

The University of Hull

COMPARATIVE ANALYSIS OF THE WTO DISPUTE
SETTLEMENT MECHANISM WITH OTHER MECHANISMS OF
SETTLING INTERNATIONAL TRADE AND INVESTMENT
DISPUTES: A PROTECTIONIST VIEW

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by

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Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr.15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 ILM 1125 (1994)

General Agreement on Tariffs and Trade, Oct. 30, 1947, Stat. A-11, T.I.A.S 1700, 55 UNTS 194

Table of Abbreviations

I.L.M	International Legal Materials
J.Droit. Intl	Journal de Droit international
B.Y.B.I.L.	British Yearbook of International Law
G.A.T.T.	General Agreement of Tariffs and Trade
WTO	World Trade Organisation
ICJ	International Court of Justice
BISD	Basic Instruments and Statutory Documents
ICJ Rep.	Reports of the International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
JWT	Journal of World Trade
ILR	International Law Reports
PCIJ	Permanent Court of International Justice
Yearbook of Int.L.	Yearbook of International Law
AJIL	American Journal of International Law
LNTS	League of Nations Treaty Series
Can.Yearbook of Int.L.	Canadian Yearbook of International Law
YILC	Yearbook of the International Law Commission
ECPSD	European Convention for the Peaceful Settlement of Disputes
DSU	Dispute Settlement Understanding to the WTO
DSB	Dispute Settlement Body
UNCITRAL	United Nations Commission on International Trade Law
CJTL	Columbia Journal of Trans-national Law

ICLQ	International & Comparative Law Quarterly
ICC	International Chamber of Commerce
UNTS	United Nations Treaty Series
EPIL	Encyclopaedia of Public International Law
IBRD	International Bank for Reconstruction and Development (World Bank)
OAU	Organization for African Unity
Fordham Int.L.J.	Fordham International Law Journal
Stan.L.Rev	Stanford Law Review
Neth.Y.B.Int.L.	Netherlands Yearbook of International Law
Har.Int.L.Journal	Harvard International Law Journal
GNP	Gross National Product
NIOC	National Iranian Oil Company
FSIA	Foreign Sovereign Immunities Act
PCOA	Permanent Court of Arbitration
MNE	Multinational Enterprises
MTN	Multilateral Trade Negotiations
CAP	Common Agricultural Policy
ITO	International Trade Organization
ECOSOC	Economic & Social Council
UNRRA	The United Nations Relief and Rehabilitation Administration
1899 HCPSID	Hague Convention for the Pacific Settlement of International Disputes of 1899
Art.	Articles
Colum. L.R.	Columbia Law Review
OAS	Organisation of American States

Para(s)	Paragraphs
US/USA	United States of America
EC	European Community
NAFTA	North American Free Trade Agreement

PREFACE

The objective of this study is to analyse the settlement of trade and investment disputes, in particular the GATT/WTO mechanism, given the fact that such settlement has made a huge impact on how governments deal with their trading partners, particularly as states are inclined to practice protectionist political and economic policies in order to protect their own interests. In order to achieve this objective, I would a) examine why disputes are brought to settlement mechanisms, which in most situations have risen as a result of protectionism, and discuss the broader concept of protectionism, b) discuss the underlying elements behind different forms of dispute settlement such as negotiation, mediation and arbitration in the light of such protectionist policy making. I would limit my analysis to the three above mentioned settlement forms for reasons of not only limited space, but also as I see negotiation and mediation as being very similar to other forms such as conciliation and good offices, under Art. 33(1) of the UN Charter. Furthermore, my discussion of adjudication would be limited to the ICJ, particularly, as I see the ICJ jurisdiction being at the forefront of international adjudication. Further, I would review the ICJ, ICSID, which work under the umbrella of peaceful methods of settlement, and d) review the GATT/WTO system discussing substantive issues which relate to dispute settlement taking into account the protectionist aspect to such settlement, and d) contrast the GATT/WTO to other institutions as mentioned above, with a eye on the philosophy of these mechanisms, which is at loggerheads with protectionism.

Chapter One of the present work will focus on the connection that exists between protectionism and international economic disputes, which ultimately provides the varying reasons for such disputes to arise between states. Disputes in any sense are not

hard to identify. It usually concerns some sort of disagreement between parties with respect to either, a) a legal right as a result of some contract being breached or b) an interest being nullified. The Permanent court of Justice described a dispute as “..a disagreement between on a point law or fact, a conflict of legal views or of interest between two persons.”¹ Therefore one could say in a broader sense that in international law such disputes arise when states have a disagreement with other states or with individuals in different parts of the world; and in the case of international economics, when it concerns a resulting legal right arising from a economic transaction or relation. Thus one could say that settlement arises, as a result of these disputes arising for varying reasons, be it political or economical.

In economic relations, it has been an accepted norm that protectionism has been a factor in the rise of disputes between states. However, in the main, protectionism has been identified with the protection of a economic benefit, rather than a interests in the protection of a broader political interests, where state sovereignty has been a key part of this interests. It is my belief, however, that one could identify a broader notion of protectionism on the part of the states, where the interests is not necessarily economic, but also the protection of one's political interests, which unfortunately has given rise to disputes. Therefore I would first deal with this broader notion of protectionism, which I believe is the underlying element in international disputes that arise between states and individuals and state parties respectfully.

Hence, I would briefly identify the sort of disputes, which have been brought forward for resolution, prior to dealing with these varying reasons for such disputes. I would deal with these reasons briefly in order to understand the basis on which the states enter into methods of peaceful settlement of disputes, because it is

my contention that these reasons, however mentioned, are based on some sort of protectionism, be it state sovereignty, local legislation, tariffs etc. which leads to dispute settlement. Furthermore I also believe that this reasoning does have a bearing on how states react to the initiation, process and implementation of awards granted by such dispute settlement. Some authorities have argued that these reasons range from the protection of a states reputation of power, as have happened in the political disputes such as the *Cuba-The United States dispute of 1959-61*, *The Gibraltar dispute* between Britain and Spain or *The Cuban Missile Crisis of 1962*,² to the extent of states protecting their local interests through protectionist policy making.³ Hence, this necessitates settlement, which could avoid war or enable the promotion of trade. Secondly, disagreements arise on conflicting assertions of rights and obligations with regard to economic activity, which quite appropriately are called “legal” disputes and are separated from the above mentioned policy interests. However, at the same time these legal interests have been inter-twined with the above mentioned political interests. As we have seen in many a case, such disputes have risen as a result of mainly investment and trade contracts being breached at international level by governments, who practice protectionist economic policy or frustrating circumstances which make these contracts ‘*force majeure*’.⁴ In these cases settlement is needed to protect future investment or the rights of investors, the rights of states involved in international trade whose rights or economic interests are effected, notwithstanding the fact that these disputes could be categorised as political disputes. Therefore, in the context of the first chapter, I would try to emphasise the fact that protectionism in the broader sense is the key to international disputes and has a bearing on the future settlement of such disputes and elements of such settlement mechanisms.

Chapter Two would be focused on the settlement of the above mentioned international disputes, via peaceful methods, as emphasised under international law. Given the fact that such protectionism has led to international disputes, settlement at international level has been a necessity. Hence the international community has resolved to the settlement of such disputes by international dispute settlement mechanisms. These have varied from legal to peaceful methods of settlement as emphasised by the Charter of the United Nations.⁵ Bearing in mind of this fact, attention would be focused on the different forms of international settlement, and how protectionism has effected the working of these settlement methods. Thus, three of the peaceful methods of settlement would be dealt with at present.

Negotiation & consultation:

Negotiation has been recognised as one of the key avenues for dispute settlement, as a result of the mutuality that is needed for its success (Ar.33(1) of the UN Charter). Thus many of the ad hoc or institutional settlement mechanisms utilise negotiation as one way of dispute settlement, as a result of this mutuality which is supposed to diminish any obstruction to the settlement process. Nevertheless, this necessary mutuality of parties, be it state or individuals, depend on the protection of one's own economic and self-interests. This is to be identified from the satisfactory conclusion or breakdown of negotiations in international relations, where the sole reason for such breakdown in negotiations is protectionism. Therefore I would discuss this concept of mutuality in light of the concepts such as state sovereignty, secrecy in negotiations and the inherent protectionism, which has a bearing on the final outcome of negotiations be it ad hoc or institutional, which works under the axis of general peaceful settlement.

Mediation:

Mediation has been recognised as another way of dispute settlement by the international world, be it in political disputes or international trade and investment disputes. Mediation, as with negotiation, has to be balanced with the concept of state consent and control of the settlement process, which has become one of the hallmarks of international dispute settlement. Therefore mediation as a settlement method has to be accepted by the parties concerned, and the mediators have to have the respect of the parties as being suitable for the settlement of the dispute. These issues become more important in institutional settlement than ad hoc settlement, given the fact that parties have already granted their consent to these institutions for settlement and the fact that mediators are chosen from a list, where the parties concerned may or may not have a right to choose. This is to be contrasted with the mutual consent of the parties concerned, who have the right to withdraw from such settlement, which may be as a result of protectionism. Hence I would deal with these issues prior to discussing the relevance in relation to institutional dispute settlement, such as the ICJ, ICSID and the WTO.

Arbitration:

Arbitration is, one could say, is the more legalised method of peaceful settlement measures, where the consent of the parties is stretched to the limit, and where the control that parties have is minimised to the extreme, notwithstanding the protectionists attitudes of the relevant parties. Hence, one could argue that arbitration is more similar to adjudication than negotiation or mediation, as a method of peaceful settlement. One could argue that this situation is more so, when parties resort to

arbitration via institutional arbitration in an international setting, where the parties have agreed to such via the signing of international convention. Therefore, prior to discussing the institutional proceedings, I would discuss relevant issues such as the selection and authority of arbitrators, the basis of law and arbitrators right to select a relevant law and the enforcement of arbitral decisions, which I believe, is to a certain extent influenced by state protectionism.

Chapter Three would narrow the focus on some of the settlement processes available under the axis of peaceful settlement, for international economic disputes. Having discussed the peaceful settlement procedures and relevant issues in general, I would follow to deal with the International Court of Justice (ICJ), The International Centre for the Settlement of Investment Disputes (ICSID), in order that such mechanisms could be contrasted with the World Trade Organisation (WTO), taking into account the protectionist attitudes of state parties. The ICJ in particular will be discussed as a result of it being one of the key judicial authorities and the judicial organ of the United Nations, which provides for peaceful settlement, and how and when the court has used its judicial powers to deal with international trade and investment disputes. The ICSID would be compared with the WTO, particularly as it makes a move away from the norms of public international law principles, which opens the debate over the effect of protectionism on the ICSID procedure, particularly as it has a direct effect on the private person, in contrast to the effect on states.

a) The Permanent Court of International Justice and International Court of Justice (ICJ)

The PCIJ and its successor, the ICJ have both been regarded as one of the most authoritative judicial institutions available to states for the settlement of their legal disputes. However, such high hopes have not materialised as a result of the reluctance of states to make use of these institutions, given the protectionist nature of state practice. I would deal with issues such as jurisdiction, applicable law and enforcement and the effect on states, taking into account this protectionist position advocated by all countries, be it developed or developing nations.

b) The International Centre for the Settlement of Investment Disputes (ICSID)

The ICSID procedure is one of the most elaborate dispute settlement mechanisms at present, granting rights and obligations, not only on state parties but on individual investors, which is a first in international dispute settlement terms. Furthermore, it is right in saying that the ICSID procedure has formalised dispute settlement, in contrast to other procedures which preceded it, which depended on politics to resolve international investment disputes. I would briefly review the ICSID and the relevant procedures in this light, to clarify the problems of applicable law, the selection of arbitrators, state sovereignty and consent of states, which is of importance in comparing these procedures with the existing GATT/WTO law, given the fact that protectionist attitudes are prevalent in state practice, on the part of developing states in most cases.

Chapter Four of the thesis would concentrate on the main regulatory body for international economic relations, namely the WTO, particularly with a view to making

a comparison with previously discussed institutions, with protectionism being a basis for such discussion. It is my intention here to discuss the dispute settlement procedure of the World Trade Organisation and its nature in satisfying the grievances of the parties to a trade dispute. Prior to the WTO agreement of 1994, the regulation of international trade was done via Art.22 & Art.23 of the GATT Agreement. However, as a result of its informality, which I believe is a direct result of states trying to protect their own economic and political interest; it failed in its desired effect. It is my intention to identify why such a procedure failed, particularly given the fact that the underlying sentiment was to eradicate or control protectionism. In order to do this, I would first deal with the basis under which the GATT was initiated, particularly taking into consideration Art.1, and Art.55-57 of the United Nations Charter, which was of relevance in these circumstances. Following on from this, I would briefly discuss the procedures that were initiated and the negotiating rounds undertaken by the Contracting Parties, which was to provide procedures to supplement the Art.22 and 23 settlement process.

Having discussed the legal or “non-legal” basis of the GATT/WTO and the procedures prior to 1994; in order to put into perspective the improvements made by the 1995 Uruguay round agreement which followed the 1979 & 1989 Understandings, I would attempt to clarify the merits and deficiencies of the pre-1994 regime from a on a legal point of view, specially taking into account the dichotomy in thinking with regard to legalising the process or keeping it informal, which I believe is a precursor to “free for all” protectionism, which was to be eradicated by the GATT/WTO. Having dealt with the pre 1994 Dispute Settlement process from a protectionist point of view and the effect it had on the system, I would follow to discuss the substantive issues of the new system, in order to make a comparison with

the above discussed institutional settlement processes. As such, key issues such as the, a) The establishment of a Panel and the Composition of such panels, b) Adoption of panel recommendations & appeal process, c) applicable law and d) enforcement of WTO reports, would be dealt, with reference on how protectionism has effected the new procedures adopted by the WTO system.

Having dealt with the ICJ, ICSID and the WTO procedures in dispute settlement and the relevant substantive issues, and the effect that the broader norm of protectionism has on these issues, I would endeavour to make a comparative analysis of these procedures in *Chapter Five*. In order to do this, I would deal with the three key issues, namely, jurisdiction, applicable law and enforcement of awards, taking into account on how state protectionism has effected these issues, which I believe is key to the satisfactory conclusion of these respective dispute settlement

The final synthesis I intend to provide on the above discussion is threefold. First, that protectionism plays its part in the satisfactory completion of dispute settlement, be it negotiation or arbitration. Secondly, that in the field of international trade and investment settlement, such protectionism has played its part in the satisfactory conclusion of dispute settlement, be it the ICJ, ICSID or the WTO, which has a far more wider scope in such settlement. Thirdly, that notwithstanding the major technical and legal improvements made by the World Trade Organization as the leading institution in international trade, the prevalent protectionist attitudes have depleted such improvements which have in turn effected the motives of liberalisation, as envisaged at the time of drafting of the UN Charter and the working of the associated institutions, particularly as state liberalisation is based on state consent and consensual relations.

Notes

¹ Mavrommatis Palestine Concessions (Jurisdiction) case; PCIJ, Ser.A., No 2 (1924)

² Donelan, M.D., International Disputes: Case Histories 1945-1970, Europa Publications, 1973

³ International Fruit Ltd Vs Commission, The Tuna Dolphin 2 case, 33 ILM (1994) etc..

⁴ B & B SARL Vs Government of the Peoples Republic of Congo, 108 J.Droit Intl (1981) 365 ;
Holiday Inns/Occidental Petroleum Corporation Vs The Government of Morocco

⁵ Art.33(1) of the United Nations Charter

Chapter One

Reasons for International Disputes and Settlement: A Protectionist view

INTRODUCTION

Protectionism has generally been attributed to economic restrictions imposed by states on other states, when concerned with losing a subjective benefit, even though such restrictions are against the accepted norms of liberalisation. At the same time, some states enter into disputes with another for reasons which are beyond the accepted reasons of protectionism, but which are categorised as political/philosophical disputes. However, the fact has remained, that in getting involved in such disputes, the state in question, has utilised a justification or has tried to protect one's sovereign rights, which unfortunately is not being recognised as being protectionist, particularly as it would be separate from legislating for the protection of subjective economic rights. Therefore, in the context of this chapter, I would first try to emphasise this broader concept of protectionism, which I believe, not necessarily to be restricted to the protection of subjective economic rights, but also the broader protection of a state's sovereign rights, which includes the right to accept the jurisdiction of arbitral tribunals or legislate for the immunity laws from such jurisdictions. It is my belief that, this broader conception of protectionism is the basis for the varying reasons provided for international disputes, which I would be discussing in the latter part of this chapter.

Having dealt with the broader conception of protectionism, I would briefly deal with what is accepted as a dispute in international law. Legal disputes in any sense are not hard to identify. They usually concern some sort of

disagreement between parties with respect to either, a) a legal right as a result of some contract being breached or b) an interest being nullified. According to Behrens, the elements of a dispute are foursome. First it consist of a) some kind of disagreement, b) between two or more parties with respect to c) a previously existing relation between them d) in light of their interests.¹ Therefore, one could say in a broader sense that in international law such disputes arise when governmental institutions or governments have a disagreement with other governments or with individuals in different parts of the world; and in the case of international trade and investments, when it concerns a resulting legal right arising from a economic transaction or relation. As we have seen in many a case, such disputes have risen as a result of mainly investment and trade contracts being breached at international level by governments, who practice protectionist economic policies, which make these contracts '*force majeure*'.² In these cases settlement is needed to protect future investment or the rights of investors, the rights of states involved in international trade whose economic interests may be affected by the protectionist practices of another state party, notwithstanding the fact that these disputes could be categorised as political disputes. I believe that while the above mentioned legal reasons may be true, it is also the fact that the rise of such disputes could be more to do with broader political reasons and protectionism, be it directly or indirectly, as evidenced in the case history of international relations.

It is on this premise that, reasons for disputes up for resolution can be separated into two types. The second of these arise on political interest and policies, where parties may change their preferences, or governments face changing majorities in their constituency and as a result political policy being changed to suit their needs, notwithstanding the outcome of the breached contract or the effect it has on the other party concerned. These reasons are argued to range from the protection of

a states reputation of power, the sense of justice, as happened in the political disputes such as the *Cuba-The United States dispute of 1959-61*, *The Gibraltar dispute* between Britain and Spain or *The Cuban Missile Crisis of 1962*,³ to the extent of states protecting their local interests through direct protectionist economic policy making.⁴ As was said with regard to the Kashmir dispute between Pakistan and India, “deeper incompatibilities of culture, ideology, psychology or historical experience than those ordinarily present in a dispute.”⁵ were in existence. Thus necessitating settlement of broader issues other than pure economic issues, which could avoid war or enable the promotion of good international relations between parties. I would deal with these philosophical reasons briefly in order to understand on which basis these arguments are made. Therefore, it is my contention that this relationship between states have to be broadly defined, not only in legal terms, but also in political terms, which not only broadens the scope of what a dispute is in international law, but also emphasises the nature of protectionism, which encapsulates these philosophical reasons as being a part of international disputes. Having discussed the philosophical reasons for international disputes⁶, I would also endeavour to discuss, what is considered to be the “real” reasons for international trade and investment disputes, particularly as it is these reasons that are primarily put forward by states in justifying the obstructions to trade liberalisation. However, while discussing the “real” reasons for international trade disputes, I would also concentrate on emphasising the point that states do ultimately have an ulterior motive in the imposition of these protectionist laws. Taking into account of this fact, I would proceed to deal with the issue of protectionism and the reasons for international disputes to arise, which I believe to depend on the broader concept of protectionism, notwithstanding the fact that these have been separated into two separate groups.

1.1 The Issue of Protectionism:

Protectionism is related to economic activities which are thought to be illegal in terms of the accepted norms of international trade. The General Agreement on Tariffs and Trade provided the principles reflecting multilateralism and non-discrimination that would assist states to benefit from obligations, that states in the GATT had accepted. Thus, state parties who accepted these non-discrimination obligations were to comply with the GATT disciplines and were limited in the use of restrictive activities against other states or investors/importers.⁷ These restrictive economic practises have ranged from tariffs to non-tariff barriers. The reasons for their usage can often be termed as “subjective” mainly because the states believe that it is within their sovereign right to impose such restrictions for the protection of what they believe to be theirs, notwithstanding the fact that these restrictions may be illegal according to accepted normative obligations under the GATT/WTO. The methods included first, the protection of infant industries, which has been a favoured justification by most developing nations for operation of trade distorting practices. Secondly, the growth of export interests in some individual nations has been advocated as a justification in the practice of legislative and administrative practices, which has resulted in these activities being challenged by other states as being GATT/WTO illegal.⁸ Thirdly, the schemes for the control and stabilization of prices have also been advocated by states as a justification for the practice of economic activities which have been agreed as being illegal under the norms of GATT.⁹

Many states, be they developed or developing, have promoted these varying arguments in justifying subjective protectionist policies, as we have witnessed with regard to cases brought to international dispute settlement forums.¹⁰ As Bhagwati notes with regard to the United States, who has been a major protagonist of

protectionism, “the protectionist fallout, however, has come not merely from troubled industries seeking relief. There has been the national-interests concern that America is threatened with de-industrialisation and that this, in turn will damage the economic wellbeing of the US.”¹¹ While Bhagwati has focused on the United States in this particular instance, this has been the trend of most states who implement these regulations against accepted norms. It is this concern for the protection of one’s local interests, notwithstanding the commitments for liberalisation, which has resulted in most international trade disputes. Hence the coinage of “protectionism” to such economic measures which goes against the accepted norms of trade practice.

While protectionism is attached mainly to economic activity and its regulation, protectionism in a subjective sense, where the states argue their case according to what they believe to be their sovereign rights, has also been practised in what Donelan calls “political disputes.”¹² As I will explain in this chapter, political as well as economic reasons have been factors in international disputes. While economic reasons in most cases have been alleged illegal economic practices, in most “political” disputes the reasoning has been the subjective views of states on its state sovereignty and its individual standing in international relations.¹³ In most of these cases, the dispute relates to disagreements on economic interests, protection of territory or reasons of what states believe is theirs in relation to the other disputing nations or international investors. Furthermore, in other circumstances, the states legislate for protection on the basis of sovereign immunity, which allows it to fall back on this exception when challenged by another state or international investor. One such example is the United States Foreign Sovereign Immunity Act of 1976 and the UK State Immunity Act of 1978, which allows only local jurisdiction over any activities undertaken by the respective states and in certain areas the complete exemption of the

state from legal enforcement. In most cases, the arbitration would involve commercial activities, hence allowing the state to argue immunity when challenged by others, notwithstanding the fact that these activities might be protectionist according to the accepted norms.

States or state authorities thus argue their case on the basis of what they believe to be their sovereign right. While a state may subjectively believe that it is entitled to a commodity or the right to make decisions on the basis of its sovereign right, another state or international investors affected by such a decision might argue the opposite, resulting in international disputes.¹⁴ It is this same subjective political mentality that was taken over to trade/investment relations, where states have resorted to economic control with concern towards, either its status and standing as economic superpowers or in other cases as the protector of the nations interests, as we have evidenced over the years and emphasised by Bhagwati.¹⁵ As Bhagwati notes, this concern of protecting one's sovereignty and resources has resulted in states advocating unilateralism rather than multilateralism.¹⁶ In most cases, this conception of protecting the local and regional interests has resulted in disputes arising as evidenced in international trade, while could be termed as economic protectionism, has also emphasised the protective nature of states in protecting what they perceive to be their right to protect, for the national interests. As evidenced in the international oil concession cases such as the *Kuwait Vs AMINOIL*¹⁷, the states have also utilised their character as the protector of the public interests in changing the previously accepted rules of the concession agreements with the oil investors by concluding further agreements with other states which restricted the benefits accruing to the investors. While the facts that involved such a change in policy were economic benefits, the decisions made by the states nonetheless were made under the guise of sovereign

states, and not just as economic players. This gave the states the opportunity to argue immunity from the legal jurisdiction of certain dispute settlement forum and the right to change its economic policy to benefit its needs.

Furthermore, larger states have advocated situations of what Bhagwati calls “Diminished Giant Syndrome” in economic activity by legislating for restrictions on the basis of purportedly protecting national security or public policy, when faced with competition, according to the a state’s sovereignty to construct such laws.¹⁸ The “Diminished Giant Syndrome”, as Bhagwati calls it, has been apparent, where larger states enforce economic barriers when threatened by the economic power of other states. In other circumstances, exceptions to accepted economic norms have been constructed on the basis of what the individual state perceives to be the “protection of its internal security” and the sovereign right of these governments to legislate for such protection.¹⁹ The perception has been that restrictions should be implemented on the commercial activities of state B, on the basis that the these commercial activities would hinder the national security of state A and further that these states are free to legislate or act on this base of protecting one’s supremacy.²⁰ While one may argue that the subjective concern for economic benefits justifies the concept of protectionism being attached to economic activity, it is my belief that it is also the fact of political sovereignty that has prompted these states to advocate such a position, on the basis of their individual sovereign right to legislate for such protection of subjective interests. Therefore, protectionism could be defined as illegal state practices which contradicts accepted norms, on the basis of either the protection of economic commodities, or what these individual states subjectively believe to be the protection of state sovereignty, which has motivated states to get involved in international disputes. It is my contention that it is this broad conception of

protectionism that has influenced states to dispute economic and political facts with other states.

1.2 Reasons for International Disputes and Settlement

1.2.1 Political and moral reasons:

Having dealt with the separation of legal and political disputes, and what I believe to be the broader sense of protectionism, I intend to discuss some of the reasons as to why such disputes arise and necessitate its settlement. The reasoning surrounding such disputes could be classified into many areas. However, as many of the disputes that arise concern some disputed political and economic interest, I would begin by discussing such reasons. It has been argued, from a political/sociological perspective, that the reasoning behind states disputing interest whether it be legal/political or economical can be threefold. As Northedge has pointed out such disputes for political and economic interests depends on the fact that states “...belief that it is theirs.”²¹ Hence, this has resulted in a) the protection of interest & honour, b) reputation of power and security reasons and c) sense of justice being advocated as justifications for disputing factual or legal situations of disputes. While I do appreciate the fact that there are instances that the parties have argued and disputes have occurred as a result of philosophical reasons, I believe that one has got to appreciate the fact that in the majority of cases the reason is more to do with, what I believe to be protectionism in a broader perspective, i.e. protecting perceived interests what they believe is theirs on the basis of state sovereignty and state’s ideology of being the protector of public interest. It is bearing this fact in mind that I would approach the following discussion.

In many cases as it happens, in spite of the issue being veiled in terms of economic interests, it is also a fact that the issue of self preservation of honour is a sublime factor in many a dispute. As it happened in the *Nicaragua case (US vs Nicaragua)*, the authorities in Nicaragua were adamant that such paramilitary activities were a direct intervention in its internal activities, thus resulting in a dispute at the ICJ.²² This is also similar to the *Panama Canal case* of 1964,²³ where the issue was more than an interest in a canal land, where the ownership was given to the US, by the Hay Bunuan Varilla Treaty. Here the dispute arose as a result of a nationalist mentality of the Panamanians, who argued that they had been forced to agree into the Treaty, and thus having to give up the sovereignty of the canal land. To the naked eye, such arguments are a result of an existing sense of justice and fairness. This is supported by the fact that both parties, in particular the Panamanians, striving to show that they had been victimised and abused by the dominant mentality of the US citizens who lived in the canal Zone. As jurists have observed it was "...unfortunate that the US citizens who lived all their lives in the canal zone, and citizens who were born and raised in the zone, have developed a particular state of mind not conducive to the promotion of happier relations between them and the people of Panama. Indeed on the contrary, this particular state of mind has resulted in building up resentment over the decades."²⁴ Thus it is argued that this particular situation aggravated the situation and consequently prompting the Panamanians to raise their national flag in defiance of US actions. This, on the other hand does emphasise the fight for fairness as the reason for the dispute, where as Northedge points out the "Panamanian people being eager to see the US atone for past injustices."²⁵ However, while the actions of a group of Panamanian students and nationalists could be described as a fight for justice and fairness, one has also got to identify a hidden motive or reason for such a sense of

aggravation. On one hand the officials of Panama were keen to recoup the best possible sum of annuity from the US in return for the control of the Canal, where it was their belief that the canal was under their sovereign control. The comparison made by the Panamanians was with the Suez Canal dispute, where they argued that they should receive compensation which was in parity with what Egypt received. Furthermore, they also believed that Panamanian commercial enterprises should get greater access to the Canal Zone, thus bolstering its economic benefits. On the other hand, the United States was keen to gain control of the Panama Canal for reasons of commercial value, where it was able to reduce the time factor in which such commercial exploits were completed.²⁶ While, economic interests were a motive in the dispute, the protection of honour and the protection of justice was not a reason on its own for the resultant dispute. The emphasis by the Panamanians that they were pushed into signing the Treaty, shows the fact that in this instance, the philosophical reasons were not alone, but protectionism based on sovereignty, and sovereign rights were a factor in the dispute.

One other example of a political dispute which was intertwined with the broader sense of protectionism was the dispute between *Guinea and Guinea-Bissau* (*Guinea vs Guinea Bissau*)²⁷, which concerned the maritime boundary between these states. While on the face of this dispute, it may seem a political border dispute of fisheries jurisdiction, it was more concerned with the opportunity for petroleum production, and the actions taken by both parties to protect such interests, which they believed was theirs as sovereign states. The dispute was triggered by the speculation that the contested area might contain petroleum/oil in commercial quantities. While, one may argue that the dispute concerned was about what was “ours” and “theirs”, a sense of fairness, and with protectionist economic interests; in reality, this supposedly

philosophical reasons were triggered by the fact that states arguing their individual cases on the basis of state sovereign rights. This is emphasised by the fact that the two states, in order to gain access to the commercial benefits available were prepared to take action, be it restrictive action and legislation, hence giving rise to the dispute. The two states decreed legislation to establish lateral limits on the territorial limits, in order to protect the oil concessions given to companies and protect fishing activities. The final outcome of these actions was to give the states the maximum opportunity to make a commercial profit of such opportunities. Hence the restrictive actions and the ensuing dispute. Furthermore, if one is to quote directly from the official reports itself, it is self evident that the states were not disputing any fact in a sense of justice or for the protection of its honour on their own as reasons for the dispute. On the contrary, the dispute was motivated by a combination of a compulsion to gain any accruing commercial profits from petroleum production, and using sovereignty to gain such benefits. As the ICJ noted “the land boundary between the two Parties in the present case, established at the time of the colonial period, is not in dispute.”²⁸ Furthermore, it also noted that “nor do the Parties dispute the homogeneity of their coastline or, despite successive marine transgressions and regressions, the unity of the continental shelf which naturally extends their land areas.”²⁹ Thus, it is my belief that one has to accept that international disputes, in the majority of instances are motivated by protectionist attitudes in a broader sense of protection of sovereign rights, despite being couched in terms of justice and fairness.

The second political/philosophical reason for states to engage in a dispute with another state is the protection of its security and maintaining its reputation of power. The argument propagated in justification of this reason is the fact that states are concerned in protecting its “prestige” in the eyes of the world order, by

not giving into the demand of other states, notwithstanding the fact that in some cases the states are not in competition in terms of international trade or investments. As was seen in *The Cuban conflict with the US*, the tension that was building in the US as a result of the growth, of what they called “communism”; aggravated into a dispute of, not only conflicting embargoes and take-over of international investments, but to the extent of a diplomatic dispute involving the Soviet Union. According to Donelan, “Cuba’s defiance of the US and breach of western hemisphere solidarity went beyond economic affairs”, and this was exemplified by its sudden establishment of diplomatic relations with the USSR, which with its reputation of missile capability, was a direct affront to the interests of the US. The establishment of diplomatic relations and practising communism has been noted as a reason for the dispute to arise, because the US felt threatened by such actions, thus arguing its case against Cuban actions. The US who had in earlier cases wanted the status quo to be balanced and resisted Russian involvement in its international affairs, criticised its interference in this dispute with Cuba. As president Kennedy commented, while denouncing the action, the Soviet action was looked upon as “...deliberately provocative and unjustified change in the status quo.”³⁰ Thus maintaining the fact that the power of the US should not be tread upon and that such intrusion will be retaliated with uninhibited action. In Donelan’s assessment, the United States, in this particular case, was not mainly concerned with the economic or political interests at stake, but with “showing off” its strength and power to its arch rival, Russia. Thus, the fact remained that Cuba’s actions were based on its sovereign rights by practising such a communist philosophy and protecting one’s political interests in this broader sense. Hence, resulting in a dispute with the United States. This is notwithstanding the fact that there did not exist an economic interest in the dispute at hand. As we have witnessed in the past, this example of a

state party flexing its muscles, so to speak, which ignites an international dispute, is one among many cases. The *Suez Canal Case*³¹, where British & French power was challenged by Egypt, and the invasion by China in India are some cases in point³², which justifies the arguments of authorities who promote these reasons of honour and political might, which however, to my mind is encapsulated in the fact that these states are arguing their case as sovereign states with such sovereign powers to protect what they believe to be theirs by right.

In the *Suez Canal case* for example, the government of Egypt announced a decree nationalising the Suez Canal Company, which was the controlling company, protecting the shipping activities in the Canal. The reasons for this attitude were intensified as a result of the local political pressures on the government to end British control of the Canal. To these actions was attached the rivalry between Egypt and Israel, who were keen on gaining control of the Sinai area. By getting control of the Canal, Egypt and its government intended to gain a stranglehold on the economic embargo which the Arab world had imposed on Israel, using its sovereign powers of legislation. Furthermore, the Egyptian government was keen on gaining the necessary finances for the Aswan Dam project through the profits of the nationalised company. Notwithstanding the discussions between the parties on resolving this issue of nationalisation, a settlement of the dispute was not foreseeable. As a result, it is argued that the British and French, on the pretext of protecting the canal invaded the canal area for reasons of economic and military superiority. While this argument could hold sway, it is my belief, that the real reasons for the British and the French to invade the canal area was broader than economic factors. This is emphasised by the fact that on one side of the equation, Egypt used its sovereign rights to nationalise the company and on the other hand, Britain using its sovereign powers to protect its

interests, economical as well as philosophical/political. This was particularly true, given the fact that a quarter of British shipping was to pass through the canal area, and the fact that British trade in Middle Eastern oil was to be transported via the canal area. The French on the other hand were keen on protecting the assets of their subsidiary company, of which, the headquarters was situated in Paris, which it believed was its duty as a sovereign state.

To be fair to the arguments promoted by authorities of philosophical/moral arguments of international disputes, there have been cases where the simple reason of the dispute has been the concern of states of protecting economic/military dominance or the concern for justice based on historical events. Thus the action taken by states to pursue its own interests, as in the case mentioned. The combination of these reasons for an international dispute to arise is exemplified in the *West Irian case*,³³ where the Dutch and Indonesians were in a deadlock over the sovereignty of the island. Under the Hague Agreement of 1949, the Dutch were legally bound to hand over the authority of the island to Indonesia, by negotiating such terms. However, Indonesia argued on the basis of sovereignty that the transfer of the island has been exempted and only the control of the territory is at issue, meaning that all islands of Indonesia were a part of the unitary state of Indonesia. Indonesia supplemented this argument by stating that West Irian(W.I.) belonged to Indonesia since the proclamation of the republic and further that W.I. has been a part of the ancient Javanese empire. As noted above, such arguments do not wash well in International law, specially as a international agreement has been signed and sealed by the respective parties, deciding the fate of the island, hence nullifying such geographical and historical reasons. Nonetheless, Indonesia argued that, it should have the authority of the island and further that this was a political dispute rather than a

legal one, hence refusing the jurisdiction of the International Court of Justice. As Northedge notes “necessity is the tyrants plea.”³⁴ However, while noting the justice argument, one could also see the power argument, where the US, USSR and China were involved in the negotiations, not merely to resolve the dispute, but to concentrate on protecting stronghold and interests. As a result the parties agreed to negotiate, thus signing a agreement, where the sovereignty of W.I. would be passed to the Indonesians, before the population makes a “act of free choice”³⁵, under UN supervision to decide its future. Thus, what made the parties decide that this issue to be a legal dispute rather than a political dispute as first perceived? It is my contention that the involvement of the US, USSR and China and the persuasion skills of then Prime minister of the UK Harold Mcmillan, changed the tide in the direction of resolving the dispute. While it is true that the superior power of the larger states did play a role in the dispute, it also nevertheless emphasises the fact that the dispute did arise as a result of the protectionism in a broader sense than pure economic factors.

1.2.2 *Economic Reasons:*

Having discussed what Donelan would call the Philosophical/political reasons for international disputes to arise and being a reason for its settlement where economic reasons are said to be secondary in the rise of international disputes, I will now concentrate on some of the direct economic reasoning which, at-least on the face of it seems to be the be the real reason for international disputes arising in the past and present. While most of the above mentioned disputes could be classed as politically protectionist, where it concerned a piece of territory or the right to passage or protecting a economic interest by arguing for the right of land, the majority of protectionist reasoning concerns more of the disputes with relation to disruptive

trading practices, economic embargoes, investment disputes. The reason for this situation is the fact that international trade is seen as an avenue of gaining economic prosperity. Thus, the protection of the individual positions of these states. Here, the parties are concerned more with the protection of its legal rights and economic benefits thereof accruing under a contractual agreement, signed with one of its trading partners. As noted at present the world economy is mainly dominated by market rules which co-ordinate the greater part of the international exchange of goods, commodities, capital and technology. This exchange of goods and commodities has not only been restricted to inter-state relations but also to investor-state relationships which has given cause to the promotion of more protectionism.

So what are these economic “protectionist” measures? Protectionist measures in general include all tariffs and non-tariff barriers, where the trading parties tend to protect their own interests by imposing restrictions on other country imports and exports. As pointed by Salvatore, since the mid 1970s developed countries, beset by slow growth and high unemployment, have increased the trade protection they provide to some of their large industries against imports from developing countries.³⁶ Some such protection measures are namely tariffs and non tariff barriers such as VER’s, countervailing duties, anti dumping measures etc and protectionist legislation, where the country that imposes such restrictions reduce the opportunity of other countries to gain advantage of these protected industries or commercial opportunity. This protection of infant industry argument or the protection of one’s national economic growth has been the case of most trade barriers constructed by these developed and developing countries in justification of protectionist policy making.³⁷ While, direct tariff and non-tariff barriers are emphasised as being a reason for international disputes, it is my belief that states

legislating for such policies, based on what they believe to be their sovereign right is a more broader protectionist reason for international disputes that arise as a result of the application of tariff and non-tariff measures. Therefore, First I would concentrate on some of these local economic situations and national policies, which I believe, give rise to international trade and investment disputes. Secondly, I would discuss some case law to emphasise the nature of direct protectionist policies based on sovereign rights and to justify as to why international disputes arise with regard to trade and investment, and necessitates its settlement.

Regulating unfair trade has become a powerful slogan in the US in contrast to protectionism, since the establishment of GATT/WTO. As Berry has mentioned “one business lobbyist called to say ‘free trade rhetoric is a loser politically; unfair trade rhetoric is a winner.’ Mr Reagan met with a group of outside advisors, including long time Reagan strategists Stuart Spencer and Lyn Nofzinger, who echoed that view.”³⁸ As James A. Baker put it “We have not neglected our responsibilities to fair trade....President Reagan, in fact has granted more import relief to US industry than any of his predecessors in more than half a century.”³⁹ While this may be true in the sense of protecting the industry in the US, has it in any way impeded the fairness in terms of international competitors, and conflicted with international trade laws, which has resulted in disputes arising? It seems that as large trade deficits resulted in the 1980s, it meant that more US industries were experiencing import competition, thus bringing about changes including ss301 of the Trade Act of 1974, modified by the Acts of 1979 and 1994.⁴⁰ As Finger has noted “export interest no longer see the trade negotiations process as the primary vehicle for advancing their interests-they have ‘301’.”⁴¹ Hence assisting them in taking action against any foreign trade parties; who in their opinion “restrict US commerce in an

unreasonable or a discriminatory fashion.”⁴² However, while this improved the US commercial interest, it also attracted the attention of other state parties, who were themselves involved in protecting their own national/local commercial interest by practising protectionist economic policy according to state sovereignty; thus culminating in international trade disputes arising.⁴³ However, while the US exporters are armed with ss301, the issue is the protective barrier’s put up by the US; which reduces other states to compete with its local commerce. Thus in some instances, the US has applied restrictions based on ss301 action, where the US alleges that the restrictions of the other state is of a unreasonable nature which is in contrast to the ideal of free trade.⁴⁴ One such case of the extent of barriers put up by the US based on individual commercial interest, is the US anti dumping duties on imports of seamless stainless steel hollow products from Sweden; where the GATT panel considered a dispute brought forward by Sweden, alleging that such duties were a nullification and impairment of benefits. While considering the relevant regulations and its interpretation, the panel denied the argument of the US that “on its face” the request supported the initiation of an investigation. Furthermore it also confirmed that there was no statistical evidence before it to support the claim of inquiry; and further denying the US argument that there was no opposition by other domestic producers, thus justifying the investigation. The cases which concern the involvement of the United States, as a result of direct protectionism wary, notwithstanding the economic status of the other state. One such case was the *United States- Prohibition of Imports of Tuna and Tuna Products from Canada(Canada Vs US)*,⁴⁵ which concerned the US prohibition of imports of tuna and tuna products from Canada, pursuant to national legislation.⁴⁶ Canada eventually won the case and the panel agreed that the measures were trade measures, which emphasised the fact that the US restrictions were the

motivation for the dispute and was held as such by the panel. Two points arise out of this case. First, that the US as a individual state is prepared to initiate a dispute, in any case, to protect its commercial interests using its sovereign rights to legislate for such subjective protection, notwithstanding the fact that it is not justified and in contrast to its ideals of free trade. Secondly that the local commercial pressures and protectionist policies practised as a result are a reason for individual states to initiate a dispute on their behalf, although such action might in the long term affect the credibility of such a state in inter state relations.

As mentioned above, countries such as the US and other developed and developing nations in particular, have used protective measures, which I believe, is the reason on the whole for international disputes, while individual circumstances are a reason for such protectionist economic policy. One of the concepts upon which developing countries in particular depend on, is the sovereignty, political as well as economical, which in other words is the improvement and attainment of the economic status of the developed nations. As such the question has arisen as to whether the developing countries should be allowed leniency in terms of tariff rates as well as the legal obligation when entering into international trade agreements. The developing countries believe that as a result of the imbalance in economic power of the respective parties and the possibility of abuse of such an imbalance; they should be given preference in international trade and investments on a non reciprocity basis. This I believe to mean that developed states are not allowed to reciprocate to any tariffs imposed by developing countries on exports of developed states. However, as pointed out by Horn, "International commerce and co-operation require, however, the stability of contractual relations and mutual legal obligations",⁴⁷ meaning that such contracts should adhere to the principle of *pacta*

sunda sevanda, and thus if a party breaches such legal obligations, such states should be made to remedy such a breach. It is here that the importance of international dispute settlement takes centre stage, as a result of the simmering mistrust between parties, while such a breach exists. However, before concluding that such a breach is the reason for international disputes to arise in cases of trade and investment, I believe it is necessary to delve further into the economic and social background of these developing countries to understand why such protectionist economic policy is legislated for and put into practice by these states.

Many of the developing countries who gained their independence in the late 1940s have very similar characteristics among them. Most of these states suffer from overpopulation, where it could range from 10 million to 900 million in the case of India.⁴⁸ Secondly these countries in the majority of cases followed in some way or another a mixed economic policy, where it could range from protectionist policies to stimulate industrial development, as in the case of Nigeria in the 1960s and 70', or to the extent of India or China, where the policy was totally planned to build self sustained growth.⁴⁹ This kind of policy was to regulate any method of external enterprises and investment conglomerates, keeping with the left wing thinking, which in my opinion, not only kept politicians in office, but emphasised the fact that they were prepared to legislate for such policy using the sovereignty of states and sovereign rights. As noted by Bhagwati on the policies of the then ruling Congress party of India, "...socialist thinking and precept influenced not merely the policy making elite in the congress party that has virtually dominated the political scene since independence in 1947; it also constrained the flexibility of the congress party to move in other directions, because the more naive left wing political parties pulled the congress party's programmes in the socialist direction, at-least at the

ex-ante level of party resolutions and declared intentions.”⁵⁰ Thus in India’s case, since 1947 until the late 1970s, the economic policies were highly interventionist and restrictive, where all imports of consumer goods were banned, unless the importer proved “essentiality” and “indigenous availability”⁵¹ and where the ministry of commerce decided whether such imports were essential for consumer use. On the other hand, the government allowed selected exporters to export manufactured foods, with the knowledge, as Pursall puts it, that it would be “offsetting the system’s anti export bias”⁵², thus emphasising the nature of state protectionism, in that the usage of state sovereign rights to regulate and control what it believes is to be its interests. This trend of an anti export bias is emphasised in many Asian and Middle Eastern states who apply trade barriers and policies in order to satisfy the interests of its local industries and consumers.⁵³ To be fair to the Indian government’s economic policy, one has to emphasise however, that since Rajiv Ghandi came into power, the export leniency has been increased to certain proportions. But at the same time non-tariff barriers have been and remain the principle means of regulating imports and protecting local industries. If one may think that Indian economic policy is rather extreme, such policy is not alone in developing countries. I would briefly outline the economic policy making of Nigeria to prove the fact that subjective state protectionism based on sovereign immunity and rights influence the enforcement of direct and non-tariff measures. While Nigeria practised very similar economic policies to India in the 1960s, since its discovery of oil, it has gradually shifted its economic policy to suit the market rules in place. This followed, as Olofin states “...from the increasing realisation that domestic inefficiency, sheltered by high tariff rates, could only lead to inefficiency and stagnation of local industry”,⁵⁴ which is in stark contrast to the “infant industry” theory protectionism. In keeping with such sentiment, Nigeria

adopted a structural adjustment programme, where it took steps to reduce existing tariff and non tariff barriers to international imports and exports. However, such open ended policies legislated to build an open market is not without its drawbacks and restrictions, aimed at giving the Nigerian government a wider role of discretion. As Horn says, “ the protagonists of market concepts, however, cannot be content with the status quo of the world economy either. There is, on one hand, the problem of abuse and manipulation of the free market through restrictive business practices and through protectionist and neo mercantilistic measures of government.”⁵⁵ As if keeping with this sentiment, the government of Nigeria has reduced and withdrawn in some instances, the open market policies implemented in the SAP. For example the new Customs and Excise Tariffs (Consolidated Decree) of 1988, makes provision for import and export duties payable on imported goods and local manufactures. In place of any outright prohibition of imports, as was the case in the 1960s, the new laws allow the selection of goods for imposition of tariffs, thus protecting local industries. This is not only going back on the open market policies, but also provides the administration with discretion to administer tariffs, when and how it desires.⁵⁶ Furthermore, if one takes into consideration the Customs Duties (Dumped and Subsidized goods) Act of 1958; which allows the government to impose special duties, one cannot help notice the discretion involved in such imposition of duties. As the official gazette provides, such duties could be invoked if the government is satisfied that a) material injury will be threatened or caused to potential or established industries in Nigeria, by the entry of subsidised or dumped goods into the country, and b) when the government is of the opinion that the imposition of a special duty will not conflict with Nigeria’s obligations under the terms of the GATT.⁵⁷

As we have witnessed in many a case presented at the GATT panels for the settlement of disputes, such discretionary protectionist legislation based on state sovereignty, is the cause of disputes which arise with other trade parties, especially as such legislation could be looked upon as unfairly protective and against the spirit of free trade. This is notwithstanding the fact that such laws on tariff duties and such duties themselves are guided by the need to realise three objectives, namely a) revenue generation, b) correction of balance of payments and c) pursuit of inward looking industrial policy, which was and is a necessity for developing countries on the whole. Hence having looked into the political, social and economical bearing that has on the relevant legislation that is passed in developing countries, in particular; one could identify a deeper economical and practical reasoning, rather than, an on the surface tariff or embargo being behind international trade and investment disputes being initiated. Therefore, it was within this protectionist atmosphere on the part of developed as well as developing countries, that any procedures of dispute settlement was to operate in international economic relations. Thus as emphasised by Art.1 and Art.33 of the United Nations, the methods of dispute settlement, namely adjudication, negotiation, mediation and arbitration was to operate under these circumstances of protectionism, where restrictions and objections were an eventuality.

This fact is particularly true of the majority of developing countries, who are keen on protecting their national interest be it for political advantage or for economic reasons. While one may note that the economic policy practised by India or Nigeria for example was of a socialist nature; it makes no difference to the argument that such economic policy necessitated by state sovereignty, does tend to be a major factor in trade and investment disputes growing at international level, notwithstanding the nature of such protectionism. This fact is

particularly true of cases which involve international investment in the Middle East and the south east Asian nations, where national sentiment and protecting one's interests has resulted in international trade and investment disputes. While many cases could be cited in order to justify the argument that protectionist pressures and protectionist policies of the developing nations have resulted in international trade and investment disputes, at present I would briefly discuss some of the more significant and notable cases to prove the impact of direct protectionism on international disputes. As I had mentioned in the previous paragraph, Asian and East Asian nations are more susceptible to tariffs and protectionist policy, given half the opportunity to do so. One such case in question was the *Thailand-Restrictions on Importation of and Internal Taxes on cigarettes(US vs Thailand)*⁵⁸, which involved the United States and was presented to the WTO panel for resolution. According to Thailand's Tobacco Act of 1966, importation or exportation of Tobacco, including cigarettes, was prohibited except by license of the Thai authorities.⁵⁹ The basic idea of this practice was the opportunity to claim higher license fees from international importers and the opportunity to vary taxation rules in order to bolster government income. Furthermore, this practice was also designed to protect local industry by restricting the opportunity of importation.⁶⁰ The Thai authorities based its arguments on rather dubious justifications. It argued that the authorisation of tobacco importation would lower the standard of living and that such restrictions were necessary for the protection of the health of its population. This was notwithstanding the fact that local tobacco production was at a premium. As noted by Klabbers, the justification for such relaxation of local industry prohibitions was that "...because this might have led to production and consumption of narcotic drugs having effects even more harmful than tobacco."⁶¹ From these arguments forwarded by the Thai authorities, it is safe to say

that the ulterior motive for such restrictions was not the protection of the health of its population, rather the protection its own industries and the unfair restriction of international trade, which quite rightly the United States argued at the panel hearings. These practices were clearly, as the US argued, inconsistent with the obligations of the GATT Agreement and resulted in the dispute being initiated, rather than any philosophical basis for such initiation.⁶² Both parties were keen to gain the appropriate commercial advantages of the opportunity to import and export cigarettes and tobacco, which was restricted by the protectionist policies of the Thai authorities.

The direct intervention of protectionist measures that resulted in international disputes are not restricted to trade disputes. On the contrary, these practices and its effects also span to international investment disputes, which involve multinational corporations and developing nations. The disputes that arise as a result of investment contracts could be divided into two parts, namely legal disputes and political disputes. It is these political aspects that have given rise to protectionism and hence disputes in most of these investment cases, especially as it involves the consideration given to facts such as state sovereignty, protection of local industry interests and consumer interests. As Agyemang notes “such disputes are essentially “political” because they are often between host states and foreign investors over the form of economic development the former should pursue; they are often policy disputes.” Protection, which I believe is for the protection of its economic and local interests. One such case was the *LIAMCO Vs The Government of the Libyan Arab Republic*⁶³, where the government of Libya issued concessions to exploit and produce petroleum under laws enacted in 1955. The government since then made amendments to these concession agreements which the investor party agreed without any protest. In August of 1973, the Libyan government announced a general plan for participation in

the oil industry, under the Nationalisation law Nos. 66, where 51% of the company's concessions rights were to be nationalised. LIAMCO was one of the companies among many who were affected. A further law was passed later on, where the remaining 49% of the LIAMCO shares were nationalised. LIAMCO argued that political motivation may take the shape of discrimination as a result of political retaliation, and this was the case at this point in time. LIAMCO argued that the nationalisation was a "part of an overall program of political retaliation against those nations whose politics were contrary to those of the Libyan regime."⁶⁴ This in a way gave justification to the philosophical arguments forwarded for the rise of international disputes. However, if one looks closely at the facts of the case, one notices that such a motive is far from the truth. First, initial measures of nationalisation were taken by Libya concerned Italian colonist settled in Libya, and secondly, the first oil nationalisation was that of British Petroleum and American Bunker Hunt Company on the 11th of June, 1973. Furthermore, in a statement issued by the Libyan Prime minister, the motives for Libyan nationalisation was revealed, which was predominantly protectionist in that the preservation of its oil was paramount. This protectionist motive of the Libyan authorities is further revealed by the fact that Libyan authorities reluctance to take part in international arbitration arguing that

*"nationalisation being related to the sovereignty of the state, is not subject to foreign jurisdiction. Provisions of international law do not permit a dispute with a state to be referred to any jurisdiction other than its national jurisdiction. In affirmance of this principle, resolutions of the General Assembly provide that any dispute related to nationalisation or its consequences should be settled in accordance with provisions of the domestic law of the state."*⁶⁵

Hence, two issues could be deduced from the facts of this case.

Firstly that direct protectionist motives and actions are a reason for international disputes and secondly, that local economic and social pressures for protection of a state's local interests are a reason for protectionist stance, which results in international disputes, notwithstanding the fact that a philosophical and political twist to the issue could be intertwined by either party to the dispute. One other case of similar stature was the *Government of the State of Kuwait Vs AMINOIL*⁶⁶, which I believe needs discussion to prove the effect of direct protectionism on international trade and investment disputes. In very similar circumstances to the above mentioned *LIAMCO case(Liamco Vs Libya)*, the AMINOIL company was subject to a nationalisation decree legislated on the part of the state of Kuwait. Here again the arbitral tribunal denied any kind of discrimination on the part of Kuwait. Furthermore it also emphasised the valid nature of the laws keeping with the international obligation accepted by Kuwait to reduce the costs of oil production by nationalisation and gaining higher revenue by higher tax increases. Economic development being the motive for this protectionist measure is further emphasised by the fact that the Kuwaiti authorities decision not to nationalise the Arabian Oil company, which at that point in time was profit making and a asset to the Kuwaiti economy, as it was in part ownership with Saudi Arabia. The arbitral tribunal thus denied the possible argument that the decree was legislated only as a discriminatory decree against an American company, which would have satisfied the theories of philosophical and moral reasons for international disputes, notwithstanding the economic arguments forwarded.

Conclusion:

Protectionism, as emphasised, has mainly been connected with the protection of economic interests. But as I had discussed, state protectionism involves not only economic facts, but also state interests in protecting their sovereign rights, which has been evident, in the attitudes of these states, towards accepting and enforcing awards of dispute settlement mechanisms.⁶⁷ The mixture of these economic and political interests as state protectionism, has resulted in different individual reasons being the reasons for international disputes, with the broader concept of “protectionism” being the basis of disputes. Hence, various political reasons such as the protection of state’s reputation of power, sense of justice etc., has been mentioned as reasons for state disputes, notwithstanding the fact that there are overtures of economic facts. Secondly, pure economic facts have also been pointed as reasons for international disputes, which had prompted protectionism to be attached to economic facts, as I had discussed in the context of this chapter. But as I had emphasised, unfortunately, the imposition of tariff and non-tariff barriers have involved the local laws being invoked by states for such protection, not necessarily for economic reasons, but also to emphasise the sovereign rights, and satisfy political pressures representing local economic interests, which is clearly the case, when one deals with local laws such the Trade Agreements Act of the United States⁶⁸, or the local laws in Nigeria for example, where the concern was partly to gain the financial backing for political office from these individual pressure groups. This political overtures in legislating for economic benefits, has also been emphasised, in the discussed investment disputes, where there is a clear combination of the motives being not only the protection of economic facts, but also the emphasis of political sovereign rights,

thus making protectionism a more broader concept than being attached to the protection of economic benefits.

Therefore it was within this protectionist atmosphere on the part of developed as well as developing countries, that any procedures of dispute settlement was to operate in international economic relations. Thus, as emphasised by Art.1 and Art.33 of the UN Charter, the methods of dispute settlement, namely adjudication, negotiation, mediation, arbitration, conciliation and others were to operate under these circumstances. Hence in the following chapter I would concentrate on the peaceful settlement methods of negotiation, mediation and arbitration and the substantive issues which relate to these methods. As seen above, developed as well as developing countries have made protectionism as an excuse for the development of disputes at international level. I would concentrate on these settlement methods taking into account the protectionist attitude of states, be it developed or developing, which I believe has effected the approach these states take in their participation in such settlement and the their approach towards the protection of state interests.

Notes

- ¹ Behrens, P., Alternative methods of dispute settlement in international economic relations, in Petersmann, E.U., *Adjudication on international trade disputes in International & National Economic Law*. University Press, Freiburg, (1992)
- ² B & B SARL Vs Government of the Peoples Republic of Congo, 108 J.Droit Intl. (1981) 365; Holiday Inns/Occidental Petroleum Corporation Vs The Government of Morocco; See., Lalive, P. The First World Bank Arbitration(Holiday Inns Vs Morocco)-some legal problems, 51 *British Yearbook of International Law*, (1980) 123
- ³ Donelan, M.D., *International Disputes: Case Histories 1945-1970*, Europa Publications, (1973)
- ⁴ For Example, General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States restrictions on Imports of Tuna, 33 ILM 839 (1994)
- ⁵ Northedge, F.S. & Donelan, M.D. *International disputes: the political aspects*, London, (1972), pp2
- ⁶ *ibid*
- ⁷ As with the GATT/WTO which is the main governing disputes settlement forum for international trade and investment disputes, further accepted rules and regulations have been accepted by the nation states and individual investors in the ICSID, ICC and to a certain extent the laws enforced by the ICJ.
- ⁸ For example see *Canada-Administration of the Foreign Investment Review Act*, BISD 30S/140
- ⁹ For example see *Japan-Restrictions on imports of certain Agricultural products*, BISD 35S/163
- ¹⁰ One such example is *Thailand-Restrictions on Importation of and Internal Taxes on cigarettes*, 27 ILM (1988)281, which concerned the violation of Article 3 of the GATT for reasons of what the states believed to be justified.
- ¹¹ Bhagwati, J., US Trade policy at crossroads, in: Irwin, D.A., ed. *Political Economy & Int. Economics*, MIT Press, London, (1991), pp35-83 at 42
- ¹² Northedge, F.S. & Donelan, M.D., *International disputes, The political Aspects*, London, (1971), pp2
- ¹³ Delimitation of the maritime Boundary in the Gulf of Maine Area, ICJ Rep.(1982) 3; Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary, 25 ILM (1986) 251-307
- ¹⁴ Libyan American Oil Company Vs The Government of the Libyan Arab Republic, 20 ILM (1981) 1-87
- ¹⁵ Protectionism practised could be evidenced in the EC constituent nations for example with regard to agriculture and enforcement of the CAP or action taken by the United States under ss301 of the Trade Agreements Act of 1979.
- ¹⁶ The reasons for most of these protectionism as noted by Bhagwati concern the “national interests”, which is in my opinion, subjective according to the interests of states.
- ¹⁷ The Government of Kuwait vs The American Independent oil company, 21 ILM (1982) 976-1053
- ¹⁸ India and Indian authorities for example have practised a social economic policy for many a decade, where public & government ownership was the key, which meant that any external competition was restricted, thus controlling the means and ends of production.
- ¹⁹ Bhagwati, J., The diminished Giant Syndrome: How Declinism Drives Trade Policy, in *Writings on International Economics*, The Oxford University Press, Delhi, (1997), pp597-603
- ²⁰ In *The Cuban conflict with the US* for example, the main concern of the US was not particularly the trade embargoes and international investments, but the establishment of diplomatic relations of Cuba with the former USSR, which was a direct affront to the economic and political strength of the US.
- ²¹ *Supra*, note 12, pp71
- ²² Nicaragua provisional Measures, ICJ Rep. (1984) pp169
- ²³ *Supra* note 3, pp249. The Hay Bunean Varilla Treaty was altered by the General Treaty of friendship and co-operation (US/Panama), Treaty series, no 945, (US government printing office)
- ²⁴ International Commission of Jurists: Report on Events in Panama, 9th-12th Jan., 1964, Geneva.
- ²⁵ *Supra*, Note 12, pp72
- ²⁶ It was argued that by securing the canal, the US was able to reduce the nautical mile routes of New York-San Francisco by 8000, and the New York-Yokohama by over 5000.
- ²⁷ *Guinea/Guinea Bissau: Dispute Concerning delimitation of the maritime boundary*, 25 ILM (1986) pp251-307
- ²⁸ *Ibid.* pp264
- ²⁹ *Ibid.*
- ³⁰ *Supra*, note 23, pp235
- ³¹ *Ibid.*, pp123
- ³² *Ibid.*, pp155

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- ³³ Supra, note 23, pp83
- ³⁴ Supra, note 12, pp79
- ³⁵ Ibid., pp 86
- ³⁶ Salvatore, D., *National Trade Policies*, Studies in Comparative Economic Policies, Vol.2, Greenwood Trees, Westport and distributed by Elsevier Science Publishers, Holland. (1992) pp6
- ³⁷ Bhagwati, J., *Protectionism*, MIT Press, Cambridge; London. (1988), pp92-93. As Bhagwati notes, The older view was based on a strict conception according to which primary products were imported and manufactures were exported. However, as industrialization proceeds, protectionist policies confine the new industries to domestic manufactures by creating an anti export bias.
- ³⁸ Berry, R., Reagan aides split over his trade speech and altered it sharply", *Wall Street Journal*, (1987), Sep.24th. pp1 at 12.
- ³⁹ "Remarks made by Secretary of state of the Treasury, James A.Baker, before a Conference sponsored by the Institute for International Economics", (1987), Washington D.C., Monday, Sep.14, as published in Treasury News. See, Finger, J.M., Trade Policies in the US, in Salvatore,D., ed. *National Trade Policies*, (1992) pp79-108 at 89.
- ⁴⁰ Trade Agreements Act of 1979, 19 U.S.C. (2531-2573), P.L.96-39, revised by the 1994 Trade Agreements Act, P.L.103-465
- ⁴¹ Finger, J.M., Trade Policies in the United States, in: Salvatore,D., ed. *National Trade Policies*, (1992) pp79- 108, at 90.
- ⁴² Ibid.
- ⁴³ 53 cases had concluded by 1988; 27 ended with some liberalisation of subsidies, 11 with the realisation that foreign practices were legitimate.
- ⁴⁴ One such case was the retaliatory duties on Brazilian goods because Brazil would not modify its "unreasonable" Intellectual Property rules.
- ⁴⁵ BISD 29s/91, report adopted on 22nd February 1982
- ⁴⁶ ss205 of the US Fishery conservation and Management Act of 1976
- ⁴⁷ Horn, N., Normative problems of a new international economic Order, 16 JWT(1982), pp338-351, at 343
- ⁴⁸ In Nigeria, for example, the country's population stood at an estimated 103.1 Million in 1986, with the GNP at US\$ 640.
- ⁴⁹ In India for example, prior to the 1990s, the import of all consumer goods were banned. Import licenses were issued by the Chief Controller of Imports and Exports in the Ministry of Commerce, but the importer would first need to establish "essentiality" and "indigenous angle clearance" from the ministry to which he reported
- ⁵⁰ Bhagwati, J., Socialism & Indian Economic policy, in *Writings on international Economics*, Oxford Unievrstity Press, (1997), pp228-245 at 233.
- ⁵¹ Pursall, G., Trade Policies in India, in: Salvatore, D., ed. *National Trade Policies*, (1992) pp423-458 at 424.
- ⁵² Ibid, pp428. While noting the historical restrictions on trade in India, one has to nevertheless note, the lenient policy making of the Rajiv Ghandi government since 1990. While leniency was shown in import restrictions, the system was nonetheless besotted with administrative discretion, which, in my opinion, negates the benefits of the liberalising trade policies.
- ⁵³ Notwithstanding the continued tariff reduction since 1988 in Korea for example, import liberalisation of agricultural products constitute the real challenge to Korean People. As of 1988, 11 agricultural products, including tobacco, were subject to 100% tariffs and subject to special laws. This was the similar situation in many of the East Asian countries, which has led to disputes with the western nations.
- ⁵⁴ Olofin, S., Trade Policies in Nigeria, in: Salvatore, D., ed. *National Trade Policies*, (1992) pp479-490 at 481.
- ⁵⁵ Supra, note 47, pp 342
- ⁵⁶ One such new law was the Customs and Excise Tariffs (Consolidated Decree) of 1st January 1988. Furthermore, other measures such as Import Duty Drawbacks, Export Proceeds retentions, Export License waivers, Export credit Guarantees, Export development funds are among some of the measures adopted for the protection of local industries.
- ⁵⁷ Federal Government of Nigeria Official Gazette, 1958 (Lagos; Government Printer)
- ⁵⁸ Reproduced in 3 W.T.M.(1991) 1 at 5
- ⁵⁹ ss27 of the Tobacco Act of 1966
- ⁶⁰ This was clearly the case given the fact that in the past only the Thai Tobacco Monopoly had been granted such licenses and had imported cigarettes on only three occasions.

⁶¹ See Klabbers, J., Jurisprudence in International Trade Law, *Article XX of GATT*, 26 JWT (1992) 63-94

⁶² The panel agreed that the Thai practices were inconsistent with Article 3 and 11 of the GATT Agreement.

⁶³ *LIAMCO vs Libya*, 20 ILM (1981) 1

⁶⁴ .ibid at pp115

⁶⁵ See the *Texaco Preliminary Award*, 53 I.L.R. (1979) 398-400 ; *LIAMCO Award*, 20 I.L.M. (1981) 1 pp115

⁶⁶ Supra note 17

⁶⁷ See *Liamco Vs Libya* and *Texaco awards*, as emphasised earlier.

⁶⁸ Trade Agreements Act of 1979, 19 U.S.C., (2531-2573), P.196-39, revised by the 1994 Trade Agreements Act, (P.L. 103-465), or the Customs and Excise Tariffs (Consolidated decree) of Nigeria, Jan. 1st, 1988

Chapter Two

Negotiation, Mediation and Arbitration as General methods of Dispute Settlement in international Relations

INTRODUCTION

As a result of the different protectionist policies practised by different state parties on varying social and political grounds, it has not always been feasible to resolve disputes by legal methods. As a result of the individual political, social and trade relationships between these parties, they are not willing in many cases, to enter into legal wrangling over such issues. Under the auspices of the United Nations Charter, Art.33, the state parties have agreed by being signatories to resolve such disputes via peaceful methods such as negotiation, mediation, arbitration, adjudication, conciliation and good offices. I would, however not discuss conciliation and good offices at present, as I believe that they are very similar in nature, to the three main settlement methods of mediation, negotiation and arbitration, which has been utilised in most disputes at international level. Furthermore, one has also got to note at this juncture that adjudication is mentioned in the UN charter as a method of dispute settlement, but its relevance has not been high on cases of international trade and investment disputes. Hence, my reluctance of discussing this as a peaceful method of dispute settlement, in the context of this study. However, I would deal with adjudication when dealing with the ICJ and its settlement process. Therefore at present, I would deal with the methods of negotiation, mediation and arbitration as a peaceful settlement process as noted by the UN Charter, and the varying conditions under which these method operate in international dispute settlement. What is its necessity, one may question? It is relevant, especially as it is these protectionist attitudes of parties, which are brought

over to institutional forums that deal with international trade and investment disputes, and secondly it is the satisfactory resolution of these secondary issues that, on the whole decides their success. Therefore I would first provide a picture of what negotiation is in international terms. The broader definition of negotiation will be dealt in order to discuss what the necessary conditions should be for such negotiation to be satisfactory, having consideration to the protective attitudes of states.

Though, these issues may look technical, it is in my opinion, important to discuss these issues, when one takes into account the individual state party's attitude towards dispute settlement. This is specially the case when one takes into account the protectionist methods that states put in place in order to protect their individual interest, and the interest of other social and political pressures. In discussing the reciprocity of parties and the consent needed in case of negotiation, I would concentrate on the standard of mutuality and the "duty to negotiate" which has arisen, which is a contradiction to the spirit of negotiation, where the consent of parties are to be the prerogative of states rather than being legally obliged to undertake negotiations. With regard to the consent needed for negotiation, I would deal with this issue, and the opportunity of parties to abuse this consent; as in the Indo-Pakistan dispute over Kashmir, bearing in mind that there exists a norm in international law that the parties consent is primary to any settlement process. Secondly, I would concentrate on the secrecy involved at state negotiation, where, from the evidence available, it is fair to say that the level of secrecy does have an effect on the conclusion of satisfactory negotiations. This is specially the case, considering the fact that the political and economic policy and the thinking of the parties concerned would be protectionist in nature, and the fact that many of the negotiations in institutional dispute settlement mechanisms are done under closed doors.

Having discussed negotiation as a dispute settlement method, I would further discuss what mediation is, as a peaceful settlement method in international terms. As a result of the mediator's role being different from a negotiator and arbitrator, it makes his/her task even more difficult, as a result of the divergent views and positions that have to be dealt with, with respect to the disputant parties. As such, I would first deal extensively with what is regarded as mediation in international terms, particularly as there is the situation where a given definition could be cited as conciliation rather than mediation, as noted by Art.33 of the UN Charter. Secondly, as with negotiation and arbitration, I would deal with the necessary conditions that are to be satisfied if mediation is to succeed, particularly in the face of state protectionism. The first of these conditions that would be dealt with is the necessary consent of parties to the mediation, particularly given the fact that the parties to the dispute are to accept the proposals of the mediators, and the fact that the consent of the parties is paramount with regard to the timing and nature of the mediation. The second fact that has concerned most disputants is finding suitably qualified mediators to resolve a dispute at hand. I would focus my attention on this fact, taking into regard the individual positions of the states and disputes that have depended on this point of mediation. Having discussed the necessities of mediation, I would deal with the limits of mediation, particularly taking into account the fact that state consent and control is a primary factor in the satisfactory conclusion of mediation, and further the fact that in some situations, other methods of resolution may be needed to complete the settlement process.

Having dealt with the issues relating to negotiation and mediation, the final part of this discussion would focus on arbitration as a dispute settlement process, taking into account the protectionist nature of states. Furthermore, a

discussion of the basis of law at international arbitration would be dealt with, very specially taking into account the different laws that an arbitrator could apply. This in turn will be debated in conjunction with the issue of the applicable law as directed by the parties to the arbitrators, and how and when the arbitrators would be able to apply a law of their choice when the parties have not decided on an applicable law. I would discuss the issue of a law applied by arbitrators, the relevance of which is vital in terms of trade and investments, especially at institutional level, given the fact that the parties provide their consent, in spite of the protectionist policy making at local level. I would also discuss the issue of *Lex Mercatoria*, and how this part of the applicable law has been utilised in order to restrict the obstructions that a state could make with regard to the applicable law. Thirdly, I would also discuss enforcement of arbitral awards, given the fact that states would have legislated for the protection of their economic interests and have sacrificed this power. Therefore, I would also discuss briefly the enforcement of arbitral decisions, which is most affected by the protectionist nature of state practice, given the fact that states are inclined to argue state sovereignty over any enforced settlement. These issues would be discussed in general terms with a eye of further discussion in the next chapter, when settlement forums of the ICSID and ICJ would be dealt with, where the protectionist attitudes of states and ensuing practice has a effect on the suitability of such settlement process, particularly taking into consideration on how such attitudes of sovereignty has been practised to circumvent the consent given for arbitration.

2.1 Negotiation as a Method of dispute settlement

2.1.1 A Definition of Negotiation:

International disputes arising between state parties or between state parties and individuals have been referred to different methods of settlement in the history of international dispute settlement. This has ranged from the simple form of discussions between parties to referring such disputes to third party sponsored arbitration/ adjudication, to which I would turn my attention later on in the chapter. However, at present, I believe it is correct to concentrate on the simplest of all such settlement methods; namely negotiation, as noted by the UN Charter. The Charter, under Ar. 33(1) provides a fairly alternative list of dispute settlement methods. It reads, “the parties to any dispute...shall...seek a solution by negotiation, inquiry, mediation, conciliation, arbitration...resorting to regional agencies or arrangements, or other peaceful means of their own choice”¹, where negotiation is provided as one alternative to the settlement that could be undertaken by the states. Therefore, the question begs as to what negotiation is, in international terms? Given the fact that such importance is given to the method of negotiation, one could say that negotiations between parties is a continuing process, where parties discuss relevant issues on a common interest which brings benefits to both parties, where this common interests is the subject of the dispute. The final desired result of such a process is to come to an agreement on how and when such a common interest and the ensuing dispute should be resolved.

This is the view presented by Ikle; when he states that negotiation is a “...process in which explicit proposals are put forward ostensibly for the purpose of reaching agreement on an exchange or on the realisation of a common interest when

conflicting interests are present.”² Thus negotiation in its present form could be a one on one discussion of the issues between parties to a long drawn round of talks between parties³, under the auspices of a settlement forum such as the GATT/WTO⁴, in order to discuss the conflicting interests, which at the same time could be the common interest. However, as we have witnessed many a time, the more the process gets complicated, the more issues are encompassed in the term “negotiation”. This not only includes the resolving of the conflicting interests, but also the agenda for negotiation, the ground rules to be applied, thus broadening of the scope of negotiation, which have been provided in many international treaties and declarations.⁵ However, it is my belief that this definition of negotiation and its scope is put into serious doubt, where the courts have held that mere informal discussion could be tantamount to negotiation, because a negotiating process involves not only the facts of the dispute as a central issue, but other facts such as the process applied, place of negotiations, the acceptable negotiators etc, if the negotiations are to be successful. In the *Mavrommatis Palestine Concessions case(UK vs Greece)*⁶, Great Britain contended that discussions with Greece had been so brief, so as not to amount to negotiation, assuming that a broader definition should be given to the word, and insisting according to Kass, that “...in negotiations parties must at least define their positions and consider each others views.”⁷ But the court held otherwise, stating that discussions between Mavrommatis and Great Britain had so defined the relevant issues, thus satisfying the negotiation issue. Hence, having noted the difference in the definition of negotiation, it is worthwhile noting the dissenting judgement of Judge Moore in the above mentioned case, where he held that “...the government which profess to have been aggrieved should have stated its claims...and the other government should have had an opportunity to reply, and if it rejects the demands, to

give its reasons for so doing...”⁸, thus emphasising the process of negotiation; and keeping with the idea that state officials should negotiate at international level.

If one is to take the literary meaning of what Judge Moore said as being that state parties should open such a diplomatic process, to resolve disputes; it seems that in some instances, the states themselves have conformed to such broad definitions of negotiation and consultation. The UN Conference on succession of States finds one major example of such a procedurally broad definition in Art.41 & 42 of the Vienna Convention that was adopted in August 1978.⁹ According to this article “if a dispute regarding the interpretation or an application of the present convention arises between two or more state parties, they should seek to resolve it by a process of consultation and negotiation upon the request of any of them.”¹⁰ In an interpretation of this article, one could safely say that its motive is for official state channels to be utilised in negotiation, which was also the express attitude of many representatives to the conference.¹¹ This is further emphasised by the fact that a “request” by a state party is required as a pre-condition to negotiation, thus making the informal negotiation in *Mavrommatis* more questionable as a proper definition of negotiation. However, by making such definitions broad and official, in my opinion it puts into doubt as to where we stand in terms of whether proper negotiation has taken place to satisfy the necessities of different dispute settlement mechanisms. But, given the fact that certain conditions are to be met, if satisfactory negotiations are to take place, and further by satisfying such conditions, one could identify the proper standard of negotiations, I would deal with these conditions at present.

2.2 Conditions for negotiation:

Negotiations involve a continuing dialogue between the states or between states and individuals, be it in political or economic disputes. However, for such negotiations to be successful, certain conditions have to be satisfied notwithstanding the protectionist policy making of the states, which would bring about a conclusion to the negotiations.

2.1.2.1 Mutuality of parties:

The first such condition is the mutuality of parties in bringing the dispute to negotiation and the successful completion of such negotiations, meaning that the parties are to enter into negotiations in good faith, in order to resolve any present disputes. As Darwin points out “...negotiations cannot settle a dispute where one party holding an entirely reasonable and just position is faced with unreasonable or even aggressive demands.”¹² Thus it is important that the parties with divergent views on the interest have a mutual agreement on bringing about the dispute to the negotiating table; and further it also needs the mutual agreement on the subject matter of negotiation. As Cheng has identified, it is imperative in international relations that there exists good faith if any solution is to be achieved for existing disputes.¹³ As the Federal Court in the US once held, “It cannot be that good faith is less obligatory upon nations than upon individuals in carrying out agreements.”¹⁴ The other side of this argument is that states get involved in any form of negotiation in bad faith, with the possibility of amending its present situation. This means that the state parties are to amend its protectionist policy positions as mentioned in the previous chapter in order to engaged in mutual negotiations. There are many cases in international law and relations, where the movement by one party of its policy position, wilfully, has either

encouraged further negotiations or has resulted in the satisfactory conclusion of negotiations. One such case was the Disarmament negotiations which commenced in 1962¹⁵, where a significant change in attitude by both parties, namely the US and Russia, brought about a newly outlined disarmament plan.¹⁶ However, having said that the mutuality of parties, the good will and the acceptance to move from their original positions is a necessity to a successful completion of negotiations; one has to question whether larger state parties would be acceptable to such mutuality, given the fact that these states are prone to protectionism. This is specially the case, given the fact that historically negotiation is supposed to be a “diplomatic”, dispute settlement mechanism. As Lall points out “where negotiation is frustrated and cannot succeed, the root causes will often include the apprehension on one side that the results of negotiation would entail a move of its international position or status.”¹⁷ Thus larger states, as we have seen in many trade dispute cases, are reluctant to “back down”, so to speak from their original positions of economic policy making, thus dragging the dispute to a long lengthy process, rather than enter into dispute settlement negotiations, or for that matter, enforcing such negotiated settlements.¹⁸ One such narrow-minded approach of a larger state was the Torres Treaty dispute, between Australia and New Guinea, with regard to the maritime boundary line over the uninhabited islands.¹⁹ Australian authorities were worried about constitutional difficulties and local political pressures it might fuel²⁰, emphasising the pressures under which such economically powerful countries were in, in negotiating with an economically lesser significant state, such as Guinea. This also emphasised the possibility of Australia not willing to let go of its rights under negotiating circumstances. Thus as Burmester notes “...it was only after the adoption of an imaginative, broadly focused approach, that a solution acceptable to all the parties

concerned was achieved.”²¹ Hence, noting the fact that free will and mutuality is one cornerstone in inter state or state-individual negotiations, be it commercial or non commercial, and secondly emphasising the point that protectionism has a significant effect on such mutuality and satisfactory negotiations. Having noted that mutuality is one cornerstone in “diplomatic” dispute resolution, I believe that the fact that many treaties as well as judges in some case law trying to impose a duty to negotiate on the part of the states or individual parties is a sign of two other related issues. First, that mutuality is needed for a successful negotiation to take place, and secondly that these states may tend to deviate from participating in such negotiations or enforcing such negotiated settlements as a result of protectionist economic policy.

I would very briefly deal with the said *duty to negotiate*, which would be seen as a restriction on the freedom of the states, notwithstanding the fact that states do consent to the treaties of their own free will and in accepting the obligations of a international institution or treaty. This is an issue that is greatly significant when dealing with the settlement forums such the WTO where enforcement panel results and the time periods of such have been regulated under the Dispute Settlement Understanding of 1994, rather than being obligatory and dependant on the satisfactory conclusion of negotiations, which have been accepted by the states, as was the case under Art.22 and Art.23 of the former GATT. Many state treaties and conventions signed on different subjects ranging from disputes concerning rivers and lakes, state trusteeships to international trade and investments duties, have at some stage or other obliged states to consult and negotiate if and when disputes arise, emphasising the fact that mutuality between parties is a necessity for negotiations to succeed.²² In the Geneva Convention relating to the development of hydraulic power affecting more than one state is one example of this obligation where

it provides that, “if a contracting state desires to carry out operations for the development of hydraulic power which might cause serious prejudice to any other contracting state, the states concerned shall enter into negotiations.”²³ This according to Bourne, has influenced the subsequent thought on the obligations of the co-basin states; where the obligations is subtly pronounced, as not to intimidate state parties, but also to make sure that they oblige with such a duty.²⁴ As Bourne points out, with regard to Art.1 para 3 of the resolution adopted by the inter American Bar Association; “...strictly speaking, one cannot say that this provision makes negotiation obligatory.... In practice, however, the provision will lead almost certainly to negotiations”²⁵, implying first the willingness to impose a duty to negotiate and secondly the necessity of a free will gesture on the part of the parties. The second aspect of obligatory negotiations, in my view, is to discourage parties from deviating from achieving the goal at hand. If one takes for example the economic policy of developed and developing nations, one could see a trend of state parties practising protectionist policy in different fields. Hence the need in some instances for obligatory negotiations. This fact is mirrored by Kass, who noted the importance of obligatory negotiations in relation to Art. 22 & Art.23 of the former GATT, which provides for voluntary negotiations. According to Kass “First, they settle many potential disputes through mutually beneficial tariff concessions. They serve the same purpose more explicitly in the consultations and negotiations required by Art.22(1) and 23(1) and further that “The circumstances under which international law requires good faith negotiations share one common element: the need for parties to co-operate to achieve their goals.”²⁶ I believe that this statement by Kass has given credence to the argument that there exists economic policy making of a protectionist nature on the part of the states involved in disputes, which is geared towards gaining the best possible benefit

for each other and secondly that there is the need for an obligation to co-operate and negotiate with each other to achieve a common goal, i.e. economic benefits. On the whole, one has to say that protectionism and protectionist policy making has a relevance to the mutuality in negotiation as a dispute settlement mechanism, which is sometimes emphasised by the provisions for the duty to negotiate in international treaties and the case law that has hinged on the mutuality of parties concerned.

2.1.2.2 *Secrecy of the negotiating process:*

Having dealt with the free will or mutuality of parties, which is necessary for a successful completion of a negotiation process, it is my contention that the availability or non-availability of secrecy of such negotiations has quite an impact on a successful negotiation process. In the past, negotiations have characteristically carried on in private, and even at present, to a certain extent, in many cases, parties are keen to settle in private²⁷, keeping with principle that negotiations should be at diplomatic level. However, at the same time, states have in other situations preferred to play a “public relations” game by disclosing information about the on going negotiations with other state parties. While this practice in some instances has a positive effect, in others, it has been criticised as having a negative effect on the conclusion of such negotiations. As Lord Strang once said “...there is no doubt that this public relations and discussions of the issues of foreign policy, often at awkward moments, has a hampering effect upon the flexibility, resourcefulness and imagination with which diplomatic operations might otherwise be more fruitfully conducted.”²⁸ What I believe Lord Strang meant by this statement, is that such disclosure of information to vested parties would have a pressuring effect, where international policy is concerned. This is especially the case, as we have witnessed,

where such interests have a bearing on how and when states decide to implement trade barriers or vice versa, in trade relations with other states, be it tariff reduction in trade or subsidies in agricultural or textiles negotiations at international level. As Ikle emphasises, governments feel handicapped in the pursuit of national objectives if domestic interest groups become involved in their negotiations; unless of course the state is making such “noises” in getting the other party arrive at the negotiating table, which is an implication that protectionist policy making is prevalent in local politics. Hence, states that are involved in negotiations on varying subjects have adopted the policy which Woodrow Wilson once called; *secret diplomacy*, revised to suit their purposes as well as satisfying the interests of other pressure groups.²⁹

This exclusion of the public dimension, is being accepted as part and parcel of international negotiations, where this process of “*you scratch my back, I scratch yours*” dealings are essential for both parties who do not want to be inhibited by pressure groups, who have a vested interest in the on going process. The “ice berg principle”, according to Colosi³⁰; where nine tenths of negotiations are not known to the public is being practised at many negotiations. This is seen not only at the panel process and negotiations of the WTO, with regard to cases of economic and foreign policy; but also other sensitive cases, with quite a success rate. One such example was the surrendering of Argentine forces in the Falklands, where the commander in charge wanted the photographers away until the negotiations were ended. As Ikle has pointed out “once the agreement is signed, it tends to act as a *fait accompli*, weakening dissent and mobilising interests groups in support of it.”³¹ Hence not only being able to satisfy the opposing party by maintaining secrecy, but also making sure that the agreements concluded, would be enforced, without the interference of parties with vested interests. Thus in my opinion, protectionism has resulted in secrecy or the lack of it

being material in the success of negotiations at international level, notwithstanding the fact that in some instances the actual openness may be a more favourable option to accomplish a satisfactory resolution.

Having noted the two most important conditions that are to be satisfied, if international negotiations are to be successful, I am of the opinion that these conditions would also apply to negotiations that take place at international trade and investment dispute resolution. This is particularly the case, given the fact that both parties concerned would be compromising their individual positions, which would on either perspective be beneficial to them. Furthermore, I also am of the view that these conditions do apply to the dispute settlement mechanisms of the World Trade Organisation, the International Centre for the Settlement of Investment Disputes, in the field of trade and investments. Hence my interest in providing a brief insight into international negotiation as a settlement procedure, as I believe that these conditions do have a bearing on how these mechanisms satisfy the interests of the parties concerned. Thus having discussed the issue of negotiations, I would move on to discuss the settlement method of Mediation, which takes dispute settlement a level further, in involving a third party in such dispute resolution.

2.2 Mediation as a Method of dispute settlement

2.2.1 A Definition of Mediation:

Mediation is in one sense the middle ground between the simple negotiation between parties and the full-blooded involvement of third party adjudication, which results in the disputant parties accepting an award to which I would turn my attention later. Thus, what is Mediation? At village level in many a state, mediation was handled by a well respected individual who had the respect and

authority to do so, with the blessing of the parties concerned. As Lubman states, with respect to the situation in the former Communist China, "...Generally speaking disputes within families were settled by elders. While the authority of the *pater familias* was theoretically absolute, there was undoubtedly much mediation by older relatives, friends, and the clan leaders-especially when the family was small. Disputes between members of a clan were settled by clan leaders and sometimes by other respected local leaders. Disputes within a village not coterminous with one clan were mediated not only by relatives, friends and neighbours, but by official village headmen and unofficial leaders, whether gentry or other respected figures."³² Thus third party influence ranged from simple family involvement to public adjudication, if necessitated. The settlement was in turn kept internal, taking into account the cultural values of the parties concerned, and secondly, it was informal, away from the adjudication of magistrates; which in most cases does not take into account the cultural and moral values that the parties appreciate.

In international terms, mediation is similar to arbitration, without the legally binding nature attributed to that method of settlement. A definition could be provided of mediation on the basis of the functions that it is supposed to achieve, as made by the Hague Convention, when it notes that "the part of the mediator consist in reconciling the opposing claims and appeasing the feelings of resentment which may have risen between the states at variance" and "with the object of preventing the rupture of pacific relations."³³ However, as Merrills says "...with the mediator as an active participant, authorised and indeed expected, to advance his own proposals and to interpret, as well as to transmit, each party's proposals to the other"³⁴ the mediators role is more difficult. Furthermore, what this means is that the consent of the parties are needed for a party to involve itself in the dispute, and secondly that the mediator

should be ready to provide its own reasoned proposals. Furthermore in international terms, the mediators, as with the case in the domestic Chinese situation mentioned above, the mediators are well equipped, though not from the local cultures of the parties, to instigate the intervention, which is an advance on simple negotiation. According to the UN handbook, the functions of mediation is shown to be two fold, namely prevention and reconciliation. As the two Hague Conventions of 1899 and 1907 provides, the functions of mediation may be provided as “with the object of preventing the rupture of pacific relations”³⁵ and “the part of the mediator consist in reconciling the opposing claims and appeasing the feelings of resentment, which may have between the states at variance.”³⁶ While the reconciliation function would be obvious in terms of the mediator providing his/her proposals for a resolution of the dispute, the preventive function in terms of mediation is more a limitation of the escalation of relations between the parties, rather than the prevention of the dispute arising in the first place. As the UN handbook notes, “the function of mediation under these circumstances may be aimed at achieving a provisional solution, such as bringing about a cease-fire when fighting has begun or to arrange a permanent solution, thus addressing the basic dispute.”³⁷ While the reconciliation function is a part of the success of the procedure, it would seem that prevention has also been a vital function in the success of international mediation.³⁸ These two apparent functions of the settlement method of mediation can be construed as a definition of mediation meaning to be a procedure, which takes into account the arguments of both parties in relevance to the apparent dispute, to give its own opinion on the dispute after due consideration to the contesting arguments of the parties, with the view of reconciling or preventing the two parties in entering into all out conflict.

However, mediation also has to be differentiated from “good offices”, where the third party normally seeks to encourage the parties to resume negotiations, by providing them with a channel of communication. However, here the party does not take part in the ongoing negotiations. As Northedge points out, the power of the mediator or mediation is wide in scope; hence allowing the mediator to “take the thread of negotiations into his own hands”³⁹, or in some cases to initiate such negotiations. However, on the other side of the spectrum mediation has to be differentiated from arbitration, which I would deal with later on. This is specially the case, in so far as arbitration is generally thought of as proceedings on the basis of respect of law⁴⁰, where as mediation is on the other hand a process of flexibility, notwithstanding the fact that in both instances the parties consent is necessary for intervention.⁴¹ The flexibility in this sense is the flexibility of the mediator in applying or considering the rules and regulation of international law, taking into consideration the cultural aspects, which are related to the dispute in hand. This, one may point out as being a *advanced situation of mediation from the village mediation existent in China* for example; where the issue is considered void of legal regulation. Thus one could identify the fact that mediation being a process of peaceful settlement, could also be of different standards, at different given forms.

2.2.2 Conditions of Mediation:

Having noted what mediation is, in contrast to negotiation and arbitration, which I deal with in the present context; it is also important to clarify the conditions/requirements that needs to be satisfied, if such a method is to be satisfactorily concluded in terms of international trade and investment. Hence, I would briefly discuss in the proceeding part of this work, the two important conditions that

need to be satisfied in order for mediation to be successful, given the fact that both parties concerned would have opposing views based on protectionist economic trade policy. The first of these two conditions is the necessary consent of the parties concerned and the acceptance of the mediators by the parties.

2.2.2.1 *Consent of the parties:*

It is agreed that, consent on the part of the parties to accept third party intervention in resolving a existing dispute or a potential dispute, is a cornerstone in international mediation. Mediation cannot be forced on parties to an international dispute. Therefore if parties to such a dispute, show reluctance in accepting outside intervention; it may be considered as a stumbling block to international mediation. This is further made worse by the fact that there is no such thing called enforced mediation. As a consequence, as Northedge points out, there arise three scenarios, where the parties' or single party may decide not to accept third party intervention. The first scenario is where the state concerned feels it is getting all it wants or a substantial part of it, without the recourse to mediation.⁴² This situation arises, mainly if the party concerned feels that, it is in control of the situation, politically, economically or militarily, and hence has no need to bend over backwards to accept a compromise deal; which negates its hold over the issue. In most cases, this situation arises, where the party is an economically or militarily powerful state, as in the case of Soviet Union's intervention in Hungary in 1956. The dispute in Hungary concerned the Soviet intentions of keeping Hungary under communist rule, whereas the anti communists were concerned with the freedom of Hungary. As Fejto explains "...the Hungarians were swayed by the feeling that their country had a natural right to independence and neutrality, and did not stop to think of the consequences."⁴³ What

Fejto meant by 'not thinking of the consequences', is what exactly happened, as the Soviet's attached "...with the obvious intention of overthrowing the lawful and democratic government"; according to Imre Nagy, the then prime minister of Hungary. The Russians, with their obvious military strength had sole control of Budapest, the Hungarian capital; and thus did not under any circumstances want to "down peddle" on its position. It is under these circumstances that the UN General Secretary tried mediation, which was revoked. Not only did the government revoke mediation by the UN, but also as Northedge states, denounced UN activity as "unwarranted interference" in Hungary's domestic affairs.⁴⁴

The second and third objections that a state could bring, in relation to not providing its consent is if it feels that the mediator is biased towards the other party or that the mediator is not well informed of the situation that exists. However, while there are valid arguments for the impartiality of the mediators, these issues are also linked to the second condition of international mediation, namely that the mediators should be satisfactorily qualified for such intervention.⁴⁵ Hence I would deal with these issues later on. But, for the present moment I would concentrate on some case law, to emphasise my point that, consent of parties is invaluable to international mediation. The Kashmir conflict between India and Pakistan is a prime example of mediation being at the mercy of the two parties to the conflict. The dispute concerned the legal responsibility and control of the Kashmir region. The incompatible nature of the two parties were at such an extent, that even a Security Council resolution; appointing a commissioner to oversee the control of the Kashmir region by "local authorities", was not implemented. It is in this state of affairs that Sir Owen Dixon; the UN mediator made his report on partition. But, such was the difference between the parties' consent, that this report was rejected, notwithstanding

the fact that the parties had accepted Sir Dixon as third party mediation, emphasising the consensual nature of mediation as a method of dispute settlement. The situation that arose in Kashmir, one could say emphasised the first scenario, mentioned by Northedge, where the parties, namely India and Pakistan were in a strong position, and were not willing to compromise. This situation was further emphasised by the fact that the then General Secretary of the UN, U.Thant; on the 15th September of 1965, again reported that there was no progress, after officiating as mediator in holding talks with the parties. On the evidence leading up to the Tashkent Declaration accepted by both parties; the only two conditions that made the parties come to a agreement was their eventual consent and secondly the intervention of the Soviet Union, as mediator.⁴⁶ As Merrills states “...what seems to have been the main incentive to accept mediation here was that having used force to make the point that their respective claims would be defended, neither side had the power to go further and impose its own solution unilaterally.”⁴⁷ Hence as a result the parties accepted Russian intervention to resolve the dispute.

Therefore, two conclusions could be arrived at from the above scenario. First, in so far as political disputes are concerned; that consent of states is a prime necessity in international mediation. Secondly, that the so called “political” disputes are on the whole, based on the protection of a right, be it economic or social. But for present, I believe it is right to say that; without the consent of the state parties, international mediation would fail, especially given the divergent political and economical policies practised in the world arena. Having provided a brief outlook on consent, I would now discuss briefly, the second condition that needs satisfying if mediation is to succeed; namely the satisfactory qualification of mediators to handle the dispute at hand.

2.2.2.2 Suitable mediators:

It is argued in many quarters that the second basic condition for mediation to succeed is that the mediators should be qualified enough to take up the position as a mediator. As Merrills points out; if the state parties concerned believe that the would be mediator has little understanding of the position, is unsympathetic, wholly committed to the other party, or less concerned with their interest than his own, he is unlikely to be acceptable. Immediately, one could identify two areas, which has to be resolved by the mediator, if the governments are to be willing to accept the qualifications of the mediator. The first such area of concern is the fact that the mediator should be familiar with the local cultures of the parties, and their approach to dispute settlement. If in the case of commercial disputes, the mediator should be aware of the practices of the parties, and as mentioned earlier, the economic background in which such activities are practised. Some have argued that dispute resolution, in any language, means the same thing and hence the cross-cultural differences do not make a difference to resolving such disputes.⁴⁸ Others however have argued that, the mediator has to be conscious about such cultural differences, while mediating in disputes between two states with different cultural backgrounds. As Cohn has mentioned, negotiation, or for that matter conflict resolution, might be hindered by the failure of adversaries to communicate freely, if they speak different languages, or give different meanings to a single word. This as Cohn has pointed out, could pave the way for great confusion. For example, in American terms “concession” mean a process give and take, but in Arabic terms, it would mean “...retreat and abandonment of a right”. To make the matter more complex, if one takes for example a developing country such as Sri Lanka; the meaning would be a process of giving

relief to one's population, without expecting any retaliatory practice. Therefore, it is important that the mediator understands the correct meaning of the language spoken, since a simple word spoken could mean different things and cause great confusion.

As well as interpreting the language spoken, and resolving any unwarranted disputes arising; so is the protection of face of the parties important in some cases, particularly if such face saving is important in cultural terms. As Brown points out "In some instances, protecting against loss of face becomes so central a issue, that it swamps the importance of the tangible issues at stake and generates, intense conflicts that can impede progress toward agreement."⁴⁹ In most western countries, saving face means the open, in public confrontations where "debate, challenge and refutative, and controversy carry no threat to the ego."⁵⁰ The individual concerned, or for that matter the state does not worry what the consequences would be to the other party concerned. But, on the other hand, state parties in the Far Eastern hemisphere, do not believe in open court confrontation.⁵¹ As I have explained earlier, in the case of China as well as Japan for instance; the community feeling is at its best, and as such confrontation is resolved "behind close doors", so to speak. Therefore, it is of importance, in sensitive cases, that the mediator takes into account these cultural differences in mediating between parties. As President Carter once said, "...is that they don't want to put forward a proposal to the other adversary and be rebuffed. Its a deep embarrassment and a loss of face if you make a proposal and you have it rejected publicly."⁵² Thus it is for the mediator to protect the image of both parties, by taking into account, the different approaches, acceptable to parties in resolving the impending dispute. Hence having taken the cultural attitudes of the disputant parties into consideration; it is right to say that the mediator should then be neutral in resolving such a dispute. This is particularly true if it concerns parties involved in

trade disputes at a given forum such as the WTO, where some countries favour a legal solution and others accept a more political settlement process.

The second concern of the parties is that the conceivable mediator would tend to be biased to and favour the other party. As Northedge states “...One of the strongest arguments in favour of the existence within the international community of states which are committed to neither side in the principle international controversies of the day is that such states are available as mediators without necessarily being suspected of bias towards one side or the other.”⁵³ However, having said that, it is argued by many scholars, and rightly so that countries, especially economically powerful countries mediate as a third party in order to gain some ulterior benefit or motive. If this is the case, it breaks the spirit of third party mediation in principle. As Zartman notes, the larger state parties “...desire to mediate is, however, intertwined with other motives, best described within the context of power politics.”⁵⁴ What this meant was that these countries get themselves involved in a disputed affair, simply as a way of showing their political strength over other parties; who wait in the side lines to get involved if the necessity arrives.⁵⁵ One such example that could be provided to illustrate this point is the Soviet involvement to mediate in the Indo-Pakistan conflict. Pakistan has historically been an ally of the US and China, where as India has had the backing of the Soviet Union. However, when the Indo-Pakistan war broke out, and India particularly being under pressure from China⁵⁶, the Soviet Union took this opportunity to involve itself through its mediator; A. Kosygin, its then Prime Minister. This pattern of Russian involvement had two motives, namely the improvement of its relations with Pakistan, and secondly reduction of the Indo-Pakistan conflicts. Hence making “...it more difficult for China” to “...establish its presence close to the southern borders of the Soviet Union”⁵⁷, and in

the process establishing its friendship with India. As a result one could question whether the third party mediator, could remain impartial if it desires is twofold, namely the establishing its existent friendship with one party, and secondly trying to build a bridge with the other and in the process having a greater influence in the region?

As Merrills has quite rightly detailed “it is some times suggested that mediation will only be acceptable if the mediator is perceived to be strictly neutral.”⁵⁸ I agree with this assumption in principle, as there is no point in the two parties bringing the dispute to third party’s attention, without impartiality. The reasons for this being that both parties agree that they are in a no-win situation; and they want a win-win situation respectively. Hence if the mediator is to be seen as partial toward one state or has a ulterior protective interests in getting involved; then the situation invariably reverts back to its original situation; especially as seen above the motives of the mediator is ulterior to say the least. However, the other side of the argument; propagated by some authors is that a former relationship of the mediator with one party or a existing relationship, will imply to the other party that the relationship could “deliver” the former party to the negotiating table, or to a possible solution. Hence meaning that the mediator could use his/her friendship as an advantage; and that “the closeness that implies a possibility to deliver its friend may stimulate the other party’s co-operation.”⁵⁹ Scholars, who endorse this theory as reality, provide many examples. Slim, for example, states in relation to the Algerian Involvement in the Iran Hostage crisis; that these mediators had “...the required revolutionary credentials and the necessary international connections needed for the job.”⁶⁰ Furthermore Lieb notes that Iran and Iraq accepted Bonmedienna as a mediator; as a result of him being “...a member of the same family.”⁶¹ I could understand these stances by parties, who want

some particular person, who in my opinion, know the situation more than another. But these efforts by scholars to frame these requests as mediation by biased mediators is unacceptable, especially as mediation is supposed to depend on the consent of the parties of a impartial, qualified mediator. If we take for example the hostage crisis, it is an acceptable fact that no Muslim revolutionary would side with the US, in any way or form, and that the US would not accept such revolutionaries as mediators. Therefore, could it be said that the Algerians were accepted because they were biased and capable of delivering the Iranians? It is my belief that, one could safely say that it was probably not the case. Furthermore could it be said that Iran and Iraq accepted Bonmedianna, because he was biased? The answer probably would be in the negative. The only reason then, would be that he was a Muslim leader; thus knowing the local situation. Furthermore, why did not the parties in the Falklands war accept the US mediation? The reason for this situation is not that the biased nature of the US would affect the outcome, but that the US wanted to develop closer ties with Argentina, as with the Russian involvement in the Indo-Pakistan conflict; and that Argentina did not want to reject any offer of mediation from a powerful neighbour. As Freedman notes "The Argentines were generally pleased with the idea of American mediation; securing it had been one of the original objectives behind the occupation of the islands."⁶² This notion of American bias being helpful to the cause of the UK was further diminished according to Carnevale, when "...the US presented a neutral front and made apposite statements to the point that the British feared a unfavourable mediated agreement"⁶³, especially as the US was interested in being neutral.

Therefore one has to agree that neutrality of the mediator is of importance, notwithstanding the fact that a mediator, who has a local knowledge of the situation may be the suitable person to handle the case at hand. Furthermore,

though it may seem that the biased mediator is able to resolve the dispute with his/her influence; it is my opinion that this is rather a fact of the conflict in total, as is seen in on-going Indo-Pakistan Kashmir conflict, hence going against the views of many authors. This is important in the case of world trade disputes, and the settlement of such disputes by mediation, at given forums such as the WTO, where the opportunity is provided for mediation, whether or not it is utilised in reality. This is particularly true, as such disputes do tend to give different parties very different interests, notwithstanding the fact that they are not directly involved in the dispute. Therefore it is important for the mediator to be unbiased, in the case where the mediator is an individual, notwithstanding the fact that his/her government could have an unsuspecting interest in the issue, within the context of international mediation.

2.2.3 *Limits of International Mediation*

In many cases mediation, states or individual parties who are parties to an international dispute insist that they be in control of such a dispute, rather than leaving it at the mercy of a third party, where the involvement is more intense. As Donelan points out “it seems to be the exception rather than the norm for disputing states to agree to third party mediation in their affairs.”⁶⁴ Even when the mediation process has begun, if the parties believe that the mediation could not do any good, it will take into its own hands, the resolution of the dispute as a result of the relevant protectionist interests involved. Therefore it is important that the timing of mediation should be at the correct time. If the offer of mediation is made too early, both parties or one of the parties may believe that they still have a chance of resolving the dispute in other ways: i.e. militarily, hence rebuking such an offer. On the other hand, if the offer is made after the critical time has passed, and the parties have resorted to other

methods, then it may all depend on whether the parties do want to resort back to mediation after taking action, which it believes would resolve the dispute, by which time, the whole purpose of mediation would have been lost. In the Arab-Israeli war, for example, the US and the then Soviet Union were not interested in getting involved. Rather than get involved in the dispute earlier, according to Grieve “the two superpowers made use of the hotline between the Kremlin and the White House to reassure each other that they did not wish to become directly involved in the war.”⁶⁵ Hence the parties lost the opportunity to offer its service as mediators. However, when the Security Council directed the Secretary General to appoint a special representative in order “to establish and maintain contacts with the states concerned”, the states were not in agreement on any issues as a result of its divergent views, thus obstructing to any offer of mediation. Therefore, unless the mediation is well timed or is made, taking into consideration the interest of the parties, it would be difficult for mediation to succeed as a method of settlement.

Another problem area of mediation is the fact that mediation may only be able to achieve a partial solution, meaning that other sources of dispute resolution may be needed in conjunction to resolve the dispute in hand as a result of the state's reluctance to enforce mediated solutions.⁶⁶ Furthermore; as it has been noted, when resolving the dispute concerns future actions by the parties concerned in a given period of time; unless the parties are willing to change their positions, the dispute will not be adequately resolved, specially if it involves protectionist economic policy of tariffs, subsidies etc.. As Merrills notes “even that degree of progress will be impossible if the parties cling tenaciously to fundamentally incompatible positions-if for instance, they are not prepared to acknowledge that a potential solution is what is needed, rather than an endorsement of existing rights.”⁶⁷ With regard to the argument

that mediation provides only for a partial solution; many instances of such situations could be provided; where notwithstanding the interventions of a third party mediation, the parties had to resort to other methods of settlement. One such political dispute is the Cyprus case extending from 1955-68, where the Greek Cypriots wanted a union with Greece, free from being a colony of the UK. Thus EOKA, which represented the Cypriots, demonstrated against British rule. The Turks who had ceded the island to Britain opposed self-determination, where as Greece wanted self-determination for the islanders. Though after more negotiations between the Greeks, British and Turks, a agreement was signed in London, in 1959 to declare Cyprus a sovereign state and allow self determination between the two communities; such a proposal did not materialise. Thus as fighting broke out, the UN Security Council, not only appointed a mediator; but also recommended a UN force to “prevent a recurrence of fighting and contribute to the maintenance and restoration of law and order.”⁶⁸ Thus the UN forces were stationed until 1968, as a result of both parties, being very “trigger happy” to battle each other, notwithstanding the efforts of Galo Plaza Lasso, or Sakari Tuomioja, who were appointed mediators, by the UN Secretary General to ensure a peaceful resolution of the affairs. This emphasis on other pressures being in place to substitute mediation, if necessary; which is a drawback on this method of settlement. As seen in the Palestine dispute of 1945-49 for example, though mediation was attempted by the UN mediators between the Arab states and Israel, heavy fighting ensued between the parties resulting in more territory being in the hands of the Israelis. The consequence of this was that parties depended on a political settlement via the UN conciliation commission; where, as Donelan notes “irreconcilable differences emerged.”⁶⁹ This therefore emphasises the fact that mediation on its own does not work in practice, especially, if the parties are still willing to fight their

corner. As Touval mentions “left to their own devices, the parties may fall out of an agreement just as it is being made or implemented.”⁷⁰ Hence effectively putting on the shoulders of the mediator to ensure that this possibility is diminished. This means that it is up to the mediator to see that the future implementation is seen to. This also emphasises the limitation of mediation, in providing a partial solution, if such future implementation is not looked at, especially if the parties have a right not to dither from their respective individual positions.

Having dealt with the more third party orientated mediation as a dispute settlement process, one conclusion that one could come to is that protectionism in a broader sense than pure economic protectionism does have a bearing on the satisfactory conclusion of any mediation process. This is particularly emphasised when one notes the different circumstances, where obstructions were made as a result of either party to the dispute, not being prepared to oblige with the work of the mediator or not being happy with the suitability of the mediator. In most cases, the main reason for such restrictions was a result of states being protectionist towards their own interests, which however derailed the mediation process. Having dealt with these issues, I would next deal with the issues that arise in arbitration as a settlement process in state relations and in particular trade and investments, where third party involvement is more prominent than the above mentioned peaceful settlement processes.

2.3 Arbitration as a method dispute settlement

2.3.1 A Definition of Arbitration:

In the preceding part of this research I have discussed the other peaceful methods of international dispute settlement, where the parties are allowed more freedom and discretion entering into such settlement and reaching an appropriate decision. In the following part of the chapter, I would discuss the issues relating to arbitration as a method of peaceful settlement. What is arbitration? While Art.33(1) of the UN Charter provides arbitration as a method of peaceful dispute settlement, a definition of what arbitration is not provided. However the Hague Conventions of 1899 & 1907 for the pacific settlement of International disputes, have provided that the object of international arbitration as the settlement of disputes between states by judges chosen by the parties themselves and on the basis of respect of law.⁷¹ The International Law Commission expressed a similar view when it said that arbitration was "...a procedure for the settlement of disputes between states by a binding award on the basis of law and as the result of an undertaking voluntarily accepted."⁷² Two points can be grasped from these definitions. First, it emphasises that the parties are allowed the freedom to choose, with restrictions on drawing back on such decisions made, which is in contrast to protectionist policy, and secondly, the legal nature of such settlement in contrast to other methods reviewed such as negotiation and mediation. As pointed out by Behrens "the proceedings are adversary in nature, and the dispute is settled on imposed terms."⁷³ Hence, it was an alternative to actual judicial settlement, but at the same time, the focus being on legal disputes; which in most cases invokes a right of one party being violated by another, or a legal

obligation not being fulfilled by a certain party in accordance with treaty provisions to which it is a signatory.

However, having noted the definition provided by various sources; one question that springs to mind is the fact that this is a method of peaceful settlement, and hence whether it is applicable to “non-legal” disputes or political disputes between state parties? According to Gray “arbitration is seen as an equitable means of settlement, but its object is the settlement of disputes by the application of legal rules, principles and techniques, and not simply reach a equitable result.”⁷⁴ What this meant was that legal disputes with political elements, which tend to promote an equitable result are not within the gambit of international arbitration. However, it is my contention that, though these disputes, which could be termed as legal, at the same time also involve a political decision making aspect for reasons of protecting one’s interests. One example of this political nature of any legal dispute brought to arbitration is the Rann of Kutch⁷⁵ case involving Pakistan and India, where tension were high, and the parties involved accepted a result where both parties were in a win-win situation.

In this case, the parties involved, namely India and Pakistan, argued that a borderland named the Rann of Kutch, was an integral part of its lands, and hence was owned by either nation. India argued that the land owned by the then Rao of Kutch, was a part of Indian state sovereignty, notwithstanding the fact that he himself lost these possessions beyond the Rann. India argued that, notwithstanding the fact that the area concerned was invaded by the Sind rulers who were the natives of Pakistan, that the Rann of Kutch was still a part of India. On the other hand, Pakistan argued that by invading these lands, the Sind rulers had established sovereignty over these lands. Furthermore, Pakistan also provided evidence of acts of individuals, such

as cultivation, grazing and fishing to emphasise its position. But, India argued that such activities did not prove sovereignty, rather that these activities were supported by the administration. Thus, these issues caused great political controversy because both administrations were willing to give different interpretations of the historical issues concerned with regard to where and who owns the sovereign rights to area of Kutch, and secondly because Pakistan in particular was not willing to accept international law as the governing law of relations between the ruling powers and native states. Thus, as a result, the arbitrator had to consider whether equity could be used as applicable in this case, as opposed to utilising only international law principles. Unfortunately, in this particular case, the states were not in agreement as to authorising the arbitrators to apply equity to the disputed facts. As noted by Merrills, this technique of using the equitable principle “...has been prominent in arbitration’s concerning territorial and boundary disputes; when the best solution may sometimes be difficult to justify in strictly legal terms.”⁷⁶ In the *Rainbow Warrior case(France Vs New Zealand)* for example, The General Secretary of the UN, while acting as a conciliator and arbitrator again emphasised the political nature of these disputes where the ruling was told to be “equitable and principled” and was taken after respecting and reconciling the differing positions of the individual parties. What this meant was that the different political positions of the states were taken into account after individual consultations with either party, prior to a decision being given on the issue at hand.⁷⁷ This emphasised the fact that disputes brought to arbitration, be it a state or individual right, involves to a certain extent a political decision making aspect by the respective states on the basis of protecting their interests, and the fact that arbitrators in some cases have tried to resolve such disputes in par with the legal dispute on the basis of resolving the legal

dispute in fair way to the parties concerned, although such political issues would be cloaked by the fact that a legal facts are to be resolved by arbitration.

Furthermore, it would seem that arbitration as a means of resolving political disputes or legal disputes with political implications, has been advocated in some treaty laws as well as by arbitrators themselves⁷⁸, who with their given discretion, have resorted to giving emphasise to such political fact. Thus in the *Rann of Kutch case (India Vs Pakistan)*, the arbitrator holding that Pakistan was entitled to territory, justified the argument saying that “...it would be inequitable to recognise these inlets as foreign territory. It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in the region compels the recognition and conformation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such.”⁷⁹ However, in a contrasting case, the ICJ has reaffirmed this view that only disputes or parts of a dispute that could be resolved according to a basis of law or according to a judicial process is in the realm of its jurisdiction. It noted that “legal disputes between sovereign states by their very nature are likely to occur in political contexts and often form only one element in a wider and longstanding political dispute between the states concerned” and thus rejected the view that “because a legal dispute submitted to the court is only one aspect of a political dispute, the court should decline to resolve for the parties the legal question at issue between them.”⁸⁰ In my view, if one is to say, as Gray has, that only legal disputes are resolved by arbitration according to international law, then there is virtually no necessity for arbitrators to make decisions, taking into consideration political elements, which should not have any relevance to the legal issues at hand. Unfortunately, it is under this political cloud that all activity; be it financial, trade or territorial is conducted; thus making the appeasement of these protectionist interests

relevant, which it seems has been recognised in some cases at least, in resolving cases according to equitable principles or the recognition of such principles. As a result, if it is only the legal issues that arbitration is concerned with, then I do not believe that arbitration would be successful, given the fact that the parties mutually agree for arbitration to gain a win-win rather than a judicial court settlement. As Behrens has mentioned, to counteract this “win-lose” situation in arbitration, “there is, however, a clear tendency of states to expand the scope of arbitration matters, especially with regard to international economic relations”⁸¹, hence emphasising the fact that protectionist aspects are existent in a dispute and has to be resolved in toe with the legal dispute. Therefore, one could safely say that the arbitration has got to take these issues into account if the principle object of mutuality of parties is to be satisfied.

2.3.2 Conditions of Successful Arbitration:

Having dealt with the definition of international arbitration, and different interpretations provided, I would presently deal with the necessary conditions that I believe need satisfying, if arbitration is to succeed, particularly given the fact that states are always keen on protecting their subjective interests, even at dispute settlement proceedings of consensual nature.

2.3.2.1 The selection and authority of arbitrators:

The Hague Convention, in emphasising the objectives of international arbitration by Art.15, also signifies the necessary conditions of international arbitration. According to Art.15, “International Arbitration has for its object the settlement of differences between states by judges of their own choice, and on the basis of a respect for law”⁸², thus emphasising “the autonomy of states” and

“the respect for law”, as bases of dispute settlement by arbitration. However, state consent has been the dominant base for many arbitration’s, be it *ad hoc* or institutional arbitration such as the WTO, where the parties are implied to have sole control over the affairs of such tribunals. As pointed out by Fox, “even when the arbitration tribunal has been properly constituted and has opened its proceedings, a state may block progress by failure to appear...refusal to appoint or agree to the appointment of a substitute.”⁸³ Fox appears to provide state control of the whole proceedings, notwithstanding the fact that “arbitration” by its definition itself is utilised by the states concerned, with the assistance of a neutral third party, be it an arbitration panel, as in the case of the WTO, or in *ad hoc* arbitration’s. Hence, the selection of arbitrators takes centre stage, because without the impartial selection of arbitrators, the proceedings of such are of no significance.⁸⁴

As mentioned before in many a case the mutuality of parties is an important part in dispute settlement. Hence, even in arbitration the parties, after extensive negotiation, would decide on the membership of the arbitral tribunal. In the majority of cases, the arbitration agreement between the parties will provide that the members will be a three or five panel, with an equal number from both parties, and a additional arbitrator, who in most cases will be the president of the arbitration panel.⁸⁵ In some cases the parties make such arrangements, more elaborated, giving names of such arbitrators, prior to the start of the proceedings, as happened in the Iran-US arbitration tribunal.⁸⁶ As one could conclude from this agreement for example, the necessity of an unbiased third party is of utmost importance, if one is to gain a satisfactory decision. Therefore unless the parties have decided on its own as to who is going to be arbitrators or has stipulated that a certain set of rules would apply to a given arbitration⁸⁷, it is vital for parties to decide via treaty as to the composition of

the arbitral tribunal. Without being biased towards developing countries; I believe it is essential that this be taken into account at commercial settlement forums such as the ICSID and WTO which does provide for arbitration as a method of settlement. This is especially true, when one notices the obstructions that one party could bring about for such appointment, especially if either state believes that the arbitrator is biased towards the other.

In the *Sapphire Arbitration award*,⁸⁸ Sapphire petroleum Ltd. requested arbitration from the National Iranian Oil Company (NIOC) and selected its arbitrator. However, the request to select its arbitrator was rejected by NIOC; thus prompting the president of the Swiss Federal court to appoint an independent sole arbitrator.⁸⁹ In this case, the agreement between the NIOC and Sapphire Petroleum indicated that the IRCAN was to act as an agency for both parties and was to be in control and management of oil production activities. Furthermore, as with any international corporation, Sapphire assigned its rights and obligations to Sapphire International, to which no objection was made by the Iranian government. Furthermore, under the Iranian Petroleum law, the agreements for oil production were subject to any decision to transfer such property and rights to the Government of Iran, where “the surface owner having no right other than that of receiving the value of his land, of which he may be dispossessed under the principle of eminent domain.”⁹⁰ Furthermore, this law also emphasised the fact that operators are enjoined from assigning their rights and duties to others, which made the Sapphire action illegal under Iranian law. As events panned out, the NIOC argued that Sapphire international did not inform it sufficiently of its contracting activities, which it had done at several meetings.⁹¹ Thus NIOC actions were evidentiary of protectionist actions of state controlled organisations, which had a seemingly discretionary control over

international investment, justified by the local laws of the state. Hence, it was this attitude on the part of the NIOC, that was taken to the administration of arbitration and the appointment of arbitrators, where it refused to appoint its arbitrator on the basis that Sapphire Petroleum has assigned its rights to Sapphire International and could not invoke the arbitral clause. This was rejected by the President of the Swiss Federal court in appointing a sole arbitrator. This emphasised the necessity of an unbiased third party involvement or the necessity of treaty laws to defuse obstruction based on such protectionist policy, which is reflected by other commercial rules which authorise the appointment of alternative authority, if by chance the prior authority has defaulted on appointing arbitrators.⁹²

This is further made clear by the *Westland Case* (*Arab Organization for Industrialisation vs Westland Helicopters*), where objections were made by the respondents on the jurisdiction of the tribunal, based on local laws and the interpretation of citizenry based on such laws.⁹³ Here the governments argued that the particular company named Shah Goli was an Iranian company registered as such and did not have the right to sue the Iranian government. According to the Iranian government, “Only a portion of Shah Goli’s shares of stock belong to a West German corporation while the rest of its stock belong to Iranian nationals. Such a corporation is an Iranian national according to the Iranian Commercial Code as amended, and according to the claims Settlement Declaration nationals of Iran may not sue the Government of Iran before the Tribunal, under its private law provisions.”⁹⁴ However, the Basic Project Agreement stated that, “*Whereas, because (Starrett, S.A.) is an expatriate corporation and cannot own land in Iran and build and sell high rise apartment dwellings thereon as contemplated by the agreement of the parties expressed in exhibit II and therefore cannot perform its obligations under exhibit II,*

*and Whereas, (Shah goli) (being Iranian joint stock company) can perform the obligations undertaken by (Starret, S.A.) in Exhibit II.”*⁹⁵ Having agreed to this provision, then the government proceeded to have its cake and eat it, when it suited its needs, by hiding under the veil of local laws. The only justification for such obstructions was the protectionist nature of state dealings, which was concerned with its local interests, rather than any valid contractual breach. One may question the relevance of the appointment of arbitrators and the authority of such arbitrators to settlement of disputes. I believe that the relevance of an unbiased, independent third party is essential in commercial arbitration, and I intend to emphasise the significance of such, when considering the settlement methods of ICJ, ICSID and the WTO in the proceeding chapters.

2.3.2.2 Basis of Law:

A procedural fact that takes precedence in an arbitration process, is the law to be applied in such proceedings. In most cases the parties direct the tribunal on the law to be applied, and this express direction by the parties, has been given precedence, over other sources of law; keeping with the principle of supremacy of state consent. This has been confirmed by the fact that an approach accepting this rule has been followed by many conventions. The European Convention on International Commercial Arbitration, for example, provided that “ the parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases, the arbitrators shall take account of the terms of the contract and trade usages.”⁹⁶ Hence, when the parties contract or come to an

agreement, what is expressly stated is accepted as the applicable law. Where two or more states are in dispute, the dispute is said to be in the realm of public international law, because such a law only recognises states as being subjects of its applicability.⁹⁷ However, as international relations involve not only states but private parties under international trade and investment agreements, the applicable law at the same time has moved from the exclusive axis of public international law to the applicability of private international law principles. Therefore, one could specify three sources of applicable law, which could be either the Public international law, which is applicable when two states enter into agreement and municipal law or what is called *Lex Mercatoria*, which could be applied in mixed arbitration proceedings where a private party has entered into contracts with a state. In most cases the tribunals are directed to use the Public international law, while in others the tribunal implies that this should be applicable. As Merrills points out, in the *Taba case (Egypt vs Israel)*, the compromis contained no reference to the applicable law, but merely asked the tribunal to decide the location of the boundary pillars “of the recognised international boundary.”⁹⁸ But the tribunal took upon itself to apply the international law, implying that this was the motive of the parties. While this is in the general area of international arbitration, it has some significance to international trade and investment disputes, particularly as it is institutionalised and having its own set of rules and further it is supposedly based on the consent of the parties, emphasising the contradictions that arise at international level.

As the party's choice has been given precedence, it is said that the parties are allowed to direct the tribunal to apply any other law than international law. Hence, parties are able to direct the tribunal to apply relevant municipal law in the process, of their choice. As once was said, “any contract which is not a contract

between states acting alone in their capacity as subjects of international law, is based on the municipal law of some country”⁹⁹, meaning that foreign investors should be governed by municipal law; notwithstanding the fact that they would have agreed on a different applicable law. It is a fact that parties are allowed to use a municipal law as an applicable law. Nevertheless, it has also got to be said that the arbitrators are allowed to decide on the municipal law via the assistance of a court or in combination with another law, which is most likely to be the International law. This combination was emphasised in the *Trial Smelter case(US vs Canada)*¹⁰⁰, where the stipulated municipal law was supposed to be complemented by the International law and practice. However, the question begs here, with regard to international trade and investment, which is in the realm of private international law; as to what happens if the municipal law is biased towards the local interest. This is specially the case, taking into account the fact that the individual states are prone to making protectionist economic policy and legislating for such, as emphasised in the previous chapter? As pointed out earlier, there is a risk that the state party might amend its rights and obligations to the detriment of the other party, as emphasised in the *Sapphire case*. This is further compounded by the fact that the defendant to the dispute has the opportunity of arguing that the municipal law was the agreed law, and that it stands supreme according to arbitration theory, thus negating any opportunity of protection, as emphasised in the *Serbian Loans case(France Vs Serb Croat states)*¹⁰¹. Hence on this account, one could say that protection of one’s own interests, be it political or economical does have an influence on the legal basis of arbitration. While it is generally accepted that in the realm of public international law, states apply such laws at the insistence of the state parties; it is also a agreed fact that in commercial arbitration between states and private individuals, in the realm of private international

law, the usage could extend to what is called *Lex Mercatoria*,¹⁰² the general principles of International trade law.

I would briefly discuss this area, as it is an important factor in its relevance to trade and investment dispute settlement. Public international law, while regulating the activities of states, is accepted as not being applicable between private parties or between a state and a private party in the event of disputes. On the contrary, as mentioned above, *Lex Mercatoria* could be used as the applicable law in these circumstances. According to Prof. Lando, when the clear laws are not ascertainable, the arbitrator to a dispute “applies the rule or chooses the solution which appears to him to be the most appropriate and equitable. In doing so he considers the laws of several legal systems. This judicial process, which is partly an application of legal and partly a selective and creative process, is here called application of the *Lex Mercatoria*.”¹⁰³ Thus according to Lando, while a exhaustive list of the elements of this law cannot be provided, the main elements of this *Lex Mercatoria* is identified as being the Public International Law, Uniform laws, The General Principles of law, The rules of International Organizations and customs and usages of traders.¹⁰⁴ It seems that Prof. Lando has implied the fact that *Lex Mercatoria* could be a part of the applicable law to disputes between states, if some of the key elements of this law is namely the Public International Law and General Principles of Law.¹⁰⁵ At the same time General principles of law, in its usage is what is called a “safety net” for parties to arbitration, where the tribunal would make use of these principles to correct a mistake in the application, for example, the municipal law. It is in other words, the common use of principles of what is fair and reasonable, notwithstanding of the fact that the parties have agreed to a different law to be applied. As Prof. Lando emphasises, the general principles of law in this environment

would include principles such as *pacta sunt servanda*, and the principle that a party may terminate a contract in the case of a breach by the other party. Thus, emphasising the importance of a given commercial contract. As Collier notes, “the choice of general principles of law as the applicable law offers effective insulation from unilateral changes in municipal law, but at the same price of certainty”¹⁰⁶, and it seems that this has been accepted as law in many cases.¹⁰⁷ Could we then deduce from this fact that the *Lex Mercatoria* could be used as a safety net from the application of other legal systems. From the definition provided of *Lex Mercatoria*, by Prof. Lando, it would certainly seem the case that this is so. What this means, I believe, is to be the instant application to a case in order to balance what is fair and reasonable, in the face of protectionist pressures of state legislation. This has been the practice in many cases of commercial arbitration, which in some cases have been high profile, where the ICC, ICSID is the given forum of dispute settlement. However, one has got to question the likelihood of states agreeing to such a usage of law, given the fact that generally states are sceptical of law that is contrary to the protection of its interests. This is specially the case if the parties could argue that the general principles apply notwithstanding the fact that a commercial contract was based on a different law. Thus it is within these limits that the ICSID and other modes of settlement operate, where the situation is even made worse by the fact that the dispute would have to be resolved under these institutional rules. Therefore, given the confusion that could be caused by such a differentiation of the applicable law and the practise of arbitration tribunals, in dealing with the issue of applicable law, I believe that this provides a basis on which the practice of the ICJ, ICSID and the WTO could be discussed in depth.

2.3.2.3 *Enforcement of arbitral awards:*

In contrast to other peaceful mechanisms, arbitration results in a decision being handed by an arbitration tribunal or panel to the parties concerned. As Behrens notes “arbitration results in a decision which is legally binding.”¹⁰⁸ If one is to accept that an arbitration decision is legally binding, what this means is that such decisions should be suitably enforced by the parties concerned. In consequence, the winning party would have to have access to the courts of the losing party and the willingness of such courts to enforce such awards after taking due consideration of national economic and social policy and ensuing laws. However, such access is subject to the freedom of such parties in restricting such access, particularly if a state party is insistent in enforcing its sovereign rights. Thus, the success of arbitration could be judged in making a balance between the autonomy of the state parties to change its laws or enforce such awards and secondly being independent of such state intervention and judicial intervention. As Fox notes “these two bases, the autonomy of the parties and the judicial supervision of the state, as sources of the authority of arbitration are given varying weight in national legal systems in relation to domestic arbitrations.”¹⁰⁹ Here, the capacity of an injured party claiming or enforcing an award is varied according to the degree that the other state is prepared to claim sovereign immunity and protection of public policy.

In international terms and international commercial arbitration, vast improvements made in successful enforcement of arbitral awards was due to the fact that the states were complying with such obligations under the axis of international conventions between states and under the axis of the New York Convention, when one of the parties is a private commercial institution, as in disputes brought to the ICSID forum.¹¹⁰ By this convention for example, the agreement of the

parties to arbitrate is given effect and any awards of the panels are to be executed in any interested state. In effect, an arbitration award given in one state is to be given effect in the local courts of the other states or in an interested third state party. However, the difficulty arises, when one is to balance these international obligations with the national political pressures which “continue to create uncertainty as to the ultimate foundations and source of authority and have produced tension which are still in process of being resolved.”¹¹¹ As in Private international law, in theory, the state divests itself of sovereign immunity and the right to enter into international obligations. Furthermore, according to theory, by agreeing to such convention, a state using its sovereignty agrees to be judged by the terms of the agreement to arbitrate sacrificing its immunity. Thus the states would have to subject international obligations in satisfying the interests of its pressure groups and local interests. As a result of this local political element, the consent of states in enforcing arbitration awards or legislating for such enforcement has been qualified. Furthermore, this qualification of enforcement of arbitration awards has also been mirrored in the opinions of the local courts, who had to deal with local national policy such as nationalisation, anti-trust laws, labour laws etc., which is based on the states argument of state sovereignty. Thus, it is up to the states to enforce such awards based on good faith, in contrast to resorting to legal methods of settling disputes; and this has been further encouraged by the ICJ, where it has held that parties are free to pursue any other non-judicial methods of settlement, while engaging in proceedings before the court.¹¹² Keeping with this fact of state sovereignty and immunity, obstructions have risen to the enforcement of arbitration awards.

The norm of sovereign immunity until recently was supposed to be absolute, in terms of the local courts jurisdiction on arbitration matters.

However, in the recent past, such absolute immunity has been watered down implying the fact that the states engagement in international trade is done with the understanding that by doing so it consents to be judged by the respective local jurisdiction. Hence, the modification of absolute immunity. According to Fox, “the commercial transaction is the best known non-immunity exception.”¹¹³ What this means is that arbitration involving a commercial transaction is subject to local courts jurisdiction, notwithstanding the fact that it could concern a act of state, which is in the realm of public law and further the fact that a government would oppose local adjudication on such acts as a result of it being a part of its public policy. If one takes for example, the UK State Immunity Act of 1978, it provides for non-immunity of a state involved in proceedings in the local courts, which concerns arbitration. According to the provisions of this act, “where a state has agreed in writing to submit a dispute which has arisen or which may arise in arbitration the state is not immune as respects proceedings in the courts of the UK which relate to the arbitration.”¹¹⁴ Similar provisions providing for state immunity are prevalent in other states, where international arbitration involving a state is made subject to the jurisdiction of the local courts.¹¹⁵ On one hand one could say that this is in keeping with the restrictive nature of international obligations that states are parties to, with respect to international dispute settlement. This varies from national constitutions¹¹⁶ extending to regional and inter-regional conventions.¹¹⁷ Notwithstanding these obligations and the commitment on the part of the states, as Delaume notes “the pressure of the state as a party to the dispute gives a particular coloration to the arbitration process.”¹¹⁸ The reason for this is the fact that the state acts in the public realm as mentioned above. Thus states involved in disputes would act not only in a private law realm, but also in the public law jurisdiction. As the ‘protector of the public interests’, the states

legislate for the protection of such interests. Such legislation and practices include anti trust laws as well as protectionist practices such as nationalisation, which goes against the spirit of liberalisation.

Economic development in developed or developing countries and investment in these countries depend on the agreement of the parties with regard to the situation, which facilitates such investment. Thus one part of this equation is the state acting on its prerogative as the public authority to either facilitate such an investment atmosphere or to obstruct for such. This not only is true for such investment and trade but also to dispute settlement and enforcement of settlement methods. Unfortunately, as we have witnessed in the oil concession cases, the case has been in the negative when enforcement was at issue. Moreover, this has been enforced further by the fact that states while having included stabilisation clauses to prohibit breach of contract, has unfortunately done the same arguing immunisation and the right to nationalisation. In the AMINOIL case, the Arbitration agreement noted that “the law governing the substantive issues between the parties shall be determined by the Tribunal...” and further that “the final award of the tribunal shall be binding on both parties who thereby expressly waive all rights of recourse to any court, except such rights as cannot be waived by the law of the place of arbitration.”¹¹⁹ Unfortunately, the same agreement included a stabilisation clause, which AMINOIL argued was all embracing and included nationalisation, which restricted the state practice. But the arbitration tribunal deferred from this view, holding that such a stipulation restricting nationalisation should be limited and that such a nationalisation is within the rights of the state. This was only one example of many other cases before it, where the tribunals had agreed that state sovereignty would prevail, notwithstanding the validity of stabilisation clauses. The tribunals have held that the

nationalisation's were lawful, but entitled the companies to compensation. However, while compensation is some consolation for the companies, it does not differ from the fact that, the states have the opportunity to invalidate any enforcement provisions of an arbitration agreement, by arguing state sovereignty, which negates the proper enforcement of the obligations therein.¹²⁰ Hence, on this perspective, the argument of state sovereignty has negated the satisfactory enforcement of arbitral awards.

Conclusion:

Having discussed the substantive issues with relation to negotiation, mediation and arbitration, it is my view that these settlement mechanisms and substantive issues are effected by protectionism, which is relevant to the discussion of any settlement institution. One such example would be the WTO, where the parties having provided their consent to these institutions, are at the mercy of its regulation, notwithstanding the fact that these states are interested in protecting their own interests. Secondly, I believe that without such discussion of the merits and difficulties that arise with regard to the substantive issues, it is difficult to understand the arguments of the parties which in most cases are shrouded in protectionist economic and social policy, when a international dispute is brought to its attention, at institutional level. Furthermore, these issues are put into further turmoil by the fact that these institutions are under a specific legal basis, thus negating any clout that the parties might have under the notion of party consent or control of the settlement process. It is argued that the legal basis might pressure parties into consent rather than these procedures being obligatory, as seen in general settlement process of negotiation, mediation and arbitration, where the parties have the opportunity to argue sovereignty and protectionist policy making on such a basis. It is on this basis that I

would discuss the substantive issues such as jurisdiction of the institution, applicable law of the process and the enforcement of institutional awards, which relate to institutional settlement procedures for trade and investment. I believe that protectionism, which has had a bearing on general dispute settlement, has a similar effect on institutional procedures, which could have an adverse effect on the protection of state interests, particularly when there exists debate and controversy on a given phrase and the interpretative difficulties with respect to that phrase. It is keeping this perspective in mind that I would proceed to discuss the institutional settlement process, namely the ICJ, ICSID and very specially the World Trade Organization, especially as it is my belief that protectionism does have an effect on the satisfactory completion of these settlement processes, as a result of the interpretative difficulties they individually face, and the contradiction between state consent and state protectionism.

Notes

- ¹ The United Nations, The UN Charter, in The Handbook on the peaceful settlement of disputes between states, (1992), pp155 at 161
- ² Ikle, F.C., How Nations Negotiate, NY: Harper, Harvard University Press. (1964)
- ³ United States-Standards for Reformulated and continental Gasoline, Panel Reports, 35 ILM (1996) pp274
- ⁴ North sea continental shelf case, ICJ Rep.(1969); Fisheries Jurisdiction case, ICJ Rep. (1974)
- ⁵ A number of treaties provide for the inclusion of negotiation as a means of settlement; such as the Manila declaration on the peaceful settlement of international disputes; The Vienna convention of 1975 with regard to the representation of states; The UN convention on the Law of the sea.
- ⁶ Mavrommatis Palestine Concessions (Jurisdiction) case; PCIJ, Ser.A, No 2 (1924)
- ⁷ Kass. S.L., Obligatory negotiations in International negotiations, 3 Yearbook of Int.Law (1965), pp36-72, at 36
- ⁸ Ibid., pp61
- ⁹ The Vienna convention on Succession of States in respect of Treaties 1978; Text in 72 AJIL (1978) 971 & UN Doc A/CONF 80/31 (1978)
- ¹⁰ This was the first draft article recommended by the ad hoc group comprising of 15 states
- ¹¹ Lavelle, R., Dispute Settlement under the Vienna Convention on succession of states in respect of treaties, in 73 AJIL (1979) 407, at 410-411
- ¹² Waldock, C.M., International Disputes: The Legal Disputes, Oxford, London, (1972) at pp77
- ¹³ Cheng, B., General Principles of Law, as applied by International Courts and Tribunals, Stevens & Sons Ltd, London, (1987)
- ¹⁴ Metzger & Co. case (1900), U.S.F.R. (1901), pp262, at 271
- ¹⁵ Lall, A., Modern International Negotiation, (1966), Columbia University Press, (1966) pp290
- ¹⁶ Ibid. pp290-291
- ¹⁷ Ibid., pp296
- ¹⁸ In the context of the WTO Dispute Settlement Mechanism, there have been many cases where the parties concerned have backed down from its original stance or have withdrawn previous demands. The U.S. Vs The EC on Citrus; South Africa Vs Canada on Gold Coins; The EC Vs The U.S. on wine & Grape products are to name a few. But one among many high profile cases was the Canned Fruit case, involving the U.S. and the EC, where a complaint was made by the US against the EC programme of subsidising domestic producers. After the report was debated the EC refused to permit adoption, compelling the US to withdraw the request from the agenda of the GATT. See AJIL (1994) 480
- ¹⁹ For Text of Torres Treaty; see 18 ILM (1979) 291
- ²⁰ Burmester, H., The Torres Strait Treaty: Ocean boundary delimitation by agreement, in 76 AJIL (1982) pp321
- ²¹ Ibid. pp328
- ²² Art.22 & Art.23 of the GATT/WTO could be included in this category. Furthermore; with regard to co-basins, of the 253 treaties on the non-navigation included in the volume prepared by the UN in the 1960s; 16 contained an explicit provision for a duty to negotiate, 18 agreed to undertake negotiation.
- ²³ 36 LNTS 77
- ²⁴ Bourne, C.B., Procedure in the development on International drainage basins: The duty to consult and to negotiate, in Can. Yearbook of Int.Law (1972) pp212, at 213-214
- ²⁵ Ibid. pp214
- ²⁶ Supra note 7 at pp54-55
- ²⁷ Northedge, F. & Donelan, M.D., International Disputes: The political Aspects, London (1971), pp279
- ²⁸ Ibid. pp280
- ²⁹ Ikle, F., How Nations Negotiate, NY, Harper, Harvard University, (194) pp133, F.N.9
- ³⁰ Colosi, T., The Iceberg Principle: Secrecy in Negotiation", In Bendahmane, D.B. & McDonald, J.W., Perspectives on Negotiation; four case studies and interpretations, Foreign Service Institute, US Dept of State, (1986)pp243-261
- ³¹ Ibid. pp135
- ³² Lubman, S., Mao and Mediation: Politics and Dispute Resolution in Communist China, in California Law Review, (1967),pp1284 at 1297
- ³³ Art.4 and Art.8 of the Hague Convention for the Pacific Settlement of International Disputes, PCA, Basic Documents, pp17

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- ³⁴ Merrills, J.G., *International Dispute Settlement*, 3rd Edition, Cambridge University Press, (1998), pp27
- ³⁵ Hague convention for the Pacific settlement of Int. Disputes of 1899 and 1907, in United Nations, *Handbook on the settlement of disputes between states*, The United Nations, Geneva. (1992)
- ³⁶ Ibid. pp41
- ³⁷ Ibid. at pp42
- ³⁸ One such example of the preventive function was the situation that arose in Palestine between 1945-49, where after the proclamation of the Israel state on the 15th of May of 1948. As a result, the armies of the majority of Arabic states attacked Israel. The preventive function was explained here, where the UN mediator, Count Folke Bernadotte, managed to persuade the two sides to accept a truce for four weeks, during which time he sought to negotiate exchanges of territory and to form joint councils, and a proposed cease-fire.
- ³⁹ Supra note 27, at pp297
- ⁴⁰ Ibid. pp297
- ⁴¹ Article 15 of the Hague convention of 1899
- ⁴² Supra note 27, at pp299
- ⁴³ Ibid. pp132-134
- ⁴⁴ Ibid. pp133
- ⁴⁵ Supra note 34, at pp33
- ⁴⁶ Donelan, M.D., *International disputes: Case Histories 1945-1970*, Europa Publications, London. (1973) pp73
- ⁴⁷ Merrills, pp32
- ⁴⁸ Rubin, J. & Sander, I., Culture, Negotiation and the eye of the beholder, in 7 *Negotiation Journal* (1991), pp249-254
- ⁴⁹ Brown, B., Face saving and face re-struction in Negotiations, In: Druckman, D., ed. *Negotiation: Social, Psychological perspective*, Beverley Hills California, pp275
- ⁵⁰ Cohn, R., Cultural Aspects of International Mediation, In: Bercovitch, I., ed., *Resolving International conflicts: The theory and practice of mediation*, London, (1992) pp166
- ⁵¹ Toomey, T., Intercultural conflict systems: A face-negotiation theory, In: Kim, Y., eds, *Theories in International communication*, Beverley Hills, California, sage. (1988)
- ⁵² Jerusalem Post, 1985: 5; Wolf Blitzer interviews Jimmy Carter; March 29
- ⁵³ Supra note 27, at pp299
- ⁵⁴ Zartman, I.W. & Touval, S., International mediation; conflict resolution and power politics, in *Journal of Social Issues*, 41 (1985), pp27-45 at 32
- ⁵⁵ The United states and Russian involvement in Rhodesia
- ⁵⁶ Donelan, D.M., *International Disputes: Case Histories 1945-1970*, (1973). pp71-73
- ⁵⁷ ibid. note 32, at pp33
- ⁵⁸ Merrills, J.G., *International Dispute Settlement*, 3rd Edition, Grotius Publications Ltd, Cambridge, (1998) pp33
- ⁵⁹ Touval, S., & Zartman, I.W., *International Mediation in theory and practice*, Westview press, Colorado, (1985) pp34
- ⁶⁰ Slim, R., small states mediation in International relations In: Bercovitch, I., ed., *Resolving International conflicts: The theory and practice of mediation*, London, (1992), pp206
- ⁶¹ Lieb, D., Iran V Iraq at Algiers, 1975, In: Touval, S. & Zartman, I., ed., *International Mediation in theory and practice*, (1985), pp67
- ⁶² Freedmon, L., *Signals of War: The Falklands conflicts*, London (1990), pp35
- ⁶³ Carnevale, P.J. & Arad, S., Bias and Impartiality in International mediation, In: Bercovitch, I., ed., *Resolving International Conflicts*, London (1996), Ch.2
- ⁶⁴ Donelan, at pp307
- ⁶⁵ Donelan & Grieve, at pp271
- ⁶⁶ Merrills, J.G., *International Dispute Settlement*, 3rd Edition, Grotius Publications, Cambridge (1998); Mandell, B., The limits of Mediation: Lessons from the Syria-Israel Experience; 1974-1994, In : Bercovitch, I., ed., *Resolving International conflicts*, (1996), pp129
- ⁶⁷ Supra note 58, at pp41
- ⁶⁸ Donelan & Grieve, at pp120
- ⁶⁹ Ibid. pp49
- ⁷⁰ Touval, S. & Zartman, I., *International Mediation in theory and practice*, (1985) pp268

- ⁷¹ Art.15 & Art.37 of the UN Charter. See, Goodrich, L.M., *Charter of the United Nations*, Stevens, London (1949)
- ⁷² Yearbook of the International Law Commission of 1953
- ⁷³ Behrens, P., Alternative methods of dispute settlement in International Economic relations, In: Pertersmann, E.U., ed., *Adjudication of International trade disputes in International and national economic law*, Fribourg University Press, Fribourg, (1992) pp27
- ⁷⁴ Gray, C., Developments in Dispute settlement: Inter state arbitration since 1945, in 63 BYBIL (1992), pp97-134 at 98
- ⁷⁵ Rann of Kutch Arbitration, 50 ILR (1976) at pp2
- ⁷⁶ Supra note 58 at pp101
- ⁷⁷ 74 ILR (1987) 256
- ⁷⁸ ECPSD of 1957; Treaty establishing the Eastern Caribbean states; Text in 20 ILM (1981)1166
- ⁷⁹ 50 ILR (1976) 530
- ⁸⁰ Nicaragua Vs US (jurisdiction and Admissibility), ICJ Rep.1984, 392 at 439
- ⁸¹ Behrens, P., Alternative methods of dispute settlement in international economic relations, In: Petersmann, E.U., ed. *Adjudication of International trade disputes in international and national economic Law*. University Press, Freiburg (1992), pp29
- ⁸² Waldock, C.M., *International Disputes: The Legal aspects*, Europa Publishers, London (1972), pp101, F.N.1
- ⁸³ Fox, H., Arbitration, In : Waldock, C.M., ed., *International Disputes: The Legal disputes*, (1972), pp101-127
- ⁸⁴ The exception to this rule is the panel procedures provided under the WTO dispute settlement Understanding (DSU), where the Secretariat is allowed to propose panel members. Prior to the innovations made by the 1994 Understanding, it was the case where there were long delays as a result of the parties not agreeing over the identity of panellists. However, after 1994, in such a event that the parties do not agree, the WTO Director General may appoint the panel on his or her own authority, in consultation with the chairs of the DSB and the relevant council, which effectively takes away from the parties the option of obstructing the proceedings of the panel procedure.
- ⁸⁵ Maritime Delimitation case, 77 ILR (1988) 642
- ⁸⁶ Collier, J. & Lowe, V., *The settlement of Disputes in International law: Institutions and Procedures*, Oxford University Press, (1999) pp219, F.N.138
- ⁸⁷ Article 8 of International chamber of Commerce rules; Ar.10(2) of UNCITRAL model Rules
- ⁸⁸ This award was unpublished. The review is based on writings on the case
- ⁸⁹ Suratgor, D., The Sapphire arbitration award, he procedural aspects: A report & a critique, 3 Colum. J.Trans. L. (1964), pp152
- ⁹⁰ Art. 11 (1) of the Petroleum Law of 1957, which is reflected in the Sapphire Agreement, Art. 24(1)
- ⁹¹ Art.12 of the agreement noted that the second party to the agreement should inform the NIOC of its actions through the IRCAN. But unfortunately, the NIOC had not nominated its members to the IRCAN, hence delaying its registration, which was of no fault of Sapphire International.
- ⁹² UNICITRAL Arbitration rules; Art. 6 & Art. 7
- ⁹³ Westland Helicopters Ltd. Vs 1. Arab Organisation for Industrialisation, 2. United Arab Emirates, 3. Kingdom of Saudi Arabia, 4. State of Qatar, 5. Arab Republic of Egypt, 6. Arab British Helicopter company, 23 ILM 1984, pp1071-1142
- ⁹⁴ Ibid. pp1099
- ⁹⁵ Ibid.
- ⁹⁶ Crook, J.R., Applicable law in International Arbitration: The Iran-US claims tribunal experience, in 83 AJIL (1989), F.N.27
- ⁹⁷ Brownlie, I., *Principles of Public International Law*, Clarendon Press, Oxford, (1990), Ch.3, pp59
- ⁹⁸ See Agreement to Arbitrate the Boundary concerning the Taba Beachfront, Egypt-Israel (1986), text in 26 I.L.M. (1987) pp1
- ⁹⁹ Serbian Loans, PCIJ, Ser.A, no.20, 41 (1920)
- ¹⁰⁰ 3 RIAA 1949, pp1903
- ¹⁰¹ PCIJ, Ser.A., no20 (1920) 41
- ¹⁰² Goldman, B., The Applicable law: General principles of law- The Lex Mercatoria, In: Lew, J., *Contemporary problems in International Arbitration*, Dordrecht, Nijhoff, (1987) pp113-125
- ¹⁰³ Lando, O., The Lex Mercatoria in International Commercial Arbitration, in 34 ICLQ (1985), pp747-768 at 747
- ¹⁰⁴ ibid. at pp750

- ¹⁰⁵ Prof. Lando provides an example of a statement made by an arbitration tribunal of the ICC, in applying the General Principles of Laws as a part of Lex Mercatoria. See ICC Award No 3327/81 (1982) Clunet 973: "Le Tribunal arbitral estime qu'en vertu des principes généraux du droit faisant partie de 'lex mercatoria'..."
- ¹⁰⁶ Collier, J. & Lowe, V., *The settlement of disputes in International law, Institutions and Procedures*, by J. Collier & V. Lowe, Oxford University Press, London (1999), Ch.8, pp190-273 at pp245
- ¹⁰⁷ See, e.g., *Deutsche Schachtbau-und Tiefbohrergesellschaft mbH vs R'As al-Khaimah National oil co. (Rakoil)* (1990) 1AC 295; *Societe Pabalk Ticaret Sirketi Vs Societe anon, Norsolor* (Vienna Supreme Court, 1982) (1984) 9 *Yearbook of commercial Arbitration* 159
- ¹⁰⁸ Behrens, P., *Alternative methods of dispute settlement in international economic relations*, In: *Petersmann, E.U., Adjudication of International Trade disputes in int. & National Economic Law*, by E.U. Petersmann (1992), pp29
- ¹⁰⁹ Fox, H., *States and the undertaking to arbitrate*, in 37 ICLQ (1988), at pp1
- ¹¹⁰ New York convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (1959) U.N.T.S. no 47-39
- ¹¹¹ Supra note 109, at pp2
- ¹¹² *United States, Diplomatic and Consular Staff in Tehran*, I.C.J.Rep. (1980) pp3. In this case the courts held that the states involved were free to utilise the twin jurisdictional facility of the UN and refer the case to the Security Council, while concurrently pursuing the judicial option. See also *Aegean Sea Continental Shelf case*, I.C.J.Rep. (1978) 3, at 12
- ¹¹³ Ibid., pp11
- ¹¹⁴ UK State Immunity Act 1978, Article 9
- ¹¹⁵ FSIA 1976; ss 1605(a)(1)
- ¹¹⁶ Art. 24 of the Constitution of the FRG for example, provide that it submits to "general comprehensive obligatory international arbitration" in resolving inter-governmental disputes.
- ¹¹⁷ Art. 3 of the Charter of the OAU, Art. 22 & Art. 23 of the GATT, Art. 38 of the West African Economic Community Treaty 1972 etc.
- ¹¹⁸ See Delaume, G., *ICSID Arbitration & the courts*, in 77 AJIL (1983) 784 at 785
- ¹¹⁹ Art.3(2) and Art.5 of the arbitration agreement, 21 ILM (1982), pp980
- ¹²⁰ While in this case, the company argued that it would pay the state \$5M a year, the state in turn argued that its final offer to the company is to pay it \$7.5M. This was the loss that the company incurred by the fact that the state was able to argue its case for sovereignty.

Chapter Three

The Dispute Settlement methods of The International Court of Justice, The International Center for the Settlement of Investment Disputes

INTRODUCTION

As mentioned in the previous chapter, the attitude of individual parties towards international dispute settlement has been varied, as a result of the protectionist attitudes of the parties involved in international disputes. It was these attitudes and policies, which guided the parties' approach towards Arbitration, Negotiation and Mediation as settlement mechanisms of peaceful nature. As a result, these mechanisms in general have faced numerous objections and obstructions with regard to issue such as jurisdiction, applicable law and enforcement. It is within this umbrella of general peaceful dispute settlement processes that international dispute settlement for International Trade & Investment has emerged in the form of the International Court of Justice, the International Center for the Settlement of Investment Disputes and the World Trade Organization, among many.

Therefore, in the context of this chapter I would deal with the ICJ as the prime institution of international judicial settlement. The ICJ is based on consent of the individual state parties. Furthermore, it is a settlement process of disputant state parties, not involving individuals. However, the emphasis on 'consent' was to be taken with regard to the protectionist thinking of the states involved, especially as these policies and thinking influenced the party's standing on issues such as jurisdiction, applicable law

and enforcement. Furthermore, I would also take into account this dichotomy in thinking of the parties involved with regard to which type of disputes that should be within the jurisdiction of the courts; which has caused debate as to whether the ICJ is suitable for the settlement of trade and investment disputes. Furthermore, the discussion would also focus on the enforcement of ICJ decisions, particularly taking into account the jurisdictional restrictions imposed on such ICJ enforcement, which has to be balanced with the interests of states, who are keen on protecting their economic and political interests.

Secondly, I would focus my attention on the International Center on the Settlement of Investment Disputes (ICSID), which I visualize as a “second tier” settlement process, where the state party’s monopoly as disputants has been broken. The norm of the ICJ procedures are emphasized in the fact that state parties were recognized as being the subjects of public international law. However, with the increase in international investment and the increase in interests of the parties concerned, it necessitated a better mechanism, which encapsulated these interests. This was of particular importance in the field of international trade and investment, given the fact that states were inclined to be protectionist when it involved an interest of an economic nature. This was specially the case, when these disputes involved developing countries and multinational corporations, in the field of international investment, where the interests of the respective parties were in great contrast to each other. It is my belief that one has to deal with this kind of dispute, if we are to make a satisfactory comparison with the WTO, which is concerned with the public international law sphere. Thus my interest in the ICSID and its procedures.

Therefore the ICSID as a settlement mechanism in the field of international investment is interested specifically in the interests of individual investors and the member states of the ICSID convention. Therefore, within the ambit of international law, the interests of individuals, which was not the recognized norm of international relations under the realm of the above mentioned ICJ. Therefore, while discussing this exception in the realm of international relations with regard to ICSID and its beginnings under the ICSID convention, I would make an effort to apply this in important issues such as Jurisdiction; applicable law and enforcement with regard to the inherent protectionism of inter state relations. This I believe not only has a relevance to the interests of individual investors but also of the developing countries, especially as these investors operate under the legal framework of the individual states. Hence my main focus would be on the ensuing problems as a result of this objections and obstructions, notwithstanding the legal backing of the ICSID convention. I believe that it is of importance to deal with these issues at present, given the fact that I would deal with the WTO settlement process in the future, as a comparison to these settlement methods. This is particularly the case, as there are differences with respect to the attitude taken by states towards settlement in the public and private international law spheres, and secondly The differences in the applicable law to such disputes arising at the different levels, and thirdly, the bearing that protectionist economic policy has on these disputes.

3.1 The International Court of Justice dispute settlement and substantive issues:

In modern legal history, the beginnings of third party dispute settlement or arbitration, could be tracked down to the Jay treaty of 1794 between the US and Great Britain. Here the parties decided to settle disputes, which arose by the composition of mixed commissions. Though this method could not be emphasized as non-partial third party arbitration, the commission was intended to function as tribunals. Moving on from this the Geneva tribunal case was a further step in the ladder towards third party judicial settlement until the promulgation of the Hague Treaties of 1899 and 1907.¹ While not dwelling too much in the pre-1899 history of international third party settlement, I would concentrate on the gradual development of the ICJ system within the political spectrum of the United Nations.

The parties to the first Hague conference were interested in peace and disarmament, that so much so, it ended up discussing dispute settlement. Furthermore the 1899 treaty conference, in particular concentrated on the gap filling of the international arbitration system, where it necessitated the reduction of political obstacles in reaching agreement on the composition and procedure of arbitral tribunals. Thus, the 1899 and 1907 conventions made provision for the institution of the Permanent Court of Arbitration. While, according to Rosenne "...the institution is misnamed, for it is neither a court nor permanent"², it was nonetheless a further step in the progress of third party dispute resolution; where the contracting parties nominated their representatives to sit on the panel of arbitrators to decide a given case. One has to emphasize these first steps in particular, bearing in mind that in later years, the PCIJ and its successor, the ICJ involved

identical methods of settlement. This is emphasized by the comments made by, then contemporary political figures, who opined that third party settlement should be used worldwide and be fair on all parties concerned. As Secretary of State Root once said, “these judges...should be so selected from the different countries that the different systems of law and procedure and the principle languages shall be fairly represented.”³ It seems that these principles have been a barometer of the development of the UN Charter and the ICJ Statute. However, while the PCOA, was developed as a first step; it was not without its problems, as a result of the political thinking and protectionism in dispute settlement, as shown in the previous chapter. Keeping with these sentiments the major problem with the PCOA was that it was non-obligatory. As Art.38 of the Hague Convention states “..In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the Contracting powers as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle.”⁴ But, having said that, it was not obligatory to use this system, thus emphasizing the consent of parties concerned, and this situation was further complicated by the fact that at that particular time there existed no permanent international machinery to enforce such decisions taken. Nevertheless, notwithstanding these problems faced by parties concerned, the great impetus taken by the states from the establishment of the PCIJ was evidenced in the amount of treaties concluded and the use of this mechanism by these state parties. Thus this encouraging move towards institutionalization of dispute settlement, via judicial and arbitral methods was brought a step forward when the League of Nations was established through the

Peace treaty of 1919 and the PCIJ was inaugurated in 1922. The Council of the League of Nations was given the responsibility to formulate plans to establish such an institution.⁵

After reports being presented to the assembly of the League and further drafts being presented by a committee of jurists to the Assembly; the Statute of the PCIJ was adopted as being officially the “constitution” of the international court, thus providing it with the necessary independence from the political institutions.⁶ Thus, as the official publication of the ICJ stated “ The PCIJ was thus a working reality”⁷, where the obligations of the parties in resolving disputes, once they had accepted the jurisdiction of the court was implemented, according to set rules of procedure; by a permanently instituted mechanisms. The Court acted in such a judicial manner that as Rosenne states “the court never became tainted with the ‘Geneva spirit.’”⁸ What this emphasized was the fact that the court was independent of the other institutions of the UN system, notwithstanding the fact that there existed a relationship on a administrative level. The court was strictly built to deal with the legal issues of a given dispute, notwithstanding the political overtones of that dispute at hand. This emphasized the fact that parties need not necessarily be a party to the League, but could be a party to the statute, thus allowing it to make use of the judicial expertise of the court. As we would see in the discussion of the ICJ, this independence of the court has been accepted as a cornerstone of its existence. From the statistical evidence available, one could say that the PCIJ was a step-stone in the working of the ICJ with regard t its judicial involvement.⁹ Furthermore, while noting the fact that eminent judges have doubted its significance in the settlement of disputes other than being a ‘bullwork of peace’, it is my opinion that notwithstanding the little work that was done, it has provided the ICJ with the necessary impetus to deal with

the majority of international disputes of various nature. To this I turn my attention at present.

Notwithstanding the fact that the activities of the PCIJ were temporarily halted as a result of the Second World War; these court procedures were revived under another independent judicial organ capable of resolving transnational disputes, namely the ICJ. As Schlochauer points out “in view of the importance of the role that the PCIJ has come to play, the opponents of the ‘axis powers’ were in agreement during the latter part of World War 2 that a system for the peaceful settlement of disputes should be set up after the war.”¹⁰ The emphasis here was laid on the peaceful settlement of disputes; which obviously involved negotiation, mediation and arbitration. However, it was also stressed that there should be a judicial organ capable of overseeing the legal aspects of a given dispute. Thus the Dumbarton Oaks proposals were agreed to by the representatives of the United States-United Kingdom-Soviet Russia-China¹¹, and was further taken for discussion at the San Francisco and Yalta conferences respectively. At that juncture, though the proposals for compulsory jurisdiction was rejected, the principle of consent of states was accepted as being the basis of its institution, with the idea of providing a continuation of the PCIJ, though the UN had no connection or proceeded from the League of Nations. Having said that, the ICJ itself is not considered to be part of the other political organs of the United Nations. On the other hand the ICJ statute itself is considered to be an integral part of the UN charter, but not incorporated in it; thus facilitating access to the courts for states who are not members of the UN. While this emphasized the legal character of the court, it also emphasized political character of the UN, hence allowing states the discretion to be parties to either or both parts of the United

Nations. This character of the UN and the atmosphere in which the ICJ works was reaffirmed in the *Reparation case*, when it was said, “it must be added that the organization is a political body charged with a political task of an important character.”¹² In contrast however, Art.92 of the Charter has promulgated the legal character of the ICJ, in order to define the boundaries of the respective institutions. What this means is that the parties to the dispute could argue the legal aspects at the ICJ, without being hindered in pursuing the political arguments at the political institutions, even if the dispute involves any political decision making aspect. As the ICJ stated in one case “ a choice amongst them could not be based on legal considerations, but only on consideration of practicability or of political expedience; it is not part of the courts judicial function to make such a choice.”¹³ However, though the ICJ, as with the PCIJ at the earlier instance, is endowed with dealing with the legal issues; on the other hand all administrative details relating to the ICJ is administered by the political institutions of the UN. One important administrative function in particular, performed for the court by the political institutions of the UN is the election of judges.¹⁴ The ICJ is composed of 15 judges, selected irrespective of their nationality. The General Assembly and the Security Council of the UN elect these judges. Furthermore, the salaries of the judges and the conditions under which they are given retirement pensions are fixed by the UN General Assembly. Under Art.16 of the Charter, it is noted that the judges may not “exercise any political or administrative function or engage in any other occupation of a professional nature”, with the intention of fulfilling the independent function of these judges. However, as we have witnessed in the Nicaragua case, judges in most cases are inclined to be politically biased when the issue concerns their nation’s interests, notwithstanding the charter provisions,

thus emphasizing the political inter dependence of the ICJ, as a international dispute settlement mechanism.

Hence, having identified the inter-dependence between the legal organ of the UN and the political institutions, I would at present turn my attention to two contentious areas with regard to ICJ dispute settlement. The first issue is whether the parties have the right to seise the court for the settlement of the dispute; which in other words is whether the court has “jurisdiction” to resolve such disputes. The second issue is whether, after having resolved the issue of jurisdiction, the court decisions could be enforced via the state parties, who in many cases are inclined to argue for the protection of their political independence, as seen in the above chapter with regard to the participation of parties in peaceful settlement procedures and the enforcement of policies which involve the political and economical aspects of protectionism.

3.1.1 *Jurisdiction of the ICJ and relevant issues:*

The court’s power to decide disputes are defined in the ICJ statute and known as the court’s “contentious jurisdiction.”¹⁵ As mentioned above, only states could be parties to this “contentious jurisdiction”, thus restricting any opportunity of any other subject of international law being party to a dispute, with access to ICJ facilities. According to the legal basis of the court’s jurisdiction “all cases which the parties refer to it and all matters specially provided for in the charter of the UN or in treaties and conventions in force”¹⁶, could be brought to the attention of the court. This, as I would like to emphasize, does not restrict the court’s competence to deal with political disputes per se. To this issue I would return later. There are various points at

which the parties could seize the court, with of course the consent of the parties, in keeping with the above mentioned third party dispute settlement. As Schlochauer mentions “jurisdiction can be accepted *ante hoc*, *ad hoc* and *post hoc*.”¹⁷, where the parties by consent could first, accept the compulsory jurisdiction of the court by treaty¹⁸, agreed prior to any dispute arising. Secondly when the dispute arises, by agreement or by declarations of the parties.¹⁹ Finally seising the court unilaterally, without agreement, allowing the other party to accept such jurisdiction under the doctrine of “*forum prorogatum*.” This is similar to the municipal legal procedure than international peaceful settlement of disputes as provided by the UN Charter. As the Charter notes “the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, arbitration, judicial settlement...or other peaceful means of their choice.”²⁰ This emphasizes consent of parties in recourse to any method of settlement. On this account one could say that on the basis of the imbalance of political power of the developing countries and the developed nations for example; this process of unilateral complaints could be beneficial to the developing country’s interest. However, having mentioned a technical benefit to a state on presenting their case to the world court, there also seems to be debate as to the interpretations on the jurisdiction of the ICJ.

First, with regard to the cases that could be presented to the court; it is said that the court has jurisdiction over cases, which the parties refer to it. As the ICJ statute states “the jurisdiction of the court comprises all cases which the parties refer to it and all matters specially provided for in the charter of the UN or in treaties and conventions in force”²¹, which obviously does not distinguish between legal and political

disputes, creating a debate on the competence of the court. But, this provision has been overridden by Art.36 (3) of the UN charter which states "...in making recommendations under this article the security council should also take into consideration that legal disputes should as a general rule be enforced by the parties to the ICJ in accordance with the provisions of the statute of the court."²² This provides a general rule that only legal disputes are "justiciable", which has been confirmed by the ICJ in cases presented for its decision.²³ However, the problem arises in the fact that; many disputes brought to the attention of the ICJ is not clear cut in the sense that it would in many cases be a combination of legal and political facts, as we have witnessed in many economic fact related disputes. This is mirrored by Schlochauer who notes, "even legal disputes can have political elements that so strongly affect the vital interests or the reputation of a state that it is reluctant to refer the matter."²⁴, meaning that any economic activity undertaken by a state also involves the practice of states on the basis of its right of sovereignty. This fact is emphasized in many a case, where the defendant state argues that the dispute involves political factors, which rejects the competence of the court. If I may concentrate on the cases brought before the ICJ with regard to the treatment of aliens, one could see that it involves legal rights and obligations and political facts, which are intertwined. One may question my reasoning in concentrating on the treatment of aliens. However, the fact remains, as mentioned by Prof. Jaenicke that " both courts have never had the opportunity to pronounce themselves on such important legal principles of international trade as most favoured nation treatment and non-discrimination."²⁵ This is especially the case, if one takes trade to mean international transport, export of goods etc. Thus, the only path in which the ICJ has got involved in solving commercial disputes between

parties is via its involvement in the “treatment of aliens” cases, which however involves political decision making by the respective state on aspects such as the protection of sovereign rights and the right to reserve its national jurisdiction over such issues, which in themselves are legal rights. One such example was the *Anglo-Iranian Oil Co. case (UK Vs Iran)*,²⁶ where the Iranian government argued that the treatment of the British company was under its jurisdiction and an exercise of its sovereign rights. The courts noting that the dispute concerned a alleged violation of international law by the breach of the concession agreement and a denial of justice, held that “it cannot be accepted a priori that a claim based on such a complaint falls completely outside the scope of international jurisdiction.”²⁷ But having looked at the circumstances of the case, the court rejected the argument that the individual company had standing before the international court, thus implying that investing companies have to seek relief in the domestic courts of the invested state. Unfortunately, it would seem that this is the final conclusion that the courts had come to in most cases that concerned the protection of “alien” interests and diplomatic protection of investing companies.²⁸

This was further emphasized in the *Nicaragua case (US Vs Nicaragua)*²⁹, which provided for the different outlook that different countries have on a given dispute, which also gives one a idea of how difficult it is for the court to decide on the interpretation it has to give to a dispute. In May 1984, the court granted an interim order rejecting the US request for termination of proceedings initiated by the Nicaraguan government. Thus pending a final decision the court ordered the US government to “immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and in particular the laying of mines.”³⁰ From the US

point of view, this order accompanied by the addendum was more political rather than being legal and this was an overreaching of its jurisdiction, on the part of the ICJ. As the department of state said “...the conflict in Central America...is not a narrow legal dispute; it is an inherently political problem that is not appropriate for judicial resolution. The conflict will be resolved only by political and diplomatic means- not through a judicial tribunal. The International Court of Justice was never intended to resolve issues of collective security and self defense and is patently unsuited for such a role.”³¹ This attitude taken by the US not only emphasized the fact that the US did not recognize the ICJ as being the correct institution to deal with what it considered to be political facts and disputes, but also provided a insight into the protectionist nature of states who indulge in ICJ dispute settlement. More importantly it presents a prime example of the diversification in thinking, on the part of the disputing parties with regard to the jurisdictional capacity of the ICJ, and the fact that these perceived economic activity also involves a political decision making factor. In my opinion this problem arises as a result of there not being any *clear cut definition of what is and what is not a legal dispute*, especially when a given dispute involves a mix of political and legal aspects. One may have to question this issue as either being a oversight on the part of the construction of the statute or being a deliberate attempt to leave the judges with discretion to decide on a given dispute.

According to McWhinney there are different judicial policies, which the courts make use of justifying the political exceptions to their jurisdiction.³² These judicial policies applied by the courts in justifying a “political questions” exception to their jurisdiction are threefold. First, the courts would use judicial policy if they feel

that the issues of debate are technically difficult or difficult to comprehend for the ordinary judicial process. Secondly, the courts justify their “political question” exception on the basis of a consideration towards the constitutional bases of the other executive and legislative institutions. According to McWhinney, “The contemporary trend with the International Courtis...toward a new notion of complementarity and of positive cooperation in common World Community problem solving.”³³ The third judicial policy is based on the fact that the particular issue before the court may be simply too big in political terms, for the judges to be able to handle it without themselves becoming embroiled in partisan political controversy, thus making exceptions, in making “political questions” a part of its jurisdiction. My question is that, if this were the case whether this would clear the path for states to bring cases with political facts to the attention of the ICJ, as Nicaragua did in the above case? McWhinney argues that if it accepted that most disputes are inherently political as well as legal, then “the criteria for separating the justiciable from the non-justiciable, the exercise of Court jurisdiction from its non-exercise, become essentially pragmatic in character.”³⁴ Does this mean that the court would be under obligation to deal with disputes which has a combination of legal and political aspects, in contrast to what has been said in the *Nuclear Weapons* case for example? But at present this avenue has not been consistently applied by the ICJ, supplemented by the differences in how states look upon at a given dispute. Given the nature of most disputes which involve a interest of a developed and developing states, and have a political aspect to it; one would have to wonder whether a developing country’s interest would be protected, given the imbalance in political and economic capacity, and the protectionist attitudes of states concerned.³⁵ Nevertheless, having said

that, one has to appreciate the positive side of the ICJ cum Security Council jurisdiction, which to a certain extent negates the obstructive element of the legal dispute requirement under the UN charter and the ICJ statute law. There is no obstacle to the simultaneous submission of a dispute to the Security Council and the court, provided their individual functions are respected. This parallel jurisdiction is in itself unique, especially as most other settlement mechanisms have either methods of peaceful settlement, namely negotiation, mediation and conciliation or judicial settlement as a last resort of settlement. The benefit of these parallel methods is more obvious, if a developing country's interest is at stake; in particular if the politically more powerful nation decides to withdraw its consent to ICJ jurisdiction.³⁶ As the court recalled in *the Nicaragua case (US vs Nicaragua)*, "...the fact that a matter was before the Security Council should not prevent it being dealt with by the court and that both proceedings could be pursued *pari passu*"³⁷, obstructing to any measures of reservations as mentioned above. Without involving myself deep into what would be called internal politics of the Security Council, one could say that this dual opportunity is favorable towards the interests of the developing countries. This is specially the case; as the court is, it seems, prepared to resolve any legal questions, in order for the larger political questions to be resolved by peaceful methods, as discussed in the previous chapter.³⁸

While dealing with the issue of jurisdiction, I would briefly deal with the question of compulsory jurisdiction, which has given cause for debate. Ar. 36(2) of the Statute states that "the state parties to the present statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the court."³⁹ What this

specifically means is that state parties could accept the jurisdiction & competence of the ICJ, with or without the consent of other parties to a treaty, prior to any dispute arising. Once the states have accepted the jurisdiction of the ICJ without reservation, these same states could invoke the jurisdiction of the court unilaterally as a result of the previously made declaration. However, this is all well and fine, as long as it is theory. But in contrast, when one concentrates on practice, it paints a different picture, which undermines the above mentioned theoretical arguments. As Schlochauer notes, states may exclude from the compulsory jurisdiction of the court, legal disputes which affect their vital interests, which on the other hand could be the very issue that the other state is depending under action brought to the ICJ. This practice of reservations has given cause for concern and for extensive scrutiny, when states make or try to make reservations once a dispute has risen.⁴⁰ As the defense advisor to the US government, Judge Sofaer concedes “it was the American government’s unhappiness with the ICJ preliminary rulings in Nicaragua, in 1984 that provided the chief motivation for the administration reviewing our acceptance of the court’s compulsory jurisdiction.”⁴¹ This, in my opinion is a rather strange justification by an imminent personality of Judge Sofaer’s stature, of making reservations, which gives credence to the fact that political decision making affects economic activity based on protectionism that results in dispute settlement. Furthermore, this also shows the supposition of the US thinking, in that it assumes first, that an ICJ judgment should be favorable to itself, rather than being impartial and secondly, that protection of its local interests should be given priority over others. With regard to the developing country’s interests, on which I am concentrating at present; one would have to question the practical security that developing countries gain by entering

into treaties with either the developed world or for that matter, the other developing countries. This is particularly true, if these countries try to enforce reservations when they like, at the time they like; arguing that a given dispute is not to be tried under ICJ jurisdiction.⁴²

3.1.2 *Enforcement of ICJ decisions:*

Having briefly treated the issue of jurisdiction, it is my contention that the enforcement of such ICJ decisions gives further cause for concern, notwithstanding the fact that such decisions are consented to by state parties, given the fact that states are naturally inclined towards the protection of its own interests. With regard to compliance and enforcement of ICJ decisions, Art.94 of the charter and Art.59 of the statute are key when emphasizing the extent of the state obligation. Art.94 reads as “each member of the UN undertakes to comply with the decision of the ICJ in any case to which it is a party”⁴³ and “ if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the court, the other party may have recourse to the Security Council.”⁴⁴ Furthermore Art.59 of the Statute states that “the decision of the court has no binding force except between the parties and in respect of that particular case.”⁴⁵ These two articles coupled with Art.36 of the statute emphasizes the remedial competence of the ICJ, and how successful such competence might be, specially if one takes into account the politically charged atmosphere in which such remedies are to adhered with. The decisions of the ICJ are legally binding, which means that since the states have consented

to the jurisdiction of the ICJ, it is liable to adhere or accept its decisions, without exception.

However, as one could foresee, not many states would be willing to accept such decisions; in many cases arguing that such issues are within its internal jurisdiction or that the ICJ has overridden its jurisdiction in entertaining political rather than legal disputes. It follows from the fact that the decision is binding on the state as such that it is binding upon all the organs of the state, meaning that the state has to prove that it is not in a state of non-compliance, but that it has complied with the judgement to the extent that compliance is possible. However, if non-compliance arises, it is even made worse by the fact that in such situations, the state which is aggrieved, has no other judicial remedy to fall back on. This is particularly the case, as the statute provides that “the judgment is final and without appeal in the event of disputes as to the meaning or scope of the judgment, the court shall construe it upon the request of any party.”⁴⁶ Thus the states only have recourse to the Security Council, if state parties do not adhere to recommendations of the ICJ, apart from actions taken under the basis of *self help*.⁴⁷ Under Art.39 to 42 of the UN Charter, the Security Council is provided with the power to take measures, which requires the recalcitrant state to comply with the legally binding decision of the ICJ, if not compliance is not forthcoming. These measures could vary from the Security Council calling upon the parties to comply with provisional measures, as noted in Art.40, to calling upon the members of the UN to take measures that do not involve measures of force. These could vary from trade embargoes, to the Security Council taking such action of armed force, “...as may be necessary to maintain or restore international peace or security.”⁴⁸ Two issues are at stake at this juncture. First, is the fact

that the Security Council in taking any measures in order to persuade compliance by the recalcitrant party has to take measures only to give effect to the judgment of the ICJ, meaning that any rights of such a recalcitrant party has to be respected at all account. What this again emphasizes is that, such measures of the Security Council, in most cases should be persuasive rather than being aggressive, hence protecting such country's rights of sovereignty, with which comes the right to adjudication and making decisions on whether to comply with judgments on international organizations. By all means one may argue that such sovereign rights are abrogated by the state once it ratifies the UN Charter. Nonetheless doubts are cast on this issue, as to whether the Security Council is capable of resolving the unresolved problem of enforcement, on this perspective, specially when the protective interests of a state is at stake, be it a developed or developing nation.

The second issue is the fact that the Security Council would only get involved in the dispute, if it deems that the dispute would led to the continued threat to world peace and security.⁴⁹ With regard to this issue of Security Council involvement depending on their being a threat to world peace and security, I would like to question the suitability and practicability of such a condition, considering the fact that in most cases it is the investor from a developed country or that government itself that invests in the developing country. Realistically I could not foresee a country such as Sri Lanka taking on the US on a war situation or enforcing trade embargo's, as a result of the US government or one of its investors having breached its trade agreements. The only opportunity that the ICJ has got involved in international trade issues is where it had dealt with the protection of aliens. The first aspect in protecting aliens is the fact that in most cases, these investors would be protected under diplomatic protection, hence obstructing

to any developing country arguing against any action. But on the other hand, as read in some case law of the ICJ, which involves the protection of aliens, the courts have argued and given decisions for the invested country. What in most cases the ICJ has emphasized is that the invested country (in this case I would pre-suppose to be a developing country), has sole jurisdiction over any disputes arising, thus rejecting first that it would have any competence to deal with the issue and secondly that these perceived economic activities also involve political decisions made on the basis of state sovereignty. As happened in the controversial *Barcelona Traction, Light & Power Co.Ltd. case(Spain Vs Belgium)*⁵⁰ with regard to aspects of diplomatic protection of aliens; the court held that "...a state may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the state is acting." It also noted that "...should the national or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law."⁵¹ Thus emphasizing the principle of sovereignty and more importantly in my opinion disregards any agreement to the contrary; which the states have agreed in order to forward any such cases to the jurisdiction of the ICJ, and Security Council if necessary, emphasizing the fact that policy decisions which involves economic and political facts are a primary concern in dispute settlement. If one builds on what Prof. Jaenicke mentioned in respect of ICJ competence in trade matters, one would have to conclude that claiming a decision, let alone enforcing ICJ decisions, in this particular category of alien protection would be complicated to say the least. On one hand, this decision has not recognized the right of an individual to argue his or her case against a state at international level. But, on the other hand, it is my view that it has inadvertently protected the interests of states, on the basis of sovereignty,

which in the perspective of the state, is good as getting a ICJ judgment enforced. This was in a way emphasized in the case of *Socobel Vs the Greek state (Belgium Vs Greece)*⁵², where the plaintiff argued that the judgment of the PCIJ constituted a title, ipso facto binding on Belgium on the defendant and exempt from the formality of exequatur in Belgium. As noted by Rosenne "...the plaintiffs stressed that it was inconceivable that a judgement delivered by the ICJ in a case between states should require an exequatur from a Belgian tribunal"⁵³, meaning that an international treaty or agreement should have direct effect on member countries. But the tribunal decided that this was not the case, since Socobel, in its view was not a party to the case between the state parties, and further because the UN charter restricts only state parties being able to seize its jurisdiction. While in hindsight, this benefits a developing country for example, it is also keeping with the norms of ICJ competence, where the individual is not duly protected, notwithstanding the fact that in many instances, it is the individual who invests under the auspices of trade agreements signed to by his or her government and the host state. This not only plays right into the protective nature of states but also a justification of such a status, where the real picture of international trade and investment is unfortunately not taken into account. Having noted the merits and limits of the ICJ as a mechanism for settling disputes of a trade and investment nature, given the protective nature of states concerned, I would follow to discuss the issues with regard to dispute settlement in relation to the ICSID at present, where the individual is and his/her interests are the focus.

3.2 International Center for the Settlement of Investment Disputes and its

Substantive Issues:

3.2.1 The conflicting interests of the parties concerned in investment disputes and the evolution of dispute settlement mechanisms:

While the World Court was in prime position to resolve international disputes, via its judicial mechanism, as was mentioned earlier, it was equipped to resolve international disputes “head on” so to speak. This was specially so; when it came to international investments; principally as these disputes, while dealing with trade issues, also involved political aspects, via the interests of developing countries, who were in most cases the benefactor. Therefore, first I would briefly deal with the interests of developing countries, and the protectionist attitude prevailing in these countries, because I believe that these attitudes affect the effectiveness of the ICSID. As I had discussed in an earlier chapter, states, in particular developing countries, tend to look upon any investment or any interference by international organizations with a certain amount of contempt. The reason for this stems not from any discriminatory attitude towards international investment at international trade level, but an attitude towards protecting its national interests. As Snyder points out “ the principle current problem in protecting foreign investment arise chiefly in newly developing nations. These nations, most of them newly independent are highly nationalistic and sovereign.”⁵⁴ It is this sense of protectionism and independence, which has brought about the conscious approach to international investment. However, unfortunately the contradiction in this thinking remains in the fact that developing

countries possess the necessary human and natural resources, but lack the capital and technological know how, which the foreign investors could provide for harnessing of such resources. It was this kind of contradiction, as seen in the case law referred in chapter one, be it at state level or state/investor level that is brought to international dispute settlement, be it peaceful or judicial methods.

Thus a compromise has to be made between these protectionist motives of developing countries and the potential investor, at the level of international investment dispute settlement. As a result, one also has to identify the motives of the international investor as well. It is possible for different people to give different interpretations on the motives of the international investor. As Sonarajah has pointed out with regard to international community and its aims of investment, “the transfer of control over natural resources to the state in order that such resources may be used to further the developmental goals of the poorer countries”⁵⁵ was of prime importance. However, while one could argue that governments of developed countries would be concerned with international development, I find it difficult to imagine that MNE’s would be concerned with the development of developing countries rather than doing business for a great range of profits. Hirsch puts this in more subtle terms when he notes that, “...one outstanding feature of investments for economic development is that one party to the transaction is usually a sovereign state, whose interests, rights and obligations significantly differ from those of private actors in the international economy.”⁵⁶ While the governments of developing nations will take political action towards economic improvement under the pressure politics and social development, the MNE’s on the other

hand will concern itself for example with the extraction of some sort of natural resource from the host state; hence providing for the disputable position to arise.

For example, one has to take the case of Sri Lanka and the involvement of foreign owned companies in the textile export trade. The government of Sri Lanka is concerned with the social development of the population in the free trade zones and the political benefits in the election to office; while the individual companies are concerned with its profits; invariably reducing its production cost; thus reducing the benefits given to its individual workforces.⁵⁷ The investor would want leniency on the part of the host state; in terms of financial benefits, infrastructure facilities and especially legal leniency; the host on the other hand would want to control the power that the investor would have in abusing such benefits. The main medium by which the host country could achieve this is through its control of the law. The government being sovereign over its territory the investment is made would have the right to implement or revise legislation, which would have an adverse affect on the investment,⁵⁸ or for the betterment of such investment organizations.⁵⁹ Thus as a result disputes would arise which would not be feasible to be resolved by national courts, in particular, as the international investor would invariably look upon such a local law as being bias towards the host state. This is voiced by Hirsch when he states that “in the absence of a special international forum for the settlement of the dispute, the only remedy available to the investor on an international level is the diplomatic protection extended by its own state”⁶⁰, thus emphasizing the view taken by potential investors.

Hence it was important that an international mechanism was initiated in order to take into account these considerations of the two parties while resolving the

ensuing disputes. This trend of distrust has even resulted in the trial advancement of an international contract law to be constructed between the developing state parties who pursue protectionist policies, and the individual investor, in order to defuse such distrust. What the protagonists of a “international contract law” has advocated is that, as a result of the existence and continuation of a relationship, the parties would acquire rights, which would be irrevocable, hence creating a legal relationship. But as Prof. Sonarajah argues; this argument was created under colonial times; thus negating any justification, as a result of those circumstances. His argument is that the change of such circumstances, and the strength of developing countries at present in flexing their sovereignty has devalued such a argument of a international contract law; meaning that the parties have to decide between themselves which law to apply, and how to resolve such disputes. What this means is that, notwithstanding the existence of such commercial relationships, and arbitral rulings; as a result of the espousal of state sovereignty by these developing nations and its protectionist policies, it is difficult to create a international contract law. Thus it was important to create a international organization to deal with investment disputes at international level, if such disputes arise as a result of commercial relationships between states and investors.

As a result of these differences between states and individual investors, there existed only two methods by which such disputes could be settled international law, namely mediation and arbitration, as discussed above. As the World Bank once said, the bank “...concluded that the most promising approach would be to attack the problem of the unfavorable investment climate from the procedural angle, by creating international machinery which would be available on a voluntary basis for the

conciliation and arbitration of investment disputes.”⁶¹ Nevertheless, one also had to keep in mind the protectionist nature under which these procedures were to operate as I had emphasized in the previous chapter. Thus it is under these circumstances of arbitration, that I would concentrate on the prior methods of settlement of investment disputes before the ICSID mechanism, briefly, and move on to discuss the ICSID in detail. The earliest arguments for arbitration as a mode of settlement was enunciated in the Institute of International law in 1875, which was taken a step further by the Hague Conventions as mentioned earlier.⁶² Though, as mentioned earlier, the definition of arbitration did not contain its usage in international trade investments; this situation was resolved to a certain extent by the London Court of Arbitration, which provided that it “...maintain a comprehensive panel of arbitrators...classified according to professions and trades of high standing ...and the court is in a position to call upon the services of acknowledged experts for whatever disputes may be submitted.”⁶³ This meant that it was willing to entertain disputes of a commercial and investment nature. This was further advanced by the ICC, which provided arbitration in “...business disputes of a international character.”⁶⁴ This was followed by the American Arbitration mechanism, which obtained permission from the PCOA to notify its members that the premises and the organization of the court were available for arbitration of disputes “between a contracting nation and a non-nation party.”⁶⁵ It is at this juncture that I would discuss the ICSID, which involves a steady improvement on the dispute settlement mechanisms of a international nature; which has involved the single individual, rather than being restricted to inter-state settlement, as in the instances of the ICJ, as discussed above.

3.2.2 ICSID and its Procedures of Settlement:

The “Convention on the settlement of investment disputes between states and nationals of other states”, or simply known as the Washington Convention, was formulated and entered into force in 1966, as part of the progressive development made in protection of private investors who dispute with the relevant state parties.⁶⁶ As a result, the International Center for the Settlement of Investment Disputes (ICSID) came into being as the newest member of the World Bank.⁶⁷ As mentioned earlier, the parties involved in any trade or investment relations would have doubts and suspicions of each other, very specially if it is a state party who has the capacity of changing its legal structure when the necessity arises keeping with its policy of protecting its own interests. Thus, it was and should be the settlement forum’s philosophy to undertake a balancing act of appeasing both parties taking into account the individual circumstances. The ICSID is based on this sort of thinking as it “seeks to assist in developing a favourable climate for the investor...”⁶⁸ To the executive directors of the IBRD, it was the thought of promoting national confidence and stimulating the flow of private international capital, which instigated the initiation of the ICSID process.⁶⁹ Thus, in order to achieve this goal, it had to take into consideration the investment interests of the investor, and the protectionist nature of the state, which had a bearing on satisfactory solution of disputes.

3.2.2.1 Structure and Process:

The ICSID convention has created the Center as an international, independent agency of the World Bank, with separate legal capacity.

However, the Center itself does not involve itself in arbitration or conciliation, which is undertaken by the conciliation commission or Arbitral tribunals.⁷⁰ Thus the Center acts only as a place of registering the complaints of the individual parties. The individual parties would nominate four members to be appointed as arbitrators, if the necessity arises, to arbitration panels. Thus, as with any other settlement process, ICSID is based on the consent of the parties to be willing to participate in the settlement process.⁷¹ While the arbitration panels deal with the settlement of the dispute, the ground work for such initiation of proceedings are provided by the administrative council, and very specially the secretariat, which is involved in carrying on the day to day business of the center. The Secretary General, as the principle officer of the secretariat has the power to register a request of arbitration or not; thus giving him the power to initiate or prevent arbitration, which I would deal with when discussing the jurisdiction of the ICSID in the following part of this area. This is in addition to other services that the secretariat provides in facilitating the arbitration process. Having very briefly outlined the process which facilitates the arbitration process of the ICSID, I would discuss the substantive aspects such as the jurisdiction, applicable law and enforcement. This I believe is important in emphasizing the bearing of protectionism on ICSID settlement and secondly, making comparisons with the World Trade Organization dispute settlement mechanism.

3.2.2.2 Initiation & Jurisdiction of the Center:

Three conditions have to be met for the ICSID to have jurisdiction in order to conciliate or arbitrate in investment disputes. As Art.25 of the Washington Convention has stipulated, the first such condition, is the written consent of

both parties to the dispute. This is, as I had mentioned earlier is keeping with the general rule in international dispute settlement, where the mutuality of parties is a necessity in order for such settlement to succeed. However, in the general international settlement process, such consent of state parties is subject to the sovereignty of states, where they have the right to withdraw their consent from ad hoc arbitration, mediation or negotiation. However, the World Bank committee, has taken this mutuality one step further in stipulating that such consent is irrevocable; meaning that, once ratified, the contracting parties cannot withdraw from such consent and are bound by such a decision. This provision is of such importance that it has even been described as the “cornerstone of the jurisdiction of the center.”⁷² The significance of this consent is further fortified by the convention, where the parties are not allowed to escape its obligation, even by denouncing the convention. In the perspective of a state party, one could say that it contradicts the norms of state sovereignty and restricts the state from taking action against a recalcitrant investor. As Hirsch notes, a state could provide its consent via national legislation, which in the context of irrevocable consent means that the state cannot repeal such legislation if the investor has given his/her consent.

Questions have been raised in some instances, where the state has consented to ICSID arbitration through legislation, and the investor has not consented, whether the center has jurisdiction. Taking into regard the fact that both parties have to consent for center jurisdiction to arise, it would seem in these circumstances that the effectiveness of the center, as a settlement process would be jeopardized at the initiation stage itself, rather than at a enforcement stage. Having said that, in one particular instance, the arbitral tribunal of the ICSID decided that it had

jurisdiction after both parties had given consent, not in particular to the ICSID but to arbitration in general, which the tribunal took as to mean consent to ICSID, notwithstanding the fact that the state arguing that it had not specifically agreed to resolve that particular dispute via ICSID tribunals.⁷³ This is further compounded by the fact that, though technical that whatever mode the parties agree, the consent provided for ICSID settlement should be in written form rather than being implied, which would seem restrictive. Unfortunately the ICSID does not speak of implied consent, where a party's actions could be construed as consent, assuming that both parties would agree in writing to such settlement in the future. As mentioned earlier, the problem of states invoking state sovereignty, hence having the right to legislate or repeal such legislation which could invalidate consent, has been a restriction on any form of dispute settlement. As evidenced in the nationalization disputes, the ICJ has accepted the states right to legislate for such or repealing of legislation.⁷⁴ Thus given the fact that implied consent is not acceptable to ICSID, and the fact that the state's right to legislate and repeal legislation is recognized, one has to question the written consent provisions of the ICSID if the state decides to revoke such laws.

The second part of deciding the jurisdiction of ICSID, is the nature of the dispute that could be brought to the attention of arbitration panels. The first part of Art.25 (1) of the convention sets out the second condition for the establishment of the center's jurisdiction: that the dispute submitted be a "legal dispute arising out of an investment". Thus the two elements that need discussing are that 1) the dispute be a legal one and 2) that it arise directly out of an investment. With regard to the first issue of an "legal dispute", the expression has been used to make clear that while conflicts of rights

are within the jurisdiction; the conflicts of interests are not. The dispute must concern a breached right or obligation, 'or the nature of extent of the reparation to be made for breach of a legal obligation."⁷⁵ However, strangely enough, as Hirsch notes, the convention does not define these terms and intentionally left this matter to the future rulings of the center's tribunals. Thus questions have to be asked as to what these legal obligations are? Are they contract based or are these connected with natural justice? No clear-cut definitions have been provided to date. This it seems is a case of "passing the buck" by the executive directors, who refrained from providing a definition of what exactly a "legal dispute" is, as it involves other social issue, which one party might not regard as a legal dispute. This is especially the case where it concerns the interests of states, and interests groups such as employees, other business interests, whose rights may be effected, but which is not a part of the investment agreement, and where the state is concerned with protecting such interests. Thus one could say that the ICSID convention has once again left to the parties, the agreement of these issues, and the discretion involved in making these decisions, notwithstanding the fact that it is dispute arising out of a legal right or obligation that they are to resolve. Given the evidence available on the nature of the parties' motives towards protection of its own interests, one has to question the ambiguity of this provision. While this issue on its own might seem unfair or imbalanced towards, not only the interests of the two main parties, but as well as the other social interests, I would deal with the second qualification on providing ICSID jurisdiction at present, which would shed some light on the reasoning behind the lacuna in interpretation.

The second qualification of *Jurisdiction Ratione Materiae* is that the “legal dispute should be investment related”. However, strangely enough, a definition was not provided on what “investment” is and its substance. The executive director’s report states that the committee does not attempt to define the term “investment” in light of the essential requirement of the consent of the parties, meaning that the parties are allowed to innovate on what investment might be, improving with times.⁷⁶ As Stark notes “...the broad purpose of the convention correspondingly require that an expansive meaning be given to the term ‘investment’.”⁷⁷ Thus being with the motives and spirit of the convention, of satisfying the interests of the states and the investor. I believe that this discretion given to the parties, not only facilitates consent, but also provides the parties with the opportunity to paint a clearer picture of what a “legal” dispute would be, specially when it concerns a investment, be it financial or material in terms of the agreement between the two parties. Thus being a plus point to the merit of the ICSID dispute settlement mechanism.

The third condition in claiming the jurisdiction of the ICSID mechanism; is that the dispute should be between a state and a national of another state, or in other words, the Jurisdiction Ratione Persone should be international, rather than domestic. Thus the main issue with regard to proving that the ICSID forum has jurisdiction, is to prove that the investor is a national of another state. While to the naked eye this may be easier to identify, taking into account the complex nature of commercial relations in the business world, it becomes very difficult to prove or becomes debatable, as seen in many cases.⁷⁸ As mentioned by Delaume, within the framework of the Washington Convention, the nationality of a corporation is determined on the basis of its

siege social or place of incorporation. Consequently, a business association incorporated in contracting state A and investing in contracting state B is eligible to be a party to an ICSID clause and use ICSID facilities.⁷⁹ However, though this is the perceived practice and theory; it is qualified in the sense that “...judicial person incorporated in the Host State can still be regarded as the national of another state because of foreign control.”⁸⁰ This is the case in many international corporations doing business in developing countries, where the day to day commercial activities are carried out via a subsidiary company rather than the parent company being directly involved in such activities; notwithstanding the fact that the parent company holds the majority share holding in such subsidiaries. This was a major issue, among many, in the *Holiday Inns Vs Morocco* case⁸¹, where Swiss and U.S. companies entered into an agreement with the government of Morocco to construct and operate four hotels through subsidiaries, incorporated in Morocco. As a result of a dispute arising, it was submitted to the ICSID requesting arbitration not only in their name, but also on behalf of their subsidiaries. The Morocco government, as a result of its suspicions of the company’s activities, got the company to sign a guarantee noting that it will “assume all responsibilities of guarantors to warrant all commitments and liabilities and the true and complete fulfillment of all obligations.”⁸² Though this would have or would be interpreted as being an agreement between a parent company and a government; the irony was that these companies were hardly in existence at the time, thus allowing the government of Morocco to argue that, there was no such agreement. Furthermore, this also resulted in the government being able to argue that it was not subject to ICSID arbitration. This, coupled with the fact that such consent should be express rather than implied, showed the inadequacies of the system. This is especially

true, when one takes into account the facts in this case. The government of Morocco was allowed to argue that it had not agreed to treat the subsidiaries as foreign nationals, as a result of the companies not being in existence at the time of the alleged agreement being formulated. Thus one could argue, in my opinion, that while the opening to the center's jurisdiction has and is more liberated than the ICJ, in keeping with world development trends, it is also correct in noting that this opening has been, to a certain extent, restricted by technical difficulties of interpretation, which the parties could turn into loopholes in their favour, as seen in the above case law. Assuming that the parties have claimed the jurisdiction of the center, the next issue at stake has been the applicable law to investment agreements and ensuing disputes.

3.2.2.3 *Applicable Law in ICSID arbitration:*

As mentioned earlier, the issue of applicable law has been a controversial aspect in international arbitration, be it ad hoc or institutional. As previously discussed in the preceding chapter, the issue is which law, be it international, local or Lex Mercatoria should be applied to a given arbitration. While the parties could agree that the ICSID has jurisdiction after the agreement on the above-mentioned issues, the next question would be, which law governs the investment agreement and dispute? As I had noted while discussing the ICJ and its settlement process, the starting point of international dispute settlement is that international law should govern only disputes between states, meaning that domestic law should govern disputes between states and individuals. As Giardina notes, this was the law handed down by the PCIJ in the case involving *Serbian loans(France Vs Serb Croat States)*, where the “relations between

states and the nationals of other states are necessarily governed by a municipal legal system and that this system is presumed to be the national system of the contracting state.”⁸³ Obviously, the argument by its critiques is that the national legal system, very specially the systems of developing countries; would not be equipped to deal with investments of international character. Furthermore, as with the other instances, the second debate is that, having control of such legislation, the state has the opportunity of changing such laws to the detriment of the investor, which is based on the norms of national sovereignty and the protection of its local interests, be it economic or social interests. On the other hand, arguments have been proposed to the effect that, international convention rather than national law, should regulate such international relations, where the states would sacrifice its sovereign right to enact and change the laws governing international investment and dispute settlement.⁸⁴

The settlement mechanism of the ICSID, it seems, has accepted the first solution, whereby the arbitration tribunal would consider the laws of the host state as the applicable law, if the parties have failed to specify such laws.⁸⁵ However, the qualification to such application is that such national laws have to be applied with regard to the international laws applicable in such a host state. Art.42 states, in the absence of agreement between the parties, the tribunal “...shall apply the law of the Contracting state party to the dispute (including the state’s rules on conflict of laws) and such rules of international law, as may be applicable.”⁸⁶ Furthermore as mentioned by Dr.Broches, the executive director’s report makes clear that “international law” in Art.42 is to be understood in the sense given to it by Art.38 of the Statute of the ICJ, which is in contrast to what the *Trial Smelter* case had advocated, as mentioned in the previous chapter. It is

at this juncture that the whole issue of applicable law gets complicated, especially when one has to balance the competing interests of investors and states, especially when one has to consider the social and political basis under which these parties enter into international relations. Hence, the first question to be asked is, which interpretation is to be given to the applicability of international law? Is it to be hierarchical or is it supposed to just complement national law, thus protecting the state party's sovereignty and leaving open the investor to the risk of such laws being changed by the host nation on the basis of sovereignty, as noted in the *Trial Smelter* case? There have been various theories put forward by theorist of law, where international law is looked upon as either being a law governing state relations, or being a supranational system of law regulating contracts between states and foreign nationals.⁸⁷ According to the positivist theory, international law was looked upon, as a law applicable to sovereign states and other entities were not allowed juridical status under such a law. According to the positivist doctrine, it was perceived that "contracts cannot be the subject of international disputes since international law contains no rules respecting their form or effect."⁸⁸ Thus, private parties who were under contract with a state or state institution were governed by municipal law according to this school of thought, which was confirmed in a number of cases brought to the PCIJ in the early 20th century.⁸⁹ In contrast to this, the efforts were made to create a "international contract law", where international law principles such as *pacta sunt servanda* are to be assimilated into contracts between states and individual parties. Hence, as noted by Prof. Sornarajah, "...the general thesis began to appear that the parties, since they had the right to choose the system of law to govern the settlement of disputes arising from the contract, may choose international law or the general principles

of law as the law according to which disputes should be settled.”⁹⁰ But at the same time, as evidenced by the jurisdictional limitation practiced by the ICJ, the “positivist” approach to international law was that, an agreement between a foreign national and a state was not the concern of international law, but of the domestic law of the foreign state. This was mirrored by what Lord McNair once said, “...this system is an international state system-*jus inter gentes*”⁹¹, referring to international law as part of state relations, not involving nationals of either state.

This division was further extended by the fact that states were in favor of an application of national laws, which did not infringe on its state sovereignty and its social and political motivations, which resulted in a disputes arising, as emphasized in the previous chapter. However, as a result of these interested parties being eager to attract the best possible investments and profits, there have been initiatives to construct a “international law of contract”⁹², which would restrict all institutions of sovereignty and social pressures. It is within this context that the ICSID has developed Art.42, which is to regulate such relations and disputes. However, doubts have to be cast, as to whether such an interpretation would break the spirit of ICSID, considering the fact that both parties have agreed to such jurisdiction, in order to get fair benefits.⁹³ Nevertheless, it seems that in some case law, which advocates international law as the applicable law, the basis on which such a position is taken, is the protection of the individual investors interests. A passage of a given award indicates this philosophy,

“ Such a solution seems particularly suitable for giving the guarantees of protection which are indispensable for foreign companies, which undergo considerable

risks in bringing financial and technical aid to countries in the process of development...’’⁹⁴

While I do agree and appreciate the fact that these investors do bring in investment of a considerable nature, it is also my opinion that these tribunals have misconstrued the economic ability of these companies in defending themselves, and does not appreciate the fact that these states are to a considerable length dependant on these companies for economic development. This not only puts them in a disadvantageous position but also necessitates the protection of their interests.

However, on the other hand, Art.42 could be interpreted to state that national law is to be the applicable law, with international law complementing such application; thus providing the Host State an advantageous position over the interests of the investor. The importance of this was emphasized in the *AGIP SpA Vs Government of the Peoples Republic of Congo*.⁹⁵ Here the arbitration tribunal, keeping with the investment agreement, applied the national law supplemented by the international law, which was to fill the gaps of national laws. The international law vis-à-vis the national applicable law had two possible roles: supplementary and correcting. Furthermore, arbitration tribunals have also held that the law of the Host State was the applicable law, rather than being supplemented by international law, as was the case in the *Klockner Industries et al Vs Republique Unie du Cameroun*.⁹⁶ In this case at hand, referring to Art.42 of the Convention, the tribunal noted that it should apply the law of Cameroon, including its rules on the conflict of laws. This further complicated issues at hand, especially as the parties at hand are to enforce such awards in their territory, as if they

were judgments of their own courts.⁹⁷ This meant two things. First, it emphasized the fact that state practice and policy would have an effect on the settlement and secondly, gave credence to the argument that ICSID has not satisfactorily dealt with this issue. This situation is further complicated by the gap left by ICSID, which has not taken into account the “*Lex Mercatoria*”, which has been used as a safety net in commercial arbitration’s. *Lex Mercatoria* is defined as a selective process of the arbitrators that considers the law of several legal systems, which apply to commercial disputes. Arbitrators more frequently use this source of law in international disputes, where clauses to this effect are inserted in international contracts. As mentioned in the previous chapter, *Lex Mercatoria* is accepted as a safety net for parties to a commercial dispute. Unfortunately, it seems that the ICSID has not adhered to this source of law. The only option that the ICSID Convention provides is that the parties are allowed to agree on a specific law. However, the second part of the equation does not come into being if the parties choose such a law. Thus invalidating this option of agreeing on a “*lex mercatoria*”, in such situations. Hence, questions have to be asked, as to what route tribunals should take, at ICSID settlement, with regard to applicable law, as a result of the dubious nature of Art.42 and its interpretations. This confusion not only causes problems of what law to be applied; but also differentiates between which rights need protecting; which in my opinion is against the motives of ICSID, and with respect to protecting the interests of either the investors or the states, it would be seen in the negative.

3.2.2.4 Enforcement of ICSID awards:

Once the parties have agreed that the ICSID has jurisdiction, and that the law of the host nation or another applicable law applies, the next issue that gives cause for concern is the recognition and enforcement of such awards. It is at this stage that the importance of sovereign immunity is well documented, when the state parties argue immunity from enforcement, absolute or restrictive⁹⁸, which translates into a few problems from the investor's point of view, given the fact that there is evidence of state protectionism at international relations. However, on the positive side of ICSID arbitration, the execution of awards is an important aspect of ICSID arbitration, distinguishing from other forms of commercial arbitration. This significance is achieved by Art.54, which notes that

“ Each Contracting state shall recognize an award rendered pursuant to this convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state....”,⁹⁹

This⁰ emphasizes the res judicata effect of ICSID awards. This effect has two consequences. Firstly, that the decision of one tribunal has a binding effect on future tribunals, as it is binding in all states, and secondly, it obstructs to the host state arguing immunity at recognition level of the award, where no executor procedure is needed, thus leaving no choice for the host state to enforce such a binding decision. Notwithstanding such a positive outlook at recognition level, the ICSID Convention, in a sense balances out the justice meted to both parties; in the context of Art.55 which states,

“Nothing in Ar.54 shall be construed as derogating from the law in force in any Contracting state relating to immunity of that state or of any foreign state from execution”,¹⁰⁰

Meaning that the law in place of arbitration governs the manner in which the execution is to be carried out. Given the fact that no derogation or modification is allowed of the laws of enforcement of the host state, one could say that this protects the state sovereignty of host states. This, according to some authors, could be distinguished as immunity from jurisdiction being separated from immunity from execution according to the provisions of the Convention, which is mirrored by the national courts, which have upheld absolute immunity in favour of the state in cases of execution. While these two provisions could be to the merit of the ICSID arbitration with regard to the protection of state interests; one also has to note that problems arise as a result of the practice of state sovereignty and national court practice as evidenced in the previous chapter, and secondly as a result of interpretation problems present in the ICSID convention. Thus I would deal with these issues, having first briefly looked at the national laws of arbitration, which has a great impact on execution of ICSID awards.

Different countries, be it developed or developing have to a certain extent developed laws which have exempted themselves from arbitral awards which, in most cases differentiate jurisdictional from execution. However, as Bernini notes “socialist countries do not make this distinction since they do not stray at any point from the absolute immunity theory”¹⁰¹, which is in contrast to most open economy states. The American law mirrors this acceptance of a restrictive immunity theory for example, where enforcement by means of execution measures against foreign state assets located in

the U.S. is permitted.¹⁰² As mentioned in the previous chapter, a further example is the Foreign Sovereign Immunities Act of 1976, where the immunity from jurisdiction and enforcement is made dependant on certain conditions based on the commercial nature of the state's property; where state property is "...or was used for the commercial activity upon which the claim is based"¹⁰³, as is the norm practiced by the U.K. State Immunity Act of 1978. While these laws are the more prominent in international relations, one has to emphasize the fact that this is not limited to developed country immunity laws, but also to other legal systems which prefer state sovereignty over international dispute settlement obligations. Thus one could conclude that the states are in control of how and when it accepts the recognition and execution of arbitral awards against state assets; with its own exemptions and conditions being set up in order for the enforcement of such arbitral awards. Ironically, in the perspective of the investor, this basis of voluntary compliance is accepted by the ICSID convention, where the actual execution of arbitral awards, is not mentioned, rather giving primacy to enforcement laws of the host state.¹⁰⁴ This is in contrast to the WTO, where the implementation of panel reports are overlooked by the DSB, and are to be complied with promptly or within a reasonable time period to be agreed by the parties.¹⁰⁵ Furthermore, this obligation of compliance is supplemented by the fact that it is to be achieved by negative consensus, thus restricting the opportunity for obstruction.

In the context of the ICSID, this incoherence is not only restricted to theory, but rather it seems that this diversity in state immunity practice has been emphasized in case law, where the inadequacy of ICSID provisions are restated. One such important case which concerns arbitral award enforcement is the *B & B Vs*

*Congo*¹⁰⁶, where the plaintiff company petitioned the court of first instance in Paris, to give recognition as a result of a dispute arising. However, as illustrated by Delaume; while the court granted the petition, a reservation was attached which read as "...we rule that no measure of execution, or even a correlating measure, can be taken pursuant to said award, on any assets located in France without prior authorization"¹⁰⁷, meaning that host state immunity is safeguarded. Hence it seems that even the courts in a developed state such as France have, and are, hesitant to apply the doctrine of immunity from execution unless the state assets are used for commercial purposes, which was at the behest of the host state. This in itself is a huge burden to prove and in many cases, beyond the capacity of individual investors. This was also the situation in the *LIAMCO case (LIAMCO Vs Libya)*, where the President of the court held that "since it is not immediately possible to segregate the funds or property intended to be used for a sovereign or public activity and those relating to a simple economic or commercial activity subject to private law, it has not appeared appropriate to us, in the absence of prior investigation, to allow a situation to occur that might interfere with the sovereignty of a foreign state by means or measures of compulsion exclusive of any notion of country and international independence."¹⁰⁸ The courts in this case gave precedence to the fact that a state might be acting in a public capacity and as such is not liable, rather than its commercial capacity, where it could be held responsible for its activities. This stance taken by local courts, not only mirrors the difficulty of enforcing an award when a state is involved, but also emphasizes the nature of state defenses, when it involves culpability for its actions. Hence, this emphasized the difficulty that investor's face and the difficulties of enforcing ICSID obligations,¹⁰⁹ if there is going to be a differentiation by national courts of this practice of state

immunity.¹¹⁰ Hence, in a sense of certainty and justice, that the convention is supposed to provide, one could say that it has not satisfied the expectations of the investors, if not only in theory, but in practice; where the courts have accepted the immunity of the sovereign states. On the other hand, the host state could benefit, in the sense that it has the opportunity of arguing its use of sovereign immunity as a result of ambiguities in the interpretation of convention provisions.¹¹¹ However; on the other hand, to the merit of the ICSID convention, this seeming advantage to the host state, has been reduced by the fact that; notwithstanding the non-derogation of national laws of enforcement, the host state could be held responsible and obliged to enforce the arbitral award.¹¹² Thus if a Contracting state, which is party to the dispute invoked immunity within its territories to prevent enforcement, it would be considered to be in violation of its obligations and vulnerable to sanctions of the convention. While this is to the merit of the convention; the problem would be whether in practice this would be feasible, considering the differences in economic, political and monetary capabilities between the developed and developing nations, and secondly, whether developing countries would even consider such an option.

Thus, having considered the merits and demerits of the ICSID Dispute Settlement process, and its effect on developing countries and its interest, one would have to say that its effect has been a mixed package. Given the act that parties to the convention, in particular the state parties, are capable of implementing protectionist measures as legislation, and the difficulties in enforcement, one would have to say that the effect of the ICSID is restricted notwithstanding the consent of both parties concerned. But at the same time one would have to say that to the merit of the ICSID, it

has done its utmost in protecting the individual investors interests, which is a turn around in contrast to the norms of international law.

Conclusion:

In conclusion, one could identify a certain improvement on the part of international dispute settlement, starting with the International Court of Justice to the ICSID, as an international mechanism, beyond the norms of historical international relations, particularly with respect to the jurisdiction of the mechanism and the justiciable disputes. While the settlement mechanisms have brought about a huge improvement in the protection of the interests of investors as well as the developing nations, with the increase of legal regulation and obligations, these have however, been subject to the consent of parties involved, which is the norm of international law. But, at the same time, the success of these instruments have been subject to the consent of the parties and the above mentioned protectionist attitudes, which is attached to such consent, as shown in the previous chapter. This is emphasized in both institutions, notwithstanding the fact that the ICJ is a judicial institution. Notwithstanding this consensual factor, the fact remained that there existed interpretative difficulties with respect to all substantive issues of dispute settlement, namely, jurisdiction, applicable law and enforcement provisions. The interpretative difficulties have been further complicated by the fact that, in the case of the ICJ in particular, there has been a reluctance to get involved in international trade and investment disputes. This has even been the case, in respect of the ICSID, where there has been debate with regard to the interpretation that could be given to the jurisdictional questions which were to be answered, if the system was to satisfactorily operate.

Unfortunately, given the fact that states are generally protectionist and concerned with the protection of their sovereign and economic rights, these interpretation difficulties have given rise to difficulties in the completion of the settlement process. This has particularly been the case in substantive issues such as the jurisdiction of the institution, applicable law and enforcement of awards etc., especially as these institutions are based on state consent and consensual relations. This has further been complicated, as I had shown above, in situations, where the individual parties have argued for the application of different laws, or the courts have had reservations about enforcing the award because it contravenes national policy, thus making the effect of these mechanisms debatable. This was evident, particularly in the case of the ICSID, where the interpretative difficulties/ question with regard to enforcement, has allowed states to object to enforcement using their local immunity legislation, which emphasizes the restrictive nature of the system, when faced with unwilling protectionist state attitudes. Therefore, having discussed the merits and demerits of the other international trade and investment dispute settlement mechanisms, having regard to the protectionist nature of states, I would proceed to discuss the World Trade Organization dispute settlement mechanism, and the substantive issues with respect to this mechanism of the WTO in the following chapters, with an eye on making a comparative analysis of the three mechanisms.

Notes

- ¹ The Alabama case; British & Foreign state papers 62 (1871-72), 233
- ² Rosenne, S., The Law and Practice of the International Court, Deventer Publishers, (1985)pp8
- ³ The ICJ, The International Court of Justice, The Hague (1976), pp13
- ⁴ For the 1899 Convention, see 187 CTS 410; for the 1907 Convention, see 205 CTS 233; 54 LTS 435
- ⁵ Art.14 of the Covenant of the League of Nations
- ⁶ The ICJ, The International Court of Justice, Daventer Publishers, The Hague, pp15
- ⁷ *ibid*
- ⁸ *Supra* note 2, at pp14
- ⁹ *Ibid.* pp15
- ¹⁰ Schlotheaur, H.J., International court of justice, in Encyclopedia of Public International Law, no1, Settlement of disputes, North Holland Publishing Company (1981), pp72
- ¹¹ The sponsoring powers, namely was the UK, the US and the old Soviet Union. For the dumbarton Oaks proposals, see documents of the UN Conference on International Organizations.
- ¹² Reparation for Injuries suffered in the service of the United Nations, ICJ Rep.(1949), pp174-219 at 179
- ¹³ Haya de la Torre judgment, ICJ Rep.(1951), pp71 at 79
- ¹⁴ Apart from the duties relating to the judges, the court also deals with the payments made to the witnesses and experts from the court funds and the pension payable to the court registrar, embodied in UN Resolution 680(7) of 1952. Furthermore, the court also deals with the appointment of the registrar and other officers under the authority provided to it under Art.21 of the Statute.
- ¹⁵ Merrills, J.G., International Dispute Settlement, Grotius Publications, (1998), Ch. 6, pp121,
- ¹⁶ Art.36(1) of the ICJ statute
- ¹⁷ *Supra* note 10, pp72-92 at 77
- ¹⁸ The Pact of Bogota (1948); one other case was where the US & Iran were parties to the Protocol concerning the Compulsory Settlement of disputes attached to the Vienna Convention.
- ¹⁹ *Jan Mayen case- Maritime Delimitation in the area between Greenland & Jan Mayen*, Judgment , ICJ Rep.(1993) pp38
- ²⁰ Art.33(1) of the UN charter
- ²¹ Art.36(1) of the ICJ statute
- ²² The United Nations, Handbook on the Peaceful settlement of disputes between states, pp161
- ²³ *Legality of the use by a state of nuclear weapons in armed conflict*, ICJ Rep. (1996), pp66
- ²⁴ *Supra* note 17, pp79
- ²⁵ Jaenicke, G., International trade conflicts before the PCIJ and ICJ, In: Perteramann, E.U., ed., Adjudication of international trade disputes in Int. & national economic Law, University press, Freiberg, (1992)pp43-58 at 44
- ²⁶ *Anglo-Iranian Oil Co. Case*, UK Vs Iran, ICJ Rep.(1951), pp89
- ²⁷ *Ibid.* pp93
- ²⁸ See, *Barcelona Traction, Light and Power company Limited, Spain Vs Belgium*, ICJ Rep. (1970), pp3; *Electronica Sicula SpA (ELSI), US Vs Italy*, ICJ Rep. (1979), pp48
- ²⁹ *Military and paramilitary activities in & against Nicaragua; Provisional measures, US Vs Nicaragua*, order of 10 May 1984, ICJ Rep.(1984) pp 169
- ³⁰ *ibid.*
- ³¹ "Statement of Department of state on US withdrawal from Nicaragua proceedings, 18 January 1985"; reprinted in part in "Contemporary practice of the US", in 79 AJIL (1985), pp 438 at 441
- ³² McWhenney, E., Judicial Settlement of international Disputes, Nijhoff Publications, (1991), Ch.2, pp41
- ³³ *Ibid.* at pp42
- ³⁴ *Ibid.* at pp44
- ³⁵ This is emphasized by the US Vs Nicaragua case, where the US withdrew from the case, arguing that it was not legal and more political, thus arguing that the ICJ had no jurisdiction.
- ³⁶ *Case concerning military and Paramilitary activities and against Nicaragua*, US Vs Nicaragua, ICJ Rep.(1984), pp392-637
- ³⁷ Skubiszewski, K., The ICJ and the Security Council, In: Lowe, V. & Fitzmaurize, M., ed., Fifty Years of the ICJ, Oxford University Press, London (1996), pp606-625 at 609

- ³⁸ The importance of parallelism is further emphasized by the fact that under Art.36(3) of the Charter; the court is obliged to take account of recommendations made by the Council
- ³⁹ Art.36(2) of the statute of the ICJ, in United Nations, Handbook on the peaceful settlement of disputes between states, annex 2, pp 175 at 180
- ⁴⁰ *Case concerning Military and Paramilitary activities in and against Nicaragua*, ICJ Rep.(1984), Judgment, pp421-426
- ⁴¹ Sofear, "The US & the World court", Proceedings of the American Society of Intl. law (1986), pp204 at 205
- ⁴² This security has further to be questioned when one considers the attention given by ICJ judges, especially Judge Oda to the necessary consent of parties to ICJ compulsory jurisdiction. Please refer Judge Oda's statement in the Nicaragua case, pp 124-5 on the importance of the parties consent.
- ⁴³ United Nations, Handbook on the peaceful settlement of disputes between states, Office of Legal Affairs, New York, (1992), pp171
- ⁴⁴ Art.94(2)
- ⁴⁵ Supra note 43, at pp183
- ⁴⁶ Art.60 of the ICJ Statute
- ⁴⁷ Acts of self-help may consist of act illegal in themselves, but legalized, or rather justified, by reference to the continuing illegal act of the state against which they are directed. But this seems to have been restricted under the UN Charter, where the state sovereignty of all states are to be respected (Art.2. and Art.51), which objects to self help. As Rosenne notes, "...preventive or enforcement measures can only be taken in conformity with the decisions of the competent organs, primarily the Security Council, and secondarily the General Assembly. This prohibition on the use of force is today preemptory and constitutes a rule of *jus cogens*." See, Rosenne, S., *The Law and Practice of the International Court, 1920-1966*, Martinus Nijhoff Publishers, (1997), pp233
- ⁴⁸ Art.42 of the UN Charter
- ⁴⁹ Art.37(2) of UN Charter notes that "if the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement, as it may consider appropriate."
- ⁵⁰ *Barcelona Traction, Light and Power Co. Ltd, Spain Vs Belgium*, ICJ Rep.(1970), pp3
- ⁵¹ Ibid., pp44-5
- ⁵² See Journal des tribunaux no 3896 (1951), pp298
- ⁵³ Supra note 2, at pp131
- ⁵⁴ Snyder, E., Foreign investment protection: The dispute solving aspect, in 3-4 Columbia Journal of Transnational law (1964), pp127-151 at 127
- ⁵⁵ Sornarajah, M., The myth of International contract law, 15 JOWT(1986)187 at 193
- ⁵⁶ Hirsch, M., Arbitration mechanism of the International Centre for the settlement of investment disputes, Nijhoff, Dordrecht, (1993), pp4
- ⁵⁷ *AAPL Vs Sri Lanka*, 6 International Arbitration Report 1, (May 1991), See, also *Amco Vs Indonesia* (award on jurisdiction), 23 ILM (1984)351
- ⁵⁸ Taxation, Labour laws etc.
- ⁵⁹ Reisenfeld, S.A., Foreign investment, 18 Encyclopedia of Public International Law (1988) pp246
- ⁶⁰ Supra note 56, pp8
- ⁶¹ Address by Aaron Broches, General counsel, IBRD, at World Conference on world peace through law, June 30-July 6, (1963), Athens, Greece
- ⁶² Art.15 of Hague convention of 1899
- ⁶³ Brochure, The London court of Arbitration, March 1961 (unpaginated)
- ⁶⁴ Brochure; International commercial arbitration of the ICC, Dec. 1956; Brochure, Rules of Conciliation & arbitration in Force, 1st June 1955, April 1955, pp10
- ⁶⁵ See circular of the Secretary General, Permanent Court of Arbitration, March 1960; 54 AJIL (1960)933, in Snyder, E., Foreign investment protection: The dispute solving aspect, in CJTL (1964-66), pp127-151
- ⁶⁶ UNTS, Vol.575 (1966)
- ⁶⁷ As of 1981, the ICSID consisted of 78 members
- ⁶⁸ Su Yun, C., The convention on the settlement of investment disputes: commentary and forecast, in *Malaya Law review* (1969), pp287-314 at 292

- ⁶⁹ See Amerasinghe, C.F., Investment disputes, convention and international Centre for the settlement of investment disputes, in 5 EPIL (1981), pp189-192
- ⁷⁰ Art. 3, 12-14
- ⁷¹ Art.25-27
- ⁷² Convention on the settlement of investment disputes between states and nationals of other states, and the accompanying report of the executive directors; in Hirsch, M., Arbitration mechanism of the ICSID, (1993), pp23
- ⁷³ *SSP Vs Egypt*, 16 Yearbook of Commercial Arbitration, 16 (1991)
- ⁷⁴ *AMINOIL Vs Kuwait*, 21 ILM (1982)976-1053; *LIAMCO Vs Libya*, 20 ILM (1981) 1-87
- ⁷⁵ Report of the Executive Directors on the Convention on the Settlement of investment Disputes, 4 ILM(1965) 524, Paragraph 26
- ⁷⁶ Art.27 of the Executive directors report to the Washington Convention on the Settlement of Investment Disputes between states and nationals of other states. See, Hirsch, M., Arbitration Mechanism of the International Center for the Settlement of investment Disputes, Nijhoff Publishers, Dordrecht, (1993), Appen. II. Delume for instance, argues in his article that this opening allows the convention to adapt to innovative patterns of investment that were not foreseen at the time of drafting. See, Delume, G., ICSID Arbitration, In: Lew, J., ed., *Contemporary problems in International Arbitration*, Dordrecht, Nijhoff, (1987), pp23-39
- ⁷⁷ Stark, J.G., The convention of 1965 on the settlement of investment disputes between states and national of other states, in *The protection and encouragement of private foreign investment* (1966), pp12
- ⁷⁸ *Holiday Inns/Occidental Petroleum corporation Vs The Government of Morocco*
- ⁷⁹ Delaume, G., ICSID Arbitration, In: Lew, J., ed., *Contemporary problems in International Arbitration*, Dordrecht, Nijhoff, (1987), pp23-39 at 28
- ⁸⁰ Ibid.
- ⁸¹ *Holiday Inns/Occidental Petroleum Vs Government of Morocco*, Case ARB/72/1
- ⁸² Lalive, P., The first World Bank arbitration (Holiday Inn Vs Morocco)- some legal problems, in BYBIL (1980), pp123-161
- ⁸³ Giardina, A., The ICSID, In: Sarcevic, P., ed., *Essays on international commercial arbitration*, Graham & Trotman, London (1989), pp214-222, at 215.
- ⁸⁴ See, for example the ICC, WTO provisions on jurisdiction
- ⁸⁵ Art. 42 of ICSID convention
- ⁸⁶ Broches, A., ICSID, In: Cohn, E. & Domke, M., *Handbook of Institutional arbitration in International Trade*, North Holland Publishing Co. (1977), pp3-15
- ⁸⁷ *Sapphire Petroleum Arbitration* 35 ILR (1963)136
- ⁸⁸ Kussi, J., The Host state and the transnational corporation, (1979), pp. 9
- ⁸⁹ *Serbian Loans case, France Vs Serb Croat States*, (1929) PCIJ REP., Series A, No. 20, also dictum in *Panvezys-Saldutiskis Railway Case*, PCIJ Series A/B, No.76.
- ⁹⁰ Sornarajah, M., The Myth of International contract law, 15 JOWT (1981), pp187-219 at 202
- ⁹¹ McNair, Lord, The general principles of law recognized by civilized nations, 33 BYBIL (1957)10
- ⁹² Supra note 90 at 206
- ⁹³ Here I am interested with the interests of the developing state, in cases of abuses by the multinational; rather than vice versa; where of course the application of Int. law would be beneficial.
- ⁹⁴ *Sapphire Petroleum Arbitration* 35 ILR (1963)at 175
- ⁹⁵ Award of Nov. 4, 1977, 21 ILM 762 (1982)
- ⁹⁶ *Klockner Industries Vs Republique de Cameroon*, Award of October 21, 1983
- ⁹⁷ Art. 54 of ICSID convention
- ⁹⁸ Bernini, G. & Jan Van den Berg J., The enforcement of arbitral awards against a state: The problem of immunity from execution, In: Lew, J., ed., *Contemporary problems in Int.Arbitration*, by J.Lew, (1987) 359-373
- ⁹⁹ Convention on the settlement of investment disputes between states and nationals of other states, submitted to governments by the executive directors of IBRD: March 18, 1965; Appendix 1 of M.Hirsch, pp171 at 190
- ¹⁰⁰ Ibid.
- ¹⁰¹ Supra note 98, at pp365
- ¹⁰² Art. IX of the Introductory law to the rules on Jurisdiction Law of Aug. 1, 1895

¹⁰³ US Foreign Sovereign Immunity Act of 1976; Ss 1610 (a)

¹⁰⁴ Art. 55 of ICSID convention

¹⁰⁵ Art.21 of the DSU 1994, World Trade Organization

¹⁰⁶ *Benvenuti & Bonfant SARL Vs Government of the Peoples Republic of Congo*, 108 J.Droit Intl. (1981) 365

¹⁰⁷ 21 ILM (1982)740. See also, Delaume, G., ICSID arbitration & the court, in 77 AJIL (1983), pp784

¹⁰⁸ *LLAMCO Vs Government of Libyan Arab republic*, 20 ILM (1982)1; 62 ILR 140 (1982)

¹⁰⁹ The Swiss courts, the US courts faced this issue of execution totally different from the French approach of the Appeal court

¹¹⁰ In the above mentioned case of Congo, the appeal court overruled the absolute theory advocated by the court of first instance; see Delaume article, note 79

¹¹¹ Here, one has to take regard of Art. 55, where it would seem that immunity is provided for execution of an award.

¹¹² Art. 27 of Washington Convention of 1965

Chapter Four

The Dispute Settlement Mechanism of the World Trade Organization

INTRODUCTION

The General Agreement on Tariffs and Trade was a new beginning since the ITO Charter in reorganising the regulation of international trade. However, as was in the case of the ITO, the basis of GATT resolving any trade disputes was the consensus of the parties involved, which was headed by the US, hence resulting in the agreement to keep the GATT as informal as possible. As a result of this informality, the GATT did not provide a separate set of rules for resolving trade disputes apart from Articles 22 and 23, which were to apply to violation and non-violation cases. Nevertheless, as clearly identified if such a procedure was to work, it necessitated the dedication and commitment on the part of the contracting parties to adhere to such obligations. But as noted in many a case, there existed a distinction in the attitude of the parties concerned with reference to the GATT agreement and more specifically to the dispute settlement mechanism as a forum for resolving trade disputes. Where as some trade blocks headed by the EC accepted and were more inclined to accept a diplomatic arena for reconciliation, another camp headed by the US tended to appreciate a more legal background for such dispute settlement. Hence there arose an immediate breach in the basis on which the GATT was to exist, namely consensus. I would thus deal first with the existent basis of the GATT/WTO from its inception under the UN Charter, and the reasons for such a consensual basis, as a first step in the discussion of the present GATT/WTO system of dispute settlement. In discussing this issue, I would deal with the reasons on why the United Nations decided to protect the trade between states, and how the

Sponsoring Parties to the United Nations achieved this objective. Secondly, I would discuss what steps the states took in terms of the UN charter in protecting international trade, particularly focusing on the stated objectives contained in Article 1 of the Charter. To this end, I would deal with briefly with Article 55-57 of the UN Charter, which I believe to be the relevant provisions, under which all institutions that I have discussed have been initiated. Furthermore, a brief outline will also be made of the negotiation rounds that were undertaken by the Contracting Parties to the GATT/WTO under the axis of the above mentioned articles, in order to emphasise the fact that protectionism and the protectionist attitude was a key in the success of trade liberalisation efforts during this period.

In order to resolve any shortcomings in the GATT dispute settlement system, that arose as a result of this dichotomy of thinking, improvements were made since 1947, which for a start involved the initiation of the panel procedure in 1952, and the more recently the Understandings of 1979 and 1989, which were developed to legalise and codify the system that existed prior to 1979, where the dispute settlement process was mainly to work under the axis of Art.22 and Art.23 of the GATT. Nevertheless, notwithstanding such innovations made by the Understandings of 1979 and 1989, which involved a “right to a panel”, the panel procedure under the GATT was, as with its predecessor, not without its deficiencies. These deficiencies existed in situations, such as initiation of the procedure, composition of a panel, the consensus necessary in establishing a panel and the adoption of panel reports etc., where one could identify the political clout that countries such as the US and the EC has on such legal rights. I would strive to emphasise that this was a result of extant protectionism, and the fact that GATT was virtually based on consent and the goodwill of states to the dispute.

As a solution, in order to negate these deficiencies, the Uruguay Round Trade negotiations came into effect in 1995, where such changes were made by the 1994 Understanding and more importantly, which involved merits and demerits on a legal point of view. There has been clear developments on the part of the Uruguay Round agreements in order to streamline the resolving of disputes arising in international trade. Some of the changes made by the Uruguay Round Agreement are namely, The establishment of the appellate body, The time limits for resolving disputes, Authorisation and adoption of reports on the basis of negative consensus, Composition of panels being regulated by specific time limits and the right of publicist and specialist of trade law to be panellists. Taking into consideration these changes that have been made since the inception of the 1994 Understanding, I would analyse as to how these changes have effected the existing practice of contracting parties to the WTO, specially taking into consideration that super-powers as well as developing countries have to adhere with such legal regulations, and more importantly considering the protectionist attitude of states which are parties to disputes. I would also take into account the case law that has emanated from the WTO panels in asking my self as to whether the WTO dispute settlement has been a improvement on the prior GATT system with regard to the applicable law, adoption of reports and the new appeal process, which is thought to be a merit of the new system, particularly taking into account the protectionist attitude still existent among states.

One important fact I would deal with regard to the new WTO system is the implementation of WTO panel reports. It is my belief that in considering whether the WTO is a improvement on the previous GATT system, one has to look at, First the Surveillance of the Implementation of recommendations and rulings and other alternative arrangements, and Secondly the view held by the countries towards

such a Dispute settlement system reports which require immediate implementation. Therefore, I would deal with the effectiveness of the mechanism in respect of the adherence of states to WTO panel implementation. I would deal with these facts in order to clarify whether these practices negate any effectiveness such legal improvements that have been made by Art.21 and Art.22 of the dispute settlement mechanism. I believe that such improvements are worthless, unless proper provisions are made for realistic implementation of panel reports, which involve major trading blocks, and the economic & political protectionism that is existent among states, be it developing or developed.

4.1 The Basis of GATT/WTO initiation under the United Nations

Having discussed the other dispute settlement mechanisms with regard to international trade and investment and the merits and demerits of these mechanisms, I would follow on to concentrate on the origins of the GATT/WTO and the ensuing jurisprudence of this mechanism within this chapter. The devastation of World War II brought about a togetherness to resolve these problems. Hence the inauguration of the UN and associated organisations, that was to be regulated by the Charter that was accepted at the end of discussions at different conferences. As economic depression had been a part of the devastation and a cause of World War 2, the UN Charter provided for the improvement and liberalisation of economic activities under the axis of Articles 1, 3 and 55-57. Thus the establishment of specialised agencies to deal with economic liberalisation noted by Art.57. Hence proposals were made to establish the ITO as the regulatory authority of trade liberalisation. However, as I would emphasise, these proposals did not succeed as a result of the inherent protectionism within the sponsoring states, in different sectors. With the breakdown of negotiations to establish the ITO, as a result of protectionism, discussions were initiated to develop the GATT as the regulatory authority of international economic activities, via a succession of trade negotiating rounds.

Among the trade negotiating rounds, ending recently in Doha, Qatar, was the Kennedy, Tokyo and Uruguay rounds which has made a large difference to the liberalisation motives enumerated by the UN via Charter provisions. These rounds have concentrated not only on the reduction of tariffs, non-tariff barriers on trade, but also the liberalisation efforts in agriculture and services sectors respectively, which have been to a greater extent been the sectors prone to restrictions

imposed by individual states or economic blocks. While great efforts have been made to stick to the liberalisation philosophy of the UN Charter, I would emphasise the fact that this liberalisation philosophy has been qualified by the protectionist nature and standing of states during these negotiating rounds. I hope to emphasise the fact that, while there is a clear motive for trade liberalisation and clear evidence of such, such efforts have not gone far enough as envisaged by the philosophy of the UN Charter, and hence a philosophy of qualified liberalisation, based on the protection of self interests.

4.1.1 Devastation of World War II:

The Second World War had different implications for different countries, be it economically or in its social standards. While it is argued that the war had effected the United States beneficially in increasing its growth and commercial output, it was the other side of the coin for some others. If one takes into account some of the German controlled European countries, developing states and socialist minded European states such as Italy; the economic effect was a disaster. In short, the European economic situation, in general was far short of the economic prosperity anticipated by the Hitler led war machine. Countries who had depended on manufacturing industries were crippled as a result of a shortage of raw material and manpower. Furthermore, these industries were further disabled by the fact that there was no export market left as a result of the war. With regard to financial aid being available for these industries via government loans, this avenue was rendered non-existent as a result of governments facing budgetary deficits and a shortage of foreign exchange reserves, compounded by high inflation levels. As Aldcroft notes, “as far as the chief productive assets, labour and capital, are concerned, European losses and

damage as a direct result of war were greater than in 1914-1918.”¹ This synopsis was more evident, when one takes into account the situation of European agriculture industries in the aftermath of the war. Most of the Eastern European countries were dependant on agriculture as a mode of export earnings, but were severely disrupted by the war through damage to land, damage to livestock and equipment, as a result of German occupation. While on the whole, the sharp fall in agriculture was not as badly effected as manufacturing industries, it was nonetheless far from modest. While the effect on agricultural industries in Western Europe was substantial, the real disruption was caused to industries in Eastern Europe and occupied territories, where the production was severely reduced.² While eastern countries were severely effected by the war, this situation did not however exonerate other western states from destruction of agricultural industries. France for example, experienced a near 50% reduction in domestic production, and with it a reduction in national income, which amounted to approximately 20%. It was a similar story in other western states, where the national income was reduced as a result of the reduction in agricultural industries.³

This crippling effect on agricultural industries coupled with the destruction of manufacturing industries saw a general reduction in the productive capacity of European nations on a whole. This shortage in raw materials, food and man-power was not only instrumental in the reduction of the overall productivity of these nations, but was also a part of a larger problem. As a result of the devastation caused by the war, the European nations were unable in the immediate aftermath to reconstruct their shipping facilities, inland transport systems etc., which hampered their ability to engage in international trade or to pay for imports, coupled with it's inability to pay for these imports.⁴ Thus, one could say that in general Europe was in shambles after World War II, be it economically or socially, where the inflation rates

were increasing daily, public debts were increasing and international trade was at a standstill. It is this fact in mind that the nations were brought forward to resolve another crisis looming, where aid was needed to reconstruct Europe as a whole. Thus one could safely say that historical escalations be it economic or social, has played its part in bringing the nations together in negotiating international conventions to resolve such disputes in the future. The most important of these mechanisms was the United Nations and associated organisations, which arose as a result of the devastation of the great depression and World War II. In the context of this research, the important organisation to concentrate would be the International Trade Organisation (ITO) and GATT, which was supposed to improve international trade relations and avoid destruction in a trade environment. Thus I would turn my attention to this aspect at present.

4.2 The United Nations and the protection of international trade:

The origins of the United Nations could be dated back to the historical attempts made by nations to construct an organisation that could harmonise and protect the interests of nations who are willing to toe a peaceful path in international relations. This is made clear by the fact that the main stimulus for the construction of the UN arose as a result of a devastating depression and war, which ruined interstate relations. However, at the same time another ulterior motive in the construction of the UN was the control of countries, which were identified as the common foe to international peace. This was emphasised in the wording of the Moscow declaration which announced that “...they recognise the necessity of establishment at the earliest practicable date a general international organisation, based on the principle of the sovereign equality of all peace loving states, and open to

membership by all such states, large or small, for the maintenance of international peace and security”⁵, meaning that any ‘rogue states’ so to speak, should be restricted in military or economic activity which would go against the ideals of international peace brought about by allied nations.⁶ Thus keeping with these ideals of international peace, the major powers were further involved in negotiations in the US, at Dumbarton Oaks, with the intention of developing a blueprint for the construction of the United Nations. While the proposals to come out of the Dumbarton Oaks conference was not the charter itself, it was a stepping stone for further discussion in the future. According to the proposals, the purposes of the Organisation were as follows: 1). To maintain international peace and security; 2) to develop friendly relations among nations to take other appropriate measures to strengthen universal peace; 3) to achieve international co-operation in the solution of international economic, social and other humanitarian problems, and 4) to afford a centre for harmonising the action of nations in the achievement of these common ends.⁷ It was agreed at the Dumbarton Oaks conference that the new organisation would consist of a general Assembly where all members would be represented.

Furthermore, there was also to be a Security Council, where the major power brokers were to be represented, with the responsibility of peace and security attached to such representation. This was a further emphasise on the control that the sponsoring governments had on the establishment and running of the United Nations. Furthermore, this control and power was intensified by the fact that, for the first time in the history of international relations, a proposal was approved to place armed forces at the disposal of the Security Council in its task of preventing war and suppressing acts of aggression.⁸ While the Proposals were initiated towards determining the structure of the UN, the opportunity was also taken to make

arrangements for the establishment of new specialised agencies,⁹ which would deal with international economic activity, under the patronage of the United Nations. Nevertheless, the parties involved in the Dumbarton Oaks discussions were unable to negotiate procedures for voting, which was left for the Yalta conference, which was a thorny issue to be resolved between the major trading parties. Notwithstanding the differences in thinking, the major parties of the US, Britain and the USSR, decided that important decisions regarding enforcement measures should be taken unanimously; which was with the keeping of the philosophy of the sponsors of the United Nations, that minor issues of procedure and state disagreements should not be a thorn in the attainment of international peace, security and economic prosperity. President Roosevelt, in one of his final statements to congress, prior to his untimely death emphasised this ideology when he declared, "this time we shall not make the mistake of waiting until the end of the war to set up the machinery of peace. This time, as we fight together to get the war over quickly, we work together to keep it from happening again."¹⁰

In keeping with this ideology, forty five nations were invited to the San Francisco Conference, and the Conference itself invited a further four nations to attend, bringing the pioneer nations of the United Nations to fifty, who gathered at the city of the "Golden Gate." The emphasise of the San Francisco Conference, was the preparation of the final Charter of the UN, which was signed on the 26th of June, 1945, in order to give credence to the proposals enumerated at preceding conferences called at Dumbarton Oaks, Tehran and Yalta. On a political front, the San Francisco conference built on the proposals of the Dumbarton Oaks proposals, by agreeing on the structural institutions of the United Nations. While the Conference agreed on the proposed charter and the structural novelties of the United Nations, the two most

important novelties of the United Nations system was the abandonment of the unanimity principle and the protection of economic and social interests. While the majority vote rule was of great significance in the political proximity of the United Nations, in the context of the focus of this piece of research the most important aspect of these novelties was the greater emphasise on economic and social objectives of the UN enumerated in the Charter.¹¹ This was a direct result of the League being focused on this field, that was taken forward by the ECOSOC, as a separate organ of the United Nations.

It was within this context of this organ and its authority that the specialised agencies worked, and was co-ordinated. But at the same time, the activities of the ECOSOC was responsible to the General Assembly, and was to work under the authority of the General Assembly. What this meant was that the ECOSOC and the specialised agencies were to work within the jurisdiction provided to it by the charter and according to the provisions of the charter dealing with economic activity. Therefore, having concentrated on the gradual development of the UN on the basis of protecting peace and security, I would concentrate on the basis of protection of international trade and economic activity, as well as the promotion of such activities, within that general mandate given to the United Nations.

4.2.1 Charter Provision relating to Economic & social Co-operation and Specialised Agencies:

Article 1 of the United Nations charter states that,

“The Purposes of the United Nations are:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace,

and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace” and,

Article 3 notes;

“To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;”

The above mentioned two articles emphasises the nature of the objectives of the UN, as a regulatory institution, where the ambitions are not only to protect the world peace by controlling aggression by states such Germany in the Second World War and more recently, Iraq in the Gulf war. The emphasise given to the protection of economic and social interests represents the identification by the UN of the destruction caused by World War II and previously the depression, as mentioned above. Furthermore this ambition is given more credence by the fact that such economic prosperity is supposed to be achieved by “international co-operation”. The interpretation to this could be twofold. First, that all countries are to be represented as sovereign equals in international relations, meaning that non-justifiable occupation and abuse of resources by one country of another is prohibited. Secondly that these countries are restricted from objecting to any form of international relations by the enforcement of trade barriers, keeping with the principle of trade liberalisation. One could say that this was a direct response to the objectionable pre-war practices of

the states who were more cautious and protectionist, with all justification, after the devastation of the great depression of the 1920s-30s. While the first interpretation of these objectives might seem political than economics based, the second strand of thinking with regard to the protection of economic and trade rights is more emphatic in the way that the UN has progressed in specifically identifying as worthy of protection, given the fact that there is a political decision making fact that results in such restrictive economic practices. This is clearly the case when one takes into account the distinctive articles dealing directly with economic and social co-operation.

4.2.2 Articles 55, 56 & 57 of the UN Charter:

Article 55 of the UN Charter states;

“With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, the United Nations shall promote:

- a) higher standards of living, full employment, and conditions of economic and social progress and development;*
- b) solutions of international economic, social, health and related problems; and international cultural and educational co-operation...”*

As with Art.3 mentioned above, Art.55 emphasises the need of the United Nations being involved in the protection and promotion of economic and social rights of peoples of the world order. While Art.3 noted the necessity of gaining the co-operation of the world order in protecting these rights, as an ambition of the

United Nations; in contrast Art.55 notes that it would “promote” such protection. The wording of this article could be given different interpretations, particularly if promotion is construed to be the interference by the UN in domestic affairs of the nations concerned, taking into regard the different positions taken by the parties to the Charter on this particular issue. Leaving aside this issue for a moment; the objectives of the article once again emphasises in detail, the necessity of protecting the employment, international trade, finance, communications, transport facilities of the nations concerned.¹² The importance of this article is further emphasised on a developing country’s point of view, by the fact that Art.55(c) notes that these objectives are to be achieved with respect to and with observance of human rights without discrimination “...as to race, sex, language, or religion.”¹³ Thus it was within the ambit of these limitations that any institution was to act, or any measure taken by the parties were to operate.

Article 56 of the UN Charter notes;

“All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55”

As Goodrich notes, the procedure to be taken by the members to confirm with the objectives are twofold. First, they are to take action, either individually or by bilateral negotiation or convention, or secondly, they are to co-operate with the appropriate organs of the UN, in satisfying the purposes in question. As I had mentioned earlier, the United Nations, according to Art.55 is in a process of “promoting” the mentioned objectives. Thus if the purpose of Art.56 is to make the nations concerned obliged to take action in conformity with the provisions of the

article, one has to question as to what extent this provision would be taken in making the countries concerned in taking the appropriate action, especially taking into account the fact that the objective of the UN was to “promote”, than “enforce” such actions? Goodrich states that the co-operation with the UN organs “...*does not mean that recommendations of these organs become binding but it does obligate Members to refrain from obstructionist acts and to co-operates in good faith in the achievement of the purposes of Article 55.*”¹⁴ If this is the interpretation one is to offer with regard to UN obligations, it could give way to further questions. First, one could question the usefulness of such a interpretation, specially given the fact that it is these same protectionists practices that the UN was to avoid,¹⁵ and secondly, the usefulness and the jurisdictional problems that the specialised agencies would face, given the fact that there is the opportunity for these states to obstruct to the jurisdiction of these agencies. Therefore, it is within these boundaries that Art.57 operated when it stated that;

“The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Art.63”

Thus the specialized agencies were autonomous and were functional according to the needs of the area of protection, where the areas were within the gambit of employment, economic and social arena. It was within this context that I would focus on the International Trade Organization (ITO)/GATT, where the area of protection was focused on international trade and investments.

4.3 The ITO/GATT negotiations in the regulation of trade:

4.3.1 The negotiations for establishment of ITO:

Keeping with the provisions of Art.55 mentioned above, the United Nations emphasised as one of its ambitions the promotion of “higher standards of living, employment, and conditions of economic....progress and development”. While the establishment of other agencies for the promotion of employment and food shortages and development had been covered; the establishment of a central agency for the protection of trade and investment rights has had; one could say “a rocky ride” from the beginning to the end of its negotiation period. On the 18th of February 1946, the Economic and Social Council (ECOSOC) decided to call an International Conference on Trade and Employment “for the purpose of promoting the expansion of production, exchange and consumption of goods”¹⁶ and to draft a charter for an International Trade Organization. While the ECOSOC was preparing a conference for the drafting a charter for the ITO; the U.S. in a way, had already began negotiations with the British in order for the establishment of the ITO. This was done through the Washington Loan Agreement, where the parties agreed on certain financial and trade preferences and restrictions. The results of these bilateral negotiations were incorporated in a document titled the Proposals for expansion of World Trade and Employment, as US plans for the establishment of the ITO.¹⁷ These plans were presented to the Preparatory Committee, which was set up in order to oversee the drafting of the convention.

It is said that these negotiations were a result of the different strands in thinking, encouraged by the United States, at the time of proposing the development of the Charter. The first strand of thinking was the emphasis on the

reduction of tariffs, where the US Congress delegated the President with the power to enter into reciprocal agreements to reduce tariffs.¹⁸ The second strand of thinking was, is said to be a part of the first strand of thinking. Jackson states that “ *The second strand of thinking during the Second World War period stemmed from the view that the mistakes concerning economic policy during the inter-war period (1920-1940) were a major cause of the disasters that led to the Second World War.*”¹⁹ Jackson argues that states were persuaded by the economic instability and destruction of the Great Depression and the Second World War, to take part in the establishment of institutions to protect the economic interests of the states concerned. Thus the logical assumption one would make is the expectancy that the states concerned in protecting these rights would encourage the establishment of these institutions by its political support at any stage or in form of enactment of legislation.

The Havana Conference in 1948 completed the draft ITO charter. As I had mentioned earlier, the Charter was born of the Washington Loan Agreement of 1945, but had its origins in two other documents, which emphasises the agreement between the US and the U.K., which culminated in the ITO charter.²⁰ One of these documents was the Atlantic Charter agreed upon nine years earlier, which noted;

“*They (the President of the US and the Prime Minister of the U.K.) will endeavour, with due respect to their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished of access on equal terms to the trade and to the raw materials of the world which are needed for their economic prosperity.*”²¹

This was followed by other mechanisms of trade expansion such as the US Lend-Lease agreements, between the U.S.-U.K. and the Soviet Union, the

creation of the United Nations Relief Rehabilitation Administration (UNRRA) in July of 1946 followed by other bilateral agreements between state parties.²² The cornerstone of these agreements and mechanisms running up to the ITO negotiations was the co-operation in international trade. Thus the ECOSOC adopted a resolution calling for an international conference on Trade and Employment to consider the creation of the ITO. Thus a Preparatory Committee consisting of representatives from 19 countries was established for this purpose. At the same time, the US provided its proposals for the ITO to the first of these meetings held in London. Thus the Sponsoring parties to the ITO charter summoned four preparatory meetings in London, New York, Geneva and Havana respectively in order to complete a draft charter for the ITO. The main of these meetings was the one held in Geneva, where the negotiations were “threefold”, where the objectives were, a) the preparation of a charter for the ITO, b) negotiation of a multilateral agreement to reduce tariffs and finally drafting ‘general’ clauses for the regulation of obligations with regard to tariffs in trade. As Jackson notes, “the second and third parts together, constitute the GATT-the General Agreement on Tariff and Trade.”²³ Thus it necessitated a commitment on the part of the parties concerned, be it political as well as economical, in satisfactorily achieving these objectives. Nonetheless, the proposed ITO failed to get off the ground for reasons of protectionism, which had dominated international trade relations, which has also been the case in most of the GATT/WTO rounds, as could be emphasised by the prolonged negotiations on different areas of contention between the parties.

4.3.2 A brief outline of the key negotiation rounds undertaken by GATT states:

The first key negotiating round undertaken was the Kennedy round of negotiations, where the key issue of negotiations was based on the reduction

of tariffs. At the same time, the parties were also concerned in the reduction of non-tariff barriers imposed by the states or economic blocks on specific areas of concern. This was specifically true of areas such as agriculture; which was subject to numerous non-tariff barriers, and cause or trade friction. While decisions were taken by Contracting Parties for the reduction of tariffs and non-tariff barriers in agricultural products for example, the fact remained that the states were allowed to forward exceptions lists to such liberalisation proposals, which meant that countries such as France could continue with the imposition of such barriers. Unfortunately, the GATT Agreement seemed to have been ignorant to this fact by allowing states to continue with these practices, which was not rectified by the negotiations undertaken at the Kennedy round of negotiations, thus leading to disputes arising between these Contracting Parties. Furthermore, from a fairness and liberalisation viewpoint advocated by the UN Charter; it seemed that the Kennedy round did not fully succeed in its motives, particularly from a developing country perspective, considering the fact that these nations had no other way of resolving such disputes which arose as a result of these restrictive practices, apart from the negotiation and power based Art.22 & 23 provisions of the former GATT, which was not the motive of Art.55-57 of the UN Charter. It was this kind of conditional liberalisation, which was a movement away from the initial liberalisation motives, that was also evident during the Tokyo round of trade negotiations held during the 1970s. Following on from the decision to reduce tariffs; the major parties however were more concerned about the existing trade systems of each other, particularly the Common Economic Tariff & Common Agricultural Policy of the EC and the Tariff systems of the US. To the credit of the round of negotiations, in order to facilitate the liberalisation process, the Contracting Parties decided to agree on 9 special agreements and 4 “Understandings” dealing with

non-tariff barriers. Keeping with ideals of liberalisation, these codes were focused on the reduction of these barriers and the initiation of dispute settlement mechanisms for each area of conflict. Notwithstanding these improvements made towards progressing with the liberalisation plan, it was the situation with regard to subjects such as agriculture which was cause for concern, especially as the Contracting Parties could not agree on a non-tariff code for this area. Unfortunately, while the major Contracting states disagreed on each others agricultural policies and restrictions; the effect of there being no non-tariff code effected not only developed states, but also developing nations, who based their economies on agricultural exportation. While the Tokyo Declaration focused on the differential treatment for developing countries, as part of the improvements made at these negotiations; the fact that the developed nations were not agreeable to initiate a code for agricultural products, also questioned the motives and the success of the Tokyo round as part of the liberalisation process undertaken within the axis of the GATT.

While progress was made during the Kennedy and Tokyo rounds to further liberalise international trade and services, it was also the case that these initiatives were still restrictive and not to the level expected under the UN system. This was certainly the case, given the fact that unless these restrictive practices were eradicated, the situation arose, where the states were still to be involved in dispute settlement under Art.22 provisions that favoured the economically powerful nations. Hence, it was under these situations that the Uruguay round of negotiations was undertaken. As the Ministerial Declaration noted “negotiations shall aim, by appropriate methods, to reduce or, as appropriate, eliminate tariffs including the reduction or elimination of high tariffs and tariff escalation. Emphasise shall be given to the expansion of the scope of tariff concessions among all participants.”²⁴ With this

mind, the bulk of the trade liberalisation rules and regulations are contained and defined in four annexes attached to the GATT 1994.²⁵ As it was understood, the General Agreement and the whole package were to be accepted as an all or nothing package and that the agreement must be accepted as a whole. To the merit of the Uruguay Round results, it restricts the opportunity of states differing from the obligations of trade liberalisation, as a result of this “whole package” of liberalisation measures. As Demaret states “The Uruguay round puts to an end to the GATT ‘a la carte’ which resulted from the Tokyo Round.”²⁶ However, as with keeping with the previous negotiating rounds, exceptions to the liberalisation process was included in certain agreements and some agreements were left as being optional for agreement. Given the restrictive nature of trade practices, as evidenced by the disputes brought to the attention of the DSM²⁷, it was questionable whether these issues would be satisfactorily completed during this round with the consensus of all parties concerned. Strangely, it was the same area of agricultural products and the reduction of tariffs and non-tariff measures which was the major concern of the states. This was even made worse by the fact that exceptions were agreed to the side agreement which concerned agriculture. Given the fact that different states were not agreeable to the reduction of their respective protectionist positions on agricultural products, questions even arose as to whether the negotiating round could be completed as a result of the numerous breakdowns that occurred during this period of negotiations.²⁸ Notwithstanding the fact that improvements have been made with regard to areas such as Trade in Services and government procurement, which were identified as areas where market access and the regulations on service providers had been limited; the fact remained that even these agreements were agreed with exceptions or loopholes which allowed states to continue these restrictive practices.²⁹

The basis of the birth of the GATT/WTO was the eradication of protectionism and the restriction of depressive effects as happened in the 1920s-30s. The GATT, since 1947 and the WTO from 1995, has been the organisational framework under which the liberalisation motives have been undertaken. However, over the years and several negotiating rounds, it has been clear that the states involved have been sceptical and protective towards their interests in these multilateral negotiations. One such contentious issue of discussion has been the dispute settlement mechanism, which was activating under Art.22 and Art.23 of GATT until 1994 and the DSU since then. The law regulating the panel procedures, the time limits, the implementation, surveillance has been the issue of negotiations over the recent years, as a result of the restrictive or intruding natures of GATT panel reports on the continuation of these anti-liberalisation practices. Certainly, this has been a debatable issue over the multilateral negotiating round, as a result of different states envisaging the dispute settlement as either being negotiation based or adjudicatory in nature or as having direct effect or not in member states etc. Therefore, I would focus my attention on the Dispute Settlement Mechanism of the GATT/WTO, with close attention on the initial liberalisation motives of the United Nations and the GATT/WTO, to which the Dispute Settlement mechanism gives or has the potential to give impetus, by upholding the principles of liberalisation by negating any anti-liberalisation measures or holding responsible states which practice such measures.

4.4 The GATT system prior to 1994 and its deficiencies

The GATT 1947 was based on consensus, and as such dispute settlement, as specified by Art.22 & Art.23 was mainly based on conciliation and negotiation, rather than adjudication, which would involve proper implementation and

given primacy to a international agreement over national legislation. However, as a result of the Dichotomy in philosophy with regard to the Dispute settlement on the part of the US and states from the EC, the GATT system has been a compilation of consultation and legal provision emphasising the dichotomy in thinking. Therefore within the section of this Chapter I would deal with the provisions of Art.22 & Art.23 of GATT and the development of the GATT dispute settlement through the Understandings of 1979 & 1989. Furthermore, I would also, however, emphasise the deficiencies GATT system which resulted as a consequence of the above mentioned dichotomy, which I believe resulted in the GATT system fading into disuse, and gave birth to the new WTO dispute settlement mechanism.

4.4.1 Different philosophies and its nature towards GATT:

4.4.1.1 Legalism Vs Pragmatism:

Different countries take a different perspective on dealing with disputes that arise with its trading partners. According to analysis made by Young for example “historically some countries, particularly the members of the European union have preferred a more diplomatic, flexible or equitable approach to dispute resolution in the context of GATT”³⁰, in contrast to the litigious approach of the Americans. Among the reasons given, one important reason for such apathy towards legalism on the part of the EC is that, “the US is a federal state and the latter is a federation of states”, which has to “accommodate the different policies of all countries concerned”³¹, thus emphasising the concern for its individual policies. Hence, as Mora notes “ it has traditionally defended the non-adjudicative character of GATT dispute settlement and the need to resolve disputes through diplomatic techniques.”³² As a result the ideology surrounding the EC, historically has been one of negotiation and

conciliation, rather than a “rule oriented” approach accepted by the US, where the invocation of the GATT dispute settlement procedure is more regular.³³ This is emphasised by the negotiations for individual topics at the Uruguay round of negotiations. In one instance for example, early in the negotiations, the United States proposed that a institution of binding arbitration be applied as a supplement to the existing procedures of negotiation and conciliation, which according to the opinion of the US delegation was for the resolution of “harder cases.”³⁴ Furthermore in another instance with regard to time limits, the legalistic instincts of the US was emphasised when it proposed a free hand for retaliation for the injured party in response to intentional delays, without any form of negotiation or conciliation between parties to resolve such delays.

The US has been a defender of a more legalistic philosophy where the agreement is that “...rules and thus expectations will become much clearer and more predictable if GATT dispute resolution is characterised by rule based decisions rendered through an adjudicatory dispute resolution process.”³⁵ This perception on the part of the US has reflected the differences in the approach and the respective legal systems. Among the reasons provided for the expectation of such a legalistic dispute settlement procedure are namely, the litigious nature of the US culture, and more importantly the power that Congress has on any trade decision that is made by the executive , which has to be authorised by congress according to the constitution.³⁶ However, as much as we are made to believe that this existing legalism is the prime reason for the US accepting a judicial process, it is also my belief that protectionism and protectionist attitudes have taken a large part in the decisions made in the panel process being effective at national level. This fact is justified by the fact that the United States Congress enacting the Trade Agreements Act of 1979, which

was essentially to modify any local legislation in order to encapsulate the MTN agreements of the Tokyo round. While the US accepted that such changes were made in order to “amend existing law to provide means for effective use of the dispute settlement processes agreed to in the MTN, and to reflect US determination to make vigorous use of such processes”³⁷, in the same breadth, the US was not hesitant in protecting, what it considered to be its sovereign right to the “enforcement of US rights in matters beyond the GATT’s authority.”³⁸ Thus subjective authority was provided to the President of the US to authorise action in order to enforce such rights or to eliminate action of other states, when the US believed it to be against its interests.³⁹ While one could argue that such an enactment of the 1979 Act was a one off, such an argument was falsified by the continued legislation of the United States, which was keen on protecting its sovereignty and international commerce. This was emphasised by the enactment of the Omnibus Trade and competitiveness Act of 1988⁴⁰, while the Uruguay Round of Negotiations were approaching the Mid-Term Review, where the US was party to such negotiations. This piece of legislation not only superimposed further regulations, but also seemed to clarify the subjective meaning of unjustified and burdensome activities indicated under ss301 of the Trade Agreements Act of 1979, hence justifying the argument that the US was interested in protecting its interests, while at the same time being involved in trade negotiations.⁴¹ This act brought into action what was called the “super 301”, where the focus was mainly on foreign nation’s treatment of US exports, while previously it was concerned with foreign imports into the US. Furthermore, this act also gave more discretion to the trade representative to designate the ‘priority countries’ and taking action against them, emphasising the continuing protectionist attitude of the United States.⁴²

As noted by many, GATT is based on economic consensus between the contracting parties, rather than an obligation to comply with the legal rules developed under the GATT dispute resolution procedure. Working with the tools peculiar to their own profession, the GATT diplomats have developed an approach towards law which attempts to reconcile, on their own terms the regulatory objectives of a conventional legal system with the turbulent realities of international trade affairs.⁴³ However, as noted by many an author an erosion of consensus with respect to GATT obligations was seen in the late 1950s and 1960s, as a result of the dichotomy between legalism and pragmatism; which was one important reason as to why the GATT, at that point in time, became ineffective in resolving trade disputes. This was clearly identified in the case of *Cuban Restrictions on Textile Imports (US Vs Cuba)*, where the US refused customary bilateral consultations and in addition asked for immediate authority to retaliate, in contrast to the negotiating stance taken by the other Contracting parties.⁴⁴ This negativity towards the GATT Dispute Settlement Mechanism was directed mainly as a result of the differences in opinion on whether the GATT legal obligations should be adhered to or left in the hands of diplomats. As seen in the Chicken war and the *US- Export Subsidy on Tobacco (Malawi Vs US)*⁴⁵, the argument was in choosing a diplomatic settlement or complying with GATT legal regulation. In the Tobacco case for example the US position as quoted stated that, “*The language of Art. 22 made it quite clear that the invocation of that article was not a hostile procedure nor a litigious one; nevertheless, psychologically and politically it could risk having the appearance and therefore might impair the objective of a friendly and collective approach to problems of common concern to the international trading community.*”⁴⁶

Hence the advocacy of a legal approach on the basis of protecting the status quo of trade relations, which was in contrast to the EC position of diplomacy. As Hudec very correctly notes, this “confrontation syndrome”⁴⁷ had not only derailed the progress of the GATT dispute settlement, but also emphasises the fact that at the early stages of the GATT, the parties involved in the GATT were more interested in protecting the domestic interest, rather than adhering to a single third party judicial system. I believe, This was what the US was advocating in the case mentioned above. But in advocating such a protectionist attitude the US believed that taking a legalistic attitude was better than a diplomatic approach as accepted by the EC. This attitude was clearly illustrated when a US delegate, speaking on both legal and other kinds of violations had this to say, “....*There are many commitments in the charter, some of them general, some of them specific. But if any of these commitments are violated, there is only one sanction that can be applied. And that, in crudest terms, is retaliation by another state...We have asked the nations of the world to confer upon an international organisation the right to limit their power to retaliate. We have sought to tame retaliation, to discipline it, to keep it within bounds. by subjecting it to the restraints of international control, we have endeavoured to check its spread and growth...*”⁴⁸

Thus emphasising firstly that the administration considers the GATT as a rule imposing third party adjudication system and secondly the fact that the United States has usually been the leading proponent of this legalistic view. The desired effect is that the rules and obligations will be much clearer, if GATT dispute settlement is governed by rule based decisions provided by an adjudicative process⁴⁹, coupled with sanctions imposed either unilaterally or as a result of multilateral negotiations. However, notwithstanding the fact that the motive of the US

in this respect was to add pressure necessary to obtain compliance with GATT rules, and stop stronger parties from negotiating an unfair advantage, it is also right to say that this has further enhanced the protectionist attitudes, as a result of the US trying to enforce GATT through unilateral trade actions via ss.301 of the Trade Agreements Act of 1979 or the Omnibus Act of 1988. The impact of the Unilateral nature of these pieces of legislation is capped by the then director General of the GATT, when he noted, that the amendments were “the single trade policy initiative which had most galvanized the attention of the international trading community.”⁵⁰

In contrast, Europeans argue that rights and obligations of the GATT, “...are the result of a delicate balance of economic interest reached after a process, often lengthy and difficult, of negotiation. This delicate balance between sovereign states cannot appropriately be dealt with in a formalized legal framework”⁵¹ and hence can only be devised by diplomacy. Different actions taken at different points in time by the EC countries emphasises the diplomatic approach preferred by the EC, which can be exemplified by two facts. First the birth of the EC and its practice of centralising its decision making to a single court, and secondly the concern of these states of the campaign by developing countries for more protection, which was a more “uncontemplated by, and decisively unsettling for the original GATT.”⁵² The EC was established under the Treaty of Rome which provided a composite set of institutions to deal with trade issues which arose within the EC, thereby reducing the involvement of these countries in the GATT dispute settlement. The goal of the EC was to develop a common market policy rather than playing, what I would call a “diplomatic mind game” with regards to international trade with the other super powers, namely the United States. Hence the reduction in GATT activities in the 1960s and early 1970s involving the EC could be attributed, as Murphy notes

“...to the fear that GATT findings on the use of agricultural subsidies, if imposed upon the EC, could entail serious reform of its policies.”⁵³ As if in confirmation of this fact, as seen in the *Oil Seeds case (US Vs US)*, the moment the subsidies were challenged by the US, the EC resorted to diplomatic negotiation within the GATT framework in order to protect its common market policies. This was the first priority of the EC, notwithstanding the fact that it was a member of the GATT, emphasising also the concern to continue with its protectionist policies. This apparent stance of the EC states on the nature of GATT/WTO dispute settlement has been quite evident at different stages of the negotiations where the delegation has opposed any legalistic codification of the system on the basis that such codification would lead to “results opposite to what we are all aiming at.”⁵⁴ Such objections have ranged from the early 1970s to the present, where at different negotiating rounds the EC had presented proposals, which indicate its willingness as a economic block, to embrace negotiation as a settlement procedure to international trade disputes, in contrast to a more legal procedure. A prime example of the EC stance was exemplified with regard to adoption of panel reports, where the EC proposed in 1988 that, in order to facilitate the full consensus of the parties for the adoption of reports, which it supported, the states involved should be given “political” disincentives to obstruct adoption. What this meant was that negotiation and mediation should be given precedence at political level in order to resolve disputes and “thrash out” these “political” incentives or disincentives, which provides the necessary consensus for adoption. It is this dichotomy that evidently had a effect on the GATT dispute settlement mechanism, which is proven by the volume of cases that was brought to the attention of the panel process. Therefore within the proceeding section I would deal with the Pre-1994 GATT dispute settlement mechanism, and its deficiencies, taking into consideration

the above mentioned philosophical dichotomy, towards protecting trade liberalisation against protectionism.

4.4.2 Dispute Resolution in the GATT:

As noted by the Director General of the GATT, the general nature of the GATT, “...*is a multilateral treaty that lays down rules, accepted by over 120 states, for the conduct of international trade relations. GATT has been the main forum for the liberalisation of trade barriers and for the settlement of trade disputes.*”⁵⁵

Hence one could deduce from this fact that the GATT disputes settlement procedure, whatever form it takes needs to satisfy specified goals in order to satisfy or rather achieve the goal of trade liberalisation. As Davey notes two goals take centre stage if the dispute settlement mechanism is to achieve the GATT goals. First, it has to resolve disputes where one party alleges that another has violated the provisions of the General agreement by practising protectionist practices and secondly, it has to compel compliance of such obligations by the parties concerned.⁵⁶ This is confirmed by Malinverni when he states that, “..*with regard to international economic organisations that the primary objective of dispute settlement procedure is not to decide who is right and who is wrong, or to determine a states responsibility in the matter, but to proceed in such a way that even important violations are only temporary and are terminated as quickly as possible.*”⁵⁷

While taking into consideration the above mentioned above goals, I would proceed to deal with the pre 1994 GATT dispute settlement system as follows.

4.2.2 Article 22 & 23 of GATT:

GATT became engaged in the activities of dispute settlement almost as soon as it opened its doors. However as correctly mentioned by Mora, “*A primary problem...is there exists no official definition of a GATT dispute or a GATT dispute settlement procedure*”⁵⁸ rather such a dispute and settlement of such a dispute was covered by Art.22 and Art.23 which provides for a procedure of “sympathetic consideration” and “consultation”⁵⁹ by the Contracting Parties in order to resolve such “nullification” or “impairment” of GATT obligations. The whole purpose of the former GATT process was to get the parties with grievance together, in order to deal with their individual grievance, in relation to international trade. The process was wholly diplomatic/politics based, which was in contrast to adjudication of the ICJ. This I believe has been the basis on which the GATT dispute settlement has been practised, in accordance with the above mentioned dichotomy of philosophy of the major trading blocks.

Third party adjudication in the GATT on the other hand, was not its greatest trade mark. In reality it did not mention adjudication by panels, rather it was based on rather weak procedures for conflict resolution, and Art.22 & Art.23 was an indication of such persistence with conciliation and consultation. According to Art.25(4) of the GATT agreement, “*...Except as otherwise provided for in this agreement, decisions of the Contracting Parties shall be taken by a majority of the votes cast.*”⁶⁰ This provision presumably covers Art.22 & Art.23 above mentioned. However, notwithstanding the original letter of the agreement, as noted by Davey, consensus has been the overriding principle in GATT practice since its inception until the adoption of the Uruguay round text⁶¹, which confirms the procedure provided to for by Art.22 & Art.23.

4.2.2.1. Operation of Article 22

Art.22 provides that,

“...Each Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding such representations as may be made by another contracting party with respect to any matter affecting the operation of this agreement. The Contracting parties may at the request of a Contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1”

While important changes have been made to this first phase where a complainant must inform the Director General of the GATT in case of any consultation under Art.22, where the purpose is to allow the Director General to notify all contracting parties and see if any one else wants to join in the consultation⁶², which emphasises a point of due process; the emphasis on conciliation and harmonisation of views is still very much present, though it is with minimal effect.⁶³

4.4.2.2 Operation of Article 23:

Art.23 is the second phase of the two phase consultation process explicitly provided for by the GATT 1947, in order to resolve disputes in differing circumstances. The circumstances under which this article could be invoked are threefold, and are as follows,

- a) the failure of another Contracting party to carry out its obligations under this agreement, or*
- b) the application by another Contracting party of any measure, whether or not it conflicts with the provisions of this agreement, or*

c) *the existence of any other situation...*⁶⁴

As noted, Art.23 not only empowers Contracting parties to deal with GATT infringements, but also with measures which are not in conflict with GATT as “non-violation measures”, which I believe to be in the realm of political wrangling, which is in keeping with tradition of negotiation. Hence the scope of Art. 23 is extremely wide, and explains the functions that the drafters wanted it to fulfil, which was interpreted by Pescatore to be, “...*the central concept of the GATT dispute settlement mechanism is not primarily violation of the General Agreement, or of obligations assumed thereunder. It is curtailment in the broadest sense of the word, of the benefits flowing from the agreement, or of the objectives pursued by the entire agreement or by individual provisions of it.*”⁶⁵

As noted by Vermulst, this statement was made by Pescatore, even before the adoption of the Uruguay round text, and hence one has to question the width of such non-violation impairment, especially if the objective of the GATT is to “...restore, with the minimum interference with trade, the balance of concessions and advantage between the parties in dispute.”⁶⁶ The concept of non-violation impairment is not a easy one to deal with⁶⁷, especially as the GATT agreement under Art.23 does not provide for a definition of what it calls “...the existence of any other situation”⁶⁸, and secondly because it does not violate GATT provisions, hence bringing such provisions into the realm of political negotiations and consultations, rather than adjudication. Furthermore, it also gives credence to the wide concept of protectionism, which it seems is accepted as a norm which goes against the ideals accepted by GATT. Hence, it seems then that the drafters wanted a procedure of dispute settlement for claims of a judicial nature, that the GATT agreement is being violated, thus satisfying the needs of the US, but also wanted a

procedure for settling more general grievances, even in the absence of a violation, which I presume to be by discussion, thereby satisfying the needs of the EC led Pragmatists.

4.4.3 Development of the GATT and settlement process until 1994:

Since conciliation and consultation as provided by Articles 22 and 23, was the basis of GATT dispute settlement, such a process developed through culture and before 1952 as a result of such a basis, it had developed the practice of referring legal disputes to working parties⁶⁹ who crucially were represented by the principle interested parties on all sides to the dispute.⁷⁰ Hence the target was gaining agreement between the parties at all times. As Hudec notes, “...*agreement was critical. Without it, working parties could only report on the reasons for disagreement.*”⁷¹ This reflects the nature of the pre-Tokyo round dispute settlement mechanism which was more of a third party adjudicatory mechanism, where the parties agreed to discuss the disputed facts, which prompted some authors to note that, “..*GATT methods, particularly in its first decade, should be taken as a model of conflict resolution*”⁷² and correctly so, as working parties were never intended to render decisions on legal issues. However on a political spectrum, this method of conciliation was bound to fail, as being satisfactory from the point of both parties to the conflict, because some parties, especially the US were more responsive to a legally backed resolution system, where as others accepted diplomatic resolution of disputes, as a result of protecting one’s own interests.⁷³

However, as a result of a upsurge in complaints brought to the GATT⁷⁴; at the seventh session in 1952, the change from ‘working parties’ to ‘panels’ was initiated, which works a present GATT dispute settlement. According to

the Chairmen of the 7th session “...it had been agreed...to establish a panel to hear the various complaints that might be referred to it by the Contracting parties during the present session.”⁷⁵ The change made in 1952 was twofold. Firstly as noted by Hudec, the members of the panel did not comprise any of the parties to the dispute, and secondly it provided a sense of impartiality, specially as the panel had the opportunity of deliberating on the dispute concerned and providing its decision in an report to the Contracting parties.⁷⁶ Furthermore, this situation was enhanced by the fact that the secretariat of the GATT began to play a stronger role in selecting the members of a panel, and as Hudec notes “*Among the other observable differences, one of the most striking was the tendency to ‘legalize’ things a bit more.*”⁷⁷ But then again in the Sardines Case the chairmen of the panel in a reply to a complaint stated that the “...success of the panel depended largely on the co-operation of the parties to the dispute”⁷⁸, thus emphasising the fact that notwithstanding the ‘tendency to legalise’, the GATT dispute settlement would depend on the goodwill of the parties concerned, and further emphasising the fact that there existed a tension within the closed doors of the GATT between Contracting parties on whether the GATT should be legalised or not.

4.4.3.1 Dispute settlement in the GATT since 1979:

Though the working party system was changed to a more adjudicatory system of panels in 1952, as a result of the above mentioned philosophical dichotomy and the consequences thereof, the GATT dispute settlement was not widely utilised by the Contracting parties until the Tokyo round negotiations codified the dispute settlement process through the 1979 Understanding.⁷⁹ This Understanding was further supplemented by the Non-Tariff barrier agreements which

were negotiated with regards to specialists subject matters, that contained their own dispute settlement procedures. This brought out a fragmented system of dispute settlement in the Tokyo round, where in some cases the understanding was explicitly applicable to the agreements and in others it was not.⁸⁰ The Non Tariff Barrier codes contained either explicit or implicit provisions concerning dispute settlement. Furthermore, the code regulations for dispute settlement were more in keeping with the negotiation and conciliation provisions of Art.22 & Art.23. For example, the Anti dumping code and the Subsidies Code contains rules where the disputing parties are to have consultations for a minimum of thirty days before requesting review by the committee. If the matter is not resolved within 30 days, any of the parties could request a panel. However, the dispute settlement process was fragmented to such an extent that the Government Procurement Code does not allow such a right, but allows a right for a panel only after three months from the request for consideration by the committee. On the other hand, these procedures were totally different from the procedures of the Bovine Meat Agreement, where no provision for panel procedures were initiated. On the contrary, the only provision for settlement was to be “consistent with the rules and principles of the GATT.”⁸¹ The Understanding, while of uncertain legal status, basically confirmed and refined the customary practices that had developed during the prior two decades. First and foremost the Understanding confirms the consultation and conciliation provisions of the GATT 1947, when it obliges the parties to “undertake to respond to request for consultations promptly.”⁸² Though it seems that the Understanding is more inclined to the diplomatic approach accepted by the EC led countries, such fears were eradicated to a certain extent when the procedure provided for by the Understanding granted a legal right to the parties concerned with respect to the request for and the establishment of a panel. Under

Art.10, *“It is agreed that if a contracting party invoking Article 23:2 requests the establishment of a panel to assist the CONTRACTING PARTIES would decide on its establishment in accordance with standing practice”*,

thus reaffirming the *‘right to have a panel’* instituted in order to refer such complaints to the Contracting Parties, which was a improvement on the Art.22 & Art.23 procedures of the 1947 GATT. This right has to be taken account of by the Contracting parties, and a panel of *‘preferable governmental’* members should be approved, and more importantly as required by the Understanding such a; *“...panel should be constituted as promptly as possible and normally not later than thirty days from the decisions by the CONTRACTING PARTIES.”*⁸³ The improvements made on Art.23 by the Understanding at this point are twofold. First, by emphasising that the members of the panel are to governmental⁸⁴ and furthermore by stating categorically that that *“...it is understood that citizens of countries whose governments are parties to the dispute would not be members of the panel concerned with that dispute”*, the Understanding emphasises the fact that it appreciates impartiality and fairness and it is further inclined towards a adjudication process. Secondly another improvement on the 1947 GATT, on the part of the Understanding is the fact that it requests for a set time limit on the establishment of the panel, which one could imagine is to reduce the inordinate delays created in such constitution of panels. Furthermore to facilitate such a motive the Understanding requires that the *“...Director-General should maintain an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations...”*⁸⁵, thereby reducing the opportunity for disputing parties to give an excuse of not being able to find a suitable person to represent their interests in such a dispute.

The panel which is constituted on the approval of the Contracting Parties would make an “..objective assessment of the facts of the case and the applicability of the conformity with the general agreement”⁸⁶, and would issue a report which has to be adopted by consensus by the Contracting Parties “within a reasonable time period.”⁸⁷ While emphasising the time factor with regard to the adoption of the panel report, one other important factor which facilitated the customary practice of Art.22 & Art.23 is the necessity of ‘consensus’⁸⁸, according to which the council adopts panel reports. As Noted by Pescatore “consensus comes close to unanimity or mutual agreement; but it is not simply unanimity. It is rather, a state of non-objection, a resigned let-it-go.”⁸⁹ As one could appreciate, Art.23 or for that matter, the Understanding, does not provide for a definition of what ‘consensus’ should be. Therefore, if one is to accept what Pescatore notes as a ‘non-objection’ as being consensus, then it is right in my opinion to state that the Understanding had resorted to a diplomatic approach, while making advances in the legal sphere, thus emphasising the different philosophies adopted by the US & the EC, which is in both instances based on the protection of their local interests. The reports of the panels, adopted by the Contracting Parties, will be given prompt consideration and recommendations made will be kept under surveillance by the Contracting Parties, until suitable efforts are made to remedy the situation that brought about the complaint. According to Art.22 of the Understanding, in case of recommendation not being implemented, “...*the contracting party bringing the case may ask the CONTRACTING PARTIES to make suitable efforts with a view to finding an appropriate solution*”⁹⁰, thus highlighting, what Beal calls, the question of “GATT being a contractual arrangement among the Contracting Parties, working on the basis of consensus.”⁹¹ The ambiguity of the effectiveness of the consensus or “non-objection”

provisions were such that, these provisions and the amendments were made the topics of discussion at post-Tokyo round council meetings, where the states voiced their concern of the conciliation, consensus and implementation provisions of the GATT provisions and the Understanding of 1979. While the US and other nations including developing nations promoted further surveillance and review provisions, the EC warned against a legalistic approach, emphasising its preference for a more diplomatic approach. According to the EC delegation, at that point in time, the concern was “whether the understanding was not being used for purposes other than those intended”⁹², which was a result of the ambiguous final drafting and the practice under the Understanding of 1979. Unfortunately, the fact remained that ironically it was these same concerns that the EC states had in utilising diplomatic approaches rather than legal ones.⁹³

Having had an insight into the dispute settlement procedures which is governed by Art.22 & Art.23 of GATT and the Understanding of 1979, it is important in my opinion to identify the deficiencies of the Pre-Uruguay round system, considering the fact that there existed a combination of political and legal nature to this system, which arose as a result of the above mentioned dichotomy, and the state’s concern for protecting one’s economic and political interests. Hence in the proceeding section I would try to deal with, what I see as deficiencies that existed in the GATT dispute settlement mechanism, as a result of this existing protectionism.

4.4.4 Deficiencies of the GATT Dispute Settlement Mechanism:

One of the changes made from the pre-1979 scenario in case of dispute settlement procedures, was changing the composition of the panel to three members. The last example of a five member panel goes back to 1981. The reasons

for such a three member panel system is that it provides a easier balance, and more importantly as Pescatore notes, *"...three member groups quite naturally work for mutual understanding, for consensus and for compromise."*⁹⁴ However, one has to quarry as to why the above mentioned statement by Pescatore should be the motive given the fact that such panels are supposed to objectively examine the facts and merits of the case? Is it the case that whatever objectivity there is, it is to be denied by the consensus arrived at, as a result of political and protectionist pressures? As mentioned by Pescatore, *"...As a matter of record the reports of all three member panels so far have been unanimous; there have been no dissenting opinion. There is only one example of an individual opinion on record, and this relates to a five member panel."*⁹⁵ Hence, as evidence has proved it to be, it is my opinion that there is a truth in the fact that *"..in assuming that role, the panel often is assisting the negotiation in reference to the power positions of the disputing parties and not with reference to the interpretation or application of an agreed upon existing rule"*⁹⁶, and further given credence to by the fact that in the GATT system the idea did not occur that panel members should preferably be lawyers. This not only has given rise to a more diplomatic oriented panel, but also as a result, as mentioned by Pescatore provided for *"...the poor legal quality of many of the older GATT panels."*⁹⁷

As seen with the problem of the composition of the panel, another issue where problems arose was with regards to the consensus necessary in order to establish a panel, as well as adopting a panel report. According to the 1979 Understanding, *"....it is agreed that if a Contracting party invoking Article 23:2 requests the establishment of a panel to assist the Contracting Parties to deal with the matter, the Contracting Parties would decide on its establishment in accordance with standing practice."*⁹⁸

The word 'requests' is of utmost importance, specially as it gives a sense of a right to the party concerned in requesting a panel in order to resolve the dispute. However, the problem is that such requests are usually taken by consensus, hence negating the effectiveness of such a right. Though this issue is of lesser importance, it exemplifies the debate that prevailed with regard to granting a right to a panel, especially as countries who accepted a 'power oriented' approach rejected such a right and furthermore as noted by Komuro, had the opportunity to *"...block the council decision to establish a panel."*⁹⁹ Having said that, the most controversial area where the consensus rule has applied is the adoption of panel reports.

Panel reports were adopted by a consensus of the council acting for the Contracting Parties. The fact that any of the contracting parties including the parties to the dispute could block the adoption by the council of the panel report has been the subject of frequent criticism. Consensus is not defined by the GATT, and as mentioned by Komoro *"...has been developed for political and practical reasons; for example, to avoid voting."*¹⁰⁰ The United States, followed by Australia, New Zealand and Argentina supported and accepted a "consensus minus two" approach, where the parties to the dispute are prevented from voting in council. In contrast, Japan and the EC rejected such proposals to withdraw the disputant parties from the process. The Japanese view was that the consensus rule binds the parties to the decision and *"as a result of their agreeing to or not obstructing the adoption of the panel report, and thereafter it becomes no longer permissible by any means for the parties to a dispute to deny or ignore the findings of the panel report in seeking solution of the dispute."*¹⁰¹ On the other hand, the EC denied such a proposal on the basis that the problem of obstruction arose as a result of competing concepts in

who should be judge and jury of the process and who should participate in settlement proceedings. Hence the EC suggested that adoption by consensus remain in practice, but with added “political” disincentives to obstruct adoption, significantly justifying Komuro’s argument of political involvement and protectionism in dispute settlement. Thus, it comes as no surprise to note that such obstructions to implementation/adoption of GATT panel reports have figured around agricultural subsidies and policies of other countries which would directly effect the national production or trade practices of these larger economies.¹⁰² Ironically, the fact that the parties are volunteering to be parties to the panel process also emphasises on one hand, the willingness of these nations to protect their policies, notwithstanding the agreement to a WTO panel process. As the Secretariat reported, between 1979-1986, there were 29 dispute settlement panels established. Of the 24 panel reports submitted to the council, five reports were not adopted due to disagreements with interpretation of GATT provisions or opposition by the losing party, emphasising the restrictive nature of the pre 1994 settlement procedures when faced with protectionist states.¹⁰³

Having said that, not only did the obstruction of adoption of panel reports reduce the effect of the GATT dispute settlement system, in a legal point of view, but it also reduced the effectiveness of provisions which protected less developed countries in theory as well as in practice, which I would detail in the following. Given the fact that the US and the EC are more inclined to appease protectionist attitudes in two different ways, one has to question the effect of such provisions that exist in the Understanding itself, which gives priority to the protection of less developed countries.¹⁰⁴ Under Art.24 of the Understanding , and I quote, *“Particular attention would be paid to developments which effect rights and obligations under the GATT, to matters effecting the interests of less developed*

contracting parties”, and further under paragraph 6(3) of the Annex to the Understanding recognised the practice of appointing panellist from a developing country to a dispute. But given the fact that there did not exist a legally binding force to the recommendations provided by the panel; coupled with the fact that such reports needed the consensus of the parties involved to be adopted, as Jackson notes “...the parties are left basically to rely upon their respective ‘power positions’, tempered by the good will and good faith of the more powerful party.”¹⁰⁵ Therefore, given the fact that there existed a practice by the developed world in obstructing the panel process, one has to say that it was a high probability that the developing countries were not protected as a result of the full consensus rule playing its part in such trade dispute settlement, specially given the fact that EC countries preferred a negotiated settlement through political discussion, which personally I think is a barrier in itself. One could argue on statistical evidence that developing countries had a greater opportunity in the GATT to bring cases against developed countries.¹⁰⁶ But then again given the amount of cases being blocked either by the US or the EC, as a result of the consensus rule, which involved developing countries; one has to accept that politics or rather ‘political clout’ rather than legal control played a major part in protecting developing countries in GATT panel proceedings, as a result of protectionist attitudes of economically powerful states or trading blocks.

Interpretative difficulties remained another problem of the GATT dispute settlement based on Art.22 & Art.23. For instance paragraph 1 of Art. 23 provides in some ways another consultation procedure, which could duplicate Art.22 with its requirements of “written representation” to be given “sympathetic consideration”. Jackson argues that there is no necessary connection between Art.22 and Art.23, and that each article stands alone, and further that Art.22 is not a pre-

requisite of Art.23.¹⁰⁷ However, as mentioned above, given the fact that the wording of the two articles are similar, it is quite possible for disputing parties to presume that consultations under paragraph 1 of Art.22 will be fulfilling the conditions of paragraph 1 of Art.23.

According to Art.23(1)(b)&(c), provision is made for consultations, if the issue really is ‘non-violation impairment’. However, Art.23 does not provide a definition of what “...*the application by another contracting party of any measure, whether or not it conflicts with the provisions of this agreement*”, and nor does it provide a definition of what “...*the existence of any other situation*” is supposed to mean. The logical assumption that could be made of such “any other situation” is that, disputes can be brought before the GATT in which, although the affects on trade can be considerable, the trade aspects take second place to political considerations.¹⁰⁸ Not only does this emphasise the leeway provided for political negotiations between Contracting Parties, but also provided interpretation problems for the panel system. For example, how is one to identify whether it is for political reasons that the restrictive trade action was taken? and secondly it also provided the panel with the interpretation problem of corroborating “any other situation”¹⁰⁹ with the fact that the “members recognise that it serves to preserve the rights and obligations of members under the covered agreements”¹¹⁰, which are rights in relation to international trade. Consequently the panels in a number of cases have restrained itself from deciding whether the restrictive measure confirmed with GATT. For example in one such case, as a result of the interpretative difficulties, the panel did not discuss the question of whether a Greek tax levied on certain imported goods might impair the effects of GATT, but rather restrained itself to the question of whether the tax violated GATT.¹¹¹ On the other extreme, as in the *Uruguayan Recourse case*,¹¹²

the panel, in a apparent acceptance of Art.23(1)(b)&(c) measurers concluded that measurers of the kind described in the second half of Art.23 of GATT can only be serious enough if they constitute “..impairment and nullification”, which must probably relate to the “...benefits accruing to the Contracting Party under the General agreement”. As a result, it remained possible, under the 1979 Understanding and Article 23, to invoke GATT against measurers not strictly violating GATT, as in the *Oil Seeds case(EC vs US)*, where the panel held, “...*The Contracting Parties have decided that a finding of impairment does not authorise them to request the impairing contracting party to remove a measure not inconsistent with the covered agreement.*”¹¹³

But as noted by Jackson, as a result of the different approaches taken by the Contracting Parties as to whether a policy will be under scrutiny, it not only reflects the fact that governments often cannot predict what the impact of their actions would be, but also the fact that they would face claims against such policies. Furthermore the difficulties arising out of the interpretation problem was emphasised by the panel in the same case, as noted by Jackson, “...*The panel further noted that changes in trade volumes result not only from government policies, but also other factors, and that in most circumstances; it is not possible to determine whether a decline in imports following a change in policies is attributed to that change or to other factors.*”¹¹⁴

As a result, under paragraph (b) & (c) of Art.23(1) it was not only difficult for a panel to decide on what was a action which breached the agreement and what the “...existence of any other situation” was; but it was also difficult for a party complaining under nullification and impairment to prove that there was a adverse change in competition and such changes had resulted in a

lowering of imports. Art.23(1)(b) & (c) situations had not only become “a bit awkward in the GATT system of dispute settlement”¹¹⁵, but also clearly showed that there existed in the GATT a philosophy among some countries, that some provisions of the GATT agreements should be interpreted by political negotiations, rather than by an appellate body of panel members, emphasising the protectionist attitudes of states.

The successful implementation of the aims of the GATT needed, as above mentioned, the consensus of the parties involved. However as a result of the dichotomy in philosophy and the protectionist attitude of states, with regard to the path that GATT dispute settlement should proceed, not only brought about this negotiating history in GATT proceedings, but also brought about the difficulties in appeasing all parties involved, especially as there was a growing diversity in trade and economic policy practised by different parties, which was more inclined towards protective subjective interests. This was compounded by the fact that smaller parties had to face the political prowess of major trading blocks, thus negating the possibility of any retaliatory action being taken by these countries, rather than by consensual negotiations, which was not in keeping with the aims of liberal trading. Therefore the Uruguay round of trade negotiations were started in order to resolve the political and legal uncertainties of the pre 1994 era of GATT dispute settlement.

4.5 The present WTO Dispute Settlement System and a analysis of specific legal issues in the light of protectionism

As a result of systematic efforts made since 1979 at codifying the dispute settlement mechanism of the GATT/WTO; the GATT “understanding” came into force in the beginning of 1995. As noted by Pescatore one of the most

important declarations made was that the “dispute settlement is a central element in providing security and predictability in the multilateral trading system”¹¹⁶, which I believe encompassed the improvements suggested by the Leutwiler report, as a result of the deficiencies of the former regime influenced by protectionist policy making. However, having said that, under Art.3.1 of the WTO Understanding, it was acknowledged that, “...*Members affirm their adherence to the principle for the management of disputes heretofore applied under Article. 22 & 23 of GATT 1947, and the rules and procedures as further elaborated and modified herein*”,¹¹⁷

and specially given the fact that the pre 1994 system was strewn with ambiguities and deficiencies as mentioned above, one had to question as to why the WTO accepted the prior procedure of dispute settlement as noted and corroborated by Art.16.1 of the WTO agreement which stated, “*Except as otherwise provided for under this agreement or the multilateral agreements, the WTO shall be guided by the decisions, procedures and the customary practices followed by the Contracting parties to GATT 1947 and the bodies established in the framework of GATT 1947.*”¹¹⁸

However, given the fact that that I had presented a brief outline of the relevant procedures of the dispute settlement mechanism and secondly the fact that the WTO has only slightly modified such a procedure, I do not intend to provide a repetition of such stages. But it is this kind of presentation, as noted in Art.3.1 & Art.16.1, that I would take into account when dealing with the innovative procedures with respect to the initiation, panel procedure, adoption and appeal of reports of the new WTO dispute settlement, specially given the fact that such “...*decisions, procedures and customary practices*”, based on the above mentioned legal or political philosophy, led to the demise of the GATT procedure. Furthermore I

would also analyse as to whether the rights of due process, legal representation and disclosure of information have been protected by the innovative dispute settlement process provided for by the WTO, in order to clarify whether the WTO is a improvement on the prior GATT system. The mentioned philosophical dichotomy and protectionism prevalent in the member countries, with respect to the WTO dispute settlement mechanism will be taken into account in achieving such a goal.

4.5.1 Request for a Panel & Composition of a Panel:

The WTO understanding reaffirms the right of parties to request a panel, which according to Art.6.1; “...*a complaining party so requests, a panel shall be established, at least at the next meeting of the DSB following the one at which the request was made; by negative consensus of the members of the DSB.*”¹¹⁹ I would deal later on with the question of negative consensus more, with regard to the adoption of reports, as I see it as a major innovation of the WTO system. At the present it is appropriate to concentrate on the establishment and the composition of the panel. Before 1989, the establishment of a panel was sometimes delayed because of the resistance of a respondent party to the dispute. Indeed, as Jackson states, there was no clearly recognised right in GATT to have a panel established, though reforms were proposed in 1989 via the Understanding.¹²⁰ However after the implementation of the DSU, where the right of a complainant is clearly set out in Art.6.1 as mentioned above, this void which prevailed under the GATT system has been rectified. One important consequence of this innovation as noted by Komuro¹²¹, and which prevented any obstructions in practice, was the fact that it protected the independence of the DSB from the political vetoing power of the major trading blocks of the US, EC and Japan, which was based on protection, thus providing a opportunity for a

lesser economically powerful country to initiate a case. This was given emphasis by the negotiating positions taken by the states during the Uruguay Round on this particular issue

The composition of such established panels is specified by Art.8 of the DSU¹²², where the panel consist of usually three members, and it is said that there is a “clear preference for three member panels, since they are ‘easier to balance’ and ‘difficult to have a majority and minority in a three member panel’.”¹²³ Such a motive for clarification is emphasised by the three conditions imposed on the composition of panellist. First panellists are required to be “well qualified governmental and/or non governmental individuals.” Secondly, panellist are “selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience”, and finally panellists should not be members of disputing parties unless agreed by such parties.¹²⁴ Moreover, having allowed the parties to the dispute to decide on the panellists in order to facilitate such a selection, if the parties are undecided, the Understanding requires the Secretariat to “*maintain an indicative list of governmental and non governmental individuals possessing the qualifications...*”¹²⁵ However, one has to question the preference for such 3 member panels, given the fact that larger contracting party’s ability to manipulate the decision making of such panels as a result of the superior economic and political power these nations wield.

Previous to the WTO agreement, allegations have been made in respect of bias on the part of panel members and the use of government officials as panel members. As Jackson notes, in such cases of government officials being panel members; “*...In assuming that role, the panel often is assisting the negotiation in*

reference to the power positions of the disputing parties and not with reference to the interpretation or application of an agreed-upon existing rule”¹²⁶

and further some reports have been criticised on the grounds that they were poorly reasoned or were opposed by contracting parties. The main reason for such misdeeds has either been the bias composition of the panel or the restricted knowledge on the subject criteria on the part of the individual panel members. The impartiality and independence was thus even greater in the case of the WTO. Therefore in order to complement the DSU of 1994, the Contracting parties, spearheaded, surprisingly enough by the United States, adopted the *Rules of Conduct for the Understanding on the Rules and Procedures for the Settlement of Disputes* in 1996.¹²⁷ As noted in paragraph 20-26 “...the ethical code was designed to complement the operation of the DSU”¹²⁸, and as such paragraph 3 of Section II entitled “General Principles” provides that, “..*Panellists, Appellate body members and secretariat officials would be required to take care in the performance of their duties during dispute settlement proceedings to adhere to the rules of ethical conduct in order to maintain their independence and avoid creation of potential conflicts of interest. The WTO members would provide for the disqualification of any panellists, Appellate body member or secretariat official committing a material violation of these rules*”¹²⁹

and this provision has been further facilitated by the fact that obligations of self-disclosure and confidentiality obligations have been imposed on the “covered parties”, namely the panellists, Appellate body members and secretarial officials. Nevertheless, having provided such obligations on panel members, one other important provision of the Rules is that it notes that, “...*these rules shall in no way modify the rights and obligations of members under the DSU nor the rules and procedures therein*”¹³⁰, thus emphasising the fact that the Contracting parties are

prepared to ensure that more procedures are brought about to facilitate rather than override the WTO and thus protect the impartiality of panel members. Hence, one could safely say that the above mentioned conditions are not only more elaborate than paragraph C2 of the 1989 decision as noted by Kohona, but also that this innovation on the part of the WTO has to a certain extent eradicated bias¹³¹ as well as providing flexibility, speed and accuracy in the adoption process of panel reports by the DSB.¹³²

4.5.2 Operational Process of Panels & the protection of Due process:

Having provided rules and regulations on the institution procedure of the panel, the Understanding also provides for the operational process of the panels. As with the 1979 & 1989 Understandings, the panels are given the responsibility of “*making an objective assessment of the matter before it*”, and “*make such other findings as well as assist the DSB in making the recommendations provided for in the covered agreements.*”¹³³ More importantly the time frame for the whole procedure “*from the composition of the panel*”, until the “*..insuance of the final report*” is set as not to exceed six months, or three months in cases of urgency¹³⁴, which in a procedural sense has eradicated the opportunity of states continuing with protectionist practices. In order to make such recommendations the panel is empowered to seek information from any source and consult with any experts to obtain their opinions on such matters; which is a clear extension of the Art.23 provisions of GATT.

As mentioned above, the General agreement, in order to achieve its respective aims, set out rules which were to protect the independence of the concessions and to protect the interest of trade of members. These included obligations which would ensure “market access” and rights to be treated in a non

discriminatory fashion.¹³⁵ Therefore in order to enjoy such rights and obligations, it was necessary that the process of dispute resolution provide rights such as rights of due process and rights of developing nations, which in my view is the accessibility to remedies granted by the DSM. Therefore I would deal with the question as to whether due process is provided in such a panel process, as a merit of this system, which I believe is the basis of this panel process. First, in relation to due process, until the 1994 WTO understanding came into effect; when a complaint is brought to the attention of the GATT council; the panel that heard the case received written and oral statements and developed a reasoned conclusion from such statements. The onus of proving a GATT violation rested with the complainant¹³⁶, and as Thomas notes “*complaints tended to take a ‘scatter gun’ approach when alleging GATT violations.*”¹³⁷ Though it may seem that this is a unfair advantage over the respondent, specially as Hudec notes, where the panel is overboard with a “ cluster of undisputed facts.”¹³⁸ In cases such as *EC-Refunds on Exports of Sugar(EC vs US)*¹³⁹, this advantage has been eradicated somewhat by the two factors. First, the disputing parties are given every opportunity to participate in the settlement process as mentioned in Art.16.3 and I quote; “*...shall have the right to participate fully in the consideration of the panel report by the DSB and their views shall be fully recorded*”¹⁴⁰, and this has been further confirmed by the fact the panels are obliged to consult with the parties regularly in making their decision and further the parties are allowed to comment at the interim review stage. There have been fears as noted by Komuro that such participation could influence the decisions made by the DSB, and hence obstruct the negative consensus necessary for implementation or adoption.¹⁴¹ However, having mentioned the fears of losing parties, from evidence available, I believe it is right to say that there has not been a instance where such a situation has

risen, specially taking into consideration Art.8 which necessitates a more legal background to the reports, much to the credit of the 1994 Understanding. This is further enhanced by the fact that third party interest are protected when such parties have “*a substantial interest in a matter before the panel.*”¹⁴² This form of protection not only provides a third party with the opportunity to deliver information which could protect its interest, but also could be decisive in the decision taken by the panel in a dispute at hand, as noted in the *Thai cigarettes case(US vs Thailand)*¹⁴³, which involved import restrictions maintained by the government of Thailand, specially if the complainant is a major world trading block.

Secondly fairness in the panel process is assured to an extent when one considers the question of *burden of proof*. No provision in the WTO agreement explicitly provides which party has the burden of proof in a dispute settlement proceeding. As Steger identifies “...Indeed, the burden of proof may vary depending upon which covered agreements govern a particular dispute.”¹⁴⁴ Thus one could at the outset that complainants in some cases could have an upper hand in a panel process. However, in the case of *United States-Measure Affecting imports of Woven Wool Shirts and Blouses from India(US vs India)*¹⁴⁵, the Appellate body addressed the question of Burden of proof. While appreciating the fact that the covered agreement concerning that particular case had its own terms, the Appellate body had this to say, “.. *Consequently, a party claiming a violation of a provision of the WTO agreement by another member must assert and prove its claim....We agree with the panel that it, therefore, was up to India to put forward evidence and legal argument sufficient to demonstrate that the transitional actionwas inconsistent with the obligations assumed by the US...*”¹⁴⁶

Hence, one could argue that the new WTO Understanding has protected fairness, with the providence of legal rules and regulations in order to negate the advantage obtained by complaining parties, if such complaints to a panel involves a “scatter gun approach.” As mentioned, the process of law should involve a full opportunity for both parties to be heard.¹⁴⁷ Further, it has been stated by the Permanent Court of Justice that such a right will not diminish, notwithstanding the fact that the decision of the panel is supervisory¹⁴⁸, and this has further been enhanced by the fact that WTO members accept the jurisdiction of the DSB as a compulsory measure under Art.6.1, rather than being consensual. Therefore in accordance with this fact Art.12.3 and Art.12.4 requires panels to provide sufficient time for the parties to present their submissions. But the problem arises in respect of representation by counsel of parties to the dispute at the panel procedure stage. One important part of due process is the right to effective representation. But as was seen in the Banana Panel case; where private lawyers who were advising some of the Caribbean countries, and rightly noted ambassador Edwin Laurent of St.Lucia this “*entrenches the disadvantage of small countries in the WTO, which unlike the larger and more powerful countries cannot afford to employ full time specialised legal counsel on a permanent basis.*”¹⁴⁹ If this case stands, and it seems like it for the present, this will mean that such countries will only be represented by laymen, who will have to confront legal specialist of countries with legal “fire-power” to coin a phrase.

This is, as Palmeter emphasises, “hardly the hall mark of due process.”¹⁵⁰ It is quite ironic to note that, while the DSU directs the Secretariat to assist all members in respect of dispute settlement at their request, and that the secretariat instructed that a qualified legal expert from the WTO co-operation service be available to countries when requested; that the panel ousted lawyers, when the US

objected that they were not permanent government officials.¹⁵¹ The absurdity of this decision is even made worse when one considers the qualification test for members of the panel itself, as mentioned in Art.8.1, where members could be non-governmental or individuals who have published on trade law. In my view one could say, while taking into consideration the practical absurdities, that the consistency and the regulatory nature of the so called due process provisions with respect to the panel procedure of the DSU has gone “out of the window.” This is a fact that is justified if one takes into consideration the *US: Standards for Reformulated and Conventional Gasoline Case(Venezuela Vs US)*¹⁵², where the appellate body invited the private attorneys into the session. Hence it will be interesting, as Palmeter notes, to see if the Appellate body follows its precedents.

4.5.3 The applicable law of GATT/WTO:

As I had mentioned earlier in this chapter with regard to pre-1994 GATT dispute settlement, the basis of such dispute resolution was Art.22 and Art.23 of GATT, which gave primacy to negotiated settlement in contrast to legal obligations. Art.22 and Art.23 had required that parties undertake negotiation and other peaceful settlement methods, which was in keeping with the “power oriented” basis of settlement than a “rule oriented” approach envisaged among the parties concerned. As Art.22 states,

“..The contracting parties may at the request of a Contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph1.”

It was this basis or “non-legal” basis that was to be reformulated with the changes made by negotiations held at the Uruguay Round at Punta del Este and the following DSU of 1994, which was to be more rule oriented. The legal basis on which the GATT was to be interpreted was identified as the Vienna Convention of 1969, which provided the customary rules of interpretation of public international law.¹⁵³ Under the Vienna Convention of 1969, it was provisioned on how a given treaty was to be interpreted by the parties involved in a dispute or a panel constituted for the resolution of such disputes. As Art.31 notes,

“ A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the term of the treaty in their context and in the light of its object and purpose...”

which meant that the covered agreement in question, which was the subject of dispute, was to be the governing law, according to the Vienna Convention. However, such a seemingly easy interpretation has been argued against by some scholarly authority, where the argument is that international law is also to be a part of the legal basis of WTO dispute settlement, meaning that the obligations accepted, has to be interpreted as part of the wider international obligations accepted by the parties. I would deal with the applicability of International law, when making a comparison between the three institutions , in the next chapter, where arguments have raged as to whether international law should be a part of the WTO or whether the WTO should be a separate island of law unto itself. Such arguments will be considered with an eye on the effect that protectionism would have on either proposed argument. For the moment, the assumption is made that the panels are to take these applicable international laws in the interpretation of these trade obligations. One could say that according to this theory, the panel procedures are to be legal as a result of the

application of international law. However, such a interpretation has been qualified by Art.32 of the 1969 Vienna Convention, where it is stated that,

“ Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: a) leaves the meaning ambiguous or obscure; b) or leads to a result which is manifestly absurd or unreasonable ”¹⁵⁴,

meaning that any negotiations and committee stages of these negotiations could be taken into account if any provision is not clear, in order to understand the motives of the provisions at issue, particularly, if the parties at dispute had taken different positions on that aspect at negotiation level.¹⁵⁵ Given the fact that panel reports of the GATT/WTO has persuasive value on present and future panels, it would seem that the applicable law of the GATT/WTO could also encompass these negotiations at bilateral and committee level, if the panels decide to take into consideration these negotiations.¹⁵⁶

However, considering the fact that the DSU of 1994 was supposed to make several changes in the format of dispute settlement and procedures adopted for such, one has to identify any foreseeable problems that would emerge as a result of the applicable law being a combination of legalised procedures and negotiation. As I had noted, Art.22 of the GATT was negotiation based, where the “power oriented” approach was the key to settlement. It was this approach to dispute settlement that the DSU of 1994 was to control, with the effect that it would give an equal opportunity for both parties concerned. As has been advocated by some scholars, the applicable law of the WTO is the covered agreement as well as the international law principles

that would be applicable. The basis of this theory has been the fact that the WTO has been developed as a part of the UN system, and hence the applicability of international law to any dispute settlement methods developed under the axis of the United Nations. The justification for the applicability of international law principles in the panel procedures have been even found in the DSU 1994, where the scholars have argued that the panels are to apply not only the covered agreement, but are also to interpret these obligations in the light of more elaborate international law principles, to which the disputing members are party to under accepted treaty law. But it would seem that the DSU has not totally replaced this system, where it has persuaded the parties to the DSU to confirm that they would agree to resolve such disputes in accordance with the principles enunciated under Art.22 & 23 of GATT. This, it would seem is the interpretation of Art.3 of the DSU when it states that,

“Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.”¹⁵⁷

Given the fact that power oriented approach to dispute settlement has had a protectionist element to resolving disputes, when these disputes concern a economic superpower and a relatively weak economy, during the pre 1994 period of dispute resolution; one has to question the logic of providing that the new procedures of dispute settlement is to be managed under the axis of Art.22 & Art.23 of the former GATT? Does this not take us back to the time when negotiations and protracted negotiations had obstructed the adoption and implementation of panel reports, when resolution was based on bilateral negotiations, specially considering the fact that this provision is in stark contrast to the improvements that were to be made in dispute settlement via the DSU 1994?

This combination of negotiations and legal procedure is further complicated by the fact that the panel reports under the new WTO regime are to be considered as being persuasive rather than having a precedent value, which means that the individual panels are to decide on facts on a given case in hand and are not obliged to follow the reasoning of the panel reports in the past. As one panel noted in a case concerning the European Community, *“while taking careful note of the earlier panel reports, the panel did not consider them relieved of the responsibility, under its terms of reference, to carry out its own thorough examination on this important point.”*¹⁵⁸

In noting this fact, the panel disagreed with the result of the 1980 panel process which dealt with the issue earlier. The fact that the previous panel reports are persuasive rather than being a precedent is not lost to most panels in the WTO, where panels have taken these previous reasoning into account, but have not applied them in a common law sense. In some cases, the Appellate Body has even gone far to note that the agreement to adopt a panel report between the Contracting Parties, does not constitute agreement by the Contracting Parties on the legal reasoning in that panel report, rather that the conclusions and the recommendations bound the parties together. Thus subsequent panels did not feel legally bound by the detail and reasoning of a previous panel report.¹⁵⁹ According to this Appellate Body report, the Contracting Parties would not have intended that the decision to adopt would constitute a definitive interpretation of the provisions of GATT. Thus it was concluded in this case that panel reports adopted by the GATT Contracting Parties and the WTO Dispute Settlement Body would not constitute “subsequent practice” under the Vienna Convention. As it said, *“In short, their character and their legal status have not been changed by the coming into force of the WTO Agreement.”*¹⁶⁰

While, it is clear that the panels are not willing to accept common law type precedential law of previous panel reports, questions however, have to be asked whether this also means that the panels are still prepared to resolve disputes according to Art.22 negotiations, notwithstanding the fact that the immediate panel is to deal with the case at hand, with reference to previous panel reports? .

Given the fact that the parties concerned in these disputes are prone to minimise any effect that these reports have on their individual standing on a contentious issue, one would have to question the benefits, if any, that the new procedures have on the improvements of the WTO. The fact that the panels over the years have been reluctant to take as precedent previous panel reports, it is my belief that this has reduced the effect of panel reports to mere fact interpretation on a alleged violation of a GATT/WTO provision. Unfortunately, this does not, in my opinion, constitute an improvement on the pre 1994 position, because the obligations on the parties and the standard of obligations remain the same, given the fact that negotiation is given prominence, in contrast to legal obligation. The basis of law it would seem, in the case of panel reports, is conditioned by the negotiating positions of the parties which do not have precedent value, but which could waiver in their reasoning on a case to case basis.

4.5.4 Adoption of Panel Recommendations & Appeal Process:

If a panel finds a violation of the WTO on the part of the respondent party, according to Art.19 it shall recommend that the offending party bring the measure into conformity with that agreement. However, the more important innovation made by the present WTO is the fact that it has provided rules and regulations for the adoption of such reports and the appeal process thereafter.¹⁶¹ Such

objectively assessed reports, as mentioned above, will be adopted by the DSB by negative consensus, after it has been provided to parties at the interim review stage. Here, the parties are given an opportunity to make arguments for the inclusion or deletion of certain matters from the draft report, which goes against the thinking of, in particular, the EC where diplomacy is clearly advocated.¹⁶² The report shall not be considered for adoption by the DSB until twenty days after their circulation to the WTO members. Such a circulated report will be adopted within sixty days after the circulation. However, such an adoption is subject to appeal by either party to the Appellate body.¹⁶³ If such an appeal is made to the appellate body, such a body is required to provide a report to the DSB within sixty days of its initiation, and is accepted by the parties to the dispute unconditionally.¹⁶⁴ The period from the establishment of the panel until the consideration of the panel report for adoption shall, in general, not exceed nine months, provided that the panel report is not appealed, which again exemplifies the innovations that the negotiating parties desired.¹⁶⁵

However, such final decisions have not been plain sailing. As emphasised earlier, different states have taken different view points on a more legalistic approach which was in contrast to a more diplomatic approach coupled with a review mechanism. Where as the US wanted a separate arbitration mechanism, the EC reiterated support a negotiation mechanism with a arbitration procedure as a supplement to existing procedures, with imposed deadlines for implementation of panel reports, at the Mid-term review of 1988. On the other hand, developing nations were more concerned of third party rights and how arbitration would assist such rights. This is emphasised by the proposal of Mexico, which supported the institution of separate arbitration as long as both parties agree and it would not abridge the rights

of third parties, at the mid-year negotiations of 1988. These negotiations were further taken forward to the 1988-89 Mid-Term Review, where the US proposals were for consensual adoption, if not automatic adoption of panel reports within a specific period. This was in contrast to the EC led proposal, where adoption of panel reports by consensus was preferred as long as procedural safeguards were in place, which was once again emphasis on the separation of thinking on the part of the United States and the European Community nations. Notwithstanding these difficulties in decision making, one prime instance of innovation on the part of the GATT/WTO dispute settlement procedures was seen in this area, to which I would turn my attention at present.

4.5.4.1 Negative Consensus at Adoption of Reports:

One of the most important innovations on the part of the WTO was the negative consensus rules of the DSB. In the past, a issue which gave cause to apprehension on the part of the member states, has been the ability of parties to block or delay progress in the dispute resolution process at different stages, namely the establishment of a panel, the adoption of a panel and Appellate body reports, implementation of DSB rulings and authorisation of retaliation etc., mainly by exploiting the requirement to secure certain decisions by positive consensus. As panel reports became effective as decisions, only when approved by the GATT council, on a one vote per country situations and the ministerial conference are required to “continue the practice of decision-making by consensus followed under GATT 1947”, it was possible as Kohona states “...its use in certain major disputes to attract considerable attention.”¹⁶⁶ The attention that Kohona mentions, I presume to be the political attention given towards the opportunity to obstruct any report that could be

an interference to achieving its objectives. This was exemplified and was the case in the *Canned Fruit Case*(EC vs US)¹⁶⁷, where the European community, a powerful participant in world politics as well as a main trading block, refused to permit adoption of the report, and the US eventually agreed to withdraw the report from the agenda of the GATT council.¹⁶⁸ This was one instance among many where the country being a major trading block had taken advantage of its veto power in obstructing the adoption of a panel report, which was condemning its actions against the spirit of the GATT/WTO agreement, and was keeping with the protectionist attitudes prevalent.

Therefore, improvements have been made by the Uruguay Round Understanding, which Pescatore calls “inverted consensus”¹⁶⁹ as mentioned above, where the various steps leading up to the authorisation of a remedy is deemed to be adopted unless *a decision to the contrary is taken by consensus*. This is very much utilised in the case of adoption of reports, where they may be set aside only by consensus, which as Pescatore identifies “...really means that there must be a unanimous decision to reject them.”¹⁷⁰ However, one could argue that given the political and economic domination of some trading blocks, it would be a disadvantageous situation for other states to promote the adoption of reports, which are contrary to the motives of the trading blocks such as the EC and the US. This is, given the fact that these economic blocks, in particular the European Community, had greater preference for the adoption of reports by full consensus of the parties concerned, with added political disincentives not to obstruct adoption, as mentioned above, which unfortunately gave more credence to the fact that some nations viewed the settlement process as a political negotiation process with no legal teeth. But on the other hand, as noted by Steger, one of the major new and encouraging trends has been

a greater involvement of smaller and developing countries in WTO disputes in a broad range of areas such as trade related intellectual property, trade related investment measures, which in the majority of cases involve the Quad countries.¹⁷¹ This negated the argument that political and economic power could discourage less developing countries from using its voting power to adopt reports provided for by panels. Therefore, one could say with satisfaction that the Negative consensus rule has not only helped to reduce the political opportunism prevalent in the former GATT, but also has provided greater incentive for lesser economically powerful countries to challenge the multilateral trading violations created by the actions of the major trading blocks, and to act against any prevalent protectionism.

4.5.4.2 Appeal Process:

The creation of an appellate body and procedures for the review of panel decisions is one of the most emphatic innovations of the WTO dispute settlement. The Appellate body will be established by the DSB to hear cases from the panels, and furthermore Art.17 provides for the establishment, composition and qualifications of the standing appellate body. As with the case of the DSB, the members of the Appellate body are required to be “.. *Persons of recognised authority, with demonstrated expertise in law, international trade and the subject of the covered agreements generally. They shall be unaffiliated with any government. The appellate body membership shall be broadly representative of membership in the WTO*”¹⁷² and furthermore with the panel process, the appeal process is covered by *Working Procedures*¹⁷³ of the Appellate body drawn up by the members in consultation with Chairmen of the DSB and director General, which specifies the time frames and provides for the right of due process as noted above.

As with other international procedures for dispute resolution, an appeal to the Appellate body is “...limited to issues of law covered in the panel report and legal interpretations developed by the panel.”¹⁷⁴ As noted by Petersmann¹⁷⁵, unlike the ICJ and ECJ, the Appellate Body has no competence to give advisory opinions, rather an interpretation of the issues put forward for its competence by the parties. This is emphasised by the DSU, which notes that the, *“provisions of the understanding are without prejudice to the rights of members to seek authoritative interpretation of provisions of a covered agreement through decision making under the WTO agreement or a covered agreement which is a Plurilateral Trade Agreement.”*¹⁷⁶

However, this has given rise to a question of jurisdiction of the Appellate Body and further a question of interpretation which I would prefer to deal with at the present moment. As mentioned above, the DSU specifies the scope of the Appellate body appeal process. However, as identified by McRea, the argument is as to whether the Appellate Body should provide a single interpretation of the panel report in question or whether *“...there must be a recognition of the need for states to have some flexibility in the implementation of their obligations”*¹⁷⁷, thus providing a political flexibility in the application of such terms, and as a consequence falling prey to the protectionist attitudes of states. Therefore the question is; How the Appellate Body has perceived its role so far, given the fact that WTO was supposed to be more legal in nature rather than fall in to the clutches of politics? In the *Reformulated Gasoline case(Venezuela Vs US)*¹⁷⁸, the Appellate body rejected the complaining parties attempt to make arguments on a matter that had not been appealed. According to the appellate body, the subject matter of the appeal was defined by the appellants submission, and thus panel findings could not be appealed. Hence the Body restricted

itself to Art.17.2 of the DSU which states that it “...address each of the issues raised....during a appellate proceedings”, and complied with the view of the US, that the proceedings of the WTO should be more legal than political, particularly, when it has concerned political policy making by states in certain circumstances.¹⁷⁹ As happened in the above mentioned *Reformulated Gasoline case(Venezuela Vs US)*, the Appellate Body stated that “*WTO members have a large measure of autonomy to determine their own policies on the environment, their environmental objectives and the environmental legislation they enact and implement*”¹⁸⁰, thus in McRea’s view reassuring the states of its insistence on dealing with the interpretation of facts presented to the initial panel, rather than introducing new issues for appeal. But having said that, it seems that the Appellate body has in some instances given primacy to negotiation and consultation when it redeems it to be fair and necessary in the circumstances. One such case was the *US-Restrictions on imports of Cotton and Manmade Fibre Underwear(Costa Rica Vs US)*, where the Appellate body reversed the panel findings by emphasising the importance of consultations on the basis of protecting due process and transparency where it noted that, “*The requirement of consultations isgrounded on, among other things, due process considerations; that requirement should be protected from erosion or attenuation by a treaty interpreter...the restraint is to be applied in the future, after the consultations, should these prove fruitless and the proposed measures not withdrawn. The principle of effectiveness in treaty interpretation sustains this implication.*”¹⁸¹

Not only does the emphasises on consultations provide a cue for states to use political sovereignty and having their own freedom to legislate, but also gives leeway for these states to practice protectionist policies, as emphasised in the *EC- Importation and distribution of Banana case(EC vs US)*.¹⁸² Hence, in the

backdrop of all these statements made, one has to question the inconsistency of the message given to the interested parties, which is inconclusive on the role of the Appellate body. Is it going to be a Body with a final word on the legal interpretation of the panel reports, or is it going to provide the Contracting Parties with the necessary flexibility, in order to implement such obligation via discussion and negotiation, which is the hall mark of states which are keen on protecting one's own economic and political interests.¹⁸³ Until now it seems that the Appellate body has taken a consistent view, with exception as mentioned. But in my view, this has reduced the legal effectiveness of the improvements made by the WTO, notwithstanding the that scholars such as McRea's view of the Appellate body obligation is to "...adopt a less intrusive, more deferential standard of review"¹⁸⁴, if one takes into consideration of cases such as the *Banana(EC vs US)* and *FSC(EC vs US)* cases¹⁸⁵, where Appellate Review has not necessarily resulted in immediate reaction.

This fact is further confirmed when one considers the question most argued; namely that a panel report favouring a winning party could lead to a running alone of the complaining party. This is the debate as to whether the losing party to a panel report would face the unilateral retaliation of the winning party.¹⁸⁶ However, it seems that the appellate body has been the innovation developed by the WTO to protect such a losing party. According to Wang, the significance of the mechanism lies clearly in the possibility to prevent the blocking of panel rights, or for that matter, unilateral actions on the part of the winning party.¹⁸⁷ According to Wang, not only will the parties have an opportunity to check panel reports for errors and have an opportunity to support their position with regard to legal issues, but also the

opportunity of reversing an adverse ruling. This is further confirmed when one takes into consideration Art.17.3, as mentioned above and Art.17.4, which states that,

“..Only parties to the dispute, not third parties, may appeal a panel report. third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.”¹⁸⁸

Hence the losing party would have the luxury of being heard by a triple layer of procedural guarantee. This is specially further enhanced by the fact that differential treatment is provided for monitoring a developing country that has brought a dispute settlement case.¹⁸⁹ If one takes for example a trade dispute between the US and Sri Lanka in relation with exports with textiles; in such a situation Sri Lanka, being a developing country would benefit from the three phase appeal process which will be a obstruction to the “run away “ benefactor of the “negative consensus” report of the DSB. The dispute settlement mechanism seems to establish within the GATT for the first time a genuine system of enforceable rules and remedies applicable, which is confirmed by the fact that the Understanding provides that the membership shall be “...broadly representative of membership in the WTO”¹⁹⁰, thus granting a important benefit to countries who have based their economies on, for example agriculture; where it accounts for around 30% of the Gross domestic product.¹⁹¹ But, more importantly, if the violation is on the part of the major trading blocks such as the EC, US and Japan, this innovation on the part of the WTO creates a opportunity for developing countries who, as noted by Chaytor¹⁹², believed they were better off avoiding the dispute settlement process because they could not effectively retaliate if the larger “loser” refused to comply with the outcome, or for that matter

compel the loser to enforce such panel findings, which in most cases were not enforced voluntarily, as a result of the protective attitude towards withdrawing illegal trading restrictions. But the problem has arisen in several cases, where the flip-side to this argument is when the winning party of an appeal had to request a further appeal or bring another case to the attention of the panel procedure, where the initial implementation has not been satisfactory, as emphasised in the Banana and FSC cases between the European Community and the United States.

Therefore, given the fact that special mention is made of developing countries, coupled with the above mentioned articles, it is true to say that this is a merit of the new WTO system, with respect to the belief long held by the “old GATT hands”, namely the EC led countries, that it is better to have a flexible, imperfect system that protects the major principles, than a system so disciplined that it provokes violation and defiance. Nonetheless, one could identify a possible demerit in relation to the Appellate body. The creation of an appellate body and of procedures for review of panel decisions is identified as the most dramatic innovation in GATT/WTO dispute settlement. Though the Appellate body has enhanced the panel procedure under Art.17.3 of the DSU, the immediate deficiency of the article in respect of the organisation of the body identified under Art.8.3, which concerns the composition of panel, members states that “...*citizens of members whose governments are parties to the dispute or third parties....shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise*”. But in contrast, Art. 17.3 only mentions as mentioned above, that Appellate body members must be “...*unaffiliated with any government.*” Obviously, the downward effect of this connotation is that there may be space for partiality on the part of the members, who, though not on the pay list of the government which is a party to the dispute, might be

citizens of that member state. Given the fact that there existed a difference in thinking on the part of the nations on this issue, one has to say that there is some doubt as to the clarification of the status of panellists on panels. For example, the European Community suggested that individuals be selected from a list of non-governmental experts possessing experience in law, economics and trade, whereas the United States supported selection from a designated list of experts (governmental and non-governmental). This is further compounded by the fact that the US delegation had earlier accepted the fact and notion that governmental panellists are not perceived as neutral arbitrators, resulting in attempts to block unfavourable decisions.¹⁹³ Therefore, as Vermulst observes from a systematical viewpoint, the phrase “unaffiliated with any government” would have to be interpreted in a broad manner, if one is to rule out partiality¹⁹⁴, thus introducing a another issue of interpretation. This not only would involve more disputes among parties, but also would involve a phase of negotiation and discussion among the WTO member states, which has been the underlying thread that holds the WTO process together, notwithstanding a denial of such process on the part of the United States.

As we have seen in the context of this chapter, the WTO, since its inception in 1995 has done its utmost to develop legal criteria and procedures in order to streamline the operation of dispute settlement between member states, thus eradicating the deficiencies that was inherent in the pre 1994 GATT. However, as was seen, notwithstanding the legal obligations and institutions created, such as establishing a panel, negative consensus, the Appellate Body, via the DSU 1994, vital legal obligations, such as due process, counsel representation, protection of developing countries from panel bias, a satisfactory appeal process has not sufficiently been addressed. The primary reason, as I see it, in such deficiencies in the

present system, is how member states look upon the WTO dispute settlement system. From evidence available it seems that the WTO dispute settlement system, while catering such legal obligations, has also more importantly catered for the parties who prefer negotiation and discussion, which in my view is unfair on smaller states who are void of the economic or political capacity to argue its case, against developed state protectionism. While I have discussed the new procedures developed by the WTO with regard to dispute settlement; in my opinion, the barometer of determining whether the WTO DSM is a improvement is to identify whether satisfactory measures have been adopted to implement such panel findings and whether such implementation is carried out by the major trading blocks, specially considering the fact that they endear protectionism in a broader sense and different philosophies on how dispute settlement should be conducted, with respect to the WTO Dispute settlement mechanism. This aspect of the Dispute settlement process will be discussed in the following section.

4.5.5 Implementation of recommendations and the effect of panel reports:

Given the legal innovations made by the WTO Dispute Settlement Mechanism since January of 1995, one could argue that the WTO is an improvement on the prior GATT system. However, having noted the negative aspects of such innovations, as a result of the dichotomy in the philosophical view of the WTO held by the major trading blocks and state protectionism. I believe that one however, has to question the provisions provided for implementation of such panel recommendations. In this section of this chapter I would first deal with the new provisions on implementation, which provide for a three step legal retaliation process, and alternate provisions of compensation in case such retaliation is not feasible, and

secondly as to whether such provisions are effective when considering the fact that the different trade blocks accept the WTO provisions on the condition that it does not effect their protectionist interests, which I believe would clarify whether the WTO Dispute Settlement Mechanism is really a improvement on the GATT.

4.5.5.1 *Implementation of Recommendations:*

As noted by the Director General of the GATT, the most of problems of GATT dispute settlement in recent years have been related to the post panel phase of surveillance and compliance with the decision made by the DSB, confirming the panel report. The Understanding of 1979 provides that, “...*The contracting parties shall keep under surveillance any matter on which they have made recommendations or given rulings. If the Contracting Parties recommendations are not implemented within a reasonable period of time, the contracting party bringing the case may ask the Contracting Parties to make suitable efforts with a view to finding an appropriate solution.*”¹⁹⁵

The problem, as noted by Mora¹⁹⁶ was the fact that this provision did not shed any light on what a reasonable time is for such compliance and nor did it provide as to what measures could be taken by the Contracting Parties to ensure such compliance, leaving the states with discretion to comply with panel decisions, leaving the states with discretion to comply with panel decisions. This is another instance, which under the old GATT system emphasised the necessity of consensus in order to decide what a “reasonable time” is and more significantly what measures are taken in accordance with the panel report, thus resorting to diplomatic negotiation. However, according to Mora, in order to solve this problem the 1994 Understanding has included a “...*comprehensive regulation of the measures that*

might assure compliance with decisions of the Contracting Parties."¹⁹⁷ After a report is adopted, the DSB will oversee the implementation of the recommendations made by the panel.¹⁹⁸ The mentioned article requires for prompt compliance of such recommendations by the losing party, and further that the losing party notify the DSB of its decisions in respect of implementation at a DSB meeting within thirty days of the adoption of the panel report.¹⁹⁹ However, unless it is possible to comply immediately, the text provides specific alternative approaches to be adopted for implementation within a "*reasonable period of time.*" Unlike the previous regime which was governed by the above mentioned Art.22 of the 1979 Understanding, where the reasonable time was a mutual decision taken by the parties, under no supervision of the GATT and left a panel report in "legal limbo"²⁰⁰, Art.21.3 provides three options for implementing a recommendation within a "reasonable period of time". In contrast to prior practice, the determination of "reasonable period" is subject to approval by the DSB and as Kohona notes, "*...the time taken between the establishment of a panel to the determination of a reasonable period of time for the implementation of its report under paragraph 21.3 shall not exceed fifteen months*"²⁰¹, which one could argue, is a conformation of the time limits under which the WTO operates; and reduces the opportunity for obstruction²⁰², and further reduces the necessity for the force of "*moral and sometimes political pressure*"²⁰³, for such compliance. This is confirmed by the fact that the issue of implementation is automatically placed on the DSB agenda after the end of the six month period of time, on the basis of negative consensus, until such a obligation is complied with.²⁰⁴ It may be argued that the understanding does not provide for a further period after the six month period, and thus could be open to abuse by a party who has not complied with such an obligation. But unlike the above mentioned situation, it seems that the WTO,

to its merit has negated such obstructions to the adoption and implementation of panel reports by requesting a negative consensus, which reinforces the obligation to comply. But the first question which arises is; what the situation would be, if the local legislation is against the recognition of WTO reports as part of the national law or the implemented legislation is not in line with the obligations accepted under the WTO, hence obstructing to quick implementation?

If one takes the US situation for example, one could identify a move towards the restriction of the effect that WTO panel reports have on the national economic activities. The question in the United States, with respect to international agreements has been, whether such agreements are self-executing in the US as a part of the law of the land or whether these agreements are subject to legislation for implementation. The judiciary has concluded in most cases that international agreements are a part of the law of the land, and thus self-executing, unless there is an intention that should not be the case.²⁰⁵ The courts in the US have tended to utilise criteria such as the language of the agreement, the class of the agreement, its history, its purpose etc., in deciding whether such a agreement is to be self executing or not. According to Leebron, the GATT/WTO agreements are not self-executing; but an executive, non-binding agreement. Leebron argues that the present legislation provides for non-self execution of GATT/WTO provisions, as with the Trade Agreements Act of 1979, which made it clear that the executive agreements are non-self executing.²⁰⁶ Hence, the URAA was initiated in making the corresponding changes that was necessary in local US law in compliance with the Uruguay Round Agreements. These changes included confirming United States law to prior adverse findings by GATT dispute settlement panels. But the implementation of these agreements were not clear cut, as a result of the obstruction and reservations that the

Congress has had on some of these provisions, when it believed that these provisions were intrusive. The limitations and conditions under which these provisions were to be implemented have been immense, where these have mostly concerned protectionism in a broader sense, and not merely concerned with economic facts. It would seem that the legislation that deals with the implementation of the Uruguay Round agreements in the United States has confirmed this, when it provides that “no provision of any of the UR agreements, nor the application of any such provision to any person or circumstances that is inconsistent with any law of the US shall have effect.”²⁰⁷ Thus emphasising the supremacy of Congress and the sovereign rights of the state. The restrictive nature of this implementing legislation is further emphasised by the fact that the act provides higher authority for local legislation of the US in comparison to WTO “law”, which deals with the protection of certain areas of concern and unilateral action initiated by the USTR.²⁰⁸ Thus, the effect of this position is that judicial action cannot be brought directly against the US to invalidate these Federal laws, which the other party believes is against the norms of trade liberalisation. Only Congress is allowed to act in these circumstances, in order to change such alleged federal laws, which are deemed contradictory to GATT/WTO provisions.

Similar situations have also arisen in other states over the effect that panel reports or the WTO agreements would have in local jurisdictions, as a result of disputes being brought to the DSB under the DSU of 1994. While in some states, as in Brazil, there exists debate and a acceptance of the fact that judicial interpretation is necessary in the implementation of WTO panel reports, in others, the courts have invalidated the application of GATT panel reports as a result of the dubious nature given to international treaty law under local Constitutions. In Japan for

example, the constitution provides that treaties and established laws of nations “shall be faithfully observed.”²⁰⁹ Notwithstanding the fact that it does not specify the rank that international law holds in the Japanese legal order, it is clearly agreed that international treaties have a higher ranking over statutes. However, at the same time, the recognised theory in the Japanese legal order is that the Constitution has supremacy over some treaties agreed upon by the government, particularly ones with respect to “bilateral political or economic treaties”²¹⁰ meaning, that the effect of such treaties are in the hands of the local courts for judicial interpretation. While, the effect of international treaties is not questioned under the constitution, as Iwasawa notes, “The status of resolutions of international organizations and judgements of international courts in Japan is not clear.”²¹¹ While one could argue that such resolutions and reports are part of accepting the international treaty, it would seem that the Japanese courts have not complied with such a theory, when concerned with GATT/WTO panel reports being used by the parties concerned as standard authority in the interpretation of GATT/WTO agreements, notwithstanding the acceptance by the Japanese government of panel reports as being binding and the agreement to adopt such reports.²¹² While the Japanese government has adopted panel reports and have changed alleged violation laws of WTO agreements, after long drawn negotiations with the United States for example; the question is whether Japan would have willingly complied with such reports, if not for the pressure by the US.²¹³ The emphasis given to state sovereignty and protectionism is emphasised in the Banana and FSC cases, where the state or economic block in question was reluctant to legislate for the corrective laws.²¹⁴ In these cases, the only option left for the winning party was to bring further cases against the implemented legislation, arguing that such legislation has failed to adhere to the ruling of the panel and failed to comply with

accepted rules of liberalisation. Thus it is within this context of issues that one has to consider the compensation and suspension of concessions provisions elaborated by the DSU of 1994, which goes in tandem with the implementation provisions thereof.

4.5.5.2 *Compensation & Suspension of Concessions:*

In recent years, questions have been asked as to whether the measures adopted by the Contracting Parties have been adequate; especially as noted by Bradley, “*..Implementation in some cases has been partial or has taken a very long time.*”²¹⁵ This was confirmed by the Director General of the GATT, when he noted that the GATT faced an, “*increasing problem of conditional and incomplete implementation of panel reports*”, and in my opinion this is a result of the original GATT provisions as well as the Understandings prior to 1994 not including compensation or suspension of concessions provisions in case of non-implementation of recommendations, which realistically would amount to retaliation.

But, one of the salient features of the Understanding is the express availability of compensation and suspension of concession provisions under Art.22, which states that,

*“Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation...”*²¹⁶

which is ideal in cases as emphasised earlier, where states have provided legislation, which would obstruct the fast implementation of panel

reports or rulings. In contrast to implementation and compensation provisions, Art. 22.2 to 9 includes detailed rules for suspension of concessions, where the motive was to reduce the opportunity for unilateral retaliation on the part of the major trading blocks, which would, it seems protect the interest of other states in a lesser bargaining position. Under Art.22.3, if a complaining party decides to request retaliation, three principles are to be followed.

- First, retaliation should be in the same sector of the same agreement.
- Secondly, if this is not practicable, retaliation shall be in other sectors of the same agreement.
- Finally if this process is impracticable, retaliation could be in another covered Agreement,

This opportunity is thereby made a legal possibility, which has hardly been invoked²¹⁷ in GATT practice, which according to Mora “...creates a regime of ‘retaliation at request.’”²¹⁸ Nonetheless, I believe that this provision in general has protected innocent parties, not parties to the original dispute; and further provides a opportunity for other Contracting Parties to neutralise the scope of larger trading parties to abuse this provision by providing that;

“....If the member concerned objects to the level of suspension proposed or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorisation to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration”²¹⁹

which satisfies one of its main objectives, namely to restrict the unfairness of ‘self judgement’, if the defendant party to the dispute abuses its

council membership. Having said that, one has to question the appropriateness of this provision from three different angles. First, with regard to the legalising of the opportunity of retaliation; one would have to question the incentive this creates for states such as the United States which has a history of unilateral retaliation as emphasised by recent legislation and attitude towards dispute resolution in trade relations. As we have witnessed, the US in particular has been very “trigger-happy” to retaliate or suspend concessions in the past. Therefore, one has to question the possibility of this trigger-happy nature being legislated for by the WTO in these circumstances. Secondly, if one takes into account the motives in the initiation of GATT/WTO, the emphasis was on the restriction of protectionist measures and creating a fair ground for international trade relations. In contrast however, the WTO has provided here an opportunity for states to take “tit for tat” action, even as a temporary measure, as emphasised in the Banana and FSC cases. Thus, questions have to be asked where the WTO is heading and whether the emphasise has changed from being a peaceful settlement process to a purely legal procedure, particularly when one considers the fact that retaliation in a broader sense provides a right for protectionism, as a answer to protectionist action of the other party to the dispute. Thirdly, Art.22(3)(d)(ii) provides that, in taking action for suspension of concessions, the state needs to take into account the economic viability of such measures. If one takes into account this provision from a developing country perspective, one could see that this would have no positive effect on the ability of the developing country in taking action, when faced with a opponent with a high economic supremacy, particularly when most developing states are dependant on the exports sent to developed nations. Therefore, one has to question whether this provision does actually

redress the economic imbalance that was the ultimate goal of the new WTO dispute settlement Understanding.

Conclusion:

As was seen within this chapter, the working of the GATT/World Trade Organization is based on the “goodwill” of the participating Contracting Parties, which is in keeping with the basis of the GATT/WTO, namely making a balance between the consensus of states and state protectionism, that was the reason for the creation of the whole United Nations system. However, as a result of the major Contracting Parties taking different views on how the WTO and more importantly the Dispute Settlement Mechanism should work, one could see the deterioration of such consensus, hence the deficiencies of the pre 1994 GATT regime. While the reason for such deterioration is consensus was partly as a result of states ideology on what the WTO should be, a further reason for such deterioration resulted because states were concerned in protecting their interests, hence their obstructions at GATT dispute settlement.²²⁰ The states were keen on keeping the *status quo*, rather than being seen as giving in to the demands of the other state at the dispute settlement forum, hence the obstructions to the satisfactory completion of the GATT process.

But as emphasised, the WTO provided sufficient innovative procedures in all areas to its merit, particularly with regard to issues such as the adoption of panel reports, thus vindicating any argument to the effect that the World Trade Organization Dispute Settlement Mechanism is a significant improvement on the former regime, notwithstanding the protectionism that is still prevalent among states. But as I have proved, such improvements have had its own deficiencies, consequently negating any expected benefits of such a purported legal regime, mainly

because there still exists interpretative difficulties with regard to issues such as applicable law and existent reluctance of states in the enforcement of WTO awards. Furthermore, notwithstanding the fact that the agreement has been ratified by the Contracting Parties, the implementation of reports of the DSB has endured great difficulties as a result of the prevailing dichotomy of views in the major trading blocks towards the authority of panel reports over national trade policy, as exemplified above, by the very recent cases involving the larger economically dominant powers of the EC and the US. Hence it is my contention that, while the WTO has provided a greater legal environment for the WTO Dispute Settlement Mechanism; the “political cauldron” of negotiating and protectionist apathy toward the WTO Dispute Settlement Mechanism has reduced the effectiveness of such a system with respect to key issues such as adoption of reports, applicable law, appeal process and implementation of panel reports, which ultimately poses questions on its effectiveness as a dispute settlement process. Thus, having discussed the present WTO dispute settlement process, I would follow to make a comparative analysis of the three institutions in the following chapter, with respect to the three key substantive issues of jurisdiction, applicable law and enforcement, where state protectionism seems to have a unwarranted effect.

Notes

- ¹ Aldcroft, D.H., *The European Economy, 1914-1980*, Croom Helm Ltd, London, (1980) pp 133
- ² In Poland for example, the production of bread and course grains were running at about 60% of pre war levels.
- ³ The decline was about 50% in Austria, 40% in Finland, Greece, Italy and Hungary etc.
- ⁴ As a result of these factors, the volume of imports into Europe in the post liberation period rarely exceeded 50% of the pre war situation.
- ⁵ The Four Nations Declaration on General Security, Department of State, Bulletin, IX, pp409
- ⁶ The main players in the negotiations at Moscow were the Britain, the US, China and the former USSR. See, Nicholas, H.G., *The UN as a political institution*, 5th Edition, The Oxford University Press, (1975) pp3
- ⁷ Goodrich, I.M., *Charter of the United Nations, Commentary & Documents*, 2nd Edition, Stevens & Sons Ltd., London, (1949), pp 7
- ⁸ United Nations, *Guide to the Charter of the United Nations*, United Nations Department of Public Information, Geneva. (1955), pp7
- ⁹ The International Labour Organisation, the Food and Agriculture Organisation and the IBRD and associated agencies were among such specialised agencies.
- ¹⁰ Supra note 6, Nicholas, at pp6
- ¹¹ The emphasise of this area on my part is a result of this piece of work being focused on the economic relations of state parties and the protection of such interests.
- ¹² UNCIO, *Report of Reporteur of Committee II/3*, Doc. 861, II/3/55(1), pp3
- ¹³ Supra, note 7, pp 319
- ¹⁴ Supra, note 7, pp324
- ¹⁵ If I may quote one passage from Goodrich, who says "The world wide economic collapse of the late twenties and the early thirties, the rise in popularity of anti-democratic and nationalist doctrines, and the unwillingness of peace loving peoples to assume necessary responsibilities for the maintenance of peace resulted in the disintegration and collapse of the League system", with regard to the non-event of the League of Nations organization. If this was the case, one had to question how the UN would operate if the obligations were not obligatory, but discretionary and dependant on good faith.
- ¹⁶ United Nations, Economic and Social Council, *Official Records, First Year: First Session*, pp173-74
- ¹⁷ Department of State Publication 2411, commercial Policy Series 79(1945); reprinted in Department of State Bulletin, XIII (1945)
- ¹⁸ The 1934 Reciprocal Trade Agreements Act, under which the US had entered into 32 bilateral agreements.
- ¹⁹ Jackson, J., *The World Trade Organization, Constitution & Jurisprudence*, Pinter Publishers, London, (1998), pp 15
- ²⁰ The Atlantic charter of 1941, and the Mutual Aid Agreement of 1942
- ²¹ The Atlantic Charter of 1941, Para 4, in Torquay Background; The Havana Charter, G.A.T.T. and the I.T.O., by W.A.Wells, Empire Industries Association & British Empire League (1967), pp1
- ²² Between 1935 and 1935, the US had entered into 32 bilateral trade agreements with other trade parties, mainly from the EC.
- ²³ Jackson, J., *The World Trading System, Law & Policy of Int. Economic Relations*, The MIT Press, Cambridge, London. (1994)
- ²⁴ Ministerial Declaration on the Uruguay Round, GATT Doc.No.MIN.Dec, at 5 (Sep.20, 1986)
- ²⁵ The four annexes are as follows. Annex one contains the Multilateral Agreement on Trade in Goods, The general Agreement on Trade in Services and the Agreement on trade aspects of Intellectual Property. The Second contains the Understanding on Rules and procedures governing Settlement of Disputes. The Third contains the Trade Policy Review Mechanism and finally the fourth contains the optional Plurilateral Agreements
- ²⁶ Demaret, P., *The metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, in the *Columbia Journal of Transnational Law*, (1995), pp123-171 at 134
- ²⁷ Almost 60% of the 56 cases brought since 1948 until the early 1960s concerned products involving measures applicable to agricultural products
- ²⁸ The US, keeping with its position as in the Tokyo round, wanted export subsidies reduced over a ten year period, with the EC export enhancement programme its main target. On the other hand the EC premised its position on the protection of the CAP, which opposed any movement towards the total elimination of tariffs. Furthermore, other states also were unwilling to renegotiate their individual

positions on the basis of food security, such as Japan did and Canada, which simply did not want to withdraw its policy positions.

²⁹ One such example of pressure being put on a government was seen in the US position on maritime and aviation industries. While keeping with its initial perspective, the US government agreed on a universal approach. Unfortunately, pressure was put on the authorities to exclude these industries from negotiations, hence the negotiation problems regarding the coverage issue.

³⁰ Young, M.K., Dispute resolution in the Uruguay Round: Lawyers Triumph over diplomats, in *The International Lawyer* (1995), pp 389

³¹ Mora, M.M., A GATT with teeth: Law wins over politics in the resolution of International trade disputes, in *Columbia Journal of Transnational Law* (1993), pp131

³² *ibid.* at pp105

³³ *Akzo Vs United States*; 1987 O.J.(L.117)18

³⁴ Improved Dispute Settlement: Elements for Consideration, Discussion Paper Prepared by the United States Delegation, GATT Doc. No.MTN.GNG/NG13/W/6

³⁵ For an exceptionally articulate presentation of this view see, Jackson, J.H., Governmental Disputes in International trade relations: A proposal on the context of GATT, in 13 *JWT* (1979) pp1-21

³⁶ Art.1, ss8, Clause 1,3

³⁷ Senate Report No.249, 96th Cong., 1st Sess., 1, reprinted in 1979 U.S. Code Cong. & Admin. News 381, at 232

³⁸ Trade Act of 1979, ss 301, 93 Stat. 295-96.

³⁹ *Id.* At ss 301 (b)

⁴⁰ P.L.100-148, Aug 23rd, 1988

⁴¹ Trade Act of 1988, ss1301, 102Stat.1164 (codified at 19 U.S.C. ss2411 (1990))

⁴² ss1374-1380 of the 1988 Act

⁴³ Hudec, R.E., The GATT Legal system: A Diplomat's Jurisprudence, in 4 *JWT* (1970), pp 615

⁴⁴ *US- Cuban restrictions on textile imports, (US vs Cuba)*, GATT/CP.3/SR.13, (May 18th, 1949)

⁴⁵ *US Export Subsidy on Tobacco, (Malawi Vs US)*, L/ 2715 (Nov 6, 1966)

⁴⁶ SR 24/19 (Nov 24, 1967)

⁴⁷ Hudec, R.E., The GATT Legal system & world trade Diplomacy, Butterworths Legal Publishers, (1990), pp 249

⁴⁸ *Ibid.* pp 40

⁴⁹ To justify this philosophy the US has in most cases, if not always has endeavoured to emphasise its position, that of a legal tenure. One such case was the US Escape clause Action on Fur Felt Hat Bodies(Nov.7th 1950), where as Hudec notes "the report itself was the most legal of GATT decisions...primarily because the US came to the proceeding armed with a well documented decision of the US Tariff Commission.

⁵⁰ Minutes of Meeting Held on 22 September 1988, GATT Doc.No. C/M/224 (Oct.17, 1988), at 28.

⁵¹ Phan van Phi, R., A European View of the GATT, in *Int'L.Bus.Law.* (1986), pp 150, 151

⁵² *Supra* note 30 at pp394

⁵³ Murphy, A., the European Community and the International Trading System (1990), pp114

⁵⁴ *Statement by the Representative of Japan on 21 February 1977*, GATT Doc.No.MTN/FR/W/3 at 8

⁵⁵ Schmittohoff, C.M., The Law & Practice of International Trade, Stevens & Sons, London (1990), pp718

⁵⁶ Davey, W.J., Dispute Settlement in GATT, in *Fordham Int.L.J.* (1987), pp67-78

⁵⁷ Long, O., Law & its Limitations in the GATT Multilateral Trade System, Martinus Nijhoff Publishers (1985), pp71

⁵⁸ *Supra* note 31 at pp115

⁵⁹ Art.22 & 23 of GATT in, Jackson, J., 1989 Documents Supplement to Legal Problems of International Economic Relations, 2nd Edition, West Publishing Co.Minn. (1989), pp34, 35

⁶⁰ *The General Agreement on Tariffs and Trade*

⁶¹ Pescatore, P. & Davey, W., Handbook on GATT dispute settlement, Kluwer Publishers (1992), pp21

⁶² The 1958 Decision; GATT, 7th Supp. BISD 24 (1959)

⁶³ As noted by Beal, only 10 cases since its inception has been brought under the above mentioned article.

⁶⁴ Art.23(1)(b)(c)

⁶⁵ *Supra* note 61 at 4

⁶⁶ *Supra* note 61 at 76

- ⁶⁷ The relevant reports on such non violation impairment involved: Australian subsidy on sulphate of ammonia, BISD 7s/68; Imports of Sardines in Germany BISD 1s/53; Italian Discrimination against Imported Agricultural Machinery BISD 7s/60 etc.
- ⁶⁸ Supra note 64
- ⁶⁹ For a better compilation of the development of GATT, See, Hudec, Supra note 55
- ⁷⁰ *Belgian Internal Taxes Case*, (GATT/CP.3/42), (1949)
- ⁷¹ Supra note 47 at 79
- ⁷² Fawcett, J., International Economic Conflicts: Prevention and resolution, in article by Mora, M.M. See supra note 31 at 108, 119
- ⁷³ *Australian Subsidy on Ammonium Sulfate* (CP. 3/61) (1949)
- ⁷⁴ Van Beal, I., The GATT dispute settlement Procedure, in 22 JWT(1988), notes from a state report covering the period from 1948 until the end of 1986 that, it appears that from the 100 complaints brought under Article 23, 52 led to the submission of a report by a panel, the others were settled without a report.
- ⁷⁵ Supra note 47 at pp85
- ⁷⁶ *ibid.* pp87-89
- ⁷⁷ *ibid.* pp88
- ⁷⁸ SR. 7/12 (Oct. 31, 1952)
- ⁷⁹ Interestingly, in the 1988 Montreal mid term review, the Contracting parties reached an agreement on a new text, adopted by a Decision of April 12, 1989, known as *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*, 36 BISD 61 (1990)
- ⁸⁰ Four agreements follow the same procedures of the Understanding, but without making reference to it. They are; *the Agreement on Technical barriers to trade*; *The code on Subsidies and countervailing duties*; *The Agreement on Government Procurement*; *The code on Customs Valuation*. The Understanding is not automatically applicable to these agreements. But in case of the *Anti dumping code*; *The Agreement on Trade in Civil Aircraft*; *The Agreement on Import Licensing Procedures* “..the settlement of disputes shall mutatis mutandis be governed by the provisions of the Understanding”
- ⁸¹ See Long, O., *Law and its Limitations in the Multilateral Trade System*, Martius Nijhoff Publishers (1987), at pp79
- ⁸² The Improvements of 1989, further promote openness of consultations by way of imposing a obligation under section C paragraph 3 to notify requests for consultations to the Council. However, having said that the emphasis on consultation is reduced primarily by providing strict time limits, thus making consultations preliminary rather than crucial.
- ⁸³ The improvements provide for stricter time limits on the establishment of panel. In principle the time period between the request and the establishment of the panel should not exceed two months.
- ⁸⁴ The Improvements have removed a preference for governmental representatives as panel members.
- ⁸⁵ paragraph 13
- ⁸⁶ paragraph 16
- ⁸⁷ paragraph 21
- ⁸⁸ The Improvements, Section G, paragraph 3; where the full consensus rule is confirmed.
- ⁸⁹ Pescatore, P., *The GATT dispute settlement Mechanism : Its present situation and its prospects*, in 27 JWT (1993), pp13
- ⁹⁰ paragraph 22
- ⁹¹ Supra note 74 at 73
- ⁹² *See Minutes of Meeting Held on 29 the June 1982, GATT Doc.No.C/M/158 (Sep.21, 1982)*
- ⁹³ This concern is emphasised by the fact that the EC made the reform of US protectionist legislation a key negotiating objective, while in some cases having the same protectionist practices which were against the spirit of dispute settlement laws.
- ⁹⁴ Supra note 89, pp7
- ⁹⁵ *Ibid.*
- ⁹⁶ Supra note 74 at pp72; See also Jackson, J.H., *The Birth of the GATT-MTN system: A Constitutional Appraisal*, in Vol. 12:21, *Law & Policy in International Business* (1980), pp42
- ⁹⁷ Supra note 89, at 9
- ⁹⁸ paragraph 10
- ⁹⁹ Komuro, N., *The WTO Dispute settlement mechanism*, by N.Komuro, in 29 JWT (1995), pp26
- ¹⁰⁰ *Ibid.* 28
- ¹⁰¹ Communication from Japan, GATT.Doc.No.MTN.GNG/NG13/W/21 (March 1, 1988), at 2-3
- ¹⁰² The panel report on EEC-Subsidies on exports of Wheat flour; The panel report on United states-Countervailing duties on non-rubber footwear from Brazil; The panel report on United states-anti

dumping duties on grey portland cement clinker imported from Mexico; The panel report on EEC-Tariff treatment of citrus products from certain Mediterranean countries etc.

¹⁰³ GATT dispute settlement system, Note by the Secretariat, GATT Doc.No.MTN.GNG/NG13/w/4 (10th June, 1987)

¹⁰⁴ paragraph 21 of Understanding

¹⁰⁵ Jackson, J., *The World Trading System: Law & Policy of International Economic Relations*, (1992), pp87; adopted from Jackson, J.H., *Governmental disputes in International trade relations: A proposal in the context of GATT*, in 13 JWT (1979), pp3-4

¹⁰⁶ Kufour, K.O., *From GATT to the WTO: The developing countries & the reform of the procedures for the settlement of international trade disputes*, in 31 JWT (1997) pp117-145. The author notes that between a 15 year period starting from 1979, complaints filed by the developing Contracting parties rose from 28 to 117.

¹⁰⁷ Jackson, J., *World Trade & Law of GATT*, Bobs Merril, N.Y.,(1969), pp178

¹⁰⁸ Supra note 57 at pp81

¹⁰⁹ Falklands-Malvinas conflict; L/5414 (1982)

¹¹⁰ Art.3 of the 1994 Understanding on Rules and Procedures governing the Settlement of Disputes (1994), in WTO publication, Annex 2, pp 405

¹¹¹ *Case of Special Import Taxes Initiated by Greece* (1953), BISD 1s/48

¹¹² (1963),BISD 11s/95

¹¹³ *EEC-Payments & subsidies paid to processors and producers of Oilseeds and related animal-feed proteins, US Vs EC*, (1991), 37 Supp. BISD 86; Look also at *Italian Discrimination against agricultural machinery Case, UK Vs Italy*, (1958) 7Supp. BISD 60

¹¹⁴ Jackson, J., *Legal Problems of International Economic Relations; Cases, Materials & Text*, West Publishing co.Minn., (1995), pp362

¹¹⁵ Vermulst, E., *An Overview of the WTO dispute settlement system and its relationship with the Uruguay round agreements; nice on paper but too much stress for the system*, in 29 JWT (1995), pp137

¹¹⁶ Pescatore, P., *The GATT dispute settlement Mechanism*, in 27 JWT(1993), pp17

¹¹⁷ *The WTO, Results of the Uruguay Round Multilateral Negotiations: Legal Text*, The WTO Secretariat, Geneva, (1995) pp405

¹¹⁸ Ibid. 417

¹¹⁹ Ibid. 410

¹²⁰ "If the consultations under Art.22.1 or 23.1 fail to settle a dispute within sixty days after the request for consultations, the complaining party may request a panel during the sixty day period if the parties jointly consider that consultations have failed to settle the dispute", Paragraph C2 of the 1989 Improvements of the GATT. DSR (1990)

¹²¹ Komuro, N., *The WTO Dispute Settlement System*, in 29 JWT(1995), pp40

¹²² Supra note 117 at 411

¹²³ Pescatore, P. & Davey, W., *Handbook of GATT Dispute Settlement*, Kluwer Law Publishers, (1992), pp 7

¹²⁴ Supra note 121 at 411

¹²⁵ Ibid.

¹²⁶ Jackson, J., *The Birth of the GATT-MTN system: A Constitutional appraisal*, in *Law & Policy in International Business*, Vol. 12:21, (1980) at pp42

¹²⁷ For the text of the Rules of conduct for the DSU see, Marceau, G., *Rules on Ethics for the New World Trade Organisation dispute Settlement Mechanism*, in 32 JWT (1998), pp57

¹²⁸ Paragraph 20-26 of PC/IPL/M/8

¹²⁹ Supra note 126 at 61

¹³⁰ Ibid.

¹³¹ According to Art.8.9, "Panellists shall serve in their individual capacities and not as government representatives, nor as representatives of any organisation. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel".

¹³² However, as Mora points out in the case involving ss337 of the US Tariff Act of 1930 has cast some doubts as to whether high quality panellists make much difference to disputing parties- F.N. 212, in Mora, M.M., *A GATT with Teeth: Law wins over Politics in the resolution of international trade disputes*, in *Columbia Journal of Transnational Law* (1993), pp103

¹³³ Supra note 117 at 413

¹³⁴ Ibid. pp415

¹³⁵ Under Article 1; General Most favoured nation treatment and Article 11; General elimination of quantitative Restrictions of GATT 1947, such principles are assured

- ¹³⁶ *Canada- Imports, Distribution and Sale of Certain Alcoholic Drinks by Provincial agencies case*, 39S/27
- ¹³⁷ Thomas, C., *Litigation Process under the GATT Dispute Settlement System: Lessons for the World Trade Organisation?*, in 30 JWT (1996), pp53-81 at 68
- ¹³⁸ Hudec, R.E., *Enforcing International Trade Law: The evolution of the Modern GATT Legal system*, by Butterworths Publishers, London. (1991)
- ¹³⁹ *Ibid.* pp130-131
- ¹⁴⁰ *Supra* note 117 at 417
- ¹⁴¹ *Supra* note 121 at 41, identifies the fears of other scholars on such participation, but refutes such arguments at the outset
- ¹⁴² Art.10.2 of the DSU 1994, at *supra* note 116 at pp413
- ¹⁴³ Thomas, C., *The need for due Process in WTO proceedings*, 30 JWT (1996), pp48
- ¹⁴⁴ Steger, D.P., *New Directions in International Trade Law: WTO Dispute Settlement*, In: Cameron, D. & Campbell, K., ed. *Dispute Resolution In the WTO*, Cameron May, London (1998), pp 28-57 at 45
- ¹⁴⁵ WT/DS33/AB/R, adopted 23 May 1997
- ¹⁴⁶ *Ibid.*, at 16-17
- ¹⁴⁷ Cheng, B., *General Principles of Law as applied by International Courts and Tribunals*, Stevens & Son, London (1987)
- ¹⁴⁸ *Eastern Carelia Case*, PCIJ Ser.B, No5 1923
- ¹⁴⁹ Martha, J., *Representation of Parties in World Trade Disputes*, in 32 JWT(1997) , pp 45-49
- ¹⁵⁰ Palmeter, R., *The need for Due Process in WTO proceedings*, 32 JWT (1997), pp 51 at 53
- ¹⁵¹ Robert Evans, *Caribbean Legal Advisers barred in WTO Banana Row*, The Reuter European Community Report, 10th Sep.1996
- ¹⁵² WT/DS2/AB/R of 29 April 1996
- ¹⁵³ Art.3(2) of the DSU 1994
- ¹⁵⁴ Art.31 and 32 of the Vienna Convention on the Law of Treaties,(23 May 1969)
- ¹⁵⁵ See for example, *United States- Measures Affecting Alcoholic and Malt Beverages*, GATT, BISD, 39S/206 at 272, where the panel even referred to previous negotiations in order to confirm an interpretation of a GATT Article that had already been found to be clear on the face of it.
- ¹⁵⁶ It would seem that even Dispute settlement panels have considered these negotiations as part of the practice of GATT, See *New Zealand-Anti dumping Duties on Finnish Tractors*, The panel found support for New Zealand's position on the meaning of the term "industry" in GATT Article VI in the Report of the Group of experts on Anti-dumping and countervailing duties, GATT,BISD, 85/145, para 18
- ¹⁵⁷ Article 3(1) of the DSU 1994
- ¹⁵⁸ *EC-Restrictions on import of dessert Apples from Chile, Chile Vs EC*, GATT, BISD, 36s/127
- ¹⁵⁹ *Japan-Taxes on Alcoholic Beverages, Report of the Appellate Body, EC Vs Japan*, WT/DS8/AB/R, adopted by the DSB on 1st November 1996.
- ¹⁶⁰ *Ibid.*, Section E of the Report
- ¹⁶¹ Art.16 & 17 of the DSU 1994; *Supra* note 116 at 417
- ¹⁶² *Supra* note 121 at 53
- ¹⁶³ This, as Vermulst notes will on "one hand, prevent an exact re-run of the arguments presented to the panel" and "...on the other hand, enable the Appellate Body to concentrate on improving the coherence of panel reports", in Vermulst, E., *An Overview of the WTO Dispute Settlement System and its relationship with the Uruguay Round Agreements; Nice on Paper but too much stress for the system?* in 29 JWT (1995), pp 145
- ¹⁶⁴ Art.17(5) of the DSU 1995
- ¹⁶⁵ This time frame specified by Art.20 of the DSU applies unless the parties agree to do otherwise, and further according to Appendix 3, the time frame may be changed in the light of unforeseen developments
- ¹⁶⁶ Kohona, P., *Dispute resolution under the World Trade Organisation: An Overview*, in 28 JWT (1994), pp33
- ¹⁶⁷ Look at foot note 6 of, Lowenfield, A., *Remedies along with Rights: Institutional Reform in the New GATT*, in 98 AJIL (1994), pp480
- ¹⁶⁸ Other instances involving the US & EC were *US Vs The EC on Citrus*; *South Africa Vs Canada on gold coins*; *EC Vs US on Wine & Grape Products*; also see Hudec, R.E., *Enforcing International Trade Law*, (1993), pp 237-48
- ¹⁶⁹ *Supra* note 116 at 18
- ¹⁷⁰ *Ibid.*

- ¹⁷¹ Since 1995, 107 requests for consultations have been made resulting in approximately 74 distinct matters. Of the 74 matters, 50 have been initiated exclusively by developed countries, and 14 of the other complaints have been brought by developing countries against developed countries, most frequent being Mexico.
- ¹⁷² Art.17(3) of the DSU, Supra note 116 at 418
- ¹⁷³ *Working Procedures for Appellate Review*, WT/AB/WP/1, in effect 15 February 1996. A revised and consolidated version of the Working Procedures, WT/AB/WP/3, was issued on 28 February 1997
- ¹⁷⁴ Art.17(6) of DSU 1994
- ¹⁷⁵ Petersmann, E.U., How to Promote the International Rule of Law? Contributions by the WTO Appellate Review System, In: Cameron, J. & Campbell, K., ed., *Dispute Resolution in the WTO*, Cameron May, London (1998), pp75-98
- ¹⁷⁶ Article 3(9) of DSU 1994
- ¹⁷⁷ McRea, D.M., The Emerging Appellate Jurisdiction in International Trade Law, In: Cameron, J. & Campbell, K., ed., *Dispute Resolution in the WTO*, by Cameron & Campbell, Cameron May, London (1998), pp98-110 at 106
- ¹⁷⁸ WT/DS2/AB/R of 29 April 1996
- ¹⁷⁹ The Appellate Body's view in the initial cases was that it should come to a formal legal conclusion on every issue raised. See *United States-Measures affecting Impact of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R., 25 April 1997
- ¹⁸⁰ Supra note 177 at 30
- ¹⁸¹ WT/DS24/AB/R of 10 February 1997
- ¹⁸² EC- Regime for the importation, sale and distribution of Bananas, US Vs EC, (1995), WT/DS16/1
- ¹⁸³ One other important issue which is connected to this problem of jurisdiction is the lack of one of the most important powers of an Appellate body, namely remand authority of an appeal tribunal. This issue has been the case in point in at least two of the first eight appeals decided so far. Such a void not only reduces another opportunity of due process but also negates the strength of an apparent juridical system. For a better review of this issue See, Palmetier, D., The WTO Appellate Body needs Remand Authority, 32 JWT (1998), pp41-45
- ¹⁸⁴ Supra note 177, at pp110
- ¹⁸⁵ *United States-Tax Treatment for "Foreign Sales Corporation"*, EC Vs US, (1999), WT/DS108/R; *United States- Tax Treatment for "Foreign Sales Corporation"*, EC Vs US, (2002), WT/DS108/AB/RW
- ¹⁸⁶ As noted by Komuro, article 3.7 of the DSU seems to halt such 'running alone' to a certain extent by requiring parties to examine whether an action would be fruitful. I quote "...Before bringing a case, a member shall exercise its judgement as to whether action under these procedures would be fruitful"
- ¹⁸⁷ Wang, L., Some observations on the Dispute Settlement system in the World Trade Organisation, in 28 JWT (1994), pp177
- ¹⁸⁸ Supra note 117 at 418
- ¹⁸⁹ Supra note 117 at 426, Art.24.1 states that "...at all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country member, particular consideration shall be given to the special situation of least developed country members..."
- ¹⁹⁰ Art.17.3 of the DSU. This protection of developing countries interests have also been recognised by Art.8.7, with regard to panel composition, noted by Kohona, Supra note 166 at 37
- ¹⁹¹ Awuku, E., How do the results of the Uruguay Round affect the North-south Trade?, in 28 JWT (1994), pp75-93. The Very recent share of Agriculture in the GDP stands as noted;
- | | <u>1965</u> | <u>1988</u> |
|------------------------------------|-------------|-------------|
| Developed Market Economy Countries | 5.5% | 2.3% |
| Developing Countries | | |
| Africa | 35.3% | 20.8% |
| Asia | 38% | 17.8% |
| South Asia | 44% | 33% |
- GDP Data: UNCTAD Handbook of International Trade Data & Development statistics, New York, 1990, Oxford University Press.
- ¹⁹² Chaytor, B., Dispute Settlement under The GATT/WTO: The Experience of Developing Countries, In: Cameron, J. & Campbell, K., ed., *Dispute Resolution in the WTO*, Cameron May, London (1998), pp250-270
- ¹⁹³ July 1987 Proposal by the United States, GATT.Doc.No.MTN.GNG/NG13/W/6, pp3
- ¹⁹⁴ Vermulst, E., An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round agreements, in 29 JWT (1995), pp131

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- ¹⁹⁵ Paragraph 22 of the Understanding Regarding notification, consultation, dispute settlement and surveillance; adopted on 28 Nov. 1979
- ¹⁹⁶ Supra note 132 at 153, F.N. 236
- ¹⁹⁷ Ibid 153
- ¹⁹⁸ Art.21 of the DSU 1994, Supra note 117
- ¹⁹⁹ Art.21.2 of the DSU. The footnote to this article provides “if a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose”
- ²⁰⁰ Jackson, J., The WTO dispute Settlement Understanding-Misunderstandings on the nature of Legal Obligation, In: Cameron, J. & Campbell, K., ed., *Dispute Resolution in the WTO*, Cameron May, London (1998), pp69-75 at 72
- ²⁰¹ Supra note 167 at 41. However, as correctly pointed by Komuro, with whom I agree, the first option in Art.21.3 is not necessarily the most likely, because the DSB approves the period of time proposed by the losing party on the basis of the positive consensus rule, rather than the negative rule, the winning party could block approval.
- ²⁰² Art.21.7 & 21.8
- ²⁰³ Long, O., Law and its Limitations in the GATT multilateral Trade system, Martinus Nijhoff Publishers (1985), pp78
- ²⁰⁴ However, one has to question as to how long this period is because it does not enlighten how long this would be.
- ²⁰⁵ Foster & Elan Vs Neilson, 27 US (2 Pet.) 253 (1829)
- ²⁰⁶ Leebron, D., Implementing the UR results in US, In: Jackson, J., ed., *Implementing the Uruguay Round*, Clarendon Press, Oxford (1997)
- ²⁰⁷ ss102, URAA, 19 USC 3512
- ²⁰⁸ ss102 (a) (2) URAA
- ²⁰⁹ Art.98(2) of the Japanese Constitution.
- ²¹⁰ The government seems to distinguish between three kinds of treaties and takes the position that some treaties prevail over the Constitution while others do not: treaties which represent ‘established laws of nations’ prevail over the Constitution; treaties which concern ‘a matter of vital importance to the destiny of a nation such as a surrender document or a peace treaty’ prevail over the Constitution; while the Constitution prevails over ‘bilateral political or economic treaties.’
- ²¹¹ Iwasawa, Y., Constitutional problems involved in implementing the UR in Japan”, In: Jackson, J., ed., *Implementing the Uruguay Round*, Clarendon Press, Oxford, (1997) pp137-174 at 161
- ²¹² In the Kyoto Necktie case, the appellants alleged in their brief to the Supreme court that “it was determined in the GATT panel consultations of 1979” that the sole importship and the price stabilisation system under the Raw Silk Price Stabilization Law violated the GATT. The Supreme Court summarily dismissed their arguments, Judgement of 6th February 1990, Sup.C., 36 Shomu Geppo 2242
- ²¹³ Restrictions on Imports of certain Agricultural Products, US Vs Japan, BISD 35S/163 (1988)
- ²¹⁴ See notes 181 and 184 for case references. these cases have particular significance for the WTO system, since the new system was supposed to stop the states from creating obstructions for speedier implementation of panel recommendations.
- ²¹⁵ Bradley, A., Implementing the results of GATT panel proceedings: An area for Uruguay round consideration, In: Petersmann, E.U. & Hilf, M., ed., *The New GATT round of Multilateral Trade Negotiations: Legal & Economic problems*, Kluwer Law Co., (1988), pp352
- ²¹⁶ Supra note 116
- ²¹⁷ Netherlands Vs the US (1952) was one case in point.
- ²¹⁸ Supra note 132 at 156
- ²¹⁹ Art.22.6 of the DSU 1994
- ²²⁰ See for example, the panel report on EEC-subsidies on exports of wheat flour, the panel report on United States- Countervailing duties on non-rubber footwear from Brazil

Chapter Five

Comparative analysis of ICJ, ICSID and WTO dispute settlement from a protectionist viewpoint

Introduction

I would be making a comparative analysis of the above mentioned dispute settlement mechanisms of the three institutions, with a consideration of the fact of how protectionism or political protectionism has effected the workings of these institutions. I would be dealing with the three different sectors namely, jurisdiction, legal basis/applicable law and enforcement provisions on a comparative basis, taking into account not only the protectionist attitudes of states towards dispute settlement, but also taking account of the reasons why these arise and finally the fact that these mechanisms are peaceful settlement mechanisms, which necessitates the consent of states and restricts the opportunity of aggressive action. As I discussed in the previous chapters, the relevant areas of substantive issues such as jurisdiction, applicable law and enforcement provisions of the institutions of the ICJ, ICSID and WTO have been agreed or consented to by the states and individuals concerned, with the motive to protect their own individual interests, which has been mirrored by the consensual nature of these provisions. Unfortunately, the consensual nature of these provisions had to be balanced with the protective nature of states and the states attitudes towards agreeing to dispute settlement, notwithstanding the fact that these states had agreed to the dispute resolution process of the ICJ, ICSID and the WTO. Hence, the possibility of protectionism affecting the initiation and the satisfactory completion of the process, at different levels of intervention, which unfortunately is the initial reason for these disputes to be brought to the attention of dispute settlement. Thus the balancing act that these mechanisms have to carryout in providing a satisfactory solution acceptable

to all parties concerned. As I had discussed in the previous chapters, this existent protectionism, has affected the conclusion of these dispute settlement mechanisms at different levels and at different situations, either in that the states have been unwilling to accede to the jurisdiction of the mechanism or legislating for state sovereign laws, which unfortunately contradict and obstruct to the enforcement of arbitration awards. It is with this in mind that I would make a comparative analysis of these institutions and the relevant sectors of dispute settlement.

5.1 *Jurisdiction:*

One key issue which could be dealt with in making a comparison between the dispute settlement mechanisms is the jurisdictional authority of these institutions in dealing with a given dispute, and which parties could be considered as being parties to a dispute. As with any international dispute, some are differentiated as legal disputes, which relate to any rights and obligations legally recognised or political decision making by the relevant state party. As was emphasised in chapter one, disputes based on the arguments of the parties who believe that a right has been breached or a obligation not complied with that has related to a consensual convention, to which the states or individuals are parties to. Based on this differentiation of legal and political disputes, different dispute settlement mechanisms have chosen to deal with either legal or political disputes and give preference to relevant parties as subjects of international law. As was discussed in chapter three, the ICJ statute for example, notes that “in making recommendations under this article, the Security Council should also take into consideration that legal disputes should as a general rule be enforced by the parties to the ICJ in accordance with the provisions of the court”¹, where the assumption is that any dispute with legal and political fact would be in the ambit of the Security Council. A further point made by the ICJ is the fact that political facts relating to international trade and investment disputes should be resolved by municipal law means, which in a sense makes the judicial objections of the mechanisms questionable, considering the fact that these disputes could involve political decision making or economic policy.² Furthermore, the questionable nature of this restriction of considering legal fact is given credence by the fact that the ICJ recognises states as being the only subjects of public international law. When one considers the fact that states do have the opportunity to adopt economic policy and

legislate for such, on the protectionist basis, one would have to consider why restrictions have been placed in only considering legal facts. This has been particularly the case, when the ICJ has only dealt with the protection of aliens, which also involves political and economic decision making, notwithstanding the fact that it concerns a legal right of investors and traders of other states, within the axis of peaceful dispute settlement, which has been influenced by protectionism.³ The questionable nature of limiting its jurisdiction to only legal fact and the ICJ's reluctance to get involved in international trade issues, when the case is brought to its attention by the parties, have been emphasised and justified by the recognition of the fact that these disputes involve political factors and thus the competence of local jurisdictions.⁴ As we have witnessed in chapter two, states have generally been protective when it involves state policy. The ICJ, notwithstanding the fact it is a judicial process, which could control any protective behaviour, has it seems been influenced by protectionism within the axis of dispute settlement. Therefore, on the evidence available, one has to question whether the ICJ as one of the leading judicial settlement institution, has dealt with the jurisdictional issues relating to international trade and investment disputes, having consideration to the protectionist nature of state economic and social policy.

In contrast, one has to consider the situation regarding the World Trade Organisation as the leading institution, which regulates international trade between states. The disputes which arise between states and to be resolved under the axis of the DSU of 1994, are as a result of alleged breach of obligations accepted by the states as parties to the WTO. As I had discussed in chapter one, economic disagreements that relate to accepted obligations are a reason for international disputes, which could be interpreted, as providing legally binding rights under

accepted conventions. In terms of the World Trade Organisation and the rights and obligations therein, these result from the covered Agreements that states are parties to, and to be resolved under the axis of the DSU of 1994.⁵ As we have evidenced, disputes that are related to covered agreements are to be resolved by a panel of experts, but under the basis of Art.22 and 23 of the former GATT, which however gave emphasis to diplomatic and negotiation based settlement. Questions could be posed whether these disputes could be termed as political as a result of enforcement being consensual and negotiation based. At the same time, the interpretation given to the rights and obligations ensuing of these agreements are that, they are to be legal in nature, notwithstanding the quasi-judicial nature of panel reports and panel proceedings. While the panels have interpreted rights accruing under the Covered Agreements being cause of legally binding disputes, the difference in the WTO settlement process and the ICJ in particular concern the consideration given to the economic policies of states by the respective institutions. While one could argue that, by the consideration of economic policy activities by the respective panels in violation and non-violation cases, it brings the protective nature of state policy into the limelight and could encourage others to consider such action, the fact however remains that the WTO has managed to encapsulate these policies in its consideration of whether legal rights have been violated. As we have witnessed in chapter two, the states are concerned with the various mechanics of peaceful settlement when it concerns their rights and interests, and hence their individual positions on these interests. This is particularly the case, even if the states have agreed to resolve these disputes by peaceful settlement methods, as emphasised under Art.33 of the UN Charter. In these circumstances, it is to the merit of the WTO that it has brought these issues to the forefront when dealing with international trade issues. The fact remains

that state economic and national policies are a part of any dispute, as emphasised in chapter one, and hence should be the consideration of a given dispute settlement institution. While one could question the opportunity provided for individual action against states within the framework of the WTO system in contrast to the ICSID, when one considers the fact that a certain trade policy of a individual state could affect the rights and freedoms of a individual of another state, in the context of trade liberalisation, on the evidence available of the WTO settlement process and the consideration of the political nature of the dispute, one could say that this system was more with reality in contrast to the situation that exists in the ICJ and the courts attitude towards the protection of international trade, notwithstanding the public international law nature of these institutions.

In contrast to the ICJ system of peaceful dispute settlement, the WTO has been a more reality based institution, where the protectionist nature of states have been taken into consideration. However, I also believe it is opportune to compare this settlement process with the ICSID process which; while being a exclusive process for a particular area of international economic relations; is however comparable as a result of the opportunity that exists for state protectionism and the protection of individual rights in the realm of international law, even in the case of peaceful dispute settlement, when these systems operate in the realm of negotiation, mediation or arbitration, as noted in chapter two. As was evidenced in chapter three, the interests of states convey the same message; where the protection of sovereign rights and the protection of economic benefits are a priority, notwithstanding the consent provided for international economic activity. This motive remains the same notwithstanding who the other party to any economic relations is, i.e. state or private individual. It was within this protectionist basis that states have agreed to international

investment agreements with private individuals; be it a private party or a multinational corporation, where the state is looking to get the best possible investment and accruing benefits, but at the same time trying to limit the opportunity of the other party claiming any undue advantage of the agreed provisions. In this sense of protectionism, the affect of protectionism and the necessity to restrict this inherent protectionism, the objections of the ICJ, WTO and the ICSID was similar. However, with regard to jurisdiction and the subjects of these institutions, the situation was quite different. One could even go insofar as to say that the jurisdictional nature of the ICSID was an innovation on the norms of international law. It would seem that it was a combination of public international law or private international law regimes, in that allows a private individual to be a party to a dispute governed by a convention agreed under public international law. Apart from protecting the rights of private individuals, which under the ICJ was under the jurisdiction of local courts, the main question that needs attention in contrast to other settlement mechanisms is, whether a state could use protectionism to “wriggle out” from the jurisdiction of the centre. The question is whether protectionism could derail a dispute that is branded as opposed to political, notwithstanding the fact that it involves economic policy making powers of the state involved as a part of its sovereignty. As opposed to the situation that exists under the ICJ regime, where the state has the option of not accepting the jurisdiction of the court as a result of its unwillingness to deal with particular issues or the states unwillingness to do so in dispute settlement in general⁶, the ICSID has based its jurisdiction on irrevocable consent, notwithstanding the fact that it is a consensual process; which concern sovereign rights of states. It was even described as being the “cornerstone of the jurisdiction of the centre.” In this sense, one has to question whether the ICSID has comparatively limited the opportunity of protectionism, with regard to the WTO.

As we have witnessed; the membership of the WTO and the jurisdictional capacity of the DSB and the panels depend on consent of the states concerned, keeping with the norms of peaceful settlement.⁷ Notwithstanding its consensual nature, the position with regard to the WTO remains however, that such consent is not revocable when the state concerned is a party to a dispute, notwithstanding the fact that it concerns economic policy making of states. When one considers the philosophy on which these institutions have been based, one could say that the WTO and the ICSID have limited the opportunity of protectionism, notwithstanding the consent factor. In terms of dispute settlement effected by protectionism, as mentioned in chapter two, this is a merit of the two systems in general.

However, there remain problems with regard to the ICSID jurisdiction on what disputes are dealt with by the settlement process in context to the WTO. As discussed earlier, the WTO system is quite clear on what disputes it deals with, particularly ones based on the violation of obligations in covered agreements; as evidenced by the interpretation of these obligations and rights by the settlement panels. It was recognised that the ICSID was concerned with legal disputes, as emphasised by the executive directors report. In contrast to the WTO however; it was not clear what these legal interests were to be, notwithstanding the fact that they were to be investment related. In keeping with the consensual nature of international arbitration and international Convention, the ICSID allows the parties to decide on the interpretation of what a investment related legal dispute was to be, as mentioned in chapter three. This puts a question mark on what is to be considered as legal in a given individual case. Given the protectionist nature of states and individual investors, I believe that the ICSID has not satisfactorily dealt with this issue of jurisdiction, in contrast to the situation that exists within the WTO system, particularly as the issue of

jurisdiction and jurisdictional capabilities of relevant parties to a given dispute is a first step where the parties could obstruct to the satisfactory completion of the settlement process.

5.2 *Applicable Law:*

The second issue, which could be an obstruction to the completion of the dispute settlement mechanism, is the basis of law/applicable law to a given dispute brought to the attention of the settlement process. The importance of this issue relates to the fact that, unless the given process deals satisfactorily with the applicable law to the dispute; the state would have the opportunity to disrupt the process by applying local laws, thereby favouring one party in contrast to the other.

The International Court of Justice, as emphasised earlier, is a single institution initiated under the axis of the United Nations, hence the subject matter and subjects being mainly legal disputes between states. Furthermore, as a result of its initiation on an international plane, the acceptance by states of international law being the applicable law to cases brought to the attention of the ICJ. This norm of the application of international law has been accepted in many a case, where the subjects have been diverse in nature.⁸ These have included cases ranging from the maritime delimitation to the diplomatic protection of aliens; where the case has been brought to the attention on the basis of a alleged breach in an international agreement or international convention, where the basis of settlement has been protectionist.⁹ The court deals with these cases in accordance with Art.38(1) of the ICJ Statute, which provides a list of applicable laws in order to resolve the dispute at hand. As Art.38(1) of the ICJ Statute notes, “the court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a)

international conventions, whether general or particular, establishing rules expressly recognised by the contracting states, b) international custom, as evidence of a general practice accepted as law, c) the general principles of law recognised by civilised nations, d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”¹⁰, which is a clear emphasis on the application of international law to any case brought to the attention of the court. At the same time however, the court has also acknowledged the fact that it is willing to adjudicate on cases under the axis of Art.38, notwithstanding the fact that the case might not require the application of international law.¹¹ This position taken by the court, not only emphasises the court’s willingness to emancipate itself from a non-liquet situation, but also as Roseanne notes “illustrates the broad scope and non-limitive character of the provisions of Art.38(1).”¹² The broad scope and nature of the ICJ applying international law to cases brought to its attention could be interpreted in two ways. It could be the case that the ICJ would be willing to go out of its way to apply international law to a relevant case; or it could be the case that the ICJ would state that a given case should be within the jurisdiction of local law, while giving a decision on the facts of the rest of a given case, which it believes to be within the gambit of international law. This, it seems is the case with regard to cases that are engrossed with economic facts, but would concern issues such as human rights, protection of aliens etc., which are regulated by international law. As I had discussed in chapter three, the ICJ has been willing to deal with issues which it believes to be within its jurisdiction, excluding economic facts which it regards as being in the jurisdiction of local laws.¹³ In most cases, these economic facts concern the economic policies of states, which in most cases are protectionist and which the states are not willing to

consent to judicial settlement, according to international law. In this sense, the ICJ has been severely handicapped in the opportunity it has to resolve trade disputes, in contrast to the WTO.

As Prof. Jaenicke notes, while the court has been willing to deal with cases such as the protection of aliens, "...in such a case, it is normally not the principle of national or most favoured nation treatment of aliens as such that is in issue, but rather the scope and the interpretation of that principle."¹⁴ While the court has been willing to deal with these cases; it is exactly this issue of a applicable law that has, in my opinion caused to give into protectionist policy making of states inadvertently, in contrast to the application of laws within the WTO system, where the responsibilities and the obligations of states are more clearly stated. While the DSU of 1994 of the WTO makes it quite clear on the applicable law, which obstructs to the application of domestic laws; in contrast, it would seem that the ICJ has advocated a application of domestic law to cases it is willing to deal with at present, as a result of its unwillingness to deal with economic facts which were relevant, but were not at the core of the dispute.¹⁵ In a sense, this situation is similar to the case of the ICSID, where the applicable law is a question of interpretation and standards of application of the law, which is not the ideal situation in the protection of international trade and investments. Unfortunately, rather than remedying the present situation, the court in one particular case has justified its decision on the basis that "...by opening the door to competing diplomatic claims, ...could create an atmosphere of confusion and insecurity in international economic relations."¹⁶ Hence, leaving the situation to be resolved under domestic law. When one takes into consideration the fact that adjudication is a peaceful settlement method, and the parties consent/willingness to approach judicial settlement; one has to question the ICJ's decision to apply domestic

laws to economic disputes, notwithstanding the fact that the parties would have consented to the application of international law through a bilateral or multilateral treaty. Unfortunately, the policies of the ICJ, it seems, have given into protectionism prevalent in international economic relations, with regard to the issue of applicable law, particularly if domestic laws, which are the prerogative of states, are to apply to a given dispute, which has been emphasised during peaceful settlement processes. As we have witnessed in international arbitration, states have been concerned about protecting one's sovereignty and sovereign rights. Thus the right to apply a suitable law to a given dispute. In this sense, one could only question the ICJ's reluctance to apply international law to trade and investment disputes brought to its attention.

As discussed in chapter four, when disputes are brought to the attention of the WTO; a panel instituted, as a result of unsuccessful consultations between parties, would have to determine the facts, according to the applicable law. In this attempt to make a comparison between the three institutions, I would only deal here with the substantive law applied to WTO dispute settlement, given the fact that the interpretative law position with regard to panel reports holds a unique position amongst the three institutions. In the case of the WTO panel procedures, there have been agreements on which law should be the applicable law for international trade disputes. The question has been whether the panel should apply the law of the covered agreements or whether the general international law should be applicable for trade disputes. As Trachtman notes, “..one persistent problem of the WTO legal system is the recognition and application of legal rules from outside the system.”¹⁷ The DSU does not explicitly provide for the international law provisions to apply in trade disputes brought under its axis. Hence, the different interpretations as to what law should be the substantive law. For an international institution, within the WTO, there

is no mechanism to involve different legal rules in deciding which law takes precedence when diverse laws conflict. I would deal here with the substantive applicable law issue, in order to make a comparison with the ICJ and ICSID on this particular issue of applicable law. Arguments have raged as to what law should be applicable to WTO panel procedures, considering the international nature of the WTO and the protectionism of state parties to the panel procedures. As noted in chapter four, the WTO and its predecessor, the GATT, was initiated under the UN Charter, hence the natural assumption of international law being applicable in the WTO system. Furthermore, a clearly appreciated norm of international law is that, there does not exist in international law of a situation of non-*liquet*. As Trachtman notes, “the prevailing among writers is that, there is no room for non-*liquet* in international adjudication, because there is no *lacunae* in international law.”¹⁸ This clearly ties in with the view that an international institution is an island and that an institution developed in a broader international setting is open to the application of broader international laws, notwithstanding the fact that the treaty creating the international institution has not explicitly provided for the application of these broader legal norms.¹⁹

Thus, on this analysis, the assumption one could make is that international law should be applicable to WTO panel reports. This is the argument forwarded by Pauwelyn, when he argues that, while WTO rules could be considered as *lex specialis*, as opposed to general international law, it does not necessarily mean that WTO rules were created outside the system of international law. In his opinion “like international environmental law and human rights law, WTO law is “just” a branch of public international law.”²⁰ He takes much encouragement from previously decided cases where this issue had been dealt with, and the confirmation of the

continuation of international law, unless it has been contracted out, and has been accepted as a rule of international law.²¹ It is in this context that the thesis is made that the WTO panel process should apply international law, notwithstanding the non-explicit nature of this obligation in the WTO Dispute Settlement Understanding of 1994.²² This acceptance of public international law has also been accepted in some panel reports where the panel has noted that “the customary reports of international law apply to the WTO treaties and to the process of treaty formation under the WTO.”²³ The panel in this case went even further and rejected the argument that Art.3(2) of the DSU only refer to customary interpretation law on the basis that customary international law applies to environmental relations in a more broader sense. While, the view that international law in general should apply in panel procedures have been accepted; at the same time, questions have been raised on the acceptance of this view, on the basis that there is no explicit reference to substantive international law in the DSU of 1994. To be fair to the proponents of this view, Art. 3(2) of the DSU does note that the “recommendation and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements”²⁴, and this has further being confirmed by Art.11, which has provided that the panels should carry out its functions with regard to covered agreement obligations. When one considers that fact that the WTO dispute settlement works under the axis of general peaceful settlement mechanisms, namely arbitration, and the fact that an important condition of this process is the consent of parties on a applicable process; it is understandable that the proponents of the applicability of WTO law rejects the applicability of non-WTO law to the process.

The argument even gained strength from the fact that in some cases the Appellate body has rejected the applicability of non-WTO agreements as

applicable law to the panel process.²⁵ However, the fact remains that WTO disputes result as a reason of protectionist policies of states. These have ranged from the protection of human rights, labour rights, the sovereign rights of states, which the states would argue are within the axis of local jurisdiction, as emphasised in chapter one, when one considers the reasons for international disputes. In terms of a protectionist effect that these policies and sovereign rights have on the resolution of the dispute, one could see that the application of international law is appropriate in contrast to local laws of a given state. This necessity of interaction between international law has been confirmed by the fact that there exists international laws which have regulated these reasons for international disputes, which would/could restrict the application of protectionist policies. In these circumstances, the proponents against the application of non-WTO law could argue, why the WTO should apply non-WTO international law which could control protectionist policies, where the ICJ as one of the main adjudicatory mechanism provides that international trade should be domestically regulated. However, the fact remains that the states have accepted the jurisdiction of the WTO to resolve international trade disputes in a international context; thus the application of international law, in general terms, notwithstanding the fact that there is no explicit commitment to apply general international law. In this sense, one could say that the WTO has dealt with the protectionist nature of state commitment to the issue of applicable law in a given international dispute brought to the attention of the panel process.

As was discussed with regard to the International court of Justice and the WTO, the norm has been that international law should be applicable to relations between states. The implication of this norm was that, if a private individual was involved and such rights were at issue, they were in the realm of domestic legal

systems. This was the interpretation given by the ICJ, on the fundamental question of under what conditions a state may exercise diplomatic protection of corporations and their shareholders of its nationality, who have suffered injury by an alleged internationally illegal act of another state.²⁶ In this case, the court based its arguments on the established rule relating to the right of diplomatic protection, where the company incorporated under a certain law will be under the legal protection of that state. According to the court, if competing claims of shareholders were allowed, it would have created "...an atmosphere of confusion and insecurity in international economic relations."²⁷ While, this case concerned diplomatic protection of aliens, the general implication of this decision was that local/ municipal laws were to regulate relations of an economic nature, when concerning a private individual. This was further confirmed in the *Serbian Loans case (France Vs Serb Croat States)*, where the court held, in keeping with its philosophy that "relations between states and the natives of other states are necessarily governed by a municipal legal system and that system is presumed to be the national system of the contracting state."²⁸ This is where the ICSID, it would seem has differed from the norms of international law, where a combination of international and domestic laws are provided as being the applicable law for these relations. The philosophy of the ICSID has been twofold. Firstly, the protection of local interests of the state, be it social or economical, particularly as these interests mainly concern developing states, which are dependent on the multinationals for greater investments. Secondly, the key interests of the ICSID also concern the individual investor, who is made a subject of international law by the ICSID convention, thus making the investment relationship, one that is regulated by international law, emphasising the protective nature of international disputes and the settlement of these disputes. However, such an interpretation has not been clear cut,

because what is provided is a combination of national and international law as being applicable, where various interpretations are being given by the case law that has dealt with the issue of applicable law in ICSID disputes. Keeping with the conditions necessary for international arbitration, the ICSID convention provides that the consent of the parties are necessary in deciding on the applicable law. However, the significant problem with the ICSID is that it has not necessarily taken into consideration the inequality of the economic capabilities of the parties, where in most cases the state is dependant on the resources of the investor; hence creating a barrier for the parties to agree on with regard to the applicable law to such a investment agreement.

As discussed with the ICJ and the WTO, the issue of agreeing on a specific law by the states, has not been an issue, particularly as solutions are in-built to resolve such a disagreement. In this sense, the ICSID applicable law provisions has not considered the issue of protectionism that could have an effect on the procedures. This issue has led to the second discrepancy with regard to what law should be applicable in the case of disagreement. As mentioned in chapter three, Art.42 of the ICSID convention provides that in case of disagreement between parties on the applicable law; the domestic law of the state would apply, including its rules on the conflict of laws. Furthermore, it also provides the international law would be a law to be considered in these circumstances. One could say that the ICSID convention has resolved the above mentioned inequality between parties, by providing that domestic law would apply in the case of disagreement. However, this has brought to the forefront the issue of state sovereignty and protectionism, which unfortunately is not what the drafters of the convention expected.²⁹ To the credit of the ICSID, it has tried to make a balance between protecting the interests of both parties concerned and

improving the conditions of liberalisation. Unfortunately, as we have witnessed earlier, in chapter three, the problem with the provision with regard to applicable law is that it has been the subject of different interpretations, because of its debatable nature as to what law is applicable. The reason for this is the protectionist nature of states, anxious to control the investment and the investor's keenness to get the best 'value for its money.'³⁰ In general, this is the key reason for most economic disputes, as noted in cases dealt in chapter one, and the situation in the ICSID seems to be no exception. However, the ICSID system, notwithstanding its novel nature and being a innovation on the ICJ norms, has not necessarily dealt with the applicable law issue, notwithstanding the fact that it has tried to create a settlement process for international investments. Comparatively, the ICSID has not conclusively dealt with the applicable law factor which has unfortunately given way to the protectionist attitude of state to question the applicability of international law to an investment agreement, which is emphasised by the objections raised at different cases and dealt by the adjudicators in these cases. Notwithstanding the fact that the ICJ has not satisfactorily dealt with international trade issue and has allowed domestic law to be applied in contrast to the ICSID, hence making the issue of applicable law debatable in both these systems, one could only conclude that the WTO system has, however, dealt with the issue of applicable law in terms of substantive law, even though questions have been raised regarding the interpretative nature and standing of panel reports as law.

5.3 Enforcement:

As discussed in chapter two and three, one important factor in the satisfactory completion of a dispute settlement mechanism, is the consensual aspect of such settlement. In terms of enforcement, this relates to the consent given by

the parties to accept not only the jurisdiction of the institution, but also an acceptance to comply with any decision given by the relevant authority. While, the consent provisions are of utmost importance in peaceful settlement methods such as negotiation & mediation with regard to enforcement of a accepted remedy, the difference from arbitration and adjudication is the fact that there will exists a binding obligation to enforce a decision given by the adjudicator, if not face the consequences provided for by the institutional settlement process. It is within this axis of consent and the approach taken by the settlement method to enforce a decision, that I would be making a comparable analysis of the ICJ, WTO and the ICSID enforcement provisions at present.

As discussed in chapter three, the jurisdiction of the ICJ could be seised by the states unilaterally, but at the same time with the opportunity to make reservations on this acceptance of jurisdiction. It is within this situation that the states are accepting the obligation to enforce a decision of the court, if the court has dealt with international economic activities according to international law. The accepted obligation according to the UN charter and the statute of the ICJ is that “each member of the UN undertakes to comply with the decision of the ICJ in any case it is a party.”³¹ This is further compounded by the fact that there is no appeal on the decision of the court; thus the enforcement of the decision being dependant on the protective nature of states. The effect of protectionism is further emphasised by the fact that the UN charter provides for Security Council resolutions if the states do not comply with ICJ obligations; notwithstanding the fact that such jurisdiction depends on there being a “threat to world peace.”³² As I had pointed out in chapter three, one could not foresee a trade war developing between economically unequal states, which strangely makes the enforcement of obligations via the security council debatable, to say the

least. As Schlochauer notes, “the possibilities of enforcing the judgement against the party in default are however, limited, because the only measure which may be employed are those concerned with the settlement of disputes under Chapter 4 of the Charter.”³³ One could understand the logic behind the enforcement provisions of Chapter 5 of the UN charter and the statute, when one considers the type of cases that have been dealt by the court and the Security Council, which could effect the relations between states.³⁴ Furthermore, it also justifies the enforcement provisions of these institutions, particularly as the cases could involve political and economic repercussions, which has the potential to threaten world peace and international relations. Unfortunately, the question one had to ask was whether these provisions were appropriate or useful in the protection of international trade disputes, particularly with jurisdictional and consensual limitation to such enforcement. The fact remains that the states concerned are protectionist in nature and thus their attitude towards protecting their individual rights, as they perceive them to be. Unfortunately, it does not seem that the ICJ enforcement mechanisms have taken these positions into account in providing for dispute settlement, particularly when these individual positions could have an influence on the enforcement of ICJ judgements, especially if the only relevant provisions are those contained in Chapter 4 of the charter. As with any adjudicatory procedure, the ICJ enforcement is based on the fact that the states have accepted the jurisdiction of the ICJ, and thus the following enforcement consequences. As Merrills notes “when both sides have clearly accepted the court’s jurisdiction by treaty or in some other way, the institution of litigation indicates that the applicant takes such arrangements seriously, as well as demonstrating its support for the principle that disputes about legal rights ought to be settled by adjudication.”³⁵ But as seen in the past, there have been cases where this acceptance of an enforcement

obligation has been ignored, not only with regard to ICJ, but the Security Council as well, by the state party to a given dispute, which unfortunately emphasises the debatable nature of ICJ enforcement provisions, if applied to international trade disputes, in contrast to the situation that exists in the WTO system, where enforcement is more likely to happen within a reasonable time frame.³⁶

While the ICJ enforcement is concerned with disputes between states where the willingness of states to enforce ICJ reports, and protectionism is at loggerheads; the situation with regard to the ICSID settlement differentiates from this as a result of the interests of investors/individuals who are within the jurisdiction of individual states. The economic strength of states are not necessarily at issue, but a given states attitude toward controlling the actions of these individual investors, and the state's willingness to accept the obligations provided by the ICSID is at the heart of enforcement of ICSID, emphasising the protective nature of economic disputes. Arguments could be forwarded for undisputed enforcement of ICSID obligations on the basis that the state and the individuals have willingly recognised the jurisdiction of the Centre for the settlement of disputes, keeping with the norms of arbitration. As discussed in relation to jurisdiction, the ICSID has provided for unrevocable consent, which includes, in my opinion, not only the recognition of ICSID awards, but also a willingness to enforce such awards, but also a willingness to enforce such awards in respective states.³⁷ Unfortunately, this consent of recognising and enforcing ICSID obligations have been debatable as a result of the varying interpretations that have been given to the applicable law to such disputes, in contrast to the ICJ and the WTO. Not only does this question of which law applies effect which rules apply to the merits of the case, but how the case is to be enforced. Keeping with the debatable nature of applicable law and interpretation of a given case, the ICSID Convention has

dealt with enforcement of ICSID reports in similar fashion, where the interests of states and the sovereign rights of these states have been taken into account.

As I had discussed in Chapter 4, this parity has been achieved under Art.54 & Art.55, where enforcement is made subject to local immunity laws relating to execution of arbitral awards. Unfortunately, the fact has remained that the individual immunity laws of states and the stance taken by the courts have made these provisions of enforcement restrictive in nature, and given into the relevant protectionism of states. While there is a question mark over the consensual enforcement provisions of the ICJ in comparison, the problem with the ICSID is not necessarily the consensual nature, but the enforcement provisions itself, which has made enforcement subject to local laws and jurisdictions. Given the fact that international investors are to work within the axis of local jurisdiction, and subject to the sovereign rights of the given state; in contrast to the situation in the ICJ and the WTO, it is unfortunately not ideal that the ICSID has made recognition and enforcement subject to sovereign laws of that particular state. In similarity with the ICJ and the WTO, the ICSID provisions have provided that, in the case of unjustified immunity claims by the state, it would be vulnerable to sanctions imposed upon it by the convention.³⁸ These concern mainly, the investor's country espousing the case at the ICJ or claiming diplomatic assistance from its state. However, as noted by Moore, the situation seems to be a catch 22 position with regard to the diplomatic protection option provided by the ICSID convention.³⁹ The effect of Art.27 of the Washington Convention, is that the investor's state could espouse diplomatic protection of its subject, if the invested state does not comply with an ICSID obligation/award. The only way that the investor state could argue its subject's case before the ICJ is by showing that there has been a "denial of justice" under international law. One main

condition of denial of justice emphasised, is that all local remedies offered should be exhausted, meaning that judicial resources at local level should be utilised, before a claim could be brought by the investor state. Considering the protectionist nature of states based on its sovereign rights to legislate for immunity from arbitral awards⁴⁰, it would seem that claiming diplomatic protection via a claim of denial of justice would be a virtual non-starter. In contrast to the ICJ and the WTO enforcement measures, which are based on an international plane, one could only note that the ICSID has been effected by the protectionist influences that states could wield, as a result of local laws and jurisdictions being given an opportunity to determine the enforcement of these awards.

In similarity to the ICJ and the ICSID as peaceful settlement mechanisms, which deal with a different range of disputes; the WTO has accepted the fact that consent is the necessity in resolving disputes emerging as a result of violation of accepted norms. The consequence of this stance, as emphasised when dealing with the ICJ and the ICSID, is the fact that the success depends on the state's recognition of a decision and the willingness to act upon these decisions. Thus, the dependency on the states to shed their individual protectionist stance to resolve the disputes at hand. As with the situations that existed with the ICJ and the ICSID, the WTO dispute settlement works in these circumstances, where the enforcement of panel reports by the respondent state is dependant on the consensus of the states. The consensual part of enforcement in the WTO was the same as the ICSID and ICJ, prior to the initiation of the DSU of 1994, whereby the enforcement of the panel report is to be done with the consent of parties, thus opening up the resolution of the dispute to the political and economic powers of the states. But, as mentioned in chapter 4, the DSU of 1994 has brought rules and regulations such as "negative consensus" in order to negate the

influence the states have on the process, which has been coupled with the fact that the process has to be completed within a “reasonable period of time”, thus ensuring that the settlement of the dispute does not exceed fifteen months from the initiation of the process. In this sense, the WTO settlement process as a whole is better equipped to restrict the opportunity of state protectionism with respect to the possible faster resolution of trade disputes.

However, as emphasised when dealing with the ICJ and the ICSID, the first problem of enforcement is the fact that these awards are subject to local immunity laws and recognition laws as a result of states being concerned in protecting their interests, be it economical or political, and the fact that the opportunity to enforce a given decision is dependent on the local laws of the states concerned.⁴¹ It is in contrast to this, that the WTO has provided that the awards of the panels should be implemented within a “reasonable time period.” However, in keeping with the protectionist nature of states, as evidenced in chapter four, different states have dealt with the implementation of Uruguay round agreements and the panel reports in a restrictive manner, which has left a question mark over whether panel reports would be readily implemented or whether political and economic supremacy would prevail, notwithstanding the motives to refute protectionism. As a result, any sort of implementation of WTO panel reports have taken longer via bilateral negotiations, notwithstanding the fact that in general the WTO dispute settlement mechanism has satisfactorily dealt with the issue of implementation of reports.⁴²

The effective and useful nature of the WTO, in contrast to the ICJ and ICSID in the area of trade and investments has been emphasised by the novel addition of compensation and suspension of concession provisions via the DSU of 1994. The ICJ and ICSID, as mentioned earlier, makes the enforcement provisions

dependent on the consent of states, which as a consequence makes these actions dependent on protectionism. In terms of “self judgement”, these provisions on “suspension of concessions” are not only obstructing the prevalent protectionism, but also seems realistic on the position of the different parties to trade relations, in terms of controlling the amount and quantities of retaliation. Questions could be raised on three different angles, as mentioned in chapter four, with regard to “retaliation” provisions, and whether these provisions are any different from those with regard to the ICJ and ICSID, in terms of encouraging protectionism. This is specially the case, when retaliation is accepted in contrast to compensation, which ultimately goes against the philosophy of the WTO, and further brings about a certain uncertainty to the completion of retaliatory actions when the dispute concerns one state dependant on the other. While there are jurisdictional problems relating to enforcement with regard to the ICJ settlement process for example; the fact however remains that it is a judicial process which the states have agreed upon and in general being complied with by the states concerned, which ultimately reduces the imbalance, be it economic or political. It is in contrast to this that one has to consider the WTO “retaliation” provisions, which is based on consent between states and is to make a balance between the interests of the states concerned. If one takes for example a dispute that arises between a larger economically powerful state such as the United states and a dependant state such as Sri Lanka, on some issue with regard to textile exports, one has to question the realistic feasibility of the fact of a dependant state such as Sri Lanka taking any retaliatory action against the economic supremacy of the US, no matter what the motives of the new “suspension of concessions” provisions were at its initiation. One has to question, whether an economic power such as the United States or the European community for example, would act in a similar way to an action

brought by another economically powerful block, in similar given situations. The evidence available, unfortunately points to the contrary.⁴³

Conclusion:

It is quite clear from the evidence available that, the ICJ and the ICSID primarily suffer from the interpretative difficulties and ultimately the debate that this opens these mechanisms to, as dispute settlement mechanisms in international trade and investments. The fact has remained that, the interpretative difficulties have made these systems wide open to state protectionism, which is prevalent at present, and consequently effects the satisfactory completion of the dispute settlement process. It would seem that the ICJ and the ICSID have found it difficult to make a balance between the competing norms of state consensus and state protectionism, which ultimately is what the dispute settlement process is attempting to achieve. Unfortunately, it would seem that the WTO has itself fallen into the same trap of its dependence on inter state willingness to comply with its decisions, where some states recognise as being a part of their sovereign rights, as has been the case with regard to the ICSID and to a certain extent the ICJ, which unfortunately has given into the protectionist nature of states. This is the case, in my opinion, notwithstanding the important innovations made by the WTO since 1994, for improved dispute resolution. Furthermore, it seems to be the case that, protectionism has effected all three important substantive issues, which ultimately has an effect on the satisfactory completion of dispute settlement. However, having said that, it is my view that one also has to appreciate nonetheless, the fact that the WTO has comparatively provided a satisfactory resolution process with respect to the ICJ and ICSID, notwithstanding the mentioned protectionism, which clearly is a obstruction to dispute settlement. But

equally; the question whether more could be done to improve the WTO system seems to be for the future, especially in terms of faster enforcement, to which one could only provide limited recommendations.

Notes

- ¹ Art. 36(1) of the ICJ Statute; Art.36(3) of the United Nations charter
- ² *Anglo-Iranian oil Co. case, UK Vs Iran*, ICJ Rep.(1951), pp89
- ³ *The case of Barcelona Traction, Light & power Company Ltd., Spain Vs Belgium*, ICJ Rep.(1970), pp3
- ⁴ Ibid.
- ⁵ Art.22 & Art.23 of GATT/WTO Dispute Settlement Understanding of 1994
- ⁶ Art.36 of the ICJ Statute; Military & Paramilitary activities in, and against Nicaragua, US Vs Nicaragua, Provisional measures, order of 10 May 1984, ICJ Reports
- ⁷ Art.6 of the DSU of 1994
- ⁸ Merrills. J.G., International dispute Settlement, 3rd edition, Grotiuos Publications (1998), Ch.2, pp152; See note 14
- ⁹ Schlochaeur, H.J., International court of Justice, in EPIL(1981), No1, Settlement of disputes, pp72-92
- ¹⁰ Ibid.
- ¹¹ The Serbian Loans case, France Vs Serb Croat States, Cf. PCIJ Ser.A Nos. 20/21; where the Permanent court held that Art.38 cannot be regarded as excluding the possibility of courts dealing with reports which do not require the application of international law.
- ¹² Roseanne, S., The law & practice of the International court of Justice, by S.Roseanne, 2nd edition, Deventer Publishers, (1985), pp605
- ¹³ Supra note 3
- ¹⁴ Jaenicke, G., International trade conflicts before the PCIJ and ICJ, In: Pertersmann, E.U., ed., Adjudication of international trade disputes in international and national economic law, University Press, Freiburg (1992), pp43-58 at 49
- ¹⁵ Cases concern the protection of aliens, where the court has dealt with the diplomatic protection of aliens, rather than directly dealing with the economic policy making of the state, which have a bearing on the resolution of the dispute at hand.
- ¹⁶ Supra note 3, Judgement of 5th February, 1970, ICJ Rep.(1970), para. 96 of the judgement
- ¹⁷ Trachtman, J.P., The domain of WTO dispute Resolution, in Harved Int.Law Journal (1999), Vol. 40, pp333 at 337
- ¹⁸ Ibid.
- ¹⁹ Ibid. pp 348; See also, Kuyper, P.J., The law of GATT as a special field of international law: Ignorance, further refinement on self-contained regime of international law, in 24 Neth.Y.B.Int.L. (1994) 227
- ²⁰ Pauwelyn, J., The role of Public International law in the WTO: How far can we go, in 95 AJIL (2000), pp535-594 at 538
- ²¹ See *Electronica Sicula SpA (ELSI), US Vs Italy*, 1989, ICJ Reports 1542, para. 50 (July 20); *Amaco Int.Fin. Co. Vs Iran*, 15 Iran-US claims Tribunal Reports, 189, para.112 (1987)
- ²² Art.3.2 of the DSU of 1994
- ²³ *Korea-Measures affecting government procurement, US Vs Korea*, WTO Doc. WT/DS 163/R, para.7.96 (June 19, 2000)
- ²⁴ Art.3.2 of the DSU 1994
- ²⁵ WTO Appellate Body Report: *European Communities-Measures affecting the importation of certain poultry products, Brazil Vs EC*, AB-1998-3, WT/DS69/AB/R, (July 23)1998,
- ²⁶ Supra note 13
- ²⁷ Ibid
- ²⁸ See, Giardina, A., The ICSID, In: Sarcevic, P., ed., Essays in International Commercial Arbitration, Graham & Trotman, London (1989), Ch.11, pp211-222, at 215
- ²⁹ Convention on the settlement of investment disputes between states & national of other states, submitted by the executive directors of IBRD: March 18, 1965; Appendix 1 of Arbitration mechanism of the ICSID, by M.Hirsch, pp171 at 190
- ³⁰ *AGIP SpA Vs Government of the Republic of Congo*, Award of 4th of Nov. (1977); *Klockner Industries et al Vs Republique Unie du Cameroon*, Award of 21st of Oct. (1983); *Sapphire Petroleum Arbitration* 35 ILR (1963)136
- ³¹ Art. 94 of the United Nations Charter and Art.59 of the ICJ Statute
- ³² Art.34 of the UN Charter notes that "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." See also Art.39 of the Charter

³³ Supra, note 9, pp85

³⁴ See, Military & Paramilitary activities in & against Nicaragua; Provisional measures, order of 10 May 1984, ICJ Rep.(1984) pp169; also Northern Cameroons case ICJ Rep. (1963)15, South West African cases (Preliminary Objections) ICJ Rep.(1962) 406-407; Diplomatic & Consular staff in Tehran, Judgement, ICJ Rep.(1980), pp3

³⁵ Supra note 8 at 163pp

³⁶ For analysis of problem of non-enforcement see, Fitzmaurize., G., The problem of the 'non-appearing' defendant government, 51 BYBIL, (1980)pp89

³⁷ Art.25-27 of the ICSID Convention

³⁸ Art.27 of the ICSID convention

³⁹ Moore, M.,International arbitration between states & Foreign Investors- The world Bank Convention, in 18 Stan.Law Rev (1965-66) pp1359-1380 at 1369

⁴⁰ Note for example the United States FSIA of 1976 and the United Kingdom SIA of 1978, which provides for immunity from arbitration awards.

⁴¹ See Barcelona Traction case, supra note 2; see also Art.27 of the ICSID Convention and the "catch-22" situation with regard to enforcement.

⁴² The prime example of this reluctant implementation of Uruguay round agreements and panel reports were dealt with regard to the United states and Japan in chapter four. See notes 198-205 of chapter four, pp62-64

⁴³ See the presently ongoing dispute between the United States and the European community with regards to alleged illegal taxation activities by the US, in violation of WTO agreements, where it seems the parties are pointing towards negotiations, notwithstanding the fact that an arbitrator had given a decision against the US.

Chapter Six

General Conclusions and Recommendations

The aim of this thesis, as put forward in the preface, was to emphasise the fact that protectionism, as a broader concept was responsible for the rise of international disputes, and further the fact that such protectionism, ultimately, still has an effect on the workings of dispute settlement mechanisms, aimed at resolving such disputes. In order to achieve such an analysis of how and when this norm of “protectionism” had affected dispute resolution, discussion was undertaken to deal with the broader norm of protectionism, which not only included economic, but also political overtones, in the practices of states. It was my firm belief that protectionism included not only the state actions in protecting economic interests, but also other desired effects, which culminate from a states attitude towards protecting one’s sovereign rights. Hence, the enforcement of rules and regulations by the state, in the belief, that it is the right of a sovereign state to protect what it is theirs. It was my argument that, it was this broader conception of protectionism that gave rise to different categorised reasons for international disputes, notwithstanding the fact that there existed an inter-twining of these reasons in the ultimate basis of protectionism. It was with this in mind, that I took the opportunity to discuss the different reasons forwarded, in the rise of international disputes. Reasons for international disputes were separated into two different groups, as mentioned in chapter One. First, they were identified as disagreements arising from interests and policies, where parties may change their preferences, or states changing their political policies to suit their needs, notwithstanding the outcome of a breached contract of the effect it has on the

other party concerned. Thus, these reasons were duly categorised as being political and moral, in the rise of international disputes between states.

As was noted, these ranged from the protection of a combined economic interests and honour, as was the case in the Nicaragua case and the Panama Canal case of 1964, where the Panamanians were mainly motivated by the protection of justice and honour; to the protection of a reputation of power and security reasons, as was emphasised in the Cuban conflict with the United States, or the Suez Canal case between the Egyptians and the British government, where the protection of sovereign rights were a primary issue. As happened in many a case, in spite of the issues being veiled in terms of economic interests, it was also a fact that the issue of self-preservation of power and honour was a sublime factor in many of these disputes.¹ On the whole, one could say that it was a state's concern of protecting its subjective interests, for wider moral reasons, notwithstanding the fact that there existed an economic factor at the outset of the dispute.

Secondly, disagreements arose as a result of conflicting assertions of rights and obligations, as a result of the economic activities of the states concerned, which are separated from the above mentioned moral and philosophical reasons for international disputes. Consequently, these were categorised as being protectionist, because they were against the norms of accepted economic rules promoted by the WTO and other economic institutions. However, as was evidenced in most cases, these reasons were either inter twined with the above mentioned political and moral reasons, or was mainly a reason for investment and trade contracts being breached at international level, by states, parties to such agreements. The reason for this situation was as a result of the fact that international trade was seen as a avenue for gaining economic prosperity, by these states, who were willing to breach accepted rules for a

combination of philosophical and economic reasons. Hence, the emergence of many an example of cases, where economic regulation was a protectionist reason for international disputes.²

As emphasised in the noted situations in the United States, India or China for example, disputes arose as a result of protectionist measures generally including tariffs and non-tariff barriers, where the justifications for such control has been varied from the stimulation of industrial development, self sustained growth to the protection of individual commercial sectors.³ While, direct trade restrictions have been a source of industrial disputes, the regulation of economic policies has also extended to international investments, as emphasised in the disputes that have resulted. Not only were the direct regulatory actions protectionist, but the ultimate motives of such regulation was also protectionist, in that, such regulation was intertwined with the political control that states, as sovereign entities desired.⁴ Thus culminating in international disputes, involving the state as host and the individual investor. This was clearly the case in the oil cases, where the states in question were keen to emphasise the rights, not only for the perceived economic benefits and financial payments, but also to the sovereign rights of legislating for such protection. Therefore, the resulting verdict from such international disputes was the fact that protectionism, in a broader sense was a basis for the rise in international disputes, notwithstanding the fact that such reasons have been categorised as being political and economic reasons.

It was in this protectionist atmosphere that the United Nations Charter provided for the peaceful settlement of disputes, in the axis of Art.33(1), where adjudication, negotiation, mediation, arbitration was to operate. While, adjudication and the substantive issues with respect to adjudication was straight

forward in terms of accepting the jurisdiction and the verdict of such a settlement process for enforcement; questions however, did arise on these issues, with respect to the other peaceful settlement methods. This was particularly the case, where the influences that states wielded, had a constructive or restrictive impact, as a result of the consensual nature of these settlement methods, and the protectionist attitude of states, parties to such dispute settlement. It was bearing this state influence, that I followed to discuss various issues with respect to negotiation, mediation and arbitration, as peaceful settlement methods of international disputes. The issues, as I had discussed, were varied, particularly, depending on the level of control that the states have on the methods of settlement, and how such protectionist attitudes could affect the final outcome of settlement process. Hence, while the consent of parties to the dispute and the secrecy involved in a process was key to a successful negotiating method, as was emphasised in chapter two, the same was not the case in arbitration as a method of peaceful settlement, where the more important issues of applicable law, enforcement of arbitral awards, choosing the proper arbitrators were key to such a process. While, these issues may have looked technical, it was paramount to discuss these, for three simple reasons. First, the discussion of these issues emphasised the impact that state consent has on the successful completion of the process, and the level of consent needed for such a completion. Secondly, these varied issues, also emphasised the impact that state protectionism has on these methods of settlement, where there was a balance to be made between the level of consent of the states and the state's protectionist attitudes, which ultimately decided the success of the individual settlement process. The third reason for discussing these issues was also important in emphasising the fact that protectionism does go beyond the mere protection of economic fact, and that such broader protectionism does have an impact

on the completion of dispute settlement. This was clear, when one notes the different cases at the divergent settlement mechanisms, where the movement or non-movement by the respective states at different levels has resulted in the completion or objections to the completion of the negotiation or arbitration.⁵ Having discussed broadly, the peaceful settlement mechanisms for international disputes, and the effect that state protectionism has on the procedural issues of these methods, it was important in my view to narrow the focus to international trade and investment dispute settlement mechanisms, within the boundaries of peaceful settlement, to which my attention was turned, particularly considering that fact that state protectionism does have a effect on these trade and investment relations.

While I did not focus on adjudication as a peaceful settlement process, and the issues relating to adjudication, it was however, my belief that one had to deal with a judicial process, and how that particular judicial process dealt with international trade and investments disputes, considering that most resolution methods for such disputes are arbitration based rather than pure judicial settlement. It was this in mind, that I dealt with the International Court of Justice (ICJ), as being one of the key judicial methods of settlement, the International Centre for the Settlement of Investment Disputes (ICSID) and the World Trade Organization (WTO) dispute settlement mechanisms. It was my opinion that protectionism does influence the workings of these institutional mechanisms, as a result of its influence on the peaceful settlement methods of settlement, under the foundation of which, these institutions ultimately operate. Therefore, in order to conclude as to whether the WTO dispute settlement mechanism is satisfactory in its objective to provide a watertight settlement process for trade and investments, I proceeded to make a comparative analysis with the ICJ and the ICSID for two important reasons. First, the comparison with the ICJ

was made, in order to analyse how, and to what extent it has succeeded in dealing with international trade and investment disputes as a judicial settlement process. Secondly, a comparison was made with the ICSID, particularly as this raised issues with respect to the extension of jurisdiction to include private individuals as subjects of international law, as a mixed arbitral institution, which is in contrast to the position of the WTO. It was my belief that it was important to make a comparison of these institutions, especially as the differences in jurisdiction, coupled with the protectionist attitudes of the states, does provide for different outcomes with respect to the settlement of disputes.

Therefore, a comparison was made of key substantive issues of jurisdiction, applicable law and the enforcement of awards, of the three different institutions. Several conclusions could be made of this existing situation. First, one could note from the discussion of the individual issues and institutions, the fact that these institutions and the settlement process, does operate in the environment of having to balance state consensus on one hand and protectionism on the other. It was clearly evident from the discussion of the substantive issues that, while the states agreed in principle and provided consent for the process; at the same time these same states were keen to protect their subjective interests. Evidence of this situation was apparent, when dealing with issues such the applicable law and enforcement of arbitral awards, where the states were willing to obstruct to the process by forwarding its sovereign rights and immunity laws, when either the applicable law or the award of the tribunal was against the protectionist interests of the losing state. Secondly, by discussing the substantive issues of the ICJ and the ICSID, one could conclude that in specific situations, the debatable and questionable nature of the phrasing of the applicable treaties and conventions on these substantive issues, has contributed to the

possible abuse and different interpretations by states, which are keen to protect their individual interests. This seemed to be the case, with respect to what is or not a legal dispute under the Statute of the ICJ for example and the jurisdictional issues which have ultimately depended on judicial decision making; or the second part of deciding the ICSID jurisdiction, i.e. “..the legal dispute arising out of an investment”, for example, which unfortunately has been left open to interpretations of the arbitrators and possible abuse of the states.⁶ Unfortunately, it would seem that the contradiction between the consent of the state on one hand and protectionism on the other has also contributed to questions been asked with regard to the substantive issues of jurisdiction, applicable law and enforcement, as a result of the interpretative difficulties of the treaties and conventions which regulate dispute settlement of the ICJ and ICSID.

While it is clear that protectionism had a effect on the satisfactory resolution of disputes in the respective methods, the question that next arose was how the WTO settlement mechanism had dealt with such an effect, considering the fact that it had to deal with the protectionism of states, particularly, when the consent of the same states were made, if the system was to work in general. As was discussed in chapter four, the basis under which the GATT was initiated, mainly concerned state consent towards accepting the GATT/WTO to regulate international economic relations. Unfortunately, with this came the situation, where the states could make the decision to provide or deny the consent to the settlement process, when it effected the subjective protectionist interests. Thus making the system prior to 1994, comparatively ineffective as a settlement process and secondly being in the hands of economically powerful states and economic blocks. As was well evidenced, the WTO has progressed immensely since the changes of 1994, where new regulations were

provided in order to control dispute settlement, non particularly so being the “negative consensus” rule which has taken away the obstructive element that plagued the previous GATT system.⁷ Therefore, what conclusions could one make in terms of the WTO as a settlement process? While new procedures have been provided for dispute settlement, the fact however has remained where there still remains discrepancies in relation to issues such as applicable law and enforcement of panel reports, as a result of the influence that the states still have on such settlement.⁸ The reason for much of this debate results from the fact that state consent is still an important factor in trade dispute settlement under the WTO proceedings, as is evident from mainly the enforcement of panel reports in states, which is decisive in the satisfactory completion of the process. Unfortunately, as I had discussed in chapter four, it would seem that the protectionist attitudes of states who are party to WTO dispute settlement, has undermined this consensual factor and also the satisfactory nature of the mechanism as a whole.

The second question, one could ask is what conclusion could be made, in terms of a comparative analysis of the WTO with the ICJ & ICSID, as a satisfactory dispute settlement process, from a protectionist point of view? As I had discussed in chapter five and endeavoured to analyse, there are differences between all three institutions, in terms of the substantive issues, which effect the completion of dispute settlement, notwithstanding the fact that all three institutions are based on the above mentioned contradiction of state consent and state protectionism. The conclusion one could make of the WTO in comparison to the ICJ and the ICSID, is the fact that it is more in stride with the commercial nature of international trade and investment relations, although there are limitations with respect to the jurisdiction of the ICJ and interpretative questions raised with regard to the applicable of the process,

in comparison to the position of the ICSID. But to the merit of the WTO, this negative impact has been defused by taking into account of the economic policies of the states, which ultimately is the reason for international trade and investment disputes. In this sense, one could say that the WTO has, comparatively negated the protectionist attitudes of states, which is the reason for dispute settlement. While the WTO has dealt with the jurisdictional issue, which effects the settlement process; the important issue with which to judge the satisfactory nature of settlement was the enforcement of institutional awards. As I had mentioned in my previous conclusion, the WTO is still plagued by the limitations in enforcement, as a result of the consensual nature of this part of WTO settlement, which delays the immediate or reasonable resolution of the dispute.⁹ In comparison, the ICJ as a judicial process requires immediate resolution. However, as I had noted, the possibility of such resolution is dependant on consensus, and secondly, on the viability of enforcement measures in Chapter IV of the Charter, in case of immediate non-enforcement. The ICSID on the other hand, has been influenced by states forwarding state immunity laws, which restricts or delays enforcement, as emphasised in the case law.¹⁰ This is regardless of the fact that consent is irrevocable in ICSID settlement. Unfortunately, this not only showed the protectionist effect on the settlement of ICSID dispute settlement, but also the fact that irrevocable consent was of restricted value in terms enforcement. Having taken into account of these individual position, the conclusion one could make is that the WTO procedures, while raising questions of delay, are still acceptable in terms of proportionality of enforcement measures, and secondly in terms of the opportunity of states arguing a case of state sovereignty, which objects to dispute resolution. It is my firm belief that this is still the case, notwithstanding the argument that tit-for-tat

measures breed protectionism, even if it does emphasise the fact that protectionism has effected immediate resolution of the dispute at hand.

If one accepts the thesis that the contradiction between the ideals of state protectionism and state consent to dispute settlement does effect the satisfactory completion of trade dispute settlement and particularly WTO dispute settlement; the following question would be, as to what remedies are available for such a problem. The key issue that effects the dispute settlement process, is the fact that, there are situations where enforcement of panel reports are delayed well over the “reasonable time” limit as applied by the DSU of 1994.¹¹ Hence, question is whether there is a possibility of adopting another method of enforcement, if one is to argue that the WTO settlement process is “water-proof” in terms of the effect that protectionism could have on the system as a whole. It is clear that the system is still diplomatic/consent based, notwithstanding the new procedures introduced by the DSU of 1994. This is specially the case, not only in the WTO, but also in other multilateral systems such as the NAFTA, where they are based on the WTO system, or allows jurisdiction to the WTO, in a given dispute¹². If one takes for example the NAFTA, this is quite clearly the case, where the dispute settlement process is modelled on the WTO panel process, and dependant on consent of the parties, notwithstanding the fact that issues such as ‘negative consensus’, third party rights and time limitations are applicable to the settlement process.¹³ Thus, being dependant on the diplomatic, rather than the judicially enforced system. While, I do accept that comparatively, the WTO dispute settlement process is successful, my recommendation, taking into account the recent cases between the “big two”, is to making the ICJ jurisdiction viable for international trade disputes, if the diplomatic option does not work in practice. However, this option of judicial enforcement is again subject to certain conditions,

such as the ICJ's willingness to deal with international trade and investment disputes, as emphasised in chapter three and secondly, the willingness of WTO members to provide their consent in order for the change to be made in Art.21 and Art.22 of the DSU of 1994, for judicial means, which unfortunately for the present, does not seem imminent. Therefore, it is my fervent hope that states, which are parties to the WTO, would take these issues to note, in recognising that more change is needed in order to uphold the ideals of the United Nations, of trade liberalisation, and the limitation of state protectionism, via the dispute settlement process.

Notes

¹ See Donelan, M.D., *International Disputes: Case histories 1945-1970*, Europa Publications, (1973)

² See for example the case at the WTO settlement process, *Thailand-Restrictions on importation of and internal taxes on cigarettes*, reproduced in W.T.M. (1991) 1

³ The local laws in Nigeria, such as the Customs and Excise Tariff act of 1988 or Ss 301 of the Tariff Act of 1989, in the US, were prime examples of these justifications for state economic protectionism.

⁴ The 'oil cases' were a clear situation where the state sovereignty issue was at a prime. Among them, the *Liamco Vs Libya* case was example for such a case.

⁵ The disarmament negotiations between the US and Russia was a case in point, where a significant move from their original positions by both parties, which brought about the disarmament plan was a example of the necessity of state consent and willingness.

⁶ There have been many cases in the ICSID, where the substantive issues have been argued, as a result of the various interpretations that could be given to these issues. *Klockner industries Vs Republique of Cameroon*, *B & B Vs Government of Congo*, are cases in point.

⁷ Ironically, such obstructions were mainly focused on the agricultural subsidies and policies of larger economies, as was the case in the EEC-subsidies on exports of wheat flour; The US-countervailing duties on non-rubber footwear from Brazil situations, which were brought to the Settlement forum.

⁸ The FSC and Banana disputes between the US and the EC, which have gone against the merits of the new system, emphasises the problems still existent in WTO dispute settlement.

⁹ The FSC and Banana cases between the US and the EC emphasises this problem, where notwithstanding the time limitations provided in the DSU of 1994, the cases have run for several years or the states have enforced the panel decisions with unsatisfactory legislation, which provokes the other party to bring a further case to the WTO forum.

¹⁰ The FSAI of 1976 in the United States and the state immunity Act of 1978 in the United Kingdom, are legislation in point, where the acceptance of arbitral reports for enforcement is restrictive.

¹¹ According to Article 21.3 of the DSU of 1994, the reasonable time period is not to exceed 15 months from the date of the establishment of the panel.

¹² Holbein, J. & Musch, D., *NAFTA-Treaties*, Oceana Publications, Inc., NY,(2003)

¹³ See Articles 2009-2017 of NAFTA, which deals with issues such the roster of panel members, third party rights, negative consensus, time limits for the report to be agreed.

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STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

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Article 1

The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.

CHAPTER I - ORGANIZATION OF THE COURT

Article 2

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Article 3

1. The Court shall consist of fifteen members, no two of whom may be nationals of the same state.
2. A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

Article 4

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.
2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.
3. The conditions under which a state which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly upon recommendation of the Security Council.

Article 5

1. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.
2. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of candidates nominated by a group be more than double the number of seats to be filled.

Article 6

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

Article 7

1. The Secretary-General shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible.

2. The Secretary-General shall submit this list to the General Assembly and to the Security Council.

Article 8

The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.

Article 9

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 10

1. Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.
2. Any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference envisaged in Article 12, shall be taken without any distinction between permanent and non-permanent members of the Security Council.
3. In the event of more than one national of the same state obtaining an absolute majority of the votes both of the General Assembly and of the Security Council, the eldest of these only shall be considered as elected.

Article 11

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Article 12

1. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.
2. If the joint conference is unanimously agreed upon any person who fulfills the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Article 7.
3. If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection

from among those candidates who have obtained votes either in the General Assembly or in the Security Council.

4. In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

Article 13

1. The members of the Court shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General immediately after the first election has been completed.

3. The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

4. In the case of the resignation of a member of the Court, the resignation shall be addressed to the President of the Court for transmission to the Secretary-General. This last notification makes the place vacant.

Article 14

Vacancies shall be filled by the same method as that laid down for the first election subject to the following provision: the Secretary-General shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council.

Article 15

A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

Article 16

1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.

2. Any doubt on this point shall be settled by the decision of the Court.

Article 17

1. No member of the Court may act as agent, counsel, or advocate in any case.

2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.
3. Any doubt on this point shall be settled by the decision of the Court.

Article 18

1. No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions.
2. Formal notification thereof shall be made to the Secretary-General by the Registrar.
3. This notification makes the place vacant.

Article 19

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Article 20

Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

Article 21

1. The Court shall elect its President and Vice-President for three years; they may be re-elected.
2. The Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

Article 22

1. The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable.
2. The President and the Registrar shall reside at the seat of the Court.

Article 23

1. The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.
2. Members of the Court are entitled to periodic leave, the dates and duration of which shall be fixed by the Court, having in mind the distance between The Hague and the home of each judge.

3. Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court.

Article 24

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.

3. If in any such case the member Court and the President disagree, the matter shall be settled by the decision of the Court.

Article 25

1. The full Court shall sit except when it is expressly provided otherwise in the present Statute.

2. Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of the Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

3. A quorum of nine judges shall suffice to constitute the Court.

Article 26

1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.

2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

3. Cases shall be heard and determined by the chambers provided for in this article if the parties so request.

Article 27

A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court.

Article 28

The chambers provided for in Articles 26 and 29 may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague.

Article 29

With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit.

Article 30

1. The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.
2. The Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote.

Article 31

1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.
2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.
3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.
4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.
5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.
6. Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfill the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.

Article 32

1. Each member of the Court shall receive an annual salary.
2. The President shall receive a special annual allowance.

3. The Vice-President shall receive a special allowance for every day on which he acts as President.
4. The judges chosen under Article 31, other than members of the Court, shall receive compensation for each day on which they exercise their functions.
5. These salaries, allowances, and compensation shall be fixed by the General Assembly. They may not be decreased during the term of office.
6. The salary of the Registrar shall be fixed by the General Assembly on the proposal of the Court.
7. Regulations made by the General Assembly shall fix the conditions under which retirement pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their travelling expenses refunded.
8. The above salaries, allowances, and compensation shall be free of all taxation.

Article 33

The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly.

CHAPTER II - COMPETENCE OF THE COURT

Article 34

1. Only states may be parties in cases before the Court.
2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.
3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

Article 35

1. The Court shall be open to the states parties to the present Statute.
2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security

Council, but in no case shall such conditions place the parties in a position of inequality before the Court.

3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 37

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court

of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

CHAPTER III - PROCEDURE

Article 39

1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.

2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court shall be given in French and English. In this case the Court shall at the same time determine which of the two texts shall be considered as authoritative.

3. The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.

Article 40

1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

2. The Registrar shall forthwith communicate the application to all concerned.
3. He shall also notify the Members of the United Nations through the Secretary-General, and also any other states entitled to appear before the Court.

Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council

Article 42

1. The parties shall be represented by agents.
2. They may have the assistance of counsel or advocates before the Court.
3. The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

Article 43

1. The procedure shall consist of two parts: written and oral.
2. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.
3. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.
4. A certified copy of every document produced by one party shall be communicated to the other party.
5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.

Article 44

1. For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the state upon whose territory the notice has to be served.
2. The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Article 45

The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.

Article 46

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted .

Article 47

1. Minutes shall be made at each hearing and signed by the Registrar and the President.

2. These minutes alone shall be authentic.

Article 48

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Article 49

The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

Article 50

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

Article 51

During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

Article 52

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Article 53

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Article 54

1. When, subject to the control of the Court, the agents, counsel, and advocates have completed their presentation of the case, the President shall declare the hearing closed.
2. The Court shall withdraw to consider the judgment.
3. The deliberations of the Court shall take place in private and remain secret.

Article 55

1. All questions shall be decided by a majority of the judges present.
2. In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.

Article 56

1. The judgment shall state the reasons on which it is based.
2. It shall contain the names of the judges who have taken part in the decision.

Article 57

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 58

The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 61

1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was,

when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

5. No application for revision may be made after the lapse of ten years from the date of the judgment.

Article 62

1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2 It shall be for the Court to decide upon this request.

Article 63

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

Article 64

Unless otherwise decided by the Court, each party shall bear its own costs.

CHAPTER IV - ADVISORY OPINIONS

Article 65

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article 66

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.
2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.
3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.
4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

Article 67

The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.

Article 68

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

CHAPTER V - AMENDMENT

Article 69

Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject

however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.

Article 70

The Court shall have power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the provisions of Article 69.

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CONVENTION ON THE SETTLEMENT
OF INVESTMENT DISPUTES BETWEEN STATES
AND NATIONALS OF OTHER STATES

PREAMBLE

The Contracting States

Considering the need for international cooperation for economic development, and the role of private international investment therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:

CHAPTER I
International Centre for Settlement of Investment Disputes

Section 1
Establishment and Organization

Article 1

(1) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).

(2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

Article 2

The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

Article 3

The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators.

Section 2
The Administrative Council

Article 4

(1) The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act.

(2) In the absence of a contrary designation, each governor and alternate governor of the Bank appointed by a Contracting State shall be *ex officio* its representative and its alternate respectively.

Article 5

The President of the Bank shall be *ex officio* Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council.

Article 6

(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall:

- (a) adopt the administrative and financial regulations of the Centre;
- (b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;
- (c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
- (d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;
- (e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;
- (f) adopt the annual budget of revenues and expenditures of the Centre;
- (g) approve the annual report on the operation of the Centre.

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.

Article 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council.

(2) Each member of the Administrative Council shall have one vote and, except as otherwise herein provided, all matters before the Council shall be decided by a majority of the votes cast.

(3) A quorum for any meeting of the Administrative Council shall be a majority of its members.

(4) The Administrative Council may establish, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by

Article 8 Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre.

Section 3 The Secretariat

Article 9 The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

Article 10

(1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

(2) The offices of Secretary-General and Deputy Secretary-General shall be incompatible with the exercise of any political function. Neither the Secretary-General nor any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

(3) During the Secretary-General's absence or inability to act, and during any vacancy of the office of Secretary-General, the Deputy Secretary-General shall act as Secretary-General. If there shall be more than one Deputy Secretary-General, the Administrative Council shall determine in advance the order in which they shall act as Secretary-General.

Article 11

The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted by the Administrative Council. He shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered pursuant to this Convention, and to certify copies thereof.

Section 4 The Panels

Article 12

The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

Article 13 (1) Each Contracting State may designate to each Panel four persons who may but need not be its nationals.

(2) The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.

Article 14 (1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

(2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

Article 15 (1) Panel members shall serve for renewable periods of six years.

(2) In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.

(3) Panel members shall continue in office until their successors have been designated.

Article 16

(1) A person may serve on both Panels.

(2) If a person shall have been designated to serve on the same Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which first designated him or, if one such authority is the State of which he is a national, by that State.

(3) All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification is received.

Section 5 Financing the Centre

Article 17 If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

Section 6

Status, Immunities and Privileges

Article 18

The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity:

- (a) to contract;
- (b) to acquire and dispose of movable and immovable property;
- (c) to institute legal proceedings.

Article 19

To enable the Centre to fulfil its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.

Article 20

The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

Article 21

The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat

- (a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;
- (b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.

Article 22

The provisions of Article 21 shall apply to persons appearing in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.

Article 23

(1) The archives of the Centre shall be inviolable, wherever they may be.

(2) With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favourable than that accorded to other international organizations.

Article 24

(1) The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.

(2) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.

(3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or members of a Committee appointed pursuant to paragraph (3) of Article 52, in proceedings under this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.

CHAPTER II **Jurisdiction of the Centre**

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

CHAPTER III Conciliation

Section 1 Request for Conciliation

Article 28

- (1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.
- (2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.
- (3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2 Constitution of the Conciliation Commission

Article 29

- (1) The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request pursuant to Article 28.
- (2) (a) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of conciliators and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties.

Article 30

If the Commission shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 28, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.

Article 31

- (1) Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments by the Chairman pursuant to Article 30.
- (2) Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in paragraph (1) of Article 14.

Article 32

(1) The Commission shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 33

Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. If any question of procedure arises which is not covered by this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

Article 34

(1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties. The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations.

(2) If the parties reach agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties, it shall close the proceedings and shall draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall close the proceedings and shall draw up a report noting that party's failure to appear or participate.

Article 35

Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed

or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.

CHAPTER IV Arbitration

Section I Request for Arbitration

Article 36

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2 Constitution of the Tribunal

Article 37

(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.

(2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

Article 38

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be

nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

Article 39

The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Article 40

(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.

(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

Section 3 Powers and Functions of the Tribunal

Article 41

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 42

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

Article 43

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

- (a) call upon the parties to produce documents or other evidence, and
- (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

Article 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Article 45

(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

Article 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

Section 4 The Award

Article 48

- (1) The Tribunal shall decide questions by a majority of the votes of all its members.
- (2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.

(3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

(4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

(5) The Centre shall not publish the award without the consent of the parties.

Article 49

(1) The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

Section 5 Interpretation, Revision and Annulment of the Award

Article 50

(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Article 51

(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

(3) The request shall, if possible, be submitted to the Tribunal which rendered the

award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

Section 6

Recognition and Enforcement of the Award

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

CHAPTER V

Replacement and Disqualification of Conciliators and Arbitrators

Article 56

(1) After a Commission or a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if a conciliator or an arbitrator should die, become incapacitated, or resign, the resulting vacancy shall be filled in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

(2) A member of a Commission or Tribunal shall continue to serve in that capacity notwithstanding that he shall have ceased to be a member of the Panel.

(3) If a conciliator or arbitrator appointed by a party shall have resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy.

Article 57

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

Article 58

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

CHAPTER VI

Cost of Proceedings

Article 59

The charges payable by the parties for the use of the facilities of the

Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council.

Article 60

(1) Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General.

(2) Nothing in paragraph (1) of this Article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.

Article 61

(1) In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.

(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

CHAPTER VII Place of Proceedings

Article 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

Article 63

Conciliation and arbitration proceedings may be held, if the parties so agree,

(a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or

(b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

CHAPTER VIII

Disputes Between Contracting States

Article 64

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

CHAPTER IX

Amendment

Article 65

Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered and shall forthwith be transmitted by him to all the members of the Administrative Council.

Article 66

(1) If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.

(2) No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.

CHAPTER X

Final Provisions

Article 67

This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

Article 68

(1) This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.

(2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Article 69

Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

Article 70

This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

Article 71

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

Article 72

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

Article 73

Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

Article 74

The depositary shall register this Convention with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

Article 75

The depositary shall notify all signatory States of the following:

- (a) signatures in accordance with Article 67;
- (b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;
- (c) the date on which this Convention enters into force in accordance with Article 68;
- (d) exclusions from territorial application pursuant to Article 70;
- (e) the date on which any amendment of this Convention enters into force in accordance with Article 66; and
- (f) denunciations in accordance with Article 71.

DONE at Washington, in the English, French and Spanish languages, all three texts being equally authentic, in a single copy which shall remain deposited in the archives of the International Bank for Reconstruction and Development, which has indicated by its signature below its agreement to fulfil the functions with which it is charged under this Convention.



UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

Members hereby agree as follows:

Article 1

Coverage and Application

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

Article 2

Administration

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.
3. The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.
4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.¹

Article 3

General Provisions

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.
2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.
3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.
4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.
5. 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 agreements, nor impede the attainment of any objective of those agreements.
6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.
7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure

¹The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.²

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

Article 4

Consultations

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

²This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.

2. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.³

3. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

8. In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed 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.

9. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

10. During consultations Members should give special attention to the particular problems and interests of developing country Members.

11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements⁴, such Member

³Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

⁴The corresponding consultation provisions in the covered agreements are listed hereunder: Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14;

may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

Article 5

Good Offices, Conciliation and Mediation

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.
2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.
3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.
4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.
5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.
6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

Article 6

Establishment of Panels

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.⁵
2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

Article 7

Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.
3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

Article 8

Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including 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 in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.
2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

⁵If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.

3. Citizens of Members whose governments⁶ are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.
4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.
5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.
6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.
7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.
8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.
9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.
10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.
11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

⁶In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

Article 9

Procedures for Multiple Complainants

1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.
2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.
3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

Article 10

Third Parties

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.
3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.
4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

Article 11

Function of Panels

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Article 12

Panel Procedures

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.
2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.
3. After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.
4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.
5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.
6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.
7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.
8. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.
9. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.
10. In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country

Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

11. Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

Article 13

Right to Seek Information

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

Article 14

Confidentiality

1. Panel deliberations shall be confidential.

2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

3. Opinions expressed in the panel report by individual panelists shall be anonymous.

Article 15

Interim Review Stage

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.
2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.
3. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.

Article 16

Adoption of Panel Reports

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.
2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.
3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.
4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting⁷ unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

⁷If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.

Article 17

Appellate Review

Standing Appellate Body

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Adoption of Appellate Body Reports

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.⁸ This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

Article 18

Communications with the Panel or Appellate Body

1. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Article 19

Panel and Appellate Body Recommendations

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned⁹ bring the measure into conformity with that agreement.¹⁰ In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

⁸If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

⁹The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

¹⁰With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 20

Time-frame for DSB Decisions

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

Article 21

Surveillance of Implementation of Recommendations and Rulings

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.
2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.
3. At a DSB meeting held within 30 days¹¹ after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:
 - (a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,
 - (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,
 - (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.¹² In such arbitration, a guideline for the arbitrator¹³ should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

¹¹If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

¹²If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

¹³The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

Article 22

Compensation and the Suspension of Concessions

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

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

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

- (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;
- (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;
- (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;
- (d) in applying the above principles, that party shall take into account:
 - (i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;
 - (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;
- (e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;
- (f) for purposes of this paragraph, "sector" means:
 - (i) with respect to goods, all goods;
 - (ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;¹⁴
 - (iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;
- (g) for purposes of this paragraph, "agreement" means:
 - (i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;
 - (ii) with respect to services, the GATS;

¹⁴The list in document MTN.GNS/W/120 identifies eleven sectors.

(iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator¹⁵ appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator¹⁶ acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to

¹⁵The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

¹⁶The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.¹⁷

Article 23

Strengthening of the Multilateral System

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

- (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;
- (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and
- (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

Article 24

Special Procedures Involving Least-Developed Country Members

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel

¹⁷Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

Article 25

Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

Article 26

1. *Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

- (a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;
- (b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;
- (c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

- (d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

2. *Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

- (a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;
- (b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

Article 27

Responsibilities of the Secretariat

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.
2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.
3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

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.