"Dealing with international trade disputes to protect Indonesia's rights in international trade"

Dr Intan Soeparna

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1. The General Overview of the WTO Dispute Settlement Process

The main objective of DSU is a central element to provide security and predictability to the multilateral trading system.[1] There are essentially six phases in the WTO dispute settlement process: consultation, the panel process, the appellate process, the recommendation and rulings, arbitration and surveillance of implementation. The surveillance of implementation basically is the final phase of the WTO dispute settlement process. Unless the loss party fails to implement the recommendations and rulings of DSB[2] within the reasonable period of time, the injury party may recourse under Article 22(2) of DSU. In this chapter, the predominant issue is the implementation of Article 22(2) DSU which unquestionably have correlation with all aspects of the research. Prior to it, six phases of WTO dispute settlement process will be elaborated in a brief enlightenment.

1.1. Consultation

Pursuant to Article 4 (1) DSU, a WTO Member has right to ask for consultation with another member, if it believes that the other member has violated a WTO Agreement or otherwise the member finds that other member nullified and impaired benefits accruing to it. Bearing in mind that the structure of consultation is undefined and there no rules for conducting them, members have to be entered into good faith.[3]

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[1]Article 3 (2), General Provision, Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes. The Agreement on Establishing the World Trade Organization, *available at:*(www.wto.org/dispute settlement*)*. See Lester, Simon, Mercurio, Bryan, Davies, Arwel and Leiner, Kara Leitner, (2008), *World Trade Law, Text, Material and Commentary*, Hart Publishing – USA, pp.153. The DSU represents an important change from the dispute settlement system in the GATT, which is broader, efficient, predictable and reliable dispute resolution process.

[2]Article 2 of DSU, Administration, *ibid*.SeeWaincymer, Jeff, (2002), *WTO Litigation: Procedural Aspects of Formal Dispute Settlement*, Cameron May – London/UK, pp.78.*See also*Wouters, Jan Wouters and De Meester, Bart, (2007), *The World Trade Organization: A Legal and Institutional Analysis*, Intersentia – Antwerpen/Belgium, pp. 217. *See also* WTO Secretariat, (2004), A *Handbook on the WTO Dispute Settlement System*, A WTO Secretariat Publication: prepared for publication by the Legal Affairs Division and the Appellate Body, Cambridge University Press – Cambridge/UK.

[3]Waincymer,Jeff, *ibid*, p. 211, There are no specific controls over such informal consultations within the WTO system, because there are a number of potentially conflicting aims in the process, it is therefore difficult to

The consultation phase is prerequisite before the request of panel establishment. It is the responsibility of the complainant and the respondent members to consult on the matter of dispute, and WTO Secretariat shall provide no support.[4] The only requirement is that the consultation should be notified to DSB. The defendant member should respond to the request of consultation within 10 days after the receipt of request, and consultation should be confidential.[5] If no response is given after 10 days, or does not enter into consultation within 30 days, the complainant member can directly request the DSB for the establishment of Panel.[6] The DSB shall establish the Panel, unless it is rejected by consensus.[7] Since consultation is a necessary step before the commencement of panel proceedings, the parties could request the establishment of panel only if the consultations fail to settle a dispute within 60 days after the date of receipt of request for consultations.[8] However, some members have purposed for shortening the period of time for consultation, so that they can proceed to another stage or to request establishment of Panel.[9]

There are various ways for parties to the dispute satisfied in consultations phase. For example member who initiates the consultations is withdrawing and not replacing the issue, even though the measure may have had some negative impact on its trade while it was

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identify an optimal procedures and obligations.*See also* Read, Robert, (2005), 'Trade Dispute Settlement Mechanisms: the WTO Dispute Settlement Understanding in the Wake of the GATT', in *the WTO and the Regulation of International Trade : Recent Trade Disputes between the European Union and the United States*, eds. Perdikis, Nicholas and Read, Rober, Edward Elgar Publishing – London/UK, pp.36.

[4] See Zimmermann, Thomas Alexander, (2005), *Negotiating the Review of the WTO Dispute Settlement Understanding*, Cameron May – London/UK, pp. 61.

[5]Article 4 (6) of DSU, Consultation. See also *the Korea – Alcoholic Beverages Case*, the Panel held that the information acquired during consultations could be subsequently be used by any party in the ensuing proceedings, WT/DS75/18. 17-01-2000. *Available at* (http://docsonline.wto.org/imrd/GEN_searchResult.asp), last visited October, 14, 2009.

[6]Article 4 (3) of DSU. See also Matsushita, Mitsuo, Schoenbaum, Thomas J. and Mavroidis, Petros C. (2003), *The World Trade Organization Law, Practice, and Policy*, Oxford University Press- Oxford/UK, pp. 26.

[7] Article 6 of DSU, *Supra Note 22.*

[8]Article 4 (7) of DSU, *Supra Note 22*. See also Yang, Guohua, (2005), *WTO Dispute Settlement Understanding: Detailed Interpretation*, Kluwer Law International – The Hague/The Netherland, pp. 495.

[9] In the EC – *Trade Descriptive of Scallops* (WT/DS7/R). In this case Canada requested for the establishment of Panel prior to the expiration of the 60 days consultation period. *Available at:* (http://www.wto.org/english/tratop_E/dispu_e/disp_settlement_cbt_e/a1s1p1_e.htm) *last visited* October, 13 2009. *See also*Trebilcock, Michael J. and Howse, Robert, (2013), *The Regulation of International Trade* (Fourth Edition), Routledge – London/UK, pp. 121. In case of Fructose Corn Syrup, Appellate Body recommended that although consultation had not occurred Panel could be properly established.

enforce.[10] Another possible settlement may also be achieved, when the consultation lead to favourable change or clarification in the way that the measure at issue is to be applied. However, the initiate member can also withdraw the measure, but it is replaced with another measure, which may have WTO-inconsistency problems of its own.[11] The most favourable result is when parties to the dispute are reaching amicable settlement. On the contrary with the respect of the dropped cases, there was not agreed settlement; the parties shall recourse to Panel.[12]

The consultation is a preliminary stage to identify with the legal basis of claim and facts. It serves a very valuable function and seems to work quiet well for cases that do not go on to Panel and Appellate process.[13] It provides a mechanism that resolves most cases promptly than the other processes. Nevertheless, some problematic issues arise in this process due to the application of Article 4 (11) of DSU which provides that any member who considers that it has a 'substantial trade interest', could join a consultation process without the consent of the other members who initiated the consultation process.[14] Another problematic issues is notification to DSB, some disputes were settled without notification to DSB.[15]

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[10] Some cases considers 'dropped' or 'to be withdrawn', for instance: US – *Tariff Increases* (Hormones Retaliation) (WT/DS39); EC – *Cheese* (WT/DS104);Pakistan – *Hides and Skin* (WT/DS107); US – *GroundnutQuotas* (WT/DS111); Argentina – *Pharmaceuticals* (WT/DS168); EC – *Rice Duties* (DS134); Turkey – *Pipe Fittings* (WT/DS208), EC – *Patent Protection* (WT/DS153); Greece – *Taxes* (WT/DS129); ect. *Available at:* (http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) *last visited* October, 15 2009.

[11]Malaysia – *Polyethylene (*WT/DS1); Korea – *Shelf Life*(WT/DS5); EC – *Grains*(WT/DS13); Poland – *Autos* (WT/DS19); Korea – *Bottled Water*(WT/DS20); Venezuela – *OCTG Imports*(WT/DS23); Japan – *Copyright*(WT/DS28); US – *Textile and Apparel I and II*(WT/DS85) and (DS151); Australia – *Coated Paper*(WT/DS119).

[12]Since the establishment of WTO in 1994 until 2009, 399 cases filed in the DSB. Most of the disputes started with consultation request. There are 107 disputes that did not result panel adoption. Available at: (http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm). See Zimmermann, Thomas Alexander, *Supra Note* 25, pp. 59-61.

[13] Davey, William J., 'Evaluating WTO dispute settlement: what results have been achieved through consultations and implementation of panel reports?', (2007), in *The WTO in the Twenty-first Century : Dispute Settlement, Negotiations, and Regionalism in Asia*, eds. Yasuhei Taniguchi, Alan Yanovich and Jab Bohanes, Cambridge University Press – Cambridge/UK, pp. 107. See also Martin, Mervyn, (2013), *WTO Dispute Settlement Understanding and Development*, MartinusNijjhoff Publisher – Leiden/The Netherlands, pp. 95-99. See also Trebilcock, Michael J, and Howse, Robert, *Supra Note* 30, pp. 136.

[14]Babu, R.Rajesh, (2005), 'Review of the WTO Dispute Settlement Understanding: Progress and Prospect', *Asian- African Legal Consultative Organization Quarterly Bulletin*, Vol. 2-3, New Delhi/India, pp. 55.

[15] Korean – *Inspection* (WT/DS3 and WT/DS41), US – *Auto* (WT/DS6), Japan – *Telecommunication Equipment* (WT/DS15), Brazil – *Autos* (WT/DS51, WT/DS52, WT/DS65,WT/DS81),Mexico - Customs Valuation of Imports (WT/DS53),), US – *Poultry Imports* (DS100), Brazil – *Payment Terms* (WT/DS116), India – *Customs Duties* (WT/DS150), EC – *Conifer Wood* (WT/DS137).

Despite the problematic issues regarding the consultation process, overall it has worked rather effectively. Unlike the Panel and Appellate process, the consultation process is more flexible for member to settle the dispute.

1.2. The Panel Process

The complainant parties are entitled to request DSB to establish Panel if consultation process is fruitless. The request for the establishment of Panel shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint. If the parties request the special terms of reference, the proposed text of it must clearly set out in the request.[16] In the *EC – Banana Case III*[17], Appellate Body indicated profoundly major terms of Article 6 of DSU that a Panel request will usually be approved automatically at the DSB meeting unless the DSB decides by consensus not to establish a Panel.

Once DSB agree to establish Panel, the Panel is bound by its terms of reference.[18] On the *Brazil – Desiccated Coconut*[19], Appellate Body explained the importance of the terms of reference for two reasons. First, terms of reference fulfil an important due process objective – they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the Panel by defining the precise claims at issue in the dispute. In terms of defining the precise claims at issue, Panel shall address the relevant provision in any covered agreement or agreements cited by the parties to the dispute, they also should not conduct *de novo* nor act *ultra petita*, in addressing issue of the claims. As explain in *Mexico – Corn Syrup Case*[20], Appellate Body defined that Panel shall come under the duty to address the issues as a matter of due process. Hence, to conduct proper exercise of the

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[16]Article 6 (2) of DSU. This article is addressing the task of Panel to examine request for establishment which must be sufficiently precise. See also United *States-Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, (WT/DS213/AB/R), 28-11-2002.

[17]*European Communities - Regime for the Importation, Sale and Distribution of Bananas* - AB-1997-3 - Report of the Appellate Body, (WT/DS27/AB/R), 09-09-1997.

[18]Article 7 of DSU also states within twenty days from the establishment of the Panel, a panel is given the following standard of reference unless the parties agree otherwise.

[19]*Brazil - Measures Affecting Desiccated Coconut* - AB-1996-4 - Report of the Appellate Body, (WT/DS22/AB/R), 21-02-1997.

[20]*Mexico – Anti – Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of DSU by the United Stated*, (WT/DS132/AB/RW), 22-10-2001.

judicial function, Panel is required to address issues that put before them by the parties. Panel also has to address and dispose of certain issues of a fundamental nature of the case.

To begin with assessing the dispute stipulates in the terms of reference, Panel shall follow the Working Procedures underlies in Appendix 3. Article 12 of DSU states the Working Procedures of the Panel unless Panel decides otherwise after consulting with the parties to the dispute. Working procedures of the Panel elucidates obligations of Panel regarding the flexibility of time frame in assessing the dispute; however, Panel should not disregard observation of due process carefully. In *Australia – Salmon Case*[21], Appellate Body reported that Panel procedures should provide sufficient flexibility so as to ensure high-quality Panel report, without unduly delaying the Panel process. Meanwhile, Panel should also be careful to observe due process, which entails providing the parties adequate opportunity to respond to the evidence submitted in their submission. The submission of the parties must be written in certain timetable.[22]

The main important aim set out in Article 12 is *basic rationale* behind the any findings and recommendations of Panel.[23]*Basic rationale* constitutes the scope of duties imposed on panels under Article 12 (7) of DSU. In defining *basic rationale*, Appellate Body considered that Article 12(7) establishes a minimum standard for the reasoning that Panels must provide in support of their findings and recommendations. Panel must also set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations.[24]

The Panel process elaborated above are converging on the aim of Article 11 of DSU, where Panel function is to assist the DSB in discharging its responsibility under DSU and covered agreements. Accordingly, 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

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[21]*Australia – Measures Affecting Importation of Salmon*, (WT/DS18/AB/R), 20 -10-1998.

[22] Article 12 (5) of DSU, *Supra Note 22*. See Slotboom, Marco, (2006), *A Comparison of WTO and EC Law: Do Different Objects and Purposes Matter for Treaty Interpretation?*, Cameron May Publisher – London/UK, pp. 231. Article 12 of the DSU gives WTO Panel discretion to depart from and to add the Working Procedures set out in Appendix 3 of the DSU, accordingly the WTO Panels should provide sufficient flexibility so as to ensure high quality panel report while not unduly delaying the Panel process.

[23]Article 12 (7) of DSU elaborates that Panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any finding and recommendations that it makes.

[24]In Mexico – Corn Syrup Case, *Supra Note 41*, Appellate Body turned first to dictionary meaning of 'basic', which includes both 'fundamental; essential' and constituting a minimum acceptable level'. 'Rationale' means both a 'reasoned exposition of principles; an explanation or statement of reasons' and 'the fundamental or underlying reason for basis of a thing of justification'. The Panels must provide directly linked by the wording of Article 12(7) to the finding and recommendations made by them.

and conformity with the relevant covered agreement. Refer to it; Panel should apply an appropriate standard of review under the covered agreements. In *EC – Hormones Case*[25], the Appellate Body held that the applicable of standard of review under Article 11 of DSU is neither *de novo* review nor the total deference, but rather the objective of the assessment of the facts. It refers to the case of *EC - Poultry*[26] when Appellate Body warned that Panel is obliged to conduct the objective assessment of the matter before it, otherwise the allegation of it constitutes a very serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself. Another serious allegation that Panel might be doing is acting *ultra petita*. In *Chile – Price Band System Case*[27], Appellate Body considered that Panel has acted inconsistently with Article 11 of DSU since Panel had made a finding on a claim that was not made by Argentina. Furthermore, the Panel assessed a provision that was not a part of the matter before it.[28] Accordingly, by acting *ultra petita*, Panel constituted depriving one party of a fair right of response. Nevertheless, in making an objective assessment of the matter before it, Panel is also duty bound to ensure that due process of fair right of response is respected.[29]

To be consistent with the duty in imposing assessment of the matter before it, Panel requires finding an objective assessment of the fact. Panel is necessary to consider the evidence presented by the parties and to make factual findings on the basis of that evidence. In *EC – Hormones Case*[30], Appellate Body considered that the wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. In supporting an objective assessment of the facts, Panel has right to

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[25]*United States - Continued Suspension of Obligations in the EC - Hormones Dispute - AB-2008-5 - Report of the Appellate Body*, (WT/DS320/AB/R),16-10-2008.

[26]*European Communities- Measures Affecting the Importation of Certain Poultry Products*, (WT/DS69/AB/R), 13-7-1998.

[27]*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Product*, (WT/DS207/AB/R), 23- 9-2002.

[28]In terms of reference of Panel, Article 7 of DSU limited the authority of Panel to assess the dispute only in the scope of claim written by the parties in the first sentence. See also *Argentina – Safeguard Measures on Imports of Footwear*, (WT/DS121/AB/R), 14-12-1999.

[29]Chile – Price Band System, *Supra Note 48*. Due process is an obligation inherent in the WTO dispute settlement system. A Panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a fair right of response. Panel considers acting beyond the requirement to asses objectively and in good faith.

[30] EC – Hormone Case, *Supra Note 4*.

consult to experts[31]. Refer to *India – Quantitative Restrictions Case*[32], Appellate Body made statement that although Panel has right to consult to expert such International Monetary Fund (IMF), Panel did not delegate to the IMF its judicial function to make an objective assessment of the fact. Panel should make carefully and critically assessment of any views made by the experts and also considered other data and opinion in reaching its conclusions. In assessing the dispute, Panel is necessary to consider the municipal law of the parties, as evidence of facts. However, the municipal law of WTO Members may be considered not only as evidence of facts, but also as evidence of compliance or non-compliant with international obligations.[33] Under DSU, Panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreements.

Once Panel concludes that a member's measure is inconsistent with a covered agreement, it shall recommend the member concerned brings that measure into conformity with the agreement.[34] Panel should submit its finding and conclusions in the form of written report to the DSB. A Panel report must, at minimum, set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.[35] The report become legally binding when it is adopted by the DSB and thus have become the recommendations and rulings of the DSB, 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

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[31] Article 13 of DSU mentions that Panel has right to seek information and technical advice from any individual or body includes the experts relating to the case.

[32]*India– Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, (WT/DS90/AB/R), 23-8-1999.

[33]*United States – Section 211 Omnibus Appropriations Act of 1998*, (WT/DS176/AB/R), 2-1-2002. See also *Case concerning certain German interests in Polish Upper Silesia (The Merits*),(22 March 1926), Publications of the Permanent Court of International Justice Series A – No.7 (Annex II); Collection of Judgments, A.W. Sijthoff's Publishing Company – Leiden/Netherland. In this merit, the court is certainly not interpreting the municipal law of the party, but there is nothing to prevent the court to give judgment on the question whether or not, in applying that law, party is acting inconformity with its obligations toward international law.

[34]Article 19(1) of DSU.*See also* Bourgeois, J.H.J., (2005), *Trade Law Experience: Pottering about in the GATT and WTO*, Cameron May Publisher – London/UK, pp. 34. The discussion about whether WTO remedies are prospective only or also retrospective focuses on Article 19, accordingly Panel or Appellate Body urge the member to concerned bring the measure in to conformity.

[35]Article 12(7) of DSU; see also Van den Bossche, Peter, (2005), *The Law and Policy of the World Trade Organization; Text, Cases and Materials*, Cambridge University Press – Cambridge/UK. pp. 253

the panel shall not be considered for adoption by the DSB until after completion of the appeal.[36]

1.3. Appellate Body Process

The dispute settlement system in the WTO allows the parties to appeal against a panel report and take it to a *quasi-judicial* body at a second instance. As enlighten in Article 17 of DSU, a standing Appellate Body shall be established by the DSB and hear appeals from Panel cases. It is composed of seven persons and as general rule; the proceeding 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 reports. Unless the Appellate considers that it cannot provide report within 60 days, it can be exceeded until 90 days.[37]

The Appellate Body process is bound to Working Procedures set out in Article 17 (9) of DSU. The Working Procedures of Appellate Review underlies in Section XXXII of DSU, and it shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and also communicated to the members for their information. Once Working Procedures are setting up by the Appellate Body, they are bound to review the case pursuant to Article 17 of DSU.

Article 17(6) of DSU provides that only issues of law and the legal interpretation developed by a panel can be reviewed by the Appellate Body. The Appellate Body has to address all issues that are brought up by the complaining parties before it,[38] and it shall not address new fact, issues or argument in its proceeding.[39] Appellate Body merely is bound

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[36]Article 16 (4) of DSU. See Fabri, Helene Ruiz, (2013), 'The Relationship between Negotiations and Third-Party Dispute Settlement at the WTO, with an Emphasis on the EC-Banana Dispute', in *Diplomatic and Judicial Means of Dispute Settlement*, eds. Chazournes, Laurence Boisson de, Kohen, Marcelo G., and Vinuales, Jorge E., MartinusNijhoff Publishers – The Hague/the Netherlands, pp. 93. In Banana Case EU had failed to comply in DSB Recommendation, thus the DSB Agree to extension of the time period of 30 days according to Article 16 (4) of the DSU.

[37]In some cases Appellate Body extend of the deadline for its report, such as, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, (WT/DS138/AB/R), 10-5-2000, *Thailand – Anti – Dumping Duties on Angles Shapes and Sections of Iron or Non- Alloy Steel and H-Beams from Poland*, (WT/DS122/AB/R), 12 -3-2001, and *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products*, (WT/DS135/AB/R), 12-3-2001.

[38] See also Case *Australia – Measures Affecting Importation of Salmon*, *Supra Note* 42.

[39]In *European Communities – Anti – Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, (WT/DS219/AB/R), 22-6-2003, Appellate Body rejected the EU's argument that was identifying during the Panel proceedings. Also in *Canada – Measures Affecting the Export of Civilian Aircraft*, (WT/DS70/AB/R), 2-8-1999, Appellate Body stated that an appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. Also in case of *the United States – Continued Dumping and*

duty completing the analysis made by Panel. As explained in *United States – Gasoline Case*[40], Appellate Body posited that they should reverse the Panel findings and complete the analysis of the case. Similar to *EC – Poultry Case*[41], Appellate Body elaborated Article 17(13) of DSU that they may uphold, modify or reverse the legal findings and conclusions of panel.

1.4. Recommendations and Rulings

The predominant function of Panel and Appellate body is assessing whether a Member's measure is inconformity with the covered agreement and whether it is nullifying and impairing[42] benefits accruing to other member's trade. Once Panel or Appellate Body concludes that a measure is inconsistent with a covered agreement[43], it shall recommend that the member concerned should bring the measure into conformity with the agreement. Panel and Appellate Body may suggest ways in which the member concerned could implement the recommendation. Refer to the case of *US - Underwear*[44] , Panel recommended the DSB to request the United States bring its measure into compliance with the Agreement on Textiles and Clothing by immediately removal of the measures that is further causing nullification and impairment of benefits accruing to Costa Rica. The recommendation is also in the form of decline the request of the party, as Panel noted in *Guatemala – Cement II case*[45] that Panel declined to suggest Guatemala to refund antidumping duties regarding the import of grey

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Subsidy Offset Act of 2000,(WT/DS217/AB/R and WT/DS234/AB/R), 16-1-2003, Appellate Body had no authority to consider new facts on appeal.

[40]*The United States – Standards for Reformulated and Conventional Gasoline*, (WT/DS2/9/AB/R), 20-5-1996. In this case Appellate Body reversed of Panel's legal finding and made a finding on a legal issue which was not addressed by the Panel. Appellate Body reversed the Panel conclusion on the first part of Article XX (g) of GATT 1994 and completed it. In this case, Appellate Body also examined the measure's consistency with the provision of Article XX based on the legal findings contained in the Panel report.

[41]*The European Communities – Measures Affecting the Importation of Certain Poultry Products,Supra Note* 47.

[42]The issue of nullification and impairment arose in *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Supra Note 38*. EU appealed the conclusion of Panel that 'there is normally a presumption that a breach of the rules has an adverse impact on other members parties to that covered agreement', Appellate observed that according to Article 3(8) of DSU, nullification and impairment issue is a basic standing the US to bring a claim before the Panel.

[43]See *India – Measures Affecting the Automotive Sector*, (WT/DS146/R and WT/DS175/R), 21-12-2001. Panel noted that the case envisages a situation where the violation is in existence.

[44]*United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*,(WT/DS24/AB/R),10-2-1997.

[45]*Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*,(WT/DS156/R),24-10-2000.

Portland cement from Mexico, however Panel only suggested Guatemala to revoke its anti-dumping measure that inconsistent with WTO rules.

Another issue relating to the recommendations and rulings of Panel and Appellate Body is both Panel and Appellate body should be vigilant in recommending the conclusion of the dispute. Addressing to this issue, many members concerned that Appellate Body was exceeding its authority and created new rights and obligations through its ruling[46]. It is remarkably notice set out in Article 19(2) of DSU that Panel and Appellate Body cannot add or diminish the rights and obligations in the covered agreement when they make findings and recommendations. In *US – Certain EC Product Case*[47], Appellate Body ruled that the purpose of dispute settlement is only to preserve the rights and obligations of members under the WTO Covered Agreements, and to clarify the existing provision of those agreements in accordance with customary rules of interpretation of public international law. Nothing from Panel and Appellate findings can exceed beyond the interpretation of WTO Covered Agreement.

In *Australia – Automotive Leather II Case*[48] , Panel addressed the issue of relationship between related covered agreements such Agreement of Surveillance and Countervailing Measures (hereinafter SCM) and Article 19(1) of DSU. Panel thereby elucidated the interpretation of Article 4(7) of the SCM Agreement seems redundant, since Article 19(1) of DSU that emphasizes the member to "bring the measure into conformity" is indistinguishable from the interpretation of Article 4(7) of the SCM Agreement.[49] Panel and Appellate Body are also bond duty of making interpretation on the provision relevant to the dispute in accordance with the general rule of interpretation. The general rule of interpretation set out in Article 31(22) Vienna Convention of Treaty is directing the Appellate Body to apply in seeking clarification of the provision of the WTO Covered Agreement. That direction reflects

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[46]Babu, R.Rajesh, *Supra Note 35*, Special Review of DSU has been established since the Marrakesh Ministerial Meeting is held; many members submitted the proposal to review a number of issues includes the function of Appellate Body to recommend the conclusion of the dispute. Addressing this issue, the US and Chile in a joint proposal has submitted six options aimed at providing parties to the WTO disputes more control over the content of Appellate Body reports, as well as the course of the dispute settlement proceedings.

[47]*United States – Import Measures on Certain Products from the European Communities*, (WT/DS165/AB/R), 11-12-2000. See also Sean D. Murphy, (2002), *United States Practice in International Law, Volume 1: 1999-2001*, Cambridge University Press – Cambridge/UK, p.256.

[48]*Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21(5) of DSU by the United States*,(WT/DS126/RW), 21-1-2000.

[49]Article 4(7) of the SCM Agreement requires member to 'withdraw the subsidies' which is requiring some actions. It is different from 'bring the measure into conformity' according to Article 19(1) of DSU.

a measure of recognition that covered agreement is not to be read in clinical isolation from public international law.[50]

After Panel or Appellate Body conclude the case and submit its recommendation to DSB, the time frame of adopting the rulings no later than 9 months since the DSB establish the Panel. The time will be exceeded until 12 months if the report is appealed.

I.5. Surveillance of Implementation Recommendation and Rulings

The implementation of recommendations and rulings of the DSB is the most crucial point for the entire WTO dispute settlement mechanism. The very objective of attaining security and predictability of the WTO legal system principally depends on the compliance and enforcement of the recommendations and rulings. Since the recommendations itself has no value unless the parties to the dispute implement it. The method to implement the recommendation can be done by withdrawal or modification of a measure, or part of measure, the establishment of application of which by a member of the WTO constitutes the violation of a provision in a covered agreement.[51]

Article 21(6) of DSU states 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 members at any time following their adoption. Accordingly, the members should implement the recommendation or rulings immediately, in a case that immediate compliance is impracticable, Article 21(3) of DSU provides a reasonable time for the member to bring itself into a state of conformity with its WTO obligation.[52] The concept of reasonable period of time is elaborated in *US – Hot-Rolled Steel (Article 21(3))*[53] by Arbitrator. It implies a degree of flexible time to comply with the recommendations or rulings. Arbitrator considered that the essence of reasonable period of time set out in covered agreement such Anti – Dumping Agreement should equally pertinent in the context of Article 21(3) (c) of DSU. It also should be defined on a case by case basis,

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[50] See US – Gasoline Case, *Supra Note 61*,

[51] See *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, Resort to Arbitration under article 21(3) of DSU* , (WTO/DS155/10), 31-8-2001.

[52] See *Chile – Taxes on Alcoholic Beverages, Arbitration under Article 21(3) (C) of DSU,* (WT/DS87/15 and WT/DS110/14), 23-5-2000. See also *United States – Continued Dumping and Subsidy Offset Act of 2000*, (WT/DS217/14 and WT/DS234/22), 13-6-2003.

[53] *The United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, (WT/DS184/AB/R), 24-6-2001

for example in *EC – Hormones (Article 21(3)*[54] case, the Arbitrator considered that the ordinary meaning of the terms of 'reasonable period time' indicates to 15 months as a guideline for the arbitrator, and not a rule.[55]

1.6. Arbitration

WTO dispute settlement mechanism recognizes Arbitration as a different and alternative procedure for parties to settle their dispute. According to Article 25 of DSU, the parties may recourse Arbitration to facilitate the solution of certain disputes that concern issues that are clearly defined by them. Arbitration process therefore requires mutual agreement of the parties, except as otherwise provided in DSU. The parties to the arbitration proceeding shall also agree to abide by the Arbitration award.

The first case recourse to Arbitration since the inception of the WTO is *US – Section 110(5) Copyright Act Case*[56]. In this case, Arbitrator observed that Article 25 of DSU provides a different procedure that the parties have alternative whether notify the DSB to establish Panel or refers matters to Arbitration. The parties to this dispute only had to notify the DSB of their recourse to Arbitration, and there is no decision required from the DSB for a matter referred to Arbitration. Arbitrator is bound duty to apply all the rules and principle governing the WTO system.

Arbitration can imply its jurisdiction regarding its function as an international tribunal. In the *US – Anti-Dumping Act of 1916 Case*[57] the Arbitrators therefore considered that they are entitled to consider the issue of its own jurisdiction on its own initiative. The jurisdiction in this case is not a unilateral extension of the WTO jurisdiction, since it is dependent on the agreement of the parties to a dispute to have recourse to Article 25 of DSU.[58] The Arbitration

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[54] EC - Hormone Case, *Supra Note 4*.See also case *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, Resort to Arbitration under article 21(3) of DSU, Supra Note* 72. Argentina had argued that it needed 46 months as the reasonable period of time for implementation in order to control and counter certain economic and financial consequences that would follow the enactment of legislation implementing the recommendations of the DSB.

[55] It applies to the case involving developing country, see also*Indonesia – Certain Measures Affecting the Automobile Industry, Recourse to Arbitration Under Article 21(3) (C) of DSU*, (WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12), 7-12-1998.

[56]*The United States – Section 110(5) of the US Copyright Act, Recourse to Arbitration under Article 25 of DSU, Award of the Arbitrators*, (WT/DS160/ARB25/1), 9-11-2001.

[57]*The United States-Anti-Dumping Act of 1916*,(WT/DS136/AB/R and WT/DS162/AB/R), 28-8-2000.

[58] See the US – Section 110(5) Copyright Act, *Supra Note* 77, see also Palmeter, David, and Mavroidis, Petros C., (2004), *Dispute Settlement in the World Trade Organization; Practice and Procedure, Second Edition*, Cambridge University Press-Cambridge/UK, pp.45.

in WTO dispute settlement system principally has broad authority to assess the issue submitted by the parties to the dispute. However, disputes submitted to Arbitration mainly regarding the determination of level of nullification or impairment or the interpretation of Article 22 of DSU and determination of reasonable period of time in implementing the recommendation of the DSB. The member may also request Arbitration of a determination by the Committee on Subsidies and Countervailing Measures regarding a program qualified as a non-actionable subsidy pursuant to SCM Agreement.

Arbitration is considered an alternative to a panel procedure. Refer to *US – Section 110(5) Copyright Act Case*[59], Arbitrator noted that pursuant to Article 25(1) of DSU, Arbitration is an alternative means of dispute settlement that generally used to complete process of dispute settlement under DSU. It is not only be used to one aspect of the procedures such as the determination of the level of benefits nullified or impaired as a result of a violation, but also to other aspect such a mutually acceptable in negotiating compensation. This would seem to be confirmed by the terms of Article 25(4) of DSU which provides that Article 21 and 22 of DSU shall apply mutatis mutandis to arbitration award.

Furthermore, recourse to Arbitration pursuant to Article 25 of DSU is fully consistent with the object and purpose of DSU. It is likely to contribute to the prompt settlement of a dispute between members, as commanded by Article 3(3) of DSU. In general, recourse to Arbitration indeed strengthens the dispute resolution system. The Working Procedures of Arbitration set out in Article 22(6) of DSU, will follow the normal working procedures of DSU where relevant and as adapted to the circumstances of the present proceeding which Arbitrator attached it to their decision.

2. Nullification and Impairment as *Basic Rationale* Causes of Action

The WTO language of dispute settlement system focuses on Article 3(8) of DSU:

"In case where there 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."

[59] *Ibid*

The core of Article 3(8) DSU is nullification or impairment which is coherent with Article XXIII of GATT 1947[60] as predecessor concept of basic claim in international trade remedy. In this article, nullification or impairment is considered as the result of failure of a contracting party to carry out its obligations, the application of any measures of a contracting party whether or not it conflicts with GATT, and the existence of any other situation.

As time went on, the concept of basic claim formulated in Article XXIII GATT remains become predominant concept in assessing dispute claimed by the WTO Member. This concept will be elaborated as violation claim basis, non-violation and existence of any other situation that is resulting nullification or impairment trade benefits of other member.

2.1. Violation Claim Basis

All WTO Members are bound to comply with Marrakesh Agreement in accordance with *pactasuntservanda* principle.[61] However, in light of considerable circumstances may arise in domestic level, some members are unable to specify in advance how they ought to behave under every conceivable contingency in applying obligations of WTO. For those members, to deviate from their commitments is inevitably, thus leading members to breach the obligations or violation of WTO Agreements.

The violation of WTO Agreements is triggering the complaining member to seek redress or to demand responsibility from violating member.[62] Refer to *India – Quantitative Restriction case*[63], when the United States considers that a benefit accruing to it under the GATT 1994 was nullified or impaired as a result of India's alleged failure to carry out its obligations regarding balance of payments. In this case, the articulation of "nullification or

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[60] Jackson, John H.,(1998), 'Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects', in *The WTO as an International Organization*, ed. Krueger, Anne O., The University of Chicago Press – Chicago USA/London/UK, pp. 166. In 1962, Uruguay brought case before Panel of GATT 1947, where the Panel introduced a revolutionary concept regarding of 'prima facie nullification or impairment'. In this concept, the breach of GATT would be prima facie nullification or impairment, and the responding party carried the burden of proof there was no nullification or impairment of benefits accruing other member.

[61] Article 26 of the Vienna Convention on the Law of the Treaty: "every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[62] See Article 43 Notice of Claim by an Injured State, *Articles on Responsibility of States for Internationally wrongful Acts, adopted by International Law Commission, at its fifty-third session, 2001),*(extract from the Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chapter IV.E.1), state that 'an injured State which invokes the responsibility of another State shall give notice of its claim to that state'.

[63] *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, Supra Note* 53. *See also*Amerisinghe, Chittharanjan F., (2009), *Jurisdiction of Specific International Tribunals*, MartinusNijhoff Publishers – Leiden/The Netherlands, pp. 357.

impairment as a result of India's violation of its obligation" should be emphasized as a notion of claim by the U.S.

Van den Boosche explains that "in only a few cases to date has the respondent argued that the alleged violation of WTO law did not nullify or impair benefits accruing to the complainant. In no case has the respondent been successful in rebutting the presumption of nullification or impairment. It is doubtful whether this presumption really is rebuttable".[64] It indicates that a party enables to rebut the presumption of nullification or impairment if it is proved contingency impact of nullification or impairment benefits accruing to other party. In *Turkey – Textiles Case*[65] albeit Turkey argued that India had not suffered any nullification or impairment of its WTO benefits, Panel determined that Turkey has not provided sufficient information to set aside the presumption of its measure has nullified and impaired the benefits accruing to India under GATT/WTO. Consequently, to rebut the presumption of nullification or impairment, Turkey shall be adequately proving it to the contrary.

2.2. Non Violation Claim Basis

Non Violation claim basis in the WTO dispute settlement system sets out in Article 26 of DSU. According to this article, a member who considers that any benefits accruing to it directly or indirectly under this Agreement are being nullified or impaired or that attainment of any objectives of the Agreement are being impeded as the result of the application by another member of any measure, whether or not it conflicts with the provisions of this Agreement, may submit its complaint to DSB. Complaining party is therefore bearing burden of proof to present a detailed justification in support of its complaint.[66] The detailed of justification must be tangible and concrete to prove the substantiation of a causal relation between the invoked measures and nullified or impaired benefits, and to this end broaden description of measure at issue is indispensable.

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[64] Van den Bossche, Peter, *Supra Note 56*, p. 193. See also Roessler, F. and Gappah, P. (2005),'A Re-appraisal of Non-Violation Complaints under the WTO Dispute Settlement Procedures', in *The World Trade Organization: Legal, Economic and Political Analysis*, Vol. I, eds. Macrory, P.F.J., Appleton, AE and Plummer, MG, Springer – New York/USA, pp.1371.Roessler mention that the non-violation remedy is best understood in the context of the original GATT, which had only limited coverage with regard to trade rules. It has been argued that the expansion of WTO rules to many new areas has made the non-violation remedy less important.

[65] *Turkey-Restrictions on Imports of Textile and Clothing Products*, (WT/DS34/R), 31-5-1999.

[66] See EC – Asbestos Case, *Supra Note 58*. See also Kim, Dae-Won, (2006), *Non-Violation Complaints in WTO Law: Theory and Practice*, Peter Lang – Bern/Switzerland, p. 77. In this case, Appellate Body therefore considered that the non-violation complaint as a remedy should be approached with caution and should remain as an exception. See also in regard with the standard of nullification and impairment, the Panel interprets as competitive relationship between imports and domestic product. This practical standard applied in GATT Article III (4) which makes distinction between violation and non-violation complain meaningless.

In the *Japan – Film Case*[67] Panel reviewed whether there was a measure that promulgated by responding party which was nullifying or impairing benefits of complaining party. In this case, Panel considered benefits that might be nullified or impaired to consist of enhanced market access arising from the change of competitive relationship brought about by tariff concessions, but it found that the U.S. as complaining party bore burden as to its 'legitimate expectations'[68] of benefits after successive tariff negotiation rounds. In order to meet this burden, the U.S. was required to show that Japanese measure at issue was not reasonably anticipated at the time the concessions were granted.[69] According to this case, the complaining party required to elucidate legitimate expectations of benefits that is nullified or impaired by responding party. However, in such case of non-violation claim basis, most Panel or Appellate Body shall recommend that the parties concerned make a mutually satisfactory adjustment.

2.3. The Existence of Any Other Situation

Similar to the non-violation claim basis, the claim base on the existence of any other situation shall present a detailed justification in support of its argument. Any other situation claim basis was designed to be used in situation such as macro economy emergencies i.e. general depressions, high unemployment, commodity price collapses, balance of payment difficulties.[70] Article 26 (1) (b) of DSU, point out the duty of Panel to prepare and circulate separate reports for violation and non-violation dispute with the other situation of dispute.

In principle, procedure burden of prove between non violation and the existence of any other situation claim basis is not different. The complaining party requires to bear burden of prove of nullification or impairment benefits accruing to it.

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[67] *Japan – Measures Affecting Consumer Photographic Film and Paper*,(WT/DS44/R), 22-4-1998.

[68] Refer to the doctrine of legitimate expectation which means an 'extension of the rules and natural justice and procedural fairness'. This doctrine has been recognized as an important principle guiding the interpretation of other obligations in international economic law; *inter alia* it can be referred from several WTO Panel decision. See also Dissenting Opinion in Arbitral Award, *International Thunderbird Gaming Cooperation (claimant) and the United Mexican States (respondent)*, before the Arbitral Tribunal constituted under Chapter Eleven of the North American Free Trade Agreement, Washington DC, 26-1-2006.

[69] Trachman, Joel P.,(1999), 'The Domain of WTO Dispute Resolution', *Harvard International Law Journal*, Vol.40 No.333, pp.27.

[70] See Nanto, Dick K., (2000), 'Dispute Settlement Under the WTO and Trade Problems with Japan', in *World Trade Organization: Issue and Bibliography*, ed. Babkina, A.M., Nova Science Publishing – New York/USA, pp. 37, Article 23 of DSU allows for a complaint if a member feels that the attainment of any objective of a WTO agreement is being impeded as a result of the failure of another party to carry out its obligations under an agreement, the application by another contracting party, or the existence of any other situation, thus the DSU are not limited to complaint about specific violations of agreements.

2.4. The Concept of Trade Nullification and Impairment in the WTO

Violation, non-violation and the existence of any other situation's claim bases constitute cause of action for WTO members to complain before the WTO dispute settlement body. However basic rationale of these claim bases is converging at 'nullification or impairment' concept. Article XXIII GATT provides that the nullification or impairment of benefits accruing to a member under the General Agreement of WTO is a legitimate basis for commencing a dispute settlement procedure. Abbot explained that GATT jurisprudence has interpreted nullification or impairment as 'any change in domestic economy policy that adversely affects imports could be considered to impair the benefits of prior tariff binding'.[71] In addition, Jackson explicitly mentioned that the phrase of nullification or impairment in Article XXIII GATT is ambiguous. It was not merely construed impair the benefits of member that could not reasonably been anticipated by the other member at the time it negotiated for a concession, but also the nullification or impairment could deter benefits in respect of reasonable expectation concept.[72] For example, in *Brazil – Financing Aircraft Case*[73], Canada as complainant implicitly brought issue of nullification or impairment in its claim before the Panel. Canada argued that nullification or impairment caused to its benefit in aircraft industry is calculating since 1994 after Brazil become member of WTO. It mentioned that the export subsidy created by Brazilian Government since 1991, reducing benefits of Canada in Aircraft industry since the export subsidy allured more international purchaser to opt purchase Brazilian aircraft. The *ProgramadeFinanciamentoàsExportaçaões (*PROEX) subsidy impeded the benefits that supposed to be gained by Canada prior 1998 and presumably will deter its benefits in the future if Brazil remains non conformity with SCM Agreement. This claim show that the concept of nullification or impairment is not merely addressing reasonable expectation concept, but also deter benefit prior the claim submitted by Canada.

However, the DSU merely recognizes concept of nullification or impairment close to the concept of injury in the law of contract that entails consequential damage and expectancy

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[71] Abbot, Kenneth W.,(1996), 'Defensive Unfairness : The Normative Structure of Section 301',*Fair Trade and Harmonization, Prerequisite for Free Trade?:Vol. 2 Legal Analysis,* eds. Bhagwati, Jagdish N. &Hudec, Rubert E., Massachusetts Institute of Technology Press – Massachusetts/USA. pp. 38.

[72] Jackson, John H., (1997), *The World Trading System, Law and Policy of International Economic System, Second edition*, Massachusetts Institute of Technology Press – Massachusetts/USA, pp.120.

[73]*Brazil – Export Financing Program for Aircraft, Report of the Panel*,(WT/DS46/R) 14-4-1999.

damage. The consequential damage does not flow directly from a breach of contract but from the consequences of the breach. These damages are, in a sense, one step removed from the breach itself. Consequential damage include those based on a loss of expected profits, often referred to as expectancy damages, and damages based on a longer term loss of benefits, often referred to as lost opportunity damages.[74] From this point of view, the nullification or impairment is deemed of losing the benefits accruing to the member under the covered agreement which is referred as consequential and expectancy damages. This concept is notably as basic rationale of cause of action in seeking adjustment by virtue of GATT Article XXIII.

3. Trade Remedy in the WTO Dispute Settlement System

The objective of WTO dispute settlement system is rebalancing trade concession which is impeded by the violating member; hence the violating member is obliged to comply with the recommendations and rulings of DSB. Article 21 of DSU therefore sets out the obligation of violating party to comply with recommendation and ruling of the DSB in such period of time. However, in such cases, some members find difficulty to comply due to further complicated by the fact that domestic regulatory system are heavily bureaucratized. There thus needs to be a procedural consensus among competing groups, based on the belief that lawmaking processes balance interest and alleviate unequal amounts of influence.[75]Furthermore, political and economic pressure that might affect a violating member's decision to carry on the recommendations and rulings of the DSB, leading to thecomplainant member accepting much less than full compliance,[76] or otherwise non-compliant measure.[77]

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[74]Fitsgerald, Jean, and Olivio, Laurence, (2005), *Fundamental of Contract Law, Second Edition*, Emond Montgomery Publications-Toronto/Canada, pp. 129.

[75]Zurn, Michael, and Joerges, Christian, (2005), *Understanding Compliance with International Law, Law and Governance in Postnational Europe: Compliance beyond the Nation-State*, Cambridge University Press – Cambridge/UK, pp. 312. See also Babu, R. Rajesh, (2012), *Remedies under the WTO Legal System*, MartinusNijhoff Publisher – Leiden/the Netherland, pp. 40-42.

[76]Van den Bossche, Peter, and Zdouc, Werner, (2013), *The Law and Policy of the World Trade Organization* (Third Edition), Cambdrige University Press – Cambridge/UK, pp.307.*See also*Brimeyer, (2001), 'Bananas, Reef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations', *Minnesota Journal of Global Trade*, Vol. 10, No. 1, pp.133. Brimeyer argues that compliance is doubtful because of disagreement as to what full compliance entails. In some cases, it appears that the settlement system must be given the benefit of the doubt.

[77]See EC – Banana Case, *Supra Note* 38, In this case the idea of compliance is a political calculation – strengthening the political economy perspective- however EU preferred non-compliance as a result from a

In term of disagreement of compliance measure, Article 21 (5) of DSU notes that a party is possible to resort to the original panel to determine whether violating party taken measure to comply with the recommendations and rulings,[78] or the complainant party may recourse directly to Article 22 of DSU, if the compliance is not achieved by the deadline. These two articles have sequencing problem, where Hudec mentioned that implementation of Article 22 of DSU cannot be separated from the working of Article 21(5) of DSU.[79] However, it is possible to recourse to both articles simultaneously, as long as the parties would request the arbitrator to suspend its work in proceedings Article 22 until the adoption of the compliance panel under the Article 21(5) of DSU. Another possible way is direct recourse to Article 22 of DSU, without preceding the Article 21(5) of DSU.

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rational choice, nevertheless the EU has had every chance to implement WTO decision. In Banana Case, EU preferential treatment of former colonies and the major economic activity of country were at stake if EU reasonably prefers to comply with the decision.

[78]*Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of DSU*, (WT/DS70/AB/RW), 21-7-2000. Appellate Body held that interpretation of Article 21(5) of DSU refers to measures which have been, or which should be, adopted by the member to bring about compliance of the recommendation and rulings of the DSB.

[79]Hudec, Robert E., (2000), 'Broadening the scope of Remedies in WTO dispute Settlement', in*Improving WTO Dispute Settlement Procedures*, eds. Weiss, Friedl, &Wiers, Jochem, Cameron May Publisher – London/UK., pp. 345. See also Case Australia Automotive Leader, *Supra Note* 69. The complainant would not initiate Article 22 proceedings until the circulation of the compliance panel's report pursuant to Article 21 (5) of DSU.