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Commercial and Trading Disputes under International Law: Analysing the Role of World Trade Organization

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Abstract

In 1995, the World Trade Organization (WTO) was established as the only international Organization dealing with the global rules of trade between nations. Its primary function was to ensure that trade flows as smoothly, predictably and freely as possible. The WTO is built under the umbrella of WTO agreements which are often called WTO's trade rules. At the heart of the system are the WTO's Agreements, which are the legal rules for international commerce. The WTO is an institution of globalization and has had both positive and potentially adverse effects on the world. The WTO's efforts have positively increased trade expansion globally. Trading cannot go without attendant disputes. Disputes in the WTO arise when one party adopts a trade policy measure or takes some actions that other party considers to be inconsistent with the obligations set out in the WTO agreements. This paper appraised the role of the WTO in settling these trade disputes. Specifically, the paper examined the WTO Dispute Settlement System, it identified the objectives of the system and whether or not the system allows for the actualization of these objective. The paper found out that WTO has a sophisticated and well detailed dispute resolution mechanism however, it made recommendations that the WTO should be more transparent and open in their dispute resolution processes.

Keywords: Trade Disputes, World Trade Organisation, International Trade, International Commercial Law

1. Introduction

International law largely recognises the sovereignty of states over their internal affairs. States also exercise unfettered authority over their domestic jurisdiction. These principles are so important and generally recognised in international law that they have gained the prominence of international customary law significance. Consequently, states take full charge and determine what happens within their territory through the exercise of territorial sovereignty. The stricto senso application of the above principles of international law would mean that it becomes impossible to achieve what is referred to as international committee of nations. Hence, states have to give away certain percentage of their sovereign right in order for things to work.[1] This is more necessary, as no state is an island of itself. For international organizations such as United Nations and the other to be formed, this compromise is required. In fact, the lack of this compromise was largely responsible for the failure of the League of Nations.

Narrowing it down to the aspect of trade, states exercise economic sovereignty by determining and controlling the trade within its territory. States determine the kind of goods that come in and out of their territory. A state may decide to place restrictions on its borders to prevent any goods

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[1]P G Adogamhe, 'Pan-Africanism Revisited: Vision and Reality of African Unity and Development' (2008) 2 (2) *African Review of Integration*, 3.

from coming or going out of its territory. This had been the economic stance of China and so many communist nations, as they had viewed the importation of foreign goods into their territory as alien incursion, infiltration and adulteration of their uniqueness. The result had been the trade barrier that existed between nations. The down side of this was that states don't get to take benefit of their comparative advantage. There were scarcity and unavailability of certain commodities in the market of states.

This challenge necessitated the removal of trade barriers between states. At first, states have entered into bilateral trade treaties between themselves. This ameliorated the situation to some extent as it established international trade. However, for international trade to develop at a wide scale there was the need for the formation of international organisation through the plurilateral and multilateral treaties.

The World Trade Organization (WTO) came into existence in 1995 as the successor to the General Agreement on Tariff and Trade (GATT), which has operated provisionally since 1947. It is concerned with world wide economic policy cooperation. Hence it provides a common institutional framework for the conduct of trade relations among its member states.[2]

2. Objectives, Functions and Structures of the World Trade Organization.

Its basic objectives are similar to those of GATT, which has been subsumed into WTO. These objectives include raising the standards of living and incomes, ensuring full employment, expanding production and trade, and allowing for the optimal use of the World's resources.

Consequently, the WTO's overriding objective is to help trade flow smoothly, freely, fairly and predictably. The WTO does this by:

a) Administering trade Agreements
b) Acting as a forum for trade negotiations
c) Settling trade disputes
d) Reviewing national trade policies
e) Cooperating with other international organizations involved in global trade, commerce and economic policy making.[3]

In addition to the above listed, the WTO also assists developing countries in trade policy issues, through technical assistance and training programmes. It also grants waivers, submit proposed amendments for the vote of members and approve the accession of new members.[4]

In line with its objective of assisting developing countries in trade policy issues, developed member states of WTO have, as a matter of policy, being contributing to WTO technical assistance fund. To this end, between April and September 2005, Italy and the United States among others donated various sums of money to the WTO to carry out this role.[5]

[2] Article II of the 1994 Marrakesh Agreement Establishing the World Trade Organization.
[3] Article III : 1 – 5 of the WTO Agreement
[4]Ibid, Articles IX :3 & 4; X
[5] World Trade Organisation, 2005 Press release of 16th September 2005, Press/416 obtained from <www.wto.org.>accessed 3 May, 2024.

Most African countries, as well as those from Asia and Latin America benefited from the assistance.[6] The WTO has rendered assistance to Togo, Kiribati, Democratic Republic of Congo, Tuvalin, Zambia, among others[7]. The WTO has also organized seminars, workshops, briefing sessions and technical missions for the developing nations, either solely or in corroboration with ITC, International Monetary Fund (IMF), World Bank, United Nations Conference on Trade and Development (UNCTAD) and United Nations Development Programme (UNDP).[8]

Functions:
The WTO provides a forum for continuous negotiations among its member countries for the further liberalization of the trade in goods, and services and for discussions on other trade related issues that may be selected for the development of rules and disciplines. Thus, the Article also anticipates future negotiations among WTO members both on matters covered by existing WTO Agreements, as well as other subjects. Although any negotiations regarding amendments or additions to existing governments would take place under the WTO auspices, the WTO Agreement does not preclude negotiations in other subjects related to those agreements.

In addition, the WTO administers the Trade Policy Review Mechanism (TPRM) and the Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU). It also cooperates with the International Monetary Fund and the World Bank.

Consequently, the WTO carries out periodic review of individual member's trade policies. This review is aimed at finding out how far countries are following the disciplines of, and its commitment made under the multilateral Agreements. By carrying out such review periodically, the WTO acts as a watchdog to ensure that its rules are carried out and thus contributes to the prevention of trade friction.

Moreover, the Trade Policy Review mechanism within the WTO allows members to discuss an individual country's trade policy regime. This is done in order to:

i. Increase the transparency and understanding of WTO members' trade policies and practices through regular monitoring;
ii. Improve the quality of public and inter governmental debate on the issues; and
iii. Enable a multilateral assessment of the effects of policies on the world trading system.[9]

The WTO Agreement also provides for a common system of rules and procedures applicable to disputes arising under any of its legal instruments. Thus, the WTO is responsible for settling trade disputes among its member countries on the basis of the rules of its legal instrument.

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[6] Lybian Arab Jamahiriya – Statement by Mr. Abdultahman M. Shalghen , Secretary of the General People's Committee for Foreign Liason and International Cooperation at the International Conference on Financing for Development, Monterrey, Mexico, delivered on 22nd March, 2022.

[7]. Committee on Trade and Development Discusses Assistance for Developing Countries an article published by International Centre for Trade and Sustainable Development (ICTSD) in (2022) 5 (2) *Bridges Weekly Trade News Digest*

[8] WTO to hold NGO Symposium on Issues Confronting the World Trading System an article published by International Centre for Trade and Sustainable Development (ICTSD) in (2022) 5 (19) *BridgesWeekly Trade News Digest.*

[9] The Austrian Foreign Ministry Press release obtained from <file://A:/WTO - World Trade Organisation.htm. >accessed 3rd May, 2024.

It is clear from the foregoing that the WTO provides a framework used by national governments to implement trade legislation and regulations as well as provides a forum for collective debate, negotiations and adjudication of trade disputes.

Structures:
These functions of the WTO are carried out by its organs. The main organs of the WTO are a Ministerial Conference, a General Council, which also functions as the Dispute Settlement Body and Trade Policy Review Body; and councils for trade in goods, services and trade related aspects of intellectual property. Under Article IV, the apex WTO body responsible for decision-making is the Ministerial Conference, which meets every two years. The Ministerial Conference consists of representatives of all WTO members and carries out WTO functions which include decisions on matters that WTO members may raise concerning a multilateral Trade Agreement. It is the final arbiter on all matters relating to any of the agreements.

The day-to-day work of the WTO is handled by the permanent bodies at the second level, the topmost being the General Council, which reports to the Ministerial Conference. During the two years between meetings, the functions of the Conference are performed by the General Council comprising of representatives of WTO member governments. The General Council meets as a Dispute Settlement Body when it considers complaints and takes necessary steps to settle disputes between member countries. It is also responsible for carrying out reviews of the trade policies of individual countries on the basis of the reports prepared by the WTO Secretariat[10].

Article V requires the General Council to make appropriate cooperative arrangements with other intergovernmental organisations that have responsibility related to those of the WTO. The Council may also consult and cooperate with nongovernmental organizations with an interest in WTO matters.

Under *Article IV:7*, the Ministerial Conference is required to establish a Committee on Trade and Development, a Committee on Balance of Payments Restrictions, a Committee on Budget, Finance and Administration, and a Committee on Trade and Environment.

The administrative work is carried out by the WTO Secretariat headed by a Director-general who is appointed for four years. The Director General is selected by the Ministerial Conference. Secretariat personnel are to perform their duties pursuant to regulations issued by the conference. Like other multilateral organisations, the staff of the secretariat is required to be impartial and member governments may not seek to influence staff action.[11]

From the foregoing, it can be seen that the structure of the WTO is intended to provide for more effective decision-making and a greater involvement of ministers in trade relations. However, whether the latter is a positive development is not entirely certain because these ministers are most often appointed based on political considerations rather than professional qualification.

2.1 Scope and Status of the World Trade Organization:
Article II stipulates the scope of the WTO. It provides that the WTO is a common institutional framework for trade relations between member countries, and clarified which agreements are parts of the WTO Agreement. It also specifies the various trade agreements that will apply to member governments.

[10] Article IV: 2, 3 & 4 of the WTO Agreement
[11]Article VI : 1 - 4

According to the Article, by accepting membership in the WTO, each government will automatically become a party to eighteen (18) agreements and legal instruments referred to as multilateral trade agreements (MTAs), which are set out in *Annexes 1, 2 and 3*. However, certain WTO agreements referred to as "plurilateral trade agreements" (PTAs) and contained in *Annex 4*, will apply only between WTO members that accept them. Currently, there are four PTAs: the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the Agreement Regarding Bovine Meat, and the International Diary Agreement. Nearly all the instruments contained in the Final Act are intended to be binding on the signatories of the Final Act. The only exceptions are the four plurilateral Agreements, which binds only those members that have signed them.

Thus, the WTO Agreement has 4 Annexes. These Annexes incorporates each of the various MTAs and PTAs. Annex 1A contains the multilateral agreements on Trade in Goods that forms part of the overall WTO Agreement. Annex 1B incorporates the General Agreement on Trade in Services (GATS). Annex 1C sets out the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). Annex 2 contains the Dispute Settlement Understanding (DSU), while Annex 3 sets out the Trade Policy Review Mechanism (TPRM). The PTAs are set out in Annex 4.

Article VIII provides for the status of the WTO. According to Paragraph 1, the WTO shall have legal personality, and each member of the WTO is required to accord to the WTO sufficient legal status for it to exercise its functions. The Article also requires each member of the WTO to accord to the officials of the WTO and the representatives from member governments such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO.

Although the WTO shares many of the same goals as GATT, it is much more than just an extension of GATT – its scope is much broader and the nature of the organization is much different. GATT was a collection of trade rules bounded together by multilateral agreements but lacking a real institution foundation. The WTO on the other hand, is a permanent institution with a large staff and secretariat.

2.2 Decision Making in the World Trade Organization:

The procedures and rules for decision making on WTO matters are set forth in *Articles IX and X*of the WTO Agreement. In each area, WTO provisions maintain old GATT practice.

Article IX establishes rules for issuing waivers and definitive interpretations of the multilateral trade agreements. The WTO continues the longstanding GATT practice of attempting to reach such decisions by consensus. Consensus is deemed to have been reached when, at the time a decision is being taken, not a single member country voices opposition to its adoption.

The Ministerial Conference and the General Council are the sole WTO bodies empowered to issue authoritative, binding interpretations of the WTO Agreement and Multilateral Trade Agreements. The Conference and Council may not, however, use their authority to issue interpretations that would undermine the amendment provisions set out in *Article X*[12] .

Under *Article X*, any member may propose that the Ministerial Conference considers amending the WTO Agreement or a multilateral Trade Agreement. In addition, each of the three

[12] Article IX : 2, of the WTO Agreement

subordinate Councils for trade in goods, services, and TRIPs may submit proposals to amend the multilateral trade agreement it oversees.

Article X sets out rules concerning the manner in which certain types of amendments may enter into force and which members would be bound by those amendments[13]. For instance, certain provisions of the multilateral trade agreements may not be amended unless all WTO members agree, and such amendments do not enter into force for any member until all members have agreed to the amendment. These are *Article IX (decision making) and X (*amendment) of the WTO Agreement; *Article I (Most Favoured Nation) and II* (tariff bindings) of GATT 1994; *Article II;1* (MFN) of the GATS; and Article IV (MFN) of the Agreement on TRIP.

Article X: 8 sets out special rules for amending the DSU and the TPRM. Any member may propose that the Ministerial Conference considers such an amendment. Conference decisions to approve amendments to the DSU may only be made by consensus. The Conference may amend the TPRM either by consensus or failing a consensus, by majority vote.

In conclusion, it is submitted that it is clear from the foregoing that the WTO decision-making process utilizes consensus, at least initially, rather than voting. This continues the GATT process and seeks to ensure that all members' needs and interests receive attention and consideration. The rule of consensus prevents 'tyranny of the majority' particularly where a sizeable section of opinion strongly opposes the decision being taken. When agreement cannot be reached via consensus, however, there is a voting procedure. In the voting procedure, decisions are based on a simple majority with every member country having one vote.

3. Dispute Settlement in the World Trade Organization.

In course of states' inter relations, there are bound to be disputes and issues of contention amongst them. This fact is well recognized by the WTO. Hence, the WTO has also provided means for trade and investment disputes settlement amongst state parties. Also, this mechanism also considers the interpretation and application of the various agreements entered amongst parties under its platform. Parties having trade disputes shall first take such matter to be determined by adhoc panel which are composed of neutral panellist. Panels are like tribunals, though slightly different from a normal tribunal. The panellists are collectively chosen by disputing countries. Where they cannot reach a consensus, the WTO Director-General shall appoint the panellist. Panels are made up of at least three, and sometimes five, experts of different countries which shall exact their independence from anybody. They shall examine the evidence and reach a decision thereto, one way or the other. The panel's report is tendered before the Dispute Settlement Body, which cannot reject the report except by consensus.[14]

Aggrieved parties can appeal such ruling to the Appellate Body. The Appellate Body has the power of judicial review over the decision of the panel. The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally, appeals should not last more than 60 days, with an absolute maximum of 90 days. The Dispute Settlement Body has to accept or reject the appeal's report within 30 days and rejection is only possible by consensus.[15]

[13]Ibid, Article X : 2 – 7

[14] J Langille, 'Neither Constitution nor Contract: Understanding the WTO by Examining the Legal Limits on Contracting out through Regional Trade Agreements' (2011) 86 New York University Law Review, p. 1507.

[15] World Trade Organization. 'Understanding the WTO' 5th ed. (2015) World Trade Organization: Geneva, accessed 5th March, 2024

Both the Panels and the Appellate Body can give an order for a member state to take measures to bring its order into compliance. Where a party fails to comply with the order, it can invoke the powers of the compliance panel adjudication to impose countermeasures against the opposing party. "A countermeasure is a measure taken against the infringing party that would normally violate WTO disciplines (for example, raising tariffs above MFN levels), but which is permitted against a country found to be in breach of the Agreement".[16]

The WTO's dispute settlement system is reputed for being the most highly developed and legalised in international law. Its paradigmatic hard law regime at the global level has established a stout dispute settlement system which imposes legally binding obligations on members. Even in its first decade of existence, it has considered a remarkable number of disputes. One of such case is the India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (India-QRs).[17] In the Argentina—Footwear Case,[18] Argentina had imposed safeguard measures on all countries except members of their major Regional Trade Bloc, MERCOSUR. The Appellate Body held that Argentina was obliged to apply safeguard measures to all countries in line with the Most Favourable Nation MFN principles. In the Brazil—Tyres Case,[19] Brazil had also imposed import restrictions on all countries other than their MERCOSUR counterparts. The Appellate body held that members of MERCOSUR were not permitted to modify their WTO obligations on import restrictions on the basis of their regional trade body. It further held that regional restrictions must be applied uniformly amongst WTO member states

3.1 Functions, Objectives and Key Features of the System

The WTO dispute settlement system is mandated to perform certain important functions and has certain significant objectives and key features. These functions, objectives and key features may be considered as follows:

3.1.1 Functions:

A. Providing Security and Predictability to the Multilateral Trading System

The system is a central element in providing security and predictability to the multilateral trading system. The central objective of the system is to provide security and predictability to the multilateral trading system. International trade in the WTO is understood as the flow of goods and services between member states[20]. However, such trade is typically not conducted by states but rather by private economic operators. These market operators need stability and predictability in the government laws, rules and regulations applying to their commercial activities, especially when they conduct trade on the basis of long-term transaction.

In the light of the foregoing, it aims at a fast, efficient, dependable and rule-oriented system to resolve disputes about the application of the provisions of the WTO Agreement. It is believed by the WTO member states that by reinforcing the rule of law, the WTO dispute settlement system would make the trading system more secure and predictable. Thus, whenever a WTO member

[16] J Langille, 'Neither Constitution nor Contract: Understanding the WTO by Examining the Legal Limits on Contracting out through Regional Trade Agreements' (2011) 86 New York University Law Review, p. 1507

[17] J L Dunoff, 'Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law' (2006) 17 (3) The European Journal of International Law, p. 657.

[18] Argentina - Safeguard Measures on Imports of Footwear - Appellate Body Report and Panel Report - Action by the Dispute Settlement Body WT/DS121/9 (2 March 2000).

[19] Brazil- Measures Affecting Imports of Retreaded Tyres- Status Report by Brazil- Addendum WT/DS332/19/Add.6 (15 September 2009)

[20] The World Book Encyclopedia, (Chicago, USA: World Book Inc. 2001) WI. 10 at page 348.

alleges non-compliance with the WTO Agreement, the system provides for a relatively rapid resolution of the matter through an independent ruling that must be implemented promptly, or the non-implementing member will face possible trade saction[21] .

B. Preserving the rights and obligations of WTO members.

Dispute in the WTO is mainly about broken promises. It arises when one WTO member adopts a trade policy measure that one or more other members consider to be inconsistent with the obligations set out in the WTO Agreements. In such a case, any member who feels aggrieved is entitled to invoke the provisions of the Dispute Settlement Understanding (DSU) in order to challenge that measure.

Whenever the parties to a dispute fail to reach a mutually agreed solution, the complainant is guaranteed a rule-based procedure in which the merit of the claims would be examined by an independent body, and under which the respondent whose measure is being challenged could defend it if it disagrees with the claims raised in the complaint.

In addition, the DSU stipulates that the recommendations and rulings of the Dispute Settlement body should reflect and correctly apply the rights and obligations of the parties as they are set out in the WTO Agreement. The recommendations and rulings must not change the WTO law that is applicable between the parties, and cannot add to or diminish the rights and obligations of the parties as provided in the covered agreements[22].

Consequently, all solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements, and shall not nullify or impair benefits accruing to any member under those agreement nor impede the attainment of any objective of those agreements Hence, even dispute settlements through bilateral arbitration and mutually agreed arrangements must be transparent and consistent with WTO law. In this way, the system serves to preserve the members' rights and obligations under the WTO Agreement.

3.1.2 Objective:

A. Mutually Agreed solution as the preferred solution.

Under the DSU[23], the primary objective of the dispute settlement mechanism is to secure a positive resolution of a dispute, preferably through a solution that is mutually acceptable to the parties to a dispute and consistent with the covered agreement. Accordingly, the DSU enjoins panels to give adequate opportunity to parties to a dispute to develop a mutually satisfactory solution[24].

It is clear from the above provisions of the DSU that unlike other judicial systems, the priority of the WTO dispute settlement system is to settle disputes, preferably through a mutually agreed solution that is consistent with the WTO Agreements, and not to make rulings or to develop jurisprudence.

[21] Articles 3:7 and 22 of DSU.
[22]Ibid.
[23] Article 3.7 .
[24] Ibid, Article 11

B. Prompt settlement of disputes

It is well known that justice delayed is justice denied. Consequently, to be achieved, justice must not only provide an equitable outcome, but must also be swift. In line with this saying, the DSU[25]emphasizes that the prompt settlement of dispute is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of members. In order to achieve efficiency, the *DSU* sets out in considerable detail, the procedures and corresponding deadlines to be followed in resolving disputes, including the right of a complainant to go on with a complaint even in the absence of agreement by the respondent[26]. Moreover, where a case is adjudicated, it should normally take not more than 9 months or 12 months from the date of establishment of a panel for a panel's ruling or appellate body's report respectively[27]. Consideration of disputes would even take lesser time in cases which the parties or panel or appellate body consider to be urgent, including those disputes that concern perishable goods[28].

C. Prohibition against unilateral determination

The WTO members, via the *DSU*, have agreed to resort to the dispute settlement mechanism for settling their disputes instead of taking unilateral actions[29]. In other words, member states of the WTO have agreed to abide by the agreed procedures under the *DSU*; to respect the rulings of the dispute settlement body once they are issued; and not to take the law into their own hands. The *DSU*, in order to prevent the detrimental effect of resolving dispute by taking unilateral actions, provides that the WTO members must have recourse to the WTO system of settling dispute whenever they seek redress against another member under the WTO Agreement[30]. Moreover, the complaining member should only take action based on the findings of an adopted panel or appellate body report or arbitration award and must respect the procedures stipulated in the *DSU* for the determination of the time for implementation, as well as impose counter measures only when authorized by the dispute settlement body[31].

3.1.3 Exclusive Jurisdiction

By mandating recourse to the WTO system for resolving trade disputes as already stated, the DSU not only excludes unilateral actions but also precludes the members from using other fora for settling trade disputes arising from the WTO Agreements. No dispute involving the WTO agreements has ever been taken to the International Court of Justice (ICJ). However, one may ask whether the court has jurisdiction over such a dispute or whether the *DSU* would be held to be exclusive. In answer to this question, *Article 23: 1 and 2(a)* of the DSU expressly excludes the use of other forums to settle trade disputes. In fact, according to a panel in US – Certain EC Products, the structure of *Article 23* is that the first paragraph states the general prohibition or general obligation, that is, when members seek the redress of a WTO violation, they shall do so only through the *DSU*. This is a general obligation and any attempt to seek redress can take place only in the institutional framework of the WTO and pursuant to the rules and procedures of the *DSU* . Thus it can be safely concluded that the ICJ do not have jurisdiction to entertain disputes

[25] DSU, Articles 3.3.
[26] Ibid, Articles 3.3.
[27] Ibid, Article 20.
[28] Ibid, Articles 4.9 and 12.8.
[29] Ibid, Article 23.
[30] Ibid, Article 23:1.
[31] Ibid, Article 23.2(a), (b) and (c).

arising from WTO agreements, and any party that takes such a dispute to the ICJ is in fact violating *Article 23* of the *DSU*.

3.1.4 Compulsory nature

One of the important features of the WTO dispute settlement system is that, unlike other international dispute resolution, it is compulsory. All WTO members have signed and ratified the WTO Agreements as a single undertaking[32] of which the DSU is a part. Therefore, all WTO members are subject to the dispute settlement system for all disputes arising under the WTO Agreements. Consequently, there is no need for any member to accept the jurisdiction of the dispute settlement system in a separate declaration or agreement as the consent to accept the dispute settlement system is already contained in a member's accession to the WTO. As a result, every member enjoys assured access to the dispute settlement system and a responding member cannot escape the jurisdiction of the dispute settlement system.

4. Laws Applicable to Legal Interpretations of WTO Agreements within the System

Legal interpretations in the WTO Dispute Settlement System must be considered in the context of the general rules of international law regarding interpretation of treaties, as according to the Appellate Body, the WTO laws are not to be read in clinical isolation from public international law . The general rules of interpretation as admitted by the Appellate Body are contained in *Article 31* of the Vienna Convention and had attained the status of a rule of customary or general international law. As such, it forms part of the customary rules of interpretation of public international law which the WTO Dispute Settlement Body has been directed to apply by *Article 3.2* of the DSU. According to *Article 31* of the Vienna Convention, the principles of treaty interpretation include:

i. ordinary meaning of words of the treaty given in the context and in the light of its object and purpose;
ii. any agreement or instrument relating to the treaty which was made and accepted by the parties in connection with the conclusion of the treaty;
iii. subsequent agreement between the parties regarding the interpretation of the treaty;
iv. subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and other relevant rules of international law. In addition, the treaty must be interpreted in good faith.

Each of these principles of interpretation plays a role in the interpretation of the WTO agreements by the Dispute Settlement Body. Consequently, the Appellate Body in Indian – Patents (US) emphasized that the duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. The principle of good faith has come into play in the interpretation of WTO agreements. *Article 32* of the Vienna Convention allows a treaty interpreter to have recourse to supplementary means of interpretation, which include the preparatory work of the treaty and the circumstances of its conclusion have also been applied in interpreting WTO agreements. Consequently, the Appellate Body stated that the classification practice of the European Communities and the classification of LAN equipment by United States during the Uruguay Round are part of the circumstances of the conclusion of the WTO agreement and may be used as supplementary means of interpretation. Finally, the corollaries of the general rule of interpretation of treaties like the principles of: effective treaty interpretation -

[32] United States – Certain EC Products: Import Measures on Certain Products from the European Communities, Appellate Body Report, WT/DS165/AB/R, adopted 10 January 2001.

which stipulates that interpretation must give meaning and effect to all the terms of a treaty; presumption against conflict; state responsibility; legitimate expectations; and non-retroactivity of treaties plays vital role in the interpretation of WTO agreements[33].

5. WTO Bodies Involved in the Dispute Settlement Process.

a) **Panels:**

Panels, like tribunals, are quasi-judicial bodies, but unlike in a normal tribunal, the panellists are usually chosen in consultation with the countries in dispute and consist of three and possibly five experts selected on an ad hoc basis[34]. It is only when the two sides cannot agree on the selection of panellist that the WTO director-general appoint panellists[35]. Under the DSU, a person is well qualified if he/she has served on or presented a case to a panel; or has 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 has worked in the secretariat, taught or published on international trade law or policy; or has served as a senior trade policy official of a member state[36]. These criteria could be roughly summarized as establishing three categories of panellists: government officials (current or former), former secretariat officials, and academics.

b) Appellate Body

The Appellate Body was one of the major innovations of the Uruguay Round of multilateral trade negotiations. It is the second and final stage in the adjudication part of the dispute. The Appellate Body, unlike the panels is a permanent body. It consists of seven (7) members entrusted with the task of reviewing the legal aspects of the reports issued by panels.[37] The Appellate Body functions to correct possible legal errors committed by panels, and thereby provided consistency of decisions. Under the DSU, if a party files an appeal against a panel report, the Appellate Body's task is limited to reviewing the challenged legal issues, and it may uphold, reverse or modify the panel's findings[38] . However, the Appellate Body has taken a broad view of its power to review panel decisions. Consequently, although the DSU did not discuss the possibility of a remand to a panel partly as a consequence, the Appellate Body has adopted the practice, where possible, of completing the analysis of particular issues in order to resolve cases where it has significantly modified a panel's reasoning.

c) **Arbitrators:**

Under the DSU[39] , as an alternative to resolving dispute by panels or appellate body, arbitrators either as individuals or group can be called to adjudicate certain questions at several stages of the dispute settlement process. The results of arbitration are not appealable but can only be enforced through the DSU[40]. However, arbitration under *Article 26* has rarely been used. There are two other circumstances where arbitrators can be appointed under the DSU. First, after the adoption of panels or Appellate Body's report by the DSB, an arbitrator may be appointed to determine

[33]For the application of these principles, see generally, World Trade Organisation, WTO Analytical Index: Dispute Settlement Understanding, (Geneva: WTO Publication 2003), paragraphs 29 to 45.
[34] Article 8.5 of the DSU
[35] Ibid, Article 8.7
[36] Ibid, Article 8.1.
[37] Ibid, Article 17.6m.
[38] Ibid, Article 17.13 .
[39]Ibid,Article 25.
[40] Ibid, Articles 21 and 22.

the reasonable period of time to be granted to the respondent to implement the panels or Appellate Body's recommendation.[41] Second, where a party subject to retaliation objects to the level or the nature of the suspension of obligation, such party may request for arbitration[42]. In these two cases, arbitration is limited to clarifying specific questions in the process of implementation, and the arbitral decision is binding on the parties.

6. Conclusion and Recommendations.

Globalization has led to increased international cooperation. States recognize the benefits of establishing international organizations with governance and coercion, as well as entering into agreements to regulate their own behaviour. The WTO has made significant progress in this area, surpassing other organizations.

The World Trade Organization (WTO) has established an institutional framework to execute its objective, with the dispute settlement mechanism playing a key role. The DSM of the WTO is considered as the "Jewel in the Crown" of the WTO. To ensure the implementation of the WTO obligations, it is necessary an "enforcement power" to impose them whenever a member fails to comply with its content. To deal with such problem the DSB[43] was created under the DSU[44] .

Recommendations.

1) Transparency and Access to the WTO dispute settlement system.

Dispute settlement mechanisms established under international public law normally provide for public access to their proceedings. This is the case for the International Court of Justice as well as the European Court of Human Rights. However, the WTO dispute settlement system differs from the international practice on this issue. Thus, it is hereby recommended that the text of the DSU should be modified as to provide sufficient flexibility for parties to decide whether certain part of the proceedings before the panel or Appellate Body should be open to the public for attendance. Third parties should also have the right to decide whether their interventions should take place in open or closed session, bearing in mind that the main aim of the mechanism is to secure positive solution to a dispute.

2) Professionalization of Panel.

There is a growing quantitative discrepancy between the need for panellists and the availability of adhoc panellists. The cases and the total duration of the cases are increasing, but it has proved more difficulty to find qualified panellists who are not nationals of members involved in the dispute either as a complainant, defendant or a third party. As a result of the foregoing, it is hereby recommended that the system should adopt permanent panellists, similar to the Appellate Body. Adopting permanent panellists, it is believed would reduce the total time frame of the dispute settlement procedure; the workload of the Appellate Body and costs for all the parties as well as enable the DSB meet up with the deadlines specified by the DSU.

3) More Effective Remedies

The first objective of the dispute settlement system in the absence of a mutually agreed solution to a dispute is to secure the withdrawal of WTO – inconsistent measures. However, where immediate compliance is impossible, the DSU gives preference to temporary compensation over

[41] Article 21.3 (c) of DSU
[42] Article 22.6 , ibid.
[43] Article IV(3), WTO Agreement
[44] WTO Agreement, Annex 2

suspension of concession or other obligations. Hence, it is logical that trade compensation should always be preferred to suspension of concession or other obligations – which is the last resort instrument.

However, the reality is that compensation is currently not a realistic option before the application of trade sanctions. In fact, the structure of the DSU is such that members are induced to request suspension of concessions first.

As a result of the foregoing, it is hereby recommended that as an alternative to trade sanction, monetary fine should be imposed on the losing member. The monetary fine should be equivalent to the level of nullification or impairment suffered by the winning party. In addition, provisional measures in terms of cost and damages should be awarded to the winning party to compensate for the legal expenses suffered in prosecuting the case, as well as damages suffered while the dispute was pending before the DSB. This it is believed would prove prompt implementation of DSB rulings.

It is also recommended that a member who fails to comply with the ruling of the DSB should be prohibited from invoking the jurisdiction of the DSU, until such a member complies with the ruling. After all, how can a member seek assistance from an institution whose decision and authority it challenges by non-compliance with the ruling? It is believed that this remedy would provide an incentive to the member to comply with the ruling but should not be so onerous as to provide it an incentive to break away from the international trade regime.