methodology of research because I believe without having a concrete knowledge about the basic of anything there exist some sorts of incompleteness. For making this research I have gone through various agreements of WTO and various books. Thus it creates a primary source of my research. Then as a secondary source I have collected information from various journals and various websites by accessing the internet for the purpose of this study.

1.4 Limitation of the study

In conducting the research, I have faced some limitations. The main limitation of the study on this research is the time limit. The time which I have got for completing this research paper, is not enough for the study. Another main limitation is that I have faced the scarcity of available research and study materials in this field. Also, there is lack of quality books on International Trade Law in Bangladesh. Hence, it is very difficult for me to collect all materials or information regarding my research paper. For this reason, I might not be able to add more value or flavor on my research paper.

1.5 Abstract of Chapters

As aforesaid and have already mentioned that my research topic is “The WTO’s Dispute Settlement Understanding (DSU) and Bangladesh: A Critical Review”. My whole research is divided into Seven Chapters.

In Chapter 2, I have discussed the Historical Background of WTO which included the GATT in brief, birth of the WTO and its covered areas and legal personality in the international arena.

In Chapter 3, I have analyzed the agreement establishing the WTO as an international organization and principles it followed for the Member States.

In Chapter 4 (the main part of the research topic), here; I critically analyzed the Understanding on Rules and Procedures Governing the Settlement of Disputes including various mechanisms available for the dispute settlement containing in Annex 2.

In Chapter 5, I have mentioned that whether the Bangladesh is getting any benefit as a Member state of the WTO.

In Chapter 6 & 7, I have tried to analyze my findings critically on my own words and concluded with any recommendations available to update the system.

II. Historical Background of WTO

2.1 Introduction

From the early days of the Silk Road to the creation of the General Agreement on Tariffs and Trade (GATT) and the birth of the WTO, trade has played an important role in supporting economic development and promoting peaceful relations among nations.⁴ This chapter traces the history of trade from 1947 GATT to 1995 WTO and the WTOs establishment, scope and status.

2.2 The GATT⁵

The quest of the international trading community for an institutional framework for the administration of a multilateral trading system commenced after the Second World War. The Havana Charter was drafted in 1947 for the establishment of the International Trade Organization (ITO). In the wake of its failure, GATT was conceived provisionally to provide both multilateral trading rules and their administrative institution. Despite its provisional nature, GATT served in that dual capacity from 1948 to 1994. Since 1948, GATT has held eight rounds of global trade liberalization talks; each round attracted more members and liberalized trade further than the last. GATT succeeded partially in advancing the ideal of free trade through continuous tariff reductions during the 1950s and 1960s. Even during these decades, GATT was criticized for its inadequate rules and half-hearted efforts for their implementation.

In the 1970s, GATT began to come under threat. International debt and oil crises and series of economic recessions in the 1970s and the early 1980s drove many governments to devise other forms of

³ <https://en.wikipedia.org/wiki/Methodology#cite_note-1> Accessed on 3 April 2019

⁴ <https://www.wto.org/english/thewto_e/history_e/history_e.htm> Accessed on 4 April 2019

⁵ M Rafiqul Islam, International trade law, 1st Edition, LBC, 1999, Pg- 38

protection for their domestic industries facing increased overseas competition. Developed countries of North America and Europe embarked on a subsidy race to maintain their hold on farm trade. The demonstrated inability of GATT to discipline its members, who ignored or defied GATT rules and principles, undermined the credibility and effectiveness of GATT. On the face of this new wave of protectionism, it became apparent that GATT was no longer as relevant to the realities of world trade as it had been in the 1950s. World trade became far more complex and important in the 1980s. The globalization of the world economy was fast taking place, international investment was growing and trade in services, not covered by the rules of GATT, became a major interest to many countries. These factors, *inter alia*, stretched GATT to its limit, if not to a point of no return. Fresh initiatives were in order, indeed imperative, to salvage the multilateral trading system. This situation convinced many GATT members to launch new efforts to reinforce and extend the system, which culminated in the commencement of the Uruguay Round of GATT trade negotiations.

2.3 Uruguay Round: The Birth of the WTO

The World Trade Organization emerged from multilateral trade negotiations launched by GATT 1947 CONTRACTING PARTIES meeting at ministerial level in Punta del Este (Uruguay) in 1986; these negotiations are referred to as the Uruguay Round. On 15 April 1994, ministers meeting in Marrakesh (Morocco) concluded the Uruguay Round and signed the Marrakesh Final Act embodying the results of the Round. These results, annexed to the Marrakesh Final Act, comprised the Marrakesh Agreement Establishing the World Trade Organization, specific Ministerial Declarations and Decisions adopted during the Uruguay Round, and the Understanding on Commitments in Financial Services. The Marrakesh Final Act opened the WTO Agreement for acceptance by the contracting parties to the GATT 1947 and the European Communities. Following its signature by ministers at Marrakesh, and subsequent deposit of sufficient instruments of acceptance, the WTO Agreement entered into force on 1 January 1995 in three authentic languages.⁶ Article I of the WTO Agreement is the legal provision of the establishment of WTO.⁷

2.4 Scope of the WTO

The WTO Agreement governs the institutional operation of the WTO and has four annexes, which are integral parts of the WTO Agreement. Annex 1 contains the substantive rules applicable to WTO member's trade in goods (including the GATT 1994), services (the GATS), and trade-related aspects of intellectual property rights (the TRIPS Agreement). Annex 2 contains the rules and procedures governing the settlement of disputes between WTO members (DSU). Annex 3 sets forth a mechanism for the regular multilateral review of WTO member's trade policies (TPRM). The WTO Agreement and these three annexes are binding on all WTO members as a Single Undertaking, and are generally referred to as the "Multilateral Trade Agreements". Conversely, Annex 4 of the WTO Agreement contains the "Plurilateral Trade Agreements", namely the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement, each of which is binding only upon those WTO members that have accepted it.⁸ Article II of the WTO Agreement is the legal provision of the scope of WTO.⁹

2.5 Status of the WTO¹⁰

The WTO is an international organization, possessing international legal personality and competence in its own right quite independently of its members. It enjoys privileges and immunities that are necessary for the exercise of its functions. These privileges and immunities are regulated by the International Convention on the Privileges and Immunities of the Specialised Agencies of the UN General Assembly of 21 November 1947 (Article VIII of the WTO Agreement).

Consistently with its predecessor GATT, the WTO is an intergovernmental organization. The transformation of GATT into the WTO has improved the situation quite substantially. The WTO Agreement provisions are definite with rare exemptions. The WTO has a very effective monitoring power of the compliance of obligations by members. It has a strict rule-oriented transparent dispute resolution system with far sharper teeth to command specific performance. All these may lead one to anticipate that the WTO has the potential of having 'direct effect'-conferring rights on individuals, which may be enforced through the national judiciary of a member. But the fact remains that the WTO system continues to be based on the principle of negotiation and compromise. The involvement of these quasi-political factors is likely to militate against the WTO Agreement

⁶ <https://www.wto.org/english/res_e/booksp_e/wto_status_legal_inst15_e.pdf> Accessed on 4 April 2019

⁷ Article 1 of the WTO

⁸ <https://www.wto.org/english/res_e/booksp_e/wto_status_legal_inst15_e.pdf> Accessed on 4 April 2019

⁹ Article 2 of the WTO

¹⁰ M Rafiqul Islam, International trade law, 1st Edition, LBC, 1999, Pg- 49,50

acquiring any *locus standi* before the domestic jurisdiction of members. Moreover, the major WTO members, notably US and Japan, have already declined to allow the 'direct effect' of the WTO Agreement.

III. The WTO as an International Organization

3.1 Introduction

The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments.¹¹ Essentially, the WTO is a place where member governments try to sort out the trade problems they face with each other.¹² The WTO is run by its member governments. All major decisions are made by the membership as a whole, either by ministers (who usually meet at least once every two years) or by their ambassadors or delegates (who meet regularly in Geneva).¹³ But the WTO is not just about liberalizing trade, and in some circumstances its rules support maintaining trade barriers – for example to protect consumers, prevent the spread of disease or protect the environment.¹⁴ Hence, its goal is to help producers of goods and services, exporters and importers conduct their business.

3.2 Objectives

The policy objectives of the WTO are set out in the first two Preambular paragraphs of the WTO Agreement, which read:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

...

Peter Van den Bossche teases out from these two paragraphs the following four ultimate objectives of the WTO:

- ✓ The increase in the standard of living;
- ✓ The attainment of full employment;
- ✓ The growth of real income and effective demand; and
- ✓ The expansion of production of, and trade in goods and services.¹⁶

3.3 Functions¹⁷

Article II (1) of the WTO Agreement stipulates the primary function of the WTO as providing 'the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments included in the annexes to the Agreement'. To this end, Article III entitled 'Functions' provides for the WTO's five broad functions in the following terms:

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

2. The WTO shall provide the forum for negotiations among its members concerning their multilateral trade relations in matters dealt with under the agreements in the annexes to this Agreement. The WTO may also

¹¹ <https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm> Accessed on 5 April 2019

¹² <https://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm> Accessed on 5 April 2019

¹³ <https://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm> Accessed on 5 April 2019

¹⁴ <https://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm> Accessed on 5 April 2019

¹⁵ Agreement Establishing the WTO (adopted 15 April 1994, entered into force 1 January 1995)

¹⁶ Surya P. Subedi, International trade and business law, 1st Edition, the people's public security publishing house, Hanoi, 2012, Pg- 58

¹⁷ Surya P. Subedi, International trade and business law, 1st Edition, the people's public security publishing house, Hanoi, 2012, Pg- 58-59

provide a forum for further negotiations among its members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the 'Dispute Settlement Understanding' or 'DSU') in Annex 2 to this Agreement.

4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the 'TPRM') provided for in Annex 3 to this Agreement.

5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies. In addition to the explicit functions referred to in Article III, Bossche also argues that technical assistance to DC members is undisputedly an important function of the WTO since it allows these members to integrate into the world trading system.

3.4 Membership

The WTO membership is not exclusive to states. Separate customs territories possessing full autonomy with regard to their external commercial relations and other matters covered by the WTO Agreement are also eligible to join the WTO. For example, Hong Kong, China (commonly referred to as Hong Kong), Macau, China (commonly referred to as Macau). The European Communities is also a member of the WTO, but this is a special and the only case by virtue of Article XI (1) of the WTO Agreement.¹⁸ At present, the WTO has 164 member states representing 98 percent of world trade.¹⁹ However, there is a provision for original membership for the contracting parties to GATT 1947 and accession membership in the WTO agreement.²⁰

3.5 Institutional Structure²¹

Article IV of the WTO Agreement provides for the basic institutional structure of the WTO; subordinate committees and working groups have been added to this structure by later decisions.

At the highest level of the WTO institutional structure stands the Ministerial Conference, the supreme body of the WTO and composed of minister-level representatives from all members; it has decision-making power on all matters under any multilateral WTO agreements.

At the second level are the General Council (which is composed of ambassador-level diplomats), the Dispute Settlement Body (DSB) and the Trade Policy Review Body (TPRB). All these three bodies are actually the same. The General Council is responsible for the continuing, day-to-day management of the WTO and its many activities and exercises, between sessions of the Ministerial Conference, the full powers of the latter. The General Council becomes the DSB when it administers the WTO dispute settlement system. Likewise, the General Council acts as the TPRB when administering the WTO trade policy review mechanism.

At the level below the General Council, the DSB and the TPRB are three so-called specialized councils, namely, the Council for Trade in Goods (CTG), the Council for Trade in Services (CTS) and the Council for TRIPS. This is envisaged by Article IV (5) of the WTO Agreement. The explicit function of these specialized councils is, according to Article IX (2) of the WTO Agreement, to make recommendation on the basis of which the Ministerial Conference and the General Council adopt interpretations of the multilateral trade agreement in Annex I of the WTO Agreement overseen by these Councils. The specialized councils also, under Articles IX (3) and X (1) of the WTO Agreement, play a role in the procedure for the adoption of waivers and the amendment procedure. The GATS and the TRIPS Agreement also empower their respective overseeing councils specific functions. In addition to the specialized councils, there are a number of committees and working parties established to assist the Ministerial Conference and the General Council.

In November 2001, the Ministerial Conference at its Doha Session established the Trade Negotiations Committee (TNC) which, together with its subordinate negotiating bodies, organizes the Doha Development Round negotiations. The TNC reports on the progress of the negotiations to each regular meeting of the General Council.

¹⁸ Surya P. Subedi, *International trade and business law*, 1st Edition, the people's public security publishing house, Hanoi, 2012, Pg- 59-60

¹⁹ <https://www.wto.org/english/thewto_e/thewto_e.htm> Accessed on 6 April 2019

²⁰ Article XI and XII of the WTO agreement

²¹ Surya P. Subedi, *International trade and business law*, 1st Edition, the people's public security publishing house, Hanoi, 2012, Pg- 60-61

Finally, It is typical that an international organization has a secretariat and the WTO is no exception. Article IV of the WTO Agreement provides that the WTO has a Secretariat, which is headed by a Director-General who is, in turn, appointed by the Ministerial Conference. The WTO Secretariat is based in Geneva with more than 600 regular staff.

3.6 Decision Making in the WTO

The normal decision-making procedure for WTO bodies is provided in Article IX (1) of the WTO Agreement in the following terms:

The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each member of the WTO shall have one vote...Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.²²

3.7 Some basic principles of the WTO

The WTO agreements are lengthy and complex because they are legal texts covering a wide range of activities. They deal with: agriculture, textiles and clothing, banking, telecommunications, government purchases, industrial standards and product safety, food sanitation regulations, intellectual property, and much more. But a number of simple, fundamental principles run throughout all of these documents. These principles are the foundation of the multilateral trading system. They are as follows:

Non-discrimination

A country should not discriminate between its trading partners and it should not discriminate between its own and foreign products, services or nationals.

More open

Lowering trade barriers is one of the most obvious ways of encouraging trade; these barriers include customs duties (or tariffs) and measure such as import bans or quotas that restrict quantities selectively.

Predictable and transparent

Foreign companies, investors and governments should be confident that trade barriers should not be raised arbitrarily. With stability and predictability, investment is encouraged, jobs are created and consumers can fully enjoy the benefits of competition – choice and lower prices.

More competitive

Discouraging 'unfair' practices, such as export subsidies and dumping products at below cost to gain market share; the issues are complex, and the rules try to establish what is fair or unfair, and how governments can respond, in particular by charging additional import duties calculated to compensate for damage caused by unfair trade.

More beneficial for less developed countries

Giving them more time to adjust, greater flexibility and special privileges; over three-quarters of WTO members are developing countries and countries in transition to market economies. The WTO agreements give them transition periods to adjust to the more unfamiliar and, perhaps, difficult WTO provisions.

Protect the environment

The WTO's agreements permit members to take measures to protect not only the environment but also public health, animal health and plant health. However, these measures must be applied in the same way to both national and foreign businesses. In other words, members must not use environmental protection measures as a means of disguising protectionist policies.²³

IV. Dispute Settlement System under the WTO

4.1 Introduction

Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. A dispute arises when a member government believes another member government is violating an agreement or a commitment that it has made in the WTO. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The

²² Agreement Establishing the WTO (adopted 15 April 1994, entered into force 1 January 1995)

²³ <https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm> Accessed on 27 April 2019

system is based on clearly-defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed (or rejected) by the WTO's full membership. Appeals based on points of law are possible.²⁴

4.2 Importance of the WTO dispute settlement system²⁵

The best international agreement is not worth very much if its obligations cannot be enforced when one of the signatories fails to comply with such obligations. An effective mechanism to settle disputes thus increases the practical value of the commitments the signatories undertake in an international agreement. The fact that the Members of the (WTO) established the current dispute settlement system during the Uruguay Round of Multilateral Trade Negotiations underscores the high importance they attach to compliance by all Members with their obligations under the WTO Agreement.

Settling disputes in a timely and structured manner is important. It helps to prevent the detrimental effects of unresolved international trade conflicts and to mitigate the imbalances between stronger and weaker players by having their disputes settled on the basis of rules rather than having power determine the outcome. Most people consider the WTO dispute settlement system to be one of the major results of the Uruguay Round. After the entry into force of the WTO Agreement in 1995; the dispute settlement system soon gained practical importance as Members frequently resorted to using this system.

4.3 The Dispute Settlement Understanding

The current dispute settlement system was created as part of the WTO Agreement during the Uruguay Round. It is embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding and abbreviated "DSU". The DSU, which constitutes Annex 2 of the WTO Agreement, sets out the procedures and rules that define today's dispute settlement system. It should however be noted that, to a large degree, the current dispute settlement system is the result of the evolution of rules, procedures and practices developed over almost half a century under the GATT 1947.²⁶

4.4 Participants in the dispute settlement system²⁷

The only participants in the dispute settlement system are the Member governments of the WTO which can take part either as parties or as third parties. The WTO Secretariat, WTO observer countries, other international organizations, and regional or local governments are not entitled to initiate dispute settlement proceedings in the WTO.

The DSU sometimes refers to the Member bringing the dispute as the "complaining party" or the "complainant". No equivalent short term is used for the "party to whom the request for consultations is addressed". The DSU sometimes also speaks of "Member concerned". In practice, the terms "respondent" or "defendant" are commonly used.

Since only WTO Member governments can bring disputes, it follows that private individuals or companies do not have direct access to the dispute settlement system, even if they may often be the ones (as exporters or importers) most directly and adversely affected by the measures allegedly violating the WTO Agreement. The same is true of other non-governmental organizations with a general interest in a matter before the dispute settlement system (which are often referred to as NGOs). They, too, cannot initiate WTO dispute settlement proceedings.

Of course, these organizations can, and often do, exert influence or even pressure on the government of a WTO Member with respect to the triggering of a dispute. Indeed, several WTO Members have formally adopted internal legislation under which private parties can petition their governments to bring a WTO dispute.

There are divergent views among Members on whether non-governmental organizations may play a role in WTO dispute settlement proceedings, for example, by filing amicus curiae submissions with WTO dispute settlement bodies. According to WTO jurisprudence, panels and the Appellate Body have the discretion to accept or reject these submissions, but are not obliged to consider them.

4.5 Scope of the dispute settlement system

The (WTO) dispute settlement system applies to all disputes brought under the WTO Agreements listed in Appendix 1 of the DSU (Article 1.1 of the DSU). In the DSU, these agreements are referred to as the "covered agreements". The DSU itself and the WTO Agreement (in the sense of Articles I to XVI) are also listed as covered agreements. In many cases brought to the dispute settlement system, the complainant invokes provisions belonging to more than one covered agreement.

²⁴ <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> Accessed on 13 April 2019

²⁵ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s1p1_e.htm> Accessed on 13 April 2019

²⁶ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s2p1_e.htm> Accessed on 13 April 2019

²⁷ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s4p1_e.htm> Accessed on 14 April 2019

The covered agreements also include the so-called Plurilateral Trade Agreements contained in Annex 4 to the WTO Agreement (Appendix 1 of the DSU), which are called “plurilateral” as opposed to “multilateral” because not all WTO Members have signed them. However, the applicability of the DSU to those Plurilateral Trade Agreements is subject to the adoption of a decision by the parties to each of these agreements setting out the terms for the application of the DSU to the individual agreement, including any special and additional rules or procedures (Appendix 1 of the DSU). The Committee on Government Procurement has taken such a decision, but not the Committee on Trade in Civil Aircraft for the Agreement on Trade in Civil Aircraft. Two other plurilateral agreements, the International Dairy Agreement and the International Bovine Meat Agreement, are no longer in force.²⁸ Appendix 1: Agreements Covered by the Understanding are as follows:

Appendix 1: Agreements Covered by the Understanding

(A) Agreement Establishing the World Trade Organization

(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods

Annex 1B: General Agreement on Trade in Services

Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes

(C) Plurilateral Trade Agreements

Annex 4: Agreement on Trade in Civil Aircraft

Agreement on Government Procurement

International Dairy Agreement

International Bovine Meat Agreement

The applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB.²⁹

4.6 WTO Bodies involved in the dispute settlement process

The operation of the (WTO) dispute settlement process involves the parties and third parties to a case, the DSB panels, the Appellate Body, the WTO Secretariat, arbitrators, independent experts and several specialized institutions. This part gives an introduction to the WTO bodies involved in the dispute settlement system. The involvement of the parties and third parties, the primary participants in a dispute settlement proceeding, has already been outlined. The precise tasks and roles of each of the actors involved in the dispute settlement process will become clear in the later part on the stages of the dispute settlement process.³⁰

4.6.1 The Dispute Settlement Body (DSB)³¹

The General Council discharges its responsibilities under the DSU through the DSB (Article IV of the WTO Agreement). Like the General Council, the DSB is composed of representatives of all WTO Members. These are governmental representatives, in most cases diplomatic delegates who reside in Geneva (where the WTO is based) and who belong to either the trade or the foreign affairs ministry of the WTO Member they represent. The DSB is responsible for administering the DSU, i.e. for overseeing the entire dispute settlement process.

The DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorize the suspension of obligations under the covered agreements (Article 2.1 of the DSU). In less technical terms, the DSB is responsible for the referral of a dispute to adjudication (establishing a panel); for making the adjudicative decision binding (adopting the reports); generally, for supervising the implementation of the ruling; and for authorizing “retaliation” when a Member does not comply with the ruling.

The DSB meets as often as is necessary to adhere to the time-frames provided for in the DSU (Article 2.3 of the DSU). The staff of the WTO Secretariat provides administrative support for the DSB (Article 27.1 of the DSU).

The DSB has its own chairperson, who is usually one of the Geneva-based ambassadors, i.e. a chief of mission of a Member’s permanent representation to the WTO (Article IV:3 of the WTO Agreement). The chairperson is appointed by a consensus decision of the WTO Members. The chairperson of the DSB has mainly procedural

²⁸ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s5p1_e.htm> Accessed on 14 April 2019

²⁹ <https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm> Accessed on 27 April 2019

³⁰ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm> Accessed on 15 April 2019

³¹ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm> Accessed on 15 April 2019

functions, that is, passing information to the Members, chairing the meeting, calling up and introducing the items on the agenda, giving the floor to delegations wishing to speak, proposing and, if taken, announcing the requested decision. The chairperson of the DSB is also the addressee of the Member's communications to the DSB.

In dispute settlement cases involving a least-developed country Member, the least-developed country can request the DSB chairperson to offer his/her good offices, conciliation and mediation before the case goes to a panel (Article 24.2 of the DSU). Lastly, the DSB chairperson is to be consulted before the Director-General determines the composition of the panel under Article 8.7 of the DSU, and before the Appellate Body adopts or amends its Working Procedures (Article 17.9 of the DSU).

4.6.2 The Director-General and the WTO Secretariat³²

The Director-General of the (WTO) may, acting in an ex officio capacity, offer his/her good offices, conciliation or mediation with a view to assisting Members to settle a dispute (Article 5.6 of the DSU). In a dispute settlement procedure involving a least-developed country Member, when a satisfactory solution has not been found during consultations, the Director-General will, upon request by the least-developed country Member, offer his or her good offices, conciliation or mediation in order to help the parties resolve the dispute, before a request for a panel is made (Article 24.2 of the DSU). The Director-General convenes the meetings of the DSB and appoints panel members upon the request of either party, and in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, where the parties cannot agree on the composition within 20 days (Article 8.7 of the DSU). The Director-General also appoints the arbitrator(s) for the determination of the reasonable period of time for implementation, if the parties cannot agree on the period of time and on the arbitrator (footnote 12 to Article 21.3(c) of the DSU), or for the review of the proposed suspension of obligations in the event of non-implementation (Article 22.6 of the DSU). The appointment of an arbitrator under Article 22 by the Director-General is an alternative to the original panelists undertaking the task, if they are unavailable.

The staff of the WTO Secretariat, which reports to the Director-General, assists Members in respect of dispute settlement at their request (Article 27.2 of the DSU), conducts special training courses (Article 27.3 of the DSU) and provides additional legal advice and assistance to developing country Members in matters relating to dispute settlement within the parameters of impartiality called for by Article 27.2 of the DSU. The Secretariat also assists parties in composing panels by proposing nominations for potential panelists to hear the dispute (Article 8.6 of the DSU), assists panels once they are composed (Article 27.1 of the DSU), and provides administrative support for the DSB.

4.6.3 Panels³³

Panels are the quasi-judicial bodies, in a way like tribunals, in charge of adjudicating disputes between Members in the first instance. They are normally composed of three, and exceptionally five, experts selected on an ad hoc basis. This means that there is no permanent panel at the (WTO); rather, a different panel is composed for each dispute. Anyone who is well-qualified and independent (Articles 8.1 and 8.2 of the DSU) can serve as panelist. Article 8.1 of the DSU mentions as examples persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or who have worked in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member. The WTO Secretariat maintains an indicative list of names of governmental and non-governmental persons, from which panelists may be drawn (Article 8.4 of the DSU). However, it is not necessary to be on the list in order to be proposed as a potential panel member in a specific dispute. Whoever is appointed as a panelist serves independently and in an individual capacity, and not as a government representative or as a representative of any organization (Article 8.9 of the DSU).

The panel composed for a specific dispute must review the factual and legal aspects of the case and submit a report to the DSB in which it expresses its conclusions as to whether the claims of the complainant are well founded and the measures or actions being challenged are WTO-inconsistent. If the panel finds that the claims are indeed well founded and that there have been breaches by a Member of WTO obligations, it makes a recommendation for implementation by the respondent (Articles 11 and 19 of the DSU).

³² <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s2p1_e.htm> Accessed on 15 April 2019

³³ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm> Accessed on 15 April 2019

4.6.4 Appellate Body³⁴

Unlike panels, the Appellate Body is a permanent body of seven members entrusted with the task of reviewing the legal aspects of the reports issued by panels. The Appellate Body is thus the second and final stage in the adjudicatory part of the dispute settlement system. As it did not exist in the old dispute settlement system under GATT 1947, the addition of this second adjudicatory stage was one of the major innovations of the Uruguay Round of Multilateral Trade Negotiations.

The appellate review carried out by the Appellate Body now has the function of correcting possible legal errors committed by panels. In doing so, the Appellate Body also provides consistency of decisions, which is in line with the central goal of the dispute settlement system to provide security and predictability to the multilateral trading system (Article 3.2 of the DSU).

The DSB established the Appellate Body in 1995, after which the seven first Appellate Body members were appointed. The DSB appoints the members by consensus (Article 2.4 of the DSU), for a four-year term and can reappoint a person once (Article 17.2 of the DSU). The seven Appellate Body members must be broadly representative of the membership of the WTO (Article 17.3 of the DSU), although they do not act as representatives of their own countries but rather they represent the WTO membership as a whole.

Appellate Body members must be persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally, and they must not be affiliated with any government (Article 17.3 of the DSU). Most Appellate Body members have so far been university professors, practicing lawyers, past government officials or senior judges. Being an Appellate Body member is theoretically only a part-time occupation. However, the workload and, conversely, the ability to pursue substantial other professional activities, depends on the number of appeals being filed, given that Appellate Body members must be available at all times and on short notice (Article 17.3 of the DSU).

4.6.5 Arbitrators

In addition to panels and the Appellate Body, arbitrators, either as individuals or as groups, can be called to adjudicate certain questions at several stages of the dispute settlement process. Arbitration is available as an alternative to dispute resolution by panels and the Appellate Body (Article 25 of the DSU), although it is a possibility that has so far very rarely been used. Arbitration results are not appealable but can be enforced through the DSU (Articles 21 and 22 of the DSU).³⁵

4.6.6 Experts³⁶

Disputes often involve complex factual questions of a technical or scientific nature, for instance when the existence or degree of a health risk related to a certain product is the subject of contention between the parties. Because panelists are experts in international trade but not necessarily in those scientific fields, the DSU gives panels the right to seek information and technical advice from experts. They may seek information from any relevant source, but before seeking information from any individual or body within the jurisdiction of a Member, the panel must inform that Member (Article 13.1 of the DSU). In addition to the general rule of Article 13 of the DSU, the following provisions in the covered agreements explicitly authorize or require panels to seek the opinions of experts when they deal with questions falling under these agreements:

- Article 11.2 of the Agreement on Sanitary and Phytosanitary Measures;
- Articles 14.2, 14.3 and Annex 2 of the Agreement on Technical Barriers to Trade;
- Articles 19.3, 19.4 and Annex 2 of the Agreement on Implementation of Article VII of GATT 1994;
- Articles 4.5 and 24.3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Where a panel considers it necessary to consult experts in order to discharge its duty to make an objective assessment of the facts, it may consult either individual experts or appoint an expert review group to prepare an advisory report (Article 13.2 of the DSU).

³⁴ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm> Accessed on 15 April 2019

³⁵ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s5p1_e.htm> Accessed on 16 April 2019

³⁶ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s6p1_e.htm> Accessed on 16 April 2019

The ultimate decision on the legal questions and the establishment of the facts on the basis of the expert opinions remains the domain of the panel. Participation in expert review groups is restricted to persons of professional standing and experience in the field in question.

4.6.7 Rules of Conduct³⁷

Under the DSU, the “players” in a dispute settlement process are subject to certain rules designed to ensure due process and unbiased decisions. Persons called to participate in the dispute settlement process as panelists, Appellate Body members or arbitrators must carry out their tasks in an impartial and independent manner. There must not be any ex parte communications between the parties and the panel or Appellate Body members concerning matters under their consideration (Article 18.1 of the DSU).

More specifically, the DSB has adopted Rules of Conduct for the DSU, which aim at guaranteeing the integrity, impartiality and confidentiality of the dispute settlement system. These Rules of Conduct are applicable to all “covered persons” which include panel members, Appellate Body members, experts assisting panels, arbitrators, members of the Textile Monitoring Body, and (WTO) Secretariat and Appellate Body Secretariat staff.

A violation of any Rules of Conduct by a covered person gives the parties to the dispute a right to challenge the participation of that person in the dispute settlement proceeding and to request the exclusion of that person from any further participation in the process. In the case of Secretariat staff, the challenge is addressed to the Director-General.

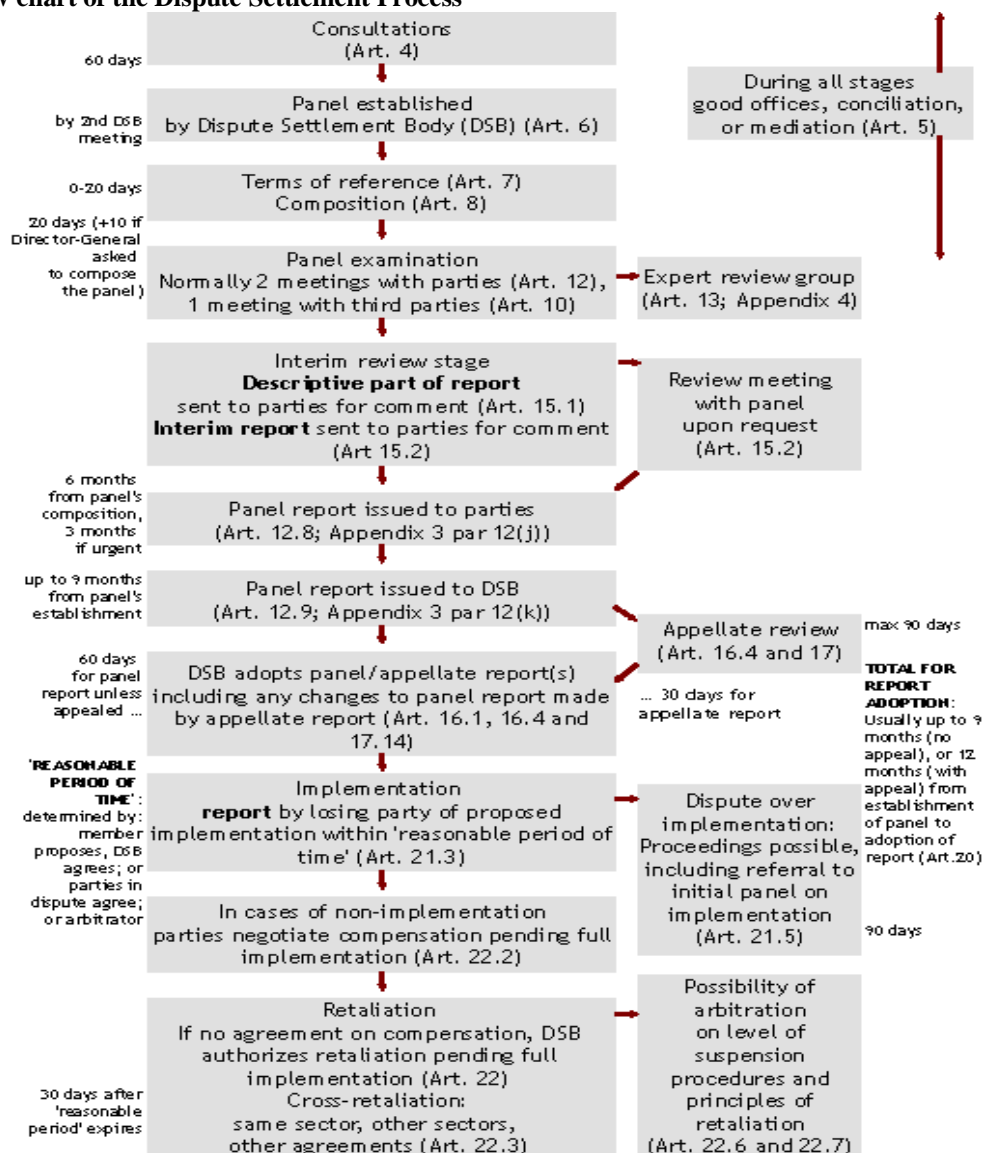
4.7 The process – Stages in a typical WTO dispute settlement case

This part explains all the various stages through which a dispute can pass in the (WTO) dispute settlement system. There are three main stages to the WTO dispute settlement process: (i) consultations between the parties; (ii) adjudication by panels and, if applicable, by the Appellate Body; and (iii) the implementation of the ruling, which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling.³⁸ These stages are described below:

³⁷ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s7p1_e.htm> Accessed on 16 April 2019

³⁸ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm> Accessed on 16 April 2019

4.7.1 Flow chart of the Dispute Settlement Process³⁹



4.7.2 Consultations

The preferred objective of the DSU is for the Members concerned to settle the dispute between themselves in a manner that is consistent with the WTO Agreement (Article 3.7 of the DSU). Accordingly, bilateral consultations between the parties are the first stage of formal dispute settlement (Article 4 of the DSU). They give the parties an opportunity to discuss the matter and to find a satisfactory solution without resorting to litigation (Article 4.5 of the DSU). Only after such mandatory consultations have failed to produce a satisfactory solution within 60 days may the complainant request adjudication by a panel (Article 4.7 of the DSU).¹ Even when consultations have failed to resolve the dispute, it always remains possible for the parties to find a mutually agreed solution at any later stage of the proceedings.

A request for consultations must be submitted in writing and must give the reasons for the request. This includes identifying the measures at issue and indicating the legal basis for the complaint (Article 4.4 of the DSU). In practice, such requests for consultations are very brief; often they are no more than one or two pages long, yet they must be sufficiently precise. Because requests for consultations are always the first official WTO document emerging in a specific dispute and each dispute has its own WT/DS number.⁴⁰

³⁹ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm> Accessed on 16 April 2019

⁴⁰ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm> Accessed on 17 April 2019

Consultations typically take place in Geneva and are confidential (Article 4.6 of the DSU), which also means that the (WTO) Secretariat is not involved. The fact that they take place behind closed doors also means that their content remains undisclosed to any panel subsequently assigned the matter.

Unless otherwise agreed, the respondent must reply to the request within ten days and must enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request for consultations. If the respondent fails to meet any of these deadlines, the complainant may immediately proceed to the adjudicative stage of dispute settlement and request the establishment of a panel (Article 4.3 of the DSU). If the respondent engages in consultations, the complainant can proceed to the request for establishment of a panel at the earliest 60 days after the date of receipt of the request for consultations, provided that no satisfactory solution has emerged from the consultations. However, the consultation stage can also be concluded earlier if the parties jointly consider that consultations have failed to settle the dispute (Article 4.7 of the DSU). In practice, parties to a dispute often allow themselves significantly more time than the minimum of 60 days.

In cases of urgency, including those that concern perishable goods, Members must enter into consultations within a period of no more than ten days after the date of receipt of the request. If the consultations fail to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel (Article 4.8 of the DSU).⁴¹

4.7.3 The Panel Procedure

If the consultations have failed to settle the dispute, the complaining party may request the establishment of a panel to adjudicate the dispute. As mentioned earlier, the complainant may do so any time 60 days after the date of receipt by the respondent of the request for consultations, but also earlier if the respondent either did not respect the deadlines for responding to the request for consultations or if the consulting parties jointly consider that consultations have failed to settle the dispute (Article 4.7 of the DSU).

The request for establishment of a panel initiates the phase of adjudication. A request for the establishment of a panel must be made in writing and is addressed to the Chairman of the DSB. This request becomes an official document in the dispute in question and is circulated to the entire (WTO) membership. It must indicate whether consultations were held, identify the specific measures at issue, and provide a brief, but sufficiently clear, summary of the legal basis of the complaint (Article 6.2 of the DSU). The content of the request for establishment of the panel is crucial. Under Article 7.1 of the DSU, such request determines the standard terms of reference for the panel's examination of the matter.

The complaining and the responding Members are the parties to the disputes. Other Members have an opportunity to be heard by panels and to make written submissions as third parties, even if they have not participated in the consultations. In order to participate in the panel procedure, these Members must have a substantial interest in the matter before the panel and they must notify their interest to the DSB (Article 10.2 of the DSU).⁴²

Once established and composed, the panel now exists as a collegial body and can start its work. One of the first tasks for the panel is to draw up a calendar for the panel's work (Article 12.3 of the DSU). The procedure is primarily set out in Article 12 and Appendix 3 to the DSU, but offers a certain degree of flexibility. The panel can follow different procedures after consulting the parties (Article 12.1 of the DSU, paragraph 11 of Appendix 3).⁴³

When there are no such preliminary issues, the parties start by exchanging a first set of written submissions. The complainant normally is the first to file its submission, to which the respondent replies in its first submission (Article 12.6 of the DSU). The third parties usually file their submissions after the parties have filed theirs. The DSU envisages that the Secretariat is to receive these submissions and transmit them to the other party or parties to the dispute (Article 12.6 of the DSU).

⁴¹ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p2_e.htm> Accessed on 17 April 2019

⁴² <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p1_e.htm> Accessed on 17 April 2019

⁴³ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p2_e.htm> Accessed on 17 April 2019

After the exchange of the first written submissions, the panel convenes a first oral hearing, called the first substantive meeting. Like all meetings, this meeting takes place at the WTO headquarters in Geneva, and is similar to an oral hearing before a court, but the setting is more informal. Only the parties and third parties to the dispute, the panelists, the Secretariat staff supporting the panel, and the interpreters are entitled to attend this meeting.

At this meeting, which is recorded on tape, the parties present their views orally, mostly on the basis of a prepared statement also distributed in writing to the panel and the other parties (paragraph 9 of the Working Procedures in Appendix 3). After hearing the complainant(s) and the respondent, the panel accords the third parties an opportunity to present their views orally during a special session dedicated to the third parties' presentations (Article 10.2 of the DSU, paragraph 6 of the Working Procedures in Appendix 3).

After the oral statements, the parties (and third parties) are invited to respond to questions from the panel and from the other parties in order to clarify all the legal and factual issues (paragraph 8 of the Working Procedures in Appendix 3).

After the conclusion of the first substantive meeting, the parties are usually requested, within a deadline of several days, to submit written answers to the panel's and the other parties' questions, irrespective of whether they have already been discussed orally.

Approximately four weeks after the first panel meeting, the parties simultaneously exchange written rebuttals, also called the second written submissions. Thereafter, the panel holds a second substantive meeting with the parties. The parties once again orally present factual and legal arguments at this second oral hearing and respond to further questions from the panel and the other party, first orally, then in writing. Sometimes a Panel holds a third meeting, in particular when an expert hearing takes place.

After the oral hearings are concluded, the panel goes into internal deliberations to review the matter and to reach conclusions as to the outcome of the dispute and the reasoning in support of such outcome. The panel should submit its final report to the parties to the dispute within two weeks following conclusion of the interim review. Once the report is translated into the other official WTO languages, it is circulated to all WTO Members and becomes a public WT/DS document. The panel's deliberations are confidential and its report is drafted in the absence of the parties (Article 14.1 and 14.2 of the DSU and paragraph 3 of the Working Procedures in Appendix 3 to the DSU). Article 18.1 of the DSU also prohibits any ex parte communications with the panel on the matter under consideration.⁴⁴

4.7.4 Appellate Review Procedure

Appeals are limited to legal questions. They may only address issues of law covered in the panel report and legal interpretations developed by the panel (Article 17.6 of the DSU).⁴⁵

According to Article 16.4 of the DSU, the appeal process begins when "a party to the dispute formally notifies the DSB of its decision to appeal". An appeal must be made to the Appellate Body within 60 days after the date of circulation of a panel report to the Members and before it is adopted by the DSB.⁴⁶

No later than ten days after the date when the notice of appeal was filed, the appellant must file its written submission, setting out in detail its legal arguments as to why the panel committed a legal error.

Within 15 days from the notice of appeal, a party to the dispute other than the original appellant may join in that appeal or appeal on the basis of other alleged errors in the panel report ("other appeal" or (informally) "cross appeal", Rule 23(1) of the Working Procedures). Also within 25 days from the notice of appeal, the third participant(s) must file their written submission(s), setting forth their position and legal arguments.

Approximately 30 to 45 days after the notice of appeal, the Appellate Body division assigned to the case holds an oral hearing (Rule 27(1) of the Working Procedures), which is not open to the public (Article 17.10 of the DSU). At this oral hearing, the participants and the third participants make a brief opening statement, after which the Appellate Body division poses questions to the participants and third participants.

After the oral hearing, the division exchanges views on the issues raised in the appeal with the four other Appellate Body members not on the division. This exchange of views is intended to give effect to the principle of collegiality in the Appellate Body and serves to ensure consistency and coherence in the jurisprudence of the Appellate Body (Rule 4(1) of the Working Procedures).

Following the exchange of views with the other Appellate Body members, the division concludes its deliberations and drafts the Appellate Body report. After the report is finalized and signed by the Appellate Body members of the division, it is translated into the two other official languages of the WTO. Finally, the

⁴⁴ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p3_e.htm> Accessed on 17 April 2019

⁴⁵ Article 17 of the DSU

⁴⁶ Article 16 of the DSU

Appellate Body report is circulated to all WTO Members and becomes a public WT/DS document. All deliberations of the Appellate Body are confidential, and the drafting of the report takes place without the presence of the participants and third participants (Article 17.10 of the DSU).⁴⁷

4.7.5 Compensation

If the implementing Member does not achieve full compliance by the end of the reasonable period of time, it has to enter into negotiations with the complaining party with a view to agreeing a mutually acceptable compensation (Article 22.2 of the DSU). This compensation does not mean monetary payment; rather, the respondent is supposed to offer a benefit, for example a tariff reduction. The parties to the dispute must agree upon the compensation, which must also be consistent with the covered agreements (Article 22.1 of the DSU).

If, within 20 days after the expiry of the reasonable period of time, the parties have not agreed on satisfactory compensation, the complainant may ask the DSB for permission to impose trade sanctions against the respondent that has failed to implement. Technically, this is called “suspending concessions or other obligations under the covered agreements” (Article 22.2 of the DSU).

This is informally also called “retaliation” or “sanctions”. Such suspension of obligations takes place on a discriminatory basis only against the Member that failed to implement. Retaliation is the final and most serious consequence a non-implementing Member faces in the WTO dispute settlement system (Article 3.7 of the DSU).

The DSB’s surveillance continues as long as the recommendation to bring a measure into conformity with the covered agreements has not yet been implemented (Article 22.8 of the DSU).⁴⁸

4.8 Dispute Settlement without recourse to Panels and the Appellate Body

There are provisions like ADR in the WTO for settling dispute without going through to Panels and Appellate Body. Hence, it is important to stress that panels and the Appellate Body are not always involved in a WTO dispute and there are various other ways to solve disputes within the framework of the WTO. Indeed, the parties often use these other ways and manage to solve their dispute in a cooperative manner and not through recourse to adjudication by panels and the Appellate Body. In this regard, parties can settle a dispute by finding a mutually agreed solution in bilateral negotiations or with the help of dispute resolution mechanisms such as good offices, conciliation or mediation. In addition, they can also agree to refer their dispute to an arbitrator.

In domestic judicial systems, the out-of-court solution of disputes is often referred to as an “alternative” form of dispute resolution. One could also talk about an “alternative” to panels and the Appellate Body in the WTO dispute settlement system, when parties settle their dispute with a mutually agreed solution, or through arbitration. However, these forms of dispute settlement are provided for in the DSU and are therefore formally part of, and not an alternative to, the WTO dispute settlement system.⁴⁹ Even these recourse can be taken at any stage of the proceeding by the parties upon withdrawal. They are as follows:

4.8.1 Mutually agreed solutions

The DSU expresses a preference for the parties to settle their disputes through mutually agreed solutions (Article 3.7 of the DSU). However, unlike many other judicial systems, the DSU does not allow the parties to settle their dispute on whatever terms they wish. Solutions mutually acceptable to the parties to the dispute must also be consistent with the WTO Agreement and must not nullify or impair benefits accruing under the agreement to any other Member (Articles 3.5 and 3.7 of the DSU). If the matter has been formally raised in a request for consultations, the mutually agreed solutions must be notified to the DSB and the relevant Councils and Committees (Article 3.6 of the DSU). This is meant to inform the other WTO Members and to give them an opportunity to raise whatever concern they may have with regard to the settlement. Implicit in these rules is an acknowledgement of the danger that the parties to a dispute might be tempted to settle on terms that are detrimental to a third Member not involved in the dispute, or in a way that is not entirely consistent with WTO law. Mutually agreed solutions must therefore be notified to the DSB with sufficient information for other Members.

⁴⁷ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p3_e.htm> Accessed on 18 April 2019

⁴⁸ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s9p1_e.htm> Accessed on 17 April 2019

⁴⁹ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s1p1_e.htm> Accessed on 17 April 2019

However, even when the consultations have failed to bring about a settlement and the dispute has progressed to the stage of adjudication, the parties are encouraged to continue their efforts to find a mutually agreed solution.⁵⁰

4.8.2 Arbitration pursuant to Article 25 of the DSU

As an alternative to adjudication by panels and the Appellate Body, the parties to a dispute can resort to arbitration (Article 25.1 of the DSU). The parties must agree on the arbitration as well as the procedures to be followed (Article 25.2 of the DSU). The parties to the dispute are thus free to depart from the standard procedures of the DSU and to agree on the rules and procedures they deem appropriate for the arbitration, including the selection of the arbitrators. The parties must also clearly define the issues in dispute.

Before the beginning of the arbitration, the parties must notify their agreement to resort to arbitration to all (WTO) Members. Other Members may become party to an arbitration only with the agreement of the parties engaged in the arbitration. The parties to the arbitration must agree to abide by the arbitration award, which, once issued, must be notified to the DSB and the relevant Councils and Committees overseeing the agreement(s) in question (Articles 25.2 and 25.3 of the DSU). The provisions of Articles 21 and 22 of the DSU on remedies and on the surveillance of implementation of a decision apply to the arbitration award (Article 25.4 of the DSU).⁵¹

4.9 Duration for Dispute Settlement

These approximate periods for each stage of a dispute settlement procedure are target figures – the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

60 days	Consultations, mediation, etc
45 days	Panel set up and panelists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	(without appeal)
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1y 3m	(with appeal)⁵²

V. Bangladesh in WTO Dispute Settlement System

5.1 Contribution of WTO regarding international trade of Bangladesh⁵³

After WTO commencing, many believed that Bangladesh would not be able to join WTO because of few factors. These are: small country, small economy, very few per capita income, and very negligible trade. It was obvious at that time. But Bangladesh had turnover very soon. Now Bangladesh has become an important representative of the Least Development Countries or LDC group in the world trade platform.

After joining WTO, many used to believe that poor country like Bangladesh would not benefit from the WTO, although the reality is opposite now. Owing to WTO system, Bangladesh gets legal right to raise trade related difficulties and concerns at the global level. Bangladesh along with other countries can be able to raise their voice against the objectionable matters.

⁵⁰ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s1p1_e.htm> Accessed on 18 April 2019

⁵¹ <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s2p1_e.htm> Accessed on 18 April 2019

⁵² <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed on 24 April 2019

⁵³ <<https://www.scribd.com/document/359302232/World-Trade-Organization-and-its-Contribution-in-Bangladesh>> Accessed on 23 April 2019

WTO gives Bangladesh greater flexibility in fulfilling rigid rule of multilateral trade and market access in developed countries and developing countries at will. WTO has helped Bangladesh to enjoy 100 percent Duty Free Quota Free (DFQF) market access in some of the developed countries.

The expiration of Multi-Fibre Arrangement (MFA) and full withdrawal of quota system on textile and clothing imports in developed countries from 1st January 2005 became a boon for the ready-made garments (RMG) industry of Bangladesh. RMG is the largest exportable of industry of the country and its export increased significantly after MFA expiration under WTO framework. Another benefit of WTO framework is the waiver of complying with Trade Related Intellectual Property Rights until 2021. The pharmaceutical industry in Bangladesh is taking the advantage of TRIPS waiver.

As WTO facilitates in the dispute settlement process, most countries get benefited from it. As per the source- Financial Express; Bangladesh has taken resort to the mechanism to challenge imposition of anti-dumping duty by India on lead-acid battery exports of Rahimafrooz. It was in 2003, when WTO asked two countries for consultation. India, however; unilaterally withdrew anti-dumping duty it had earlier imposed. This is the first, and so far the only case when a LDC put a powerful developing country in the dock of WTO. Last but not the least, WTO helps Bangladesh to strengthen capacity and build self confidence to address the challenges of multilateral trade and helps Bangladesh take advantage of the entire system.

5.2 DS306: India – Anti-Dumping Measure on Batteries from Bangladesh⁵⁴

Current status

Mutually agreed solution on 20 February 2006

Key facts

Complainant:	Bangladesh
Respondent:	India
Third Parties:	None
Agreements cited: (as cited in request for consultations)	Anti-dumping (Article VI of GATT 1994): Art. 1, 2, 3, 5, 6, 12 Annex II, GATT 1994: Art. I, II, VI, XXIII
Request for Consultations received:	28 January 2004

Summary of the dispute

Complaint by Bangladesh

This is the first dispute involving an LDC Member as a principal party to a dispute. On 28 January 2004, Bangladesh requested consultations with India concerning a certain anti-dumping measure imposed by India on imports of lead acid batteries from Bangladesh. Bangladesh is particularly concerned about the following aspects of the investigation by the Indian authority leading to the imposition of the definitive anti-dumping duties:

- Initiation of the investigation, notwithstanding the unsubstantiated claim of the applicants that the application was “by or on behalf of the domestic industry”; and failure to immediately terminate the investigation, notwithstanding the negligible volume of imports from Bangladesh;
- determination of margin (determination of normal value; apparent adoption of constructed value; determination of export price; and comparison between normal value and export price);
- determination of injury and causation (examination of import volume, the effect on prices, and the impact on domestic producers of like products; inclusion of imports from Bangladesh in the assessment of the effects of imports; evaluation and examination of relevant factors; and examination of the causal link between the imports and the alleged injury);
- treatment of evidence (failure to consider information submitted by the interested parties from Bangladesh; treatment of information submitted by the applicants as confidential; failure to disclose to the interested parties the “essential facts under consideration which form the basis for the decision to apply definitive measures” and other relevant information);
- failure to provide the parties and give public notice of “all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures”.

Bangladesh considers that the foregoing Indian measure is inconsistent with: Article VI of GATT 1994, including Articles VI:1, VI:2 and VI:6(a); Articles 1, 2.1, 2.2, 2.4, 3.1, 3.2, 3.3, 3.4, 3.5, 3.7, 5.4, 5.8, 6.2, 6.4,

⁵⁴ <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm> Accessed on 24 April 2019

6.5, 6.8 (including para. 3 of Annex II), 6.9 and 12.2 of the Anti-Dumping Agreement. Furthermore, Bangladesh considers that, as a result of the imposition of the anti-dumping duties, India may be acting inconsistently with its obligations under Articles I:1 and II:1 of GATT 1994. Bangladesh also considers that the benefits accruing to it directly or indirectly under the WTO Agreement are being nullified or impaired pursuant to Articles XXIII:1(a) and XXIII:1(b), respectively, of GATT 1994. On 11 February 2004, the European Communities requested to join the consultations.

Mutually agreed solution

On 20 February 2006, the parties informed the DSB of a mutually satisfactory solution to the matter raised by Bangladesh. The measure which was addressed in the request for consultations has been terminated by India's Customs Notification No. 01/2005 dated 4 January 2005.

5.3 DS243: United States – Rules of Origin for Textiles and Apparel Products⁵⁵

Current status

Report(s) adopted, no further action required on 21 July 2003

Key facts

Complainant:	India
Respondent:	United States
Third Parties:	Bangladesh; China; European Communities; Pakistan; Philippines
Agreements cited: (as cited in request for consultations)	Rules of Origin: Art. 2
Request for Consultations received:	11 January 2002
Panel Report circulated:	20 June 2003

Summary of the dispute

Complaint by India

On 11 January 2002, India requested consultations with the United States in respect of its rules of origin applicable to imports of textiles and apparel products as set out in Section 334 of the Uruguay Round Agreements Act, Section 405 of the Trade and Development Act of 2000 and the customs regulations implementing these provisions.

India argued that, prior to the abovementioned Section 334, the rule of origin applicable to textiles and apparel products was the "substantial transformation" rule. India considered that Section 334 changed the system by identifying specific processing operations which would confer origin to the various types of textiles and apparel products. In India's view, these changes appear to have been made to protect the United States textiles and clothing industry from import competition. India indicated that the changes introduced by Section 334 had already been challenged by the European Communities on the grounds that they were incompatible with the United States' obligations under the Agreement on Rules of Origin and other WTO Agreements (WT/DS151). India explained that that dispute was settled through a *procès-verbal* whereby the United States agreed to introduce legislation amending Section 334. According to India, the changes introduced by the amending legislation, i.e. Section 405, were aimed at taking account of the particular export interests of the European Communities.

India is of the view that the changes introduced by Sections 334 and 405 have 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.

On 7 May 2002, India requested the establishment of a panel. At its meeting on 22 May 2002, the DSB deferred the establishment of a panel.

Panel and Appellate Body proceedings

Further to a second request by India, the DSB established a panel at its meeting on 24 June 2002. EC, Pakistan and the Philippines reserved their third party rights. On 3 July 2002, Bangladesh reserved its third party rights. On 4 July 2002, China reserved its third party rights. On 10 October 2002, the Panel was composed. On 9 April 2003, the Chairman of the Panel informed the DSB that due to the complexity of the matter, the Panel would not

⁵⁵ <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds243_e.htm> Accessed on 24 April 2019

be able to complete its work in six months. The Panel expects to issue its final report to the parties in early May 2003.

Panel Report

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 is inconsistent with Articles 2(b) or 2(c) of the RO Agreement; and
- ❖ India 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; At its meeting on 21 July 2003, the DSB adopted the Panel Report.

VI. Analysis and Findings

6.1 Analysis and Findings

The establishment of the WTO with the Dispute Settlement Body is a remarkable creation in the world trade. It is playing an important role for the settling dispute among its member nations. But the statistics of dispute settlement illustrate that only developed countries are in good position to avail the opportunity. Especially, the LDCs have various limitations to avail the benefit of the Dispute Settlement Body.

The DSU has given a platform to the weaker nations to bring action against strong nations who violate the rules of trade. It is easier for strong nations to impose arbitrary tariffs on goods and services on the weaker nations while importing. But the WTO's principle is to provide tariff reduction to the weaker nations which lay better foundation for the weaker nations. Hence, the weaker nations can recourse to DSU under its own rule of law for the violation of agreements and principles of WTO. However, there are many restrictions for weaker nations to recourse to the dispute settlement system such as lack of expertise and resources, other retaliation from the strong nations if recourse to dispute settlement system.

On the other hand, the compensation system of the DSU is not worthy to attract member states to file a request for dispute settlement. It gives compensation on the reduction of tariffs which is not a viable for a member state because a member state has to file a request and wait for a long time to get the possible outcome. Furthermore, it is expectable that a member state should get compensation instantly in money which will be fruitful for the victim. Immediate payment of compensation in money will be the proper punishment for breaching the WTO trade rules. Also, It may carry on checks and balance on that member state. Thereby, It can bring down the barrier and encourage the member state to recourse to the DSU.

Bangladesh was the first LDC to formally approach the WTO to settle dispute it had with its powerful neighbor like India regarding the imposition of an anti-dumping duty on the export of lead acid battery from Bangladesh. For long two years Bangladesh tried to settle the dispute amicably through bilateral efforts, but without any success. The decision to move the dispute to the WTO was not taken easily or without internal resistance. The difficulties and the psychological barriers that Bangladesh had to overcome in order to seek redress of the unfair trade imposition on its exports by a powerful trading partner provide a good indication of the predicaments that other LDCs will face in moving their trade disputes to the WTO. The experience of Bangladesh could provide important lessons for other LDCs that they should contemplate utilizing the dispute settlement mechanism of WTO.

Finally, there are various conventions and treaties of United Nations which are governing the international trade distinctly. Hence, I am doubtful how far the WTO as a separate international organization will be able to conduct the international trade fairly. As the WTO is an independent entity and is regulated by the Ministerial Conference held once every two years; hence, It has to wait for an urgent amendment. On the other hand, it cannot grow up strongly for the protection of welfare of the world trade without proper punishment system.

VII. Conclusion and Recommendations

7.1 Conclusion and Recommendations

From the above discussion, it can be said that the WTO trade rules are providing the international framework for conducting trade across the globe. Hence, the member states are becoming more aware about their responsibilities in conducting trade. They are enriching with the standard of trade ethics. Thereby, the member states are becoming more generous and kind to each other for running business smoothly, predictably and freely. However, there are some important recommendations for the WTO and its dispute settlement system. They are as follows:

- i. WTO should have its own jurisdictional power to tariffs reduction for LDCs to the developed nations market.

- ii. WTO should encourage LDCs to recourse to the DSU and should have power to retaliate any member nations who are creating trade discrimination in revenge.
- iii. There should be special provisions for poor and cheap labor cost countries.
- iv. WTO should become the subsidiary organ of the United Nations which will bring more strength and trust on international trade. And the dispute settlement system will become the sword of justice.

BIBLIOGRAPHY

List of Statutes

1. Copy right Act 2000 (Act No XXVIII of 2000)
2. Copy right (Amendment) Act 2005 (Act No XXIV of 2005)
3. Trademarks (Amendment) Act 2003 (Act No XXIV of 2003)
4. Customs Act 2014

International Conventions

1. Marrakesh Agreement Establishing the World Trade Organization
2. Understanding on Rules and Procedures Governing the Settlement of Disputes
3. Agreement on Sanitary and Phytosanitary Measures, April 15, 1994
4. Agreement on Technical Barriers to Trade, April 15, 1994
5. Agreement on Implementation of Article VII of GATT 1994;
6. Agreement on Subsidies and Countervailing Measures (SCM Agreement).
7. Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994
8. Vienna Convention on the Law of Treaties, May 22, 1969

List of Cases

1. DS306: India – Anti-Dumping Measure on Batteries from Bangladesh
2. DS243: United States – Rules of Origin for Textiles and Apparel Products

Books

1. Surya P. Subedi, International trade and business law, 1st Edition, the people's public security publishing house, Hanoi, 2012
2. M Rafiqul Islam, International Trade Law, 1st Edition, LBC, 1999
3. Pamela Sellman, Law of International Trade, Fourth Edition, Old Bailey Press, 2003
4. Md. Golam Moula Suhag, Lecture on International Trade Law, Law Point Prokashoni, 1st Edition, 2016

Web Sites

1. <https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm>
2. <https://en.wikipedia.org/wiki/Methodology#cite_note-1>
3. <https://www.wto.org/english/thewto_e/history_e/history_e.htm>
4. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s5p1_e.htm>
5. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm>
6. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm>
7. <https://www.wto.org/english/thewto_e/thewto_e.htm>
8. <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm>
9. <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm>
10. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s1p1_e.htm>
11. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s2p1_e.htm>
12. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm>
13. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm>
14. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s5p1_e.htm>
15. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s6p1_e.htm>
16. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s7p1_e.htm>
17. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p2_e.htm>
18. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p1_e.htm>
19. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p2_e.htm>
20. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p3_e.htm>
21. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p3_e.htm>
22. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s9p1_e.htm>
23. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s1p1_e.htm>
24. <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s2p1_e.htm>

25. <<https://www.scribd.com/document/359302232/World-Trade-Organization-and-its-Contribution-in-Bangladesh>>
26. <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds306_e.htm>
27. <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds243_e.htm>