

**A COMPARISON BETWEEN THE DISPUTE SETTLEMENT
PROCEDURES IN THE INTERNATIONAL COURT OF JUSTICE
AND THE WORLD TRADE ORGANISATION**

Turki Al Saud (Bachelor of Laws)

Thesis submitted to Brunel University

for the degree of Master of Philosophy (research)

December 2009

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ABSTRACT

The International Court of Justice (ICJ) came into being due to a perceived need for international judicial settlement, whereas the World Trade Organisation (WTO) was created for the purpose of specifically promoting international trade by reducing tariffs and other barriers to trade. Alternative structures for each institution are also considered, as is the older dispute settlement process of arbitration, by means of cases. It is a voluntary submission by both parties to a dispute, when they have agreed on the issues, but need external assistance to proceed further. As a type of judicial settlement, it is binding, can permit third party or non-state involvement, and is a precursor of international tribunals.

In the WTO, one aim is to use cases to test conceptual points. The specific aspects of dispute settlement including the application of rules and procedures, and implementation and processes, will be discussed. The working procedures of the Appellate Body (AB) will be analysed in detail. Another aim is to compare with the ICJ, wherever possible. Legal concepts such as jurisdiction, judicial aspects of reasoning, the burden of proof, and the standard of proof will be discussed. The Appellate Body's (AB's) standard of review of panel recommendations and rulings will be analysed. Compliance and enforcement are compared between the two organisations. Economic and political considerations will also be touched on when relevant to this study.

In the ICJ, the application of concepts such as judicial restraint and activism will be assessed, including the degree of inconsistency found in different cases. The implications of the different types of agreements between states that can lead to or have led to the ICJ's jurisdiction will be examined, and the impacts assessed. The ambiguity involving provisional measures will be studied in detail. The ICJ's relationship to the UN Security Council will also be assessed. The lack of monitoring or enforcement, and of no stated compliance timeframe are considered. The thesis will end with various future recommendations.

ACKNOWLEDGEMENTS

I should like to thank my main supervisor, Professor Manisuli Ssenyonjo, for his constructive suggestions and recommendations throughout.

I should also like to thank Professor Javaid Rehman.

ABBREVIATIONS

AB	Appellate Body
AJIL	American Journal of International Law
Art	Article
CSCE	Conference on Security and Co-operation in Europe
DSB	Dispute Settlement Body
<i>DSU</i>	Dispute Settlement Understanding
EC	European Communities
EU	European Union
<i>GATS</i>	General Agreement on Trade in Services
<i>GATT</i>	General Agreement on Tariffs and Trade
ICAO	International Civil Aviation Organisation
ICJ	International Court of Justice
ILO	International Labour Organisation
ILR	International Law Review
ITO	International Trade Organisation
<i>NAFTA</i>	North American Free Trade Agreement
NGO	Non-governmental Organisation
OSCE	Organisation for Security and Cooperation in Europe
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RPT	Reasonable Period of Time
<i>SCM</i>	Agreement on Subsidies and Countervailing Measures
<i>TRIMS</i>	Agreement on Trade-Related Investment Measures
<i>TRIPS</i>	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNSC	United Nations Security Council
US	United States of America
<i>VCCR 1963</i>	Vienna Convention on Consular Relations (1963)
<i>VCLT 1969</i>	Vienna Convention on the Law of Treaties (1969)
WTO	World Trade Organisation

CHAPTER 1: INTRODUCTION

The purpose of this chapter is to do several things. The first is to give a historical background to the basis of the research in this study (Section 1.1). A brief introduction to the World Trade Organisation (WTO) is given, followed by developments which led to the creation of the International Court of Justice (ICJ). The research objectives are then explained in Section 1.2, and the organisation of this study is set out in Section 1.3.

1.1 Background to the research

1.1.1 The World Trade Organisation

The General Agreement on Tariffs and Trade (*GATT*) is a set of agreements governing state parties' trade conduct; it is not an international organisation.¹ It became one since the preceding International Trade Organisation's (ITO's) Charter was not adopted. Based in Geneva, it lacked a legal charter or structure. The treaty obligations remained internationally binding. Contracting parties could recommend abandoning the disputed trade measures, and could permit one contracting party to suspend

¹ *General Agreement on Tariffs and Trade* (1994),
http://www.wto.org/english/docs_e/legal_e/legal_e.htm

concessions or obligations to any other, or retaliate, by suspending tariff concessions. Rules addressed tariff concessions and dispute settlement. *GATT* shortcomings included allowing contracting parties to retain *GATT*-inconsistent legislation. Canada suggested a World Trade Organisation (WTO) for legal matters in international trade, including the *GATT*, the *GATS* and others.

There were 8 negotiation rounds in the *GATT*, of which the Uruguay Round led to WTO agreements in each key area, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (*TRIPS*),² the Agreement on Trade-Related Investment Measures (*TRIMS*),³ and the *General Agreement on Trade in Services (GATS)*.⁴ A problem in the *GATT* dispute settlement system was that no objection from any contracting party to the decision was allowed, when referring a dispute to a panel. Reports therefore took into account the fact that the losing party must accept them. Dispute settlement consensus was blocked often, so dissatisfied parties

² *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Annex 1C, Marrakesh Agreement Establishing the World Trade Organization*, 15/04/1994, http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm

³ *Agreement on Trade-Related Investment Measures (TRIMS), Final Act of the 1986—1994 Uruguay Round of trade negotiations*, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#eAgreement

⁴ *General Agreement on Trade in Services (1995)*, http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm

avoided it and took direct action. A stronger dispute settlement understanding (DSU) resulted (1984), preventing the widespread blocking of panel establishment and reports by losing parties. It included detailed procedures for dispute stages, and a framework for all covered agreements. Appellate review of panel reports, and implementation surveillance were introduced.

The European Community suggested an institution to implement the Uruguay Round; the *Agreement Establishing the World Trade Organisation* was signed in Marrakesh in April 1994.⁵ Major new international laws resulted, including several agreements, and the *Final Act*. The latter changed the *GATT* into the (WTO). The *Montreal Rules* (1989) led to the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes*.⁶

1.1.2 The ICJ

The Hague Conferences of 1897 and 1907 led to a desire for a world court for international issues.⁷ The Permanent Court of Arbitration (PCA) was

⁵ *Marrakesh Agreement Establishing the World Trade Organization*, 15/04/94, 33 I.L.M. 1144 (1994).

⁶ *Understanding on Rules and Procedures governing the settlement of disputes* (1994), http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

⁷ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003; Ch 19, p.961.

neither permanent, nor a standing court. It could not therefore build a jurisprudence.⁸ This negative criticism led to a draft Convention Relative to the Creation of a permanent Court of Arbitral Justice at the 1907 Hague Peace Conference.⁹ The Convention could not be adopted due to discord over the number of judges on the Court, for example calls for one judge to represent each state Court member.

After the First World War, in 1920, the Council of the League of Nations set up, by appointment, an advisory committee of judges to work on a draft Statute for a Permanent Court of International Justice (PCIJ). One of its objectives was also to develop international arbitration. Its sources were the draft Convention of 1907,¹⁰ a plan for neutral states with a view to compulsory jurisdiction, and the Root-Phillimore plan to elect judges.¹¹ Although the draft Statute included compulsory jurisdiction, the major powers opposed this in the Council and in the Assembly of the League. In the latter, an ‘optional clause’ was agreed instead. The amended Statute began in 1921.

⁸ Brownlie, I., *Principles of Public International Law*, 6th edn, Oxford, Oxford University Press, 2003; Ch 32, p.677.

⁹ *Convention for the pacific settlement of international disputes* (1907), <http://www.pca-cpa.org/upload/files/1907ENG.pdf>

¹⁰ *Ibid.*

¹¹ *Root-Phillimore plan*: joint election of the judges by the Council and Assembly of the League, 24/07/1920, draft before the Council and the Assembly of the League of Nations.

After the Second World War, in 1946, the PCIJ was replaced by the International Court of Justice (ICJ). Continuing the PCIJ was opposed by the committee at the San Francisco conference, since the United States and the Soviet Union did not want the Court to be related to the League of Nations, and there was also the problem of amending the PCIJ's Statute to conform to the newly created United Nations (UN).¹² However, the ICJ is much more closely related to the UN legally. Actual case continuity was preserved between the two courts, as was the PCIJ as the close model.¹³ The *Statute* is almost the same; as is the jurisdiction and jurisprudence. Article 92 (Art 92) of the UN Charter refers to it as the UN's principal judicial organ. Moreover, from Art 93 of the UN Charter, all UN members are *ipso facto* parties to the *Court Statute*.

1.2 Research objectives

The usual historical diplomatic methods of international dispute settlement are first considered, as well as the established process of arbitration, which

¹² Brownlie, *Ibid.*, Ch 32, p.678.

¹³ Sands P., Mackenzie R., and Shany Y., *Manual on International Courts and Tribunals*, West Sussex, Reed Elsevier, 2006; ch 1, p.4.

predated international judicial settlement. After outlining the historic context in which each institution was created (above), this study examines the intended scope of laws in the jurisdiction of the WTO and in the ICJ respectively.

A key objective will be to show, possibly via examples, the significance of treaty law, for example Art 31 of the *Vienna Convention on the Law of Treaties (VCLT 1969)*. Another objective will be to show the significance, as it has evolved in the practice of the two institutions, of the *DSU* for the WTO and of customary law for the ICJ. Brownlie has identified defining characteristics of custom as duration; uniformity and consistency of the practice; generality of the same; and *opinion juris et necessitatis*.¹⁴

For the *DSU*, it is not always easy to see the influence of international law in trade law, let alone the historic meaning of customary international law. It will be illustrated that the WTO AB has decided to use this as referring to the rules in the *VCLT 1969*. Moreover, the legal interpretations used by each institution in specific cases will be investigated, and trends or inconsistencies highlighted. At a comparative level, it will be shown how

¹⁴ Brownlie, I., *Principles of Public International Law*, 6th edn, Oxford, Oxford University Press, 2003; Ch 1, p.7.

the WTO represents an innovation in the sense that trade law (as reflected in the covered agreements to be explained) takes precedence over international law, unlike in the ICJ which aims to continue the trend of the presumed primacy of international law from the PCIJ. The tensions and inconsistencies which have resulted will also be discussed for both.

Another objective is to explain the differences in the conception of jurisdiction, with the WTO's exclusive jurisdiction to be contrasted with the ICJ's preference for voluntary submission by the parties, recalling that the latter is not the only international tribunal to which parties have recourse. The WTO cannot usually decline a trade case on jurisdictional grounds, whereas the ICJ can decline a case on such grounds, as will be shown. In the *DSU*, the AB can overrule a panel's decision about a case on jurisdictional grounds, whereas there is no analogous check on the ICJ. This raises issues concerning the status of international law and the significance of states submitting voluntarily to the ICJ's jurisdiction, and whether therefore the system of national or state courts has enough power. These points will be analysed with an example case.

Due to the nature of compliance in the *DSU*, compliance panels will be

compared with dispute panels, and the terms of reference compared to show the impacts on the overall trade disputes between the parties. The sanctions remedy will be considered, shortcomings shown, and alternatives assessed in detail.

Everyday concepts will be related to each organisation. Ideas such as the transparency of the proceedings, and whether there are any steps to make improvements will be considered. Where there have been milestones in the jurisprudence, these will be highlighted and the implications analysed. Cases will be referred to in suitable detail to illustrate the point being made. Where there are issues of fairness that impact on developing countries vis-à-vis developed ones, the discussion will be extended and suggestions made for the future. To try to redress imbalances, domestic institutional rigidities or difficulties will also be touched on, and what this might impact, for example the reasonable period of time (RPT) for implementation in the *DSU*. If alternatives represent a better allocation of institutional resources, these will be put forward.

In terms of the structure of each institution, significant differences will be explored. In the *DSU*, the role of panels and appellate review will be

examined in detail. The merits of alternative panel structures and procedures will be compared. This is different from the structure in the ICJ, where there is no scope for judicial review. The ICJ distinction between jurisdictional scope concerning law and facts (panels) and law only (AB) will be explained.

1.3 Organisation of thesis

This thesis contains five chapters. Chapter 2 lays the foundation. It begins by considering, in turn, the types of judicial dispute settlement historically available to state parties when attempting to resolve a dispute, as well as arbitration. This lays the foundation for what existed when international judicial settlement was increasingly sought, and explains particularly the framework in which the ICJ was created. Arbitration is explained as a process available to the parties in either the ICJ or the WTO. The chapter then discusses the comparative benefits of each dispute settlement method.

Chapters 3 and 4 represent the main part of the work in relation to the two institutions. First, Chapter 3 addresses different aspects of how dispute settlement works in two broad areas. These are: rules and procedures, and

implementation and processes. Having set the stage, Chapter 4 then undertakes a detailed comparison between the processes in the WTO and the ICJ, under three different dispute settlement areas. These are jurisdiction and scope, judicial aspects and burden of proof, and compliance and enforcement.

Finally, Chapter 5 concludes the study, summarising the thesis. Recommendations are considered for the future, first generally, then in the five areas of dispute settlement covered in Chapters 3 and 4.

CHAPTER 2: THE METHODS OF DISPUTE SETTLEMENT IN INTERNATIONAL LAW

2.1 Introduction

Usually, the methods of dispute settlement in international law are classified in two different ways. The first broad category represents *diplomatic methods*, and includes negotiation, mediation, inquiry and conciliation. In this category, the parties remain in overall control of the dispute, and can either accept or reject the suggested settlement. The other general category is termed *legal settlement*, since the basis of settlement is international law. The types here are arbitration and judicial settlement, and are employed where a decision that is binding on the parties is needed. Judicial settlement involves referring the matter to the ICJ or other standing court. Arbitration, on the other hand, needs the parties themselves to institute the method of resolving the dispute between them.¹⁵ Having stated above the two general categories, our next step is to consider each dispute settlement process in turn.

¹⁵ Merrills, J.G., *International Dispute Settlement*, 4th edn, New York, Cambridge University Press, 2005; Ch 5, p.91.

2.2 Negotiation

From Art 2(3) of the United Nations charter, ‘all members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered’.¹⁶ A tribunal may be set up, and might require the parties to negotiate in good faith, and could state what aspects the parties must consider whilst negotiating.

Basic negotiation is between two parties, when there exists a dispute between them. It will involve consultation and exchange of opinions. Essentially, it is to do with the parties discussing the disagreement, in order to understand it. It is the method by which they decide how to proceed subsequently.

In general, diplomacy will refine a disagreement by articulating the parties’ positions such that it could be considered to be a dispute. Therefore, one purpose of negotiation is to potentially establish a situation where an international court’s jurisdiction may be required.

¹⁶ *Charter of the United Nations* (1945).

By negotiating, the parties can separate the dispute into component parts to achieve their ambitions. For example in the *Lake Lanoux case*, Australia and Papua New Guinea disputed the Torres Strait.¹⁷ In this case, the parties tackled their differences under the following headings: the population of the islands in the Straits, the islands as an entity, the seabed, and the rights to fishing, conservation, and navigation. Generally, if the dispute cannot be easily separated, the parties can devise a procedural agreement (‘without prejudice’) to reward one party for making a concession on a key issue. However, any underlying problems will then likely resurface in future.

An international court can require a duty on the parties to negotiate in certain specific circumstances, e.g. territorial delimitation. An example is the *Fisheries Jurisdiction cases*.¹⁸ Here, the ICJ stated the duty on the parties to negotiate fairly over the dispute concerning the sharing of fishing rights. However, it should be emphasised that the need to negotiate does not preclude other processes being used as well. Notably, this duty does not assume that a dispute exists already, but could be designed to prevent a future dispute from arising between the parties.

¹⁷ Merrills, J.G., *International Dispute Settlement*, 4th edn, New York, Cambridge University Press, 2005; Ch 1, p.13.

¹⁸ *Fisheries Jurisdiction* (Uk v Ice., FRG v Ice), Merits, 25/07/74, General list no.56, ICJ Report 3.

In many instances, the duty to negotiate has been laid out in the terms of a treaty, as a result of a dispute arising. For example, Art 41 of the 1978 *Vienna Convention on Succession of States in Respect of Treaties*.¹⁹

According to this:-

‘If a dispute regarding the application or interpretation of the present Convention arises between two or more Parties to the Convention, they shall, upon the request of any of them, seek to resolve it by a process of consultation and negotiation.’²⁰

Negotiation can also be between many parties. Moreover, the obligation to negotiate does not necessarily imply a duty to reach agreement; in fact, negotiation represents the first step in dispute resolution, not necessarily its conclusion. According to Art 66 of the United Nations Charter, if a dispute is not resolved within twelve months in the way covered by Art 33, then there are other methods to follow.²¹ In the event that Arts 53 or 64 are relevant (*jus cogens*), any party can submit for a decision to the ICJ in writing. *Jus cogens* means a mandatory norm of general international law,

¹⁹ E.g. Lavalley, R., ‘Dispute Settlement under the Vienna Convention on Succession of States in Respect of Treaties’, 1979, *American Journal Of International Law*, No. 73, pp.407-430.

²⁰ Merrills, J.G., *International Dispute Settlement*, 4th edn, New York, Cambridge University Press, 2005; Ch 1, p.13.

²¹ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003; Ch 16, p.858.

from which no derogation is permissible. The alternative is that the parties all consent to a process called arbitration.

Negotiation might not be possible, for example when one party denies another international status. However, two parties might have productive negotiations through discussion, that could lead to official recognition. One example is represented by the detailed discussions between the US and China, before the Peking government was recognized.²²

In practice, if the parties have no shared interest in resolving their differences, negotiation will not succeed. For example, the parties might adopt the tactics of stating very different agendas. Also, negotiation will not suit a weaker party in dispute with a stronger party. Stronger here means greater political and economic strength, and therefore having access to better legal support and so a better understanding of the legal and historical issues involved in the area.

²² Shaw, M. N., *Ibid.*, Ch 8, p.368.

Here, one might refer to Japan and Russia's long-standing dispute over the legal jurisdiction of the Kuril Islands.²³

It is useful to consider what might happen if negotiation has failed. Obviously, failure can only result in the event that negotiations actually occurred. However, even where there have been no negotiations, the ICJ can exercise jurisdiction. One procedure that can be used to accelerate the process is to state a timeframe in which peaceful settlement should have occurred. Consider the 1965 *Convention on Transit Trade of Land-Locked Countries*, from which:-

‘Any dispute which may arise with respect to the interpretation or application of the provisions of this Convention which is not settled by negotiation or by peaceful means of settlement within a period of nine months shall, at the request of either party, be settled by arbitration.’²⁴

To sum up, negotiation represents the first step in identifying and resolving an international dispute.

²³ http://www.amun.org/uploads/ICJn_samp_opinion.pdf

²⁴ *Convention on Transit Trade of Landlocked Countries* (1965), http://www.imli.org/legal_docs/docs/A87A.DOC

It can occur whilst other resolution methods are in progress. In international law, there is an obligation on parties to negotiate as part of the peaceful settlement of a dispute. If one party omits to negotiate, the ICJ can get involved, directly or from the terms of a treaty.

2.3 Inquiry and fact finding

Where the nature of a dispute between two parties is rooted in different factual accounts of an event, rather than a stated difference in terms of international law, a historic approach has been to appoint an inquiry commission containing well-qualified members, whose task is to find out the facts.²⁵

Thus, the *1899 Hague Convention* set out the scope of an inquiry commission.²⁶ This included facts such as their use for disputes ‘involving neither honour nor essential interests’; that only factual and not legal issues should be handled; and neither the existence nor the findings of the commission should be treated as compulsory.

²⁵ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003; Ch 18, p.923.

²⁶ Art 9, *Hague Convention for the Pacific Settlement of International Disputes* (1899).

Additionally, from Art 9 of the *Hague Convention for the Pacific Settlement of Disputes* (1907), the purpose of an inquiry is ‘to facilitate a solution ofdisputes by elucidating the facts by means of an impartial and conscientious investigation’.²⁷

According to Collier and Lowe, even if there is a legal basis to the dispute, the inquiry could help in resolving it.²⁸ This could be seen as a form of impartial detective work, to remove the risk of two separate national inquiries which might conflict in their findings. Inquiry is appropriate where the parties actively welcome the involvement of an impartial commission. The Hague Conference of 1899 first discussed this process as an alternative to arbitration, which had already existed for about one hundred years.

One of the best known examples of a successful inquiry commission is the Dogger Bank incident of 1904, during the Russo-Japanese war.²⁹ This inquiry was set up under the *1899 Hague Convention*.

²⁷ *Hague Convention for the pacific settlement of international disputes* (1907), <http://www.pca-cpa.org/upload/files/1907ENG.pdf>

²⁸ Collier, J. and Lowe, V., *The Settlement of Disputes in International law*, Oxford, Oxford University Press, 1999; Ch 2, p.24.

²⁹ *Anglo-Russian Declaration of St. Petersburg*, 25/11/1904.

The incident was that the Russian Baltic Fleet fired on the Hull trawler fleet, then fishing on the Dogger Bank in the North Sea. The United Kingdom was the aggrieved party. The Commission's report was accepted by Russia and the UK, and effectively resolved the dispute. This prevented the UK from entering the war against Russia. As a result of this process, the *1907 Hague Convention* further elaborated the inquiry process articles from a total of 6 to 28.

To put inquiry into historic perspective, it is interesting to note that the United States was party to 48 bilateral treaties from 1913 to 1940. Each contained the possibility of a permanent inquiry commission. Collectively, these treaties are referred to as the *Bryan treaties*.³⁰ Commissions were developed in the *Hague Convention of 1907*, but were not in fact used very much in the years to follow.³¹ As a process, inquiry has not progressed in a gradual way in that there was a forty year period in which it was not used at all. However, as time went on, the commissions assumed less of an exclusively fact-finding character, and more of a judicial role. This shows the increasing influence of international law during the twentieth century.

³⁰ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003; Ch 18, p.924.

³¹ *Hague Convention for the pacific settlement of international disputes* (1907), <http://www.pca-cpa.org/upload/files/1907ENG.pdf>

For example, Britain and Denmark set up the Red Crusader inquiry in 1961.³² In this case, a Danish fisheries protection ship boarded the UK trawler the Red Crusader, based on an accusation of illegal fishing. At one point, the Danish ship fired at the UK trawler. Most of the subsequent commission members were jurists, and interestingly for the first time in any inquiry, none of the members were nationals of either party. In both this and the *Letelier and Moffitt* case, the commission's findings made significant legal rulings, as a basis for deciding the compensation.³³ However, within the context of specific institutions which have developed since, this process has been used. For example, the UN has employed this method, as has the International Labour Organisation (ILO) and the International Civil Aviation Organisation (ICAO).

Recent times have seen increased involvement in inquiry by the UN. This can be seen in the fact that as recently as 1991, the General Assembly issued a Declaration which re-defined fact finding as:-

³² Merrills, J.G., *International Dispute Settlement*, 4th edn, New York, Cambridge University Press, 2005; Ch 3, p.53.

³³ *Dispute concerning responsibility for the deaths of Letelier and Moffitt*, 11/01/92.

‘any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security.’³⁴

To complete this assessment of inquiry and fact finding, one clear reason why inquiry has not been the adopted method is as follows. In a wide range of disputes, it is not appropriate to solve the dispute by simply finding out the facts.³⁵ Also, this type of official third party involvement would not be the process favoured by various states in certain circumstances.

In general, however, we can observe that where an episode has caught one or more parties by surprise, an inquiry commission can be very useful in settling the issue. One advantage of this method is that it permits a party to make a compensatory payment without formally accepting its fault, and the matter need not be prolonged. One case is *Letelier and Moffitt*, whereby the two named persons were assassinated in 1976, in Washington DC.³⁶ The US

³⁴ *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security* (09/12/91), A/RES/46/59, <http://www.un.org/documents/ga/res/46/a46r059.htm>

³⁵ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003, Ch 18, p.925.

³⁶ *Dispute concerning responsibility for the deaths of Letelier and Moffitt*, 11/01/92, http://untreaty.un.org/cod/riaa/cases/vol_XXV/1-19.pdf

had alleged that this was carried out by Chilean intelligence. The inquiry then resolved the matter to both parties' satisfaction.

2.4 Mediation and good offices

The *Hague Conventions of 1899 and 1907* set out the regulations by which these methods would work.³⁷ The *Conventions* imposed a duty on parties to use good offices or negotiation as much as possible, before resorting to arms. Mediation is a part of negotiation, and tries to reconcile the two parties. The mediator is actively involved and officially recognized as the authority to find new ways to resolve the dispute, as well as help the parties to communicate. The proposals trust the parties in that the mediator's suggestions are based on information from the parties, not on any investigation (unlike inquiry).

We can also identify a related approach to dispute resolution known as 'good offices', which depending on the context, may be similar or different to mediation.

³⁷ Collier, J. and Lowe, V., *The Settlement of Disputes in International law*, Oxford, Oxford University Press, 1999; Ch 2, p.27.

It is worth noting that Art 33(1) of the UN Charter does not specifically mention good offices. However, according to Shaw, good offices are relevant where a third party tries to get the disputing parties to negotiate. The United Nations Secretary General has taken part in disputes through his good offices.³⁸ He can also undertake to use of his good offices with officials of regional organisations. The use of his good offices or mediation can be required in different ways. One can be due to power inherent in his office. Or, a request can be made by the Security Council or the General Assembly. Sometimes, the parties have requested the mediation of the Secretary General themselves.

Unlike good offices, mediation means that the third party is actively involved in the negotiations.³⁹ Mediation has been defined in the following terms:-

‘mediation is the participation of a third State or States, a disinterested individual or an organ of the United Nations with the disputing States, in an attempt to reconcile the claims of the contending parties and to advance

³⁸ Merrills, J.G., *International Dispute Settlement*, 4th edn, New York, Cambridge University Press, 2005; Ch 2, p.35.

³⁹ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003; Ch 18, p.921.

proposals aimed at a compromise solution.⁴⁰

When the parties have not succeeded at negotiations, the mediator assumes importance. This third party can ask the parties to restart negotiations, or act as an intermediary if one or more of them is unwilling to communicate. These possibilities are called ‘good offices’. Either the parties could request mediation, or the third party could assume the task. Again, the state parties do not have to accept the mediator’s suggestions. In a difficult dispute, parties might make concessions more easily through a mediator than directly. The mediation can be confidential if required.

Initially, a party who is willing to mediate needs to be found. A mediator can be an international organisation, a state, or even an individual.⁴¹ For example, in the 1982 dispute over the Falkland Islands between Britain and Argentina, initially Alexander Haig, the US Secretary of State, was prepared to mediate. Subsequently, Senor Perez de Cuellar, the UN Secretary General, was willing to put forward his good offices as an alternative.

⁴⁰ Collier, J. and Lowe, V., *The Settlement of Disputes in International law*, Oxford, Oxford University Press, 1999; Ch 2, p.27.

⁴¹ Merrills, J.G., *International Dispute Settlement*, 4th edn, New York, Cambridge University Press, 2005; Ch 2, p.29.

In 1978, the *Beagle Channel award* almost led to war between Chile and Argentina.⁴² Because of his vested interest, the Pope put forward Cardinal Antonio Samore as a mediator. In this case, the good offices of the Pope had been involved in Catholic South American countries for about 500 years, and intended to prevent war.

One aspect of mediation is that it is more likely to succeed because the dispute has reached a point whereby a change in the parties' position is required as the next move. The mediator can facilitate this.⁴³ One should realize that if mediation is to be the right process, the parties must agree to the identity of the mediator. A potential mediator must have respected qualities. Therefore, in the Beagle Channel dispute, the good offices of the Pope offered an ideal channel for the mediation of his envoy.⁴⁴ More generally, impartiality is a crucial part of the offices of the UN Secretary General. The Secretariat has the power to take the initiative in a dispute. For this reason, the Secretariat has the credibility to maintain the parties' trust in dispute resolution.

⁴² *Beagle Channel Award* (1 *Beagle Channel Arbitration (Argentina v. Chile)* (1977), http://untreaty.un.org/cod/riaa/cases/vol_XXI/53-264.pdf

⁴³ Merrills, *Ibid.*, p.28.

⁴⁴ Collier, J. and Lowe, V., *The Settlement of Disputes in International law*, Oxford, Oxford University Press, 1999; Ch 2, p.28.

Let us consider where a state offers to mediate. This will typically be because the state foresees settlement terms which are somehow favourable to itself. Any historic closeness to one party need not prevent the state from being the mediator, provided the communication exists with the other party. Mediation fulfills certain tasks. One task is to recommence official communication in a difficult case. For example in November 1979 in the hostage crisis between the US and Iran, communication had ceased. A group of intermediaries then had to restart official communications, the task eventually being taken by Algeria, since this intermediary was trusted for good offices and mediation. Another task a mediator fulfills is to convey information, so that the two sets of proposals can be modified and therefore reconciled. Thus, Algeria could modify Washington's proposals and give significant importance to Iran's assets in the USA.⁴⁵

In general, if both parties are strong (politically or economically) and have very different aims (about being dominant, for example), then mediation is not likely to be the successful procedure. Also, mediation does not necessarily require equal treatment.

⁴⁵ Merrills, J.G., *International Dispute Settlement*, 4th edn, New York, Cambridge University Press, 2005; Ch 2, p.31.

For example, if one state has invaded another, it might be sufficient to recognize some other claims of that state, to require it to withdraw to its previous limits in the present dispute.

In conclusion, if the parties do not co-operate with the mediator, mediation or good offices will not resolve the dispute. The purpose of mediation is for a third party to convince the disputing parties to change the positions in a way they both find acceptable, so that they can resolve the dispute themselves. Mediation can produce a degree of trust and therefore improve co-operation between the parties, which can then lead to an agreement between them. Whether or not mediation is likely to succeed will depend partly on historic associations between the parties as well as between the mediator and the parties. For example, regional affiliation as well as religion can play a part, as we saw in the case of the Pope's prior involvement in Catholic matters in two South American countries.⁴⁶

In practice, successful mediation frequently depends on its timing, and the particular personality involved. There are no set terms on which the dispute should be resolved.

⁴⁶ Merrills, *Ibid.* p.34.

2.5 Conciliation

We can note the following definition of conciliation:-

‘A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an *ad hoc* basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested.’⁴⁷

From the 1928 *General Act on the Pacific Dispute of International Disputes* (revised 1949),⁴⁸ commissions were to include inquiry and mediation methods. A commission would have five members, one appointed by each party, and the other three were to be taken from amongst the citizens of third states. The process was to end within six months, and not be held in public.

Conciliation is frequently used in international trade agreements, and also in

⁴⁷ From Art 1 of the *Regulations on the Procedure of International Conciliation* adopted by the Institute of International Law (1961).

⁴⁸ Revised *General Act for the Pacific Dispute of International Disputes* (1949), <http://treaties.un.org/doc/Publication/UNTS/Volume%2071/volume-71-I-912-English.pdf>

treaties to protect human rights. An example of the former is the institution of the WTO. Where many parties are concerned, because a commission contains several different members, it would be better placed to form conclusions regarded as fair by the parties.

One view of conciliation is that it is a kind of formalized negotiation, with the commission providing the necessary assistance to the parties to resolve their differences. To be effective, the commission must have taken a view as to what kind of role it will play. Because it is required to study the detail of a dispute, it has significant investigative power. It can obtain data from the parties in various ways, and can require reports before formulating its proposals. The commission might feel the need to establish its credibility, and so might state the reasons for its conclusions. If the commission's proposals are accepted, it produces a *proces verbal*, which is an agreement stating the conciliation and the terms achieved. If the proposals are rejected, the conciliation has failed.⁴⁹

⁴⁹ Merrills, J.G., *International Dispute Settlement*, 4th edn, New York, Cambridge University Press, 2005; Ch 4, p.76.

Conciliation is a dispute settlement process which contains aspects of mediation and inquiry. It was especially popular in the period between the two world wars. It is relevant to cases where a dispute has been put forward to an individual or a commission who is required to impartially establish the facts and make settlement proposals. The settlement is not binding, unlike an award or judgment.

Since 1945, the general use of conciliation has decreased significantly. According to Shaw, conciliation began from treaties which enabled permanent commissions of enquiry.⁵⁰ Switzerland has been the prime user of this method. States can make an agreement to set up an *ad hoc* commission. Some treaties contain conciliation, which is often used to settle trade disputes. For example, *the Succession of States in Respect of Treaties* (1978),⁵¹ or the *UN Convention on the Law of the Sea* (1982).⁵² The latter is often used in trade disputes. *The France-Switzerland Treaty of 1925* applied the idea of Commissions of Reconciliation, from which we can trace the

⁵⁰ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003; Ch 18, p.926.

⁵¹ *Vienna Convention on Succession of States in respect of Treaties* (1978), http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf

⁵² *UN Convention on the Law of the Sea* (1982), http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm

idea of conciliation in international dispute resolution.⁵³ From there, conciliation through treaties reached a maximum influence by the second world war. In 1940, there were 200 treaties.⁵⁴

The *VCLT 1969* establishes the circumstances under which treaty obligations can be settled by recourse to conciliation. The annex to the Convention enables the UN Secretary General to refer to a list of suitable lawyers who can act as conciliators. Any such commission has twelve months to report its conclusions. Also, from Art 33 of the UN Charter, commissions can have an important role in conciliation.

In 1990, the UN Sixth Committee began work on Draft Rules for the Conciliation of Disputes between States.⁵⁵ This work was completed in 1995, containing revisions to the Model Rules, which were then approved by the General Assembly. Now, there are 29 articles on the entire process of conciliation, but they still are not binding on the parties.

⁵³ *Pact of Locarno* (1925), [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/A2BDB2541806916CC1256F33002DD5F8/\\$file/locarno_eng.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/A2BDB2541806916CC1256F33002DD5F8/$file/locarno_eng.pdf)

⁵⁴ Merrills, J.G., *International Dispute Settlement*, 4th edn, New York, Cambridge University Press, 2005; Ch 4, p.70.

⁵⁵ Merrills, *Ibid.*, Ch 4, p.82.

The importance of these rules depends on how frequently conciliation is used. Overall, conciliation has not proved to be a very widely used method. One reason is that the treaties in which it has been used contain restrictions that have prevented more widespread use. The fact that conciliation is a time-consuming formal procedure would tend to discourage its use in smaller disputes. From a practical viewpoint, disputes are usually resolved along lines preferred by powerful states. Therefore, since a conciliation commission has no political authority, many states might prefer to avoid this method. This argument can be generalized to larger disputes also.

Historically, conciliation has been most appropriate where the principal issues are legal, and the parties prefer a fair compromise. Perhaps one would expect conciliation to succeed where the dispute has continued for some time. It would seem that the process is likely to succeed where the parties hope and expect a resolution, but prefer an external body with some authority to suggest the terms. Because there is not so much time pressure, the parties may feel that the right solution will be reached.

The UN General Assembly can appoint commissions for reconciliation. Such commissions are usually used for bilateral or multilateral treaties.

Additionally, states can opt to use an individual conciliator. There is an example in the case of Kenya, Uganda, and Tanzania in 1977, when these countries requested the services of a Swiss diplomat, Dr. Victor Umbricht.⁵⁶ Under World Bank guidance, he was asked to produce proposals as to the intended distribution of assets belonging to the former East African Community.

Unlike in the bilateral treaties, for multilateral treaties conciliation has remained popular. *The Pact of Bogota* (1948) allows for conciliation.⁵⁷ Also, the *European Convention for the Peaceful Settlement of Disputes* (1957)⁵⁸ enables conciliation in a way based on the *Franco-Swiss treaty* (1925).⁵⁹ Conciliation developed from inquiry, and includes this method and mediation in its process. It is a flexible procedure in that it can be used in a range of circumstances.

⁵⁶ Merrills, *Ibid.*, p.71.

⁵⁷ *American Treaty on Pacific Settlement (Pact of Bogotá)*, 1948),
<http://www.unhcr.org/refworld/publisher,OAS,,,3de4a7024,0.html>

⁵⁸ *European Convention for the Peaceful Settlement of Disputes* (1957),
<http://untreaty.un.org/cod/avl/ha/mdpsid/mdpsid.html>

⁵⁹ *Pact of Locarno* (1925),

[http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/A2BDB2541806916CC1256F33002DD5F8/\\$file/locarno_eng.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/A2BDB2541806916CC1256F33002DD5F8/$file/locarno_eng.pdf)

In general, conciliation is well suited to disputes where the framework of rules and regulations is preferred by the parties. Therefore, it is appropriate to the intended terms of future interactions of the parties. A weak party can achieve a better settlement with the use of an official commission, than on its own. Therefore, if one party is economically or politically weak compared to the other parties, it may be more comfortable with conciliation. Conciliation is better suited to situations where there is no immediate threat to regional security, and is therefore appropriate for, e.g., regional trading arrangements.

The decline in the use of conciliation over the years for trade disputes most likely goes hand in hand with the increasing influence of the *GATT* and then the WTO. Recently, there have been more formal attempts to revive conciliation, e.g. by the UN and via the Conference on Security and Cooperation in Europe (CSCE).

2.6 Arbitration

According to Collier and Lowe, ‘arbitration is the name given to the determination of a difference between States (or between a State and a non-State entity) through a legal decision of one or more arbitrators and an umpire, or of a tribunal other than the ICJ or other permanent tribunal.’⁶⁰

In this process, the disputing parties are required to set up the terms of the dispute themselves. This requires the use of a tribunal, a procedure which is almost 200 years old. About 100 years ago, the nature of arbitration changed. The input of jurists in terms of international law came to be relied on in arbitral decisions. Sometimes, a well-qualified single arbitrator can be appointed, usually a jurist. In 1986, however, the Secretary General of the UN was asked by France and New Zealand to arbitrate in the *Rainbow Warrior case*.⁶¹ In this case, an unreasoned ruling was used to settle the case.

⁶⁰ Collier, J. and Lowe, V., *The Settlement of Disputes in International law*, Oxford, Oxford University Press, 1999; Ch 2, p.31.

⁶¹ *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, 30/04/90, Reports of International Arbitral Awards, Vol. XX pp.215-284, United Nations, http://untreaty.un.org/cod/riaa/cases/vol_XX/215-284.pdf

There are different ways of constructing arbitration tribunals. In a collegiate structure, the arbitrators can appoint the chairman, as can the parties.

A head of state can be put forward as a single arbitrator. He can then delegate his power to nominated relevant international experts. According to the procedure used by the Permanent Court of Arbitration (PCA), each party chooses two arbitrators from a panel, of which only one can be a national of the party's own state. These arbitrators subsequently select an umpire. If they cannot agree, a third party will choose. The third party is previously agreed between the parties. In modern treaties, the tribunal frequently used is an odd-numbered group of people (three or five), empowered to decide by a majority vote. The *Heathrow Airport case* between the US and the UK (1992-3) is one example of a dispute where a three member tribunal was employed.⁶²

By negotiation, the parties appoint the constituents of a collegiate tribunal. Each party appoints at least one national arbitrator, and they decide the neutral members by consent.

⁶² *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges (United States-United Kingdom)*, 01/11/93, Decision N0.23 of the Tribunal (Supplementary Decisions and Clarifications), Vol.XXIV, pp.335-355, http://untreaty.un.org/cod/riaa/cases/vol_XXIV/335-355.pdf

In many cases, the identity of the arbitrators is decided after producing the arbitration agreement, which contains the procedure for setting up the tribunal. Because they can act as swing voters, the neutral arbitrators can be very important. Due to the scope for disagreement about them, arbitration treaties can permit the President of the ICJ or other impartial body to appoint them. In the event of disagreement, the *European Convention for the Peaceful Settlement of Disputes* (Art 21) contains guidelines.⁶³

The parties decide what issues the arbitrators will address, and how the arbitration will proceed. The detailed procedures address issues such as where the arbitration is to be held, and how it is to be paid for. Others areas covered include the structure of the written pleadings, the oral stage, and the time limits.

The *compromis* is a special agreement, which can be part of a treaty.⁶⁴ It contains reference to the parties' agreement to refer a dispute to arbitration, where the issues in question already exist.

⁶³ Merrills, J.G., *International Dispute Settlement*, 4th edn, New York, Cambridge University Press, 2005; Ch 5, p.98.

⁶⁴ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003; p.955.

There is an understanding that international law will form the basis of arbitration, although the parties can agree to specific principles to be incorporated by the tribunal. These will be stated in the *compromis*, and the proceedings must then use these rules. The *compromis* covers, for example, how evidence will be obtained, will experts be appointed, will there be visits, what languages will be employed, and what will be the nature of the decision, including whether it will be published. Usually, arbitration is conducted in private.

The International Law Commission (ILC) produced optional Model Rules on Arbitral Procedure, which the UN General Assembly adopted in 1958.⁶⁵ The Rules cover the dispute and the intended framework of the arbitration, the *compromis*, the composition and power of the tribunal, and general procedures, including whether differing opinions are permitted. The arbitral award represents a binding settlement on the parties. More specifically, if the tribunal has not taken shape by three months after the initial arbitration request, or decision on arbitrability, the President of the ICJ will, on request from either party, appoint the remaining arbitrators. If the President is

⁶⁵ Collier, J. and Lowe, V., *The Settlement of Disputes in International law*, Oxford, Oxford University Press, 1999; Ch 2, p.34.

unable to act, for example because his nationality is the same as one of the parties, the Vice-President will confirm the appointments. The procedural rules can be taken from an existing procedure. For example, in the *Heathrow Airport arbitration* the parties decided to adapt rules from the International Centre for the Settlement of Investment Disputes (ICSID). One party can require the other to produce detailed information, as the US asked of the UK in the pre-hearing period of the remedial phase in the *Heathrow case*.

The advantage of the parties agreeing to the scope of the arbitration is that there is much less chance that a subsequent disagreement will arise. Once parties have accepted an award, it is implicitly accepted as valid in procedure, and therefore binding. No subsequent challenge can occur by the parties. There is an exception to this. If a fact later comes to light which is such as to have conclusively influenced the award, a party can request a reopening of the award.⁶⁶ Also in general, it is important to bear in mind that the agreement of any affected third party is an essential part of a successful arbitration. It is important for the tribunal to clearly understand its remit, so that the scope of the dispute remains clear to all. In the last 60

⁶⁶ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003; Ch.19, p.955.

years or so, arbitration has developed especially where one party is a State, and the other party is a non-State, e.g. a company. One such dispute was *Saudi Arabia v Aramco*.⁶⁷

It can be concluded that in international dispute resolution, arbitration represents a formal procedure, along agreed lines, to award damages against the offending party, as decided by an arbitration panel. It also allows one party to be a state, and the other to be a non-State. Because of this, it has enabled commercial disputes to be resolved, for example where one party is a company. For many years now, arbitration has been a more transparent process, where international lawyers have been the arbitrators. The parties can however request the proceedings to remain private. One advantage of arbitration is that since the parties have subscribed to the terms of any arbitrable dispute (e.g. via treaty), the scope for ill-feeling based on an award is less likely.

⁶⁷ *Saudi Arabia v Aramco*, 1958, *International Law Review*, Issue 117.

2.7 The relative merits of each method of dispute settlement, and their future potential

2.7.1 Negotiation

Firstly, we consider negotiation. From the viewpoint of the ICJ, it is always preferable to settle a dispute by negotiation in the first instance. However, if there already exists a dispute where there is a significantly different legal stance between two parties, the Court considers that it can adjudicate even in the absence of negotiation. Also, international law is not such that adjudication can commence once negotiation has ceased. In other words, both can exist at the same time, with the hope that negotiation or other methods will resolve the dispute before adjudication does.

2.7.2. Mediation; good offices; inquiry and fact finding

On the third party role in mediation, we have previously noted that a mediator can facilitate better negotiation. In general, a mediator can be assisted by the risks of a dispute getting out of hand, e.g. leading to preparations for war. This is especially the case where the parties seem to be lacking an obvious peaceful way forward. To make sure a mediated settlement proceeds as planned, a third party can increase its involvement to see it through, possibly using other established dispute settlement procedures. For example in 1975, in the Iran vs Iraq dispute, Algeria

mediated the negotiation of the peace treaty, but also ensured its representative was present when the agreed mixed commissions were instituted, and even during their actual discussions. With the commissions, we see an aspect of inquiry and fact finding as part of the settlement process. It is important to recall the other aspect of mediation, namely good offices. Here, as we have seen, people in high office, for example, the UN Secretary General or the Pope, have been able to use personal representatives successfully because their office lent great credibility to the mediation in the parties' eyes.

It is possible to make some specific proposals in connection with mediation and good offices. In the context of bilateral trade relations, for example between Arab states, as more states lean towards WTO membership, a specific dispute may arise. In such instances, the Secretary General of the Arab League could lend his good offices to act as mediator in such a trade dispute.

Let us now make some observations about the nature of inquiry and fact finding. As time goes on, with the increased globalisation of many forms of traffic and transactions, the scope for mistakes being made increases.

Therefore, in line with the growth of international organisations, e.g. ICAO, there should be more established procedures to establish blame and decide reparation (including compensation) where one state or non-state party is aggrieved.

2.7.3 Conciliation; mediation; arbitration

The next process we revisit is conciliation, whereby a commission issues a report containing some proposals, as opposed to a decision. In this context, let us note the example of the 1986 boundary dispute between Egypt and Israel in the Taba area.⁶⁸ Here, the attempt was for an *ad hoc* commission to settle the issue. In the event, the conciliation could not succeed. The final agreement was actually an arbitration, but contained details about the intended conciliation whilst the arbitration proceeded. Thus, conciliation and arbitration were envisaged as the ways forward, but only the arbitration could succeed.

From the *1975 Convention on the Representation of States in Their*

⁶⁸ *Case concerning the location of boundary markers in Taba between Egypt and Israel*, Reports of International Arbitral Awards, 29/09/88, Vol.XX, pp.1-118, http://untreaty.un.org/cod/riaa/cases/vol_XX/1-118.pdf

Relations with International Organisations of a Universal Character,⁶⁹ and the *1978 Vienna Convention on Succession of States in respect of Treaties*,⁷⁰ the use of a conciliation commission cannot be negated at the outset. Incidentally, the *1975 Convention* also refers to the fact that the relevant international organisation can ask for an advisory opinion from the ICJ.

In recent times, conciliation has become popular again, perhaps due to its flexibility. For example, an impartial state can facilitate the terms of a conciliation between warring factions within another country in that region. This can be seen in Saudi Arabia's role as conciliator in the ending of Lebanon's civil war in 1990. Here, King Fahd of Saudi Arabia set up a commission in Taif, to oversee the Taif Accord. Partly due to the establishment of this commission, it was possible to successfully end the civil war in Lebanon.

In recent times, we have seen the possibility of conciliation used in

⁶⁹ *Vienna Convention on the Representation of States in Their Relations with International Organisations of a Universal Character* (1975),

http://untreaty.un.org/ilc/texts/instruments/english/conventions/5_1_1975.pdf

⁷⁰ *Vienna Convention on Succession of States in respect of Treaties* (1978),

http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf

association with mediation, for example in the field of international military strategy with the creation of a Dispute Settlement Mechanism for the CSCE. The CSCE has been superseded by the Organisation for Security and Cooperation in Europe (OSCE). There is further evidence to show that in the modern world, conciliation is most effective when used in conjunction with another dispute settlement process. For example, from a 1992 meeting, the *Stockholm Convention on Conciliation and Arbitration*⁷¹ includes the possibility of a panel of conciliators and arbitrators, nominated by the states parties.⁷² This would be called the Court of Conciliation and Arbitration, and be based in Geneva. It would define its own rules, and could be a source of conciliation for disputes referred by consensus or by a single party. A commission would be appointed on a case by case basis, with each party contributing its choice of one member, in a total number of probably three. If the commission's findings are not acceptable to the parties, then its report goes to the OSCE Council.

2.7.4 Arbitration

The next process to consider is arbitration. It should be stated that this is not

⁷¹ *Convention on conciliation and arbitration within the Conference on Security and Co-operation in Europe* (with financial protocol of 28 April 1993), 15/12/1992, http://untreaty.un.org/unts/120001_144071/10/4/00007971.pdf

⁷² Merrills, J.G., *International Dispute Settlement*, 4th edn, New York, Cambridge University Press, 2005; Ch 4, p.83.

an absolute procedure, and can reflect aspects of conciliation in some cases. For example, consider the case of the sinking of the *Rainbow Warrior* ship, between France and New Zealand. The parties had not stated how they wanted the matter to proceed. The UN Secretary General became involved. He suggested his own method, different to the parties' opposing views, on the imprisonment of the French agents, as well as a pragmatic approach to compensation and other matters. No real reference was made to the parties' rights in international law.

Such practicalities as imprisonment procedures could not have been handled exclusively by an arbitration with its emphasis on the parties' rights. In general, we find that conciliation and arbitration constitute a significant element of many bilateral and multilateral treaties, and therefore could be said to form the backbone of many matters in international relations. Additionally, it should be pointed out that if there is shown to be serious procedural error in an arbitration, the ICJ has the power to annul the award.

2.7.5 Comparative discussion

If we now consider the entire range of dispute settlement procedures

available, it is useful to refer to Art 33 of the UN Charter. The procedures available to the parties range across ‘negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.’ As noted by Collier and Lowe, the processes become increasingly more formal in the list order from diplomatic to judicial settlement means.⁷³ Also, the extent of third party involvement increases, as does the openly stated importance of international law.

2.7.6 Future potentials

It is now proposed to discuss the likely future potential of the various settlement processes we have already discussed. In negotiation, presently any dispute between two states can have a tendency to go unresolved for many years (although Art 66 of the UN Charter prescribes other methods after twelve months). Different types of mediation usually will occur, whether by a powerful third state or possibly the UN. Perhaps a better implementation procedure is to establish more regional treaties, which state certain timeframes within which a given dispute should have been

⁷³ Collier, J. and Lowe, V., *The Settlement of Disputes in International law*, Oxford, Oxford University Press, 1999; Ch 1 Introduction, p.7.

satisfactorily resolved. Then, if this is not the case, it would be sensible to advocate the setting up of a regional conciliation commission within the treaties, which is set up such that it has the power to require compulsory arbitration if the parties have not resolved their differences.

Arbitration, as we discussed, is a legal method of settling a dispute, which the parties subscribe to. It does not represent a judicial settlement by a permanent court. It would be useful where the eventual terms of settlement are not clear to the parties. Because it is a lengthy procedure, it is usually slow. To make it more efficient and transparent (without undermining the confidentiality of the final decision), an inquiry commission could be employed to accelerate the proceedings. This should also improve the way in which any affected third party claims are assessed.

CHAPTER 3: AN EXPLANATION OF THE DISPUTE SETTLEMENT PROCEDURES IN THE WTO AND THE ICJ

3.1 Introduction

In this chapter, the main purpose is to make a general comparison between the WTO and the ICJ. The predecessor to the WTO was the *GATT*, which began in 1944. The WTO replaced the *GATT* on 1 January 1995. By contrast, the ICJ is the permanent court instituted by the UN, and dates from the 1940s. Its charter includes a large number of laws from that of its predecessor, the Permanent Court of International Justice (PCIJ). Here, the intention is to analyse each institution under the two areas of rules and procedures and implementation and processes, and to finish with an overall conclusion. Section 3.2 reviews the rules and procedures in the WTO, followed by those in the ICJ in Section 3.3. Section 3.4 covers the implementation and processes in the WTO, including discussion of the RPT. The *Canada-Pharmaceutical Patents* case is used to illustrate, including how the AB works.⁷⁴ Section 3.5 covers implementation and processes in the ICJ, and Section 3.6 concludes the chapter.

⁷⁴ *Canada-Pharmaceutical Patents*, Panel Report 07/04/00, WT/DS114/R.

3.2 The rules and procedures within the WTO

The WTO derives many of its processes from the *GATT* rules. In general, there was a historic presumption that diplomatic consultation would provide the main method to deal with disputes.⁷⁵ As the *GATT* practice developed, it became more common to use a rules and judicial approach to dispute resolution. The result of giving more emphasis to dispute resolution within *GATT* led to the addition of several procedures being added to various Codes in the Tokyo Round of trade negotiations.⁷⁶ The legal document that represents the WTO's approach to dispute settlement is the *Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes*, usually referred to as the *DSU*.⁷⁷

The procedures are handled by the following bodies. The Dispute Settlement Body (DSB), according to which panels are formed, and which accepts panel and AB Reports.

⁷⁵ Art XXII, *General Agreement on Tariffs and Trade* (1994), http://www.wto.org/english/docs_e/legal_e/legal_e.htm

⁷⁶ Matsushita, M., Schoenbaum, T.J., and Mavroidis, P.C., *The World Trade Organisation: Law, Practice, and Policy*, 2nd edn, New York, Oxford University Press, 2006, Ch 4, p.107.

⁷⁷ *Understanding on Rules and Procedures governing the settlement of disputes* (1994), http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

According to Leitner and Lester,⁷⁸ appellate review represents one of the most significant aspects of the *DSU*, and was used a lot in the WTO's first 8 years. Statistically, 72% of panel reports had been appealed. Art 16.4 demands that a panel report is adopted or appealed within 60 days of circulation. Practically, this time period has varied between 3 and 90 days. Art 7.1 of the *DSU* mandates the use of panels.⁷⁹ The DSB is charged with the task of implementing rulings. It also imposes sanctions on parties that do not follow dispute settlement rulings. In practice, the General Council of the WTO fulfills the role of the DSB. However, to increase its autonomy, the DSB has a separate chairman, and its procedures are separate to the procedures of the General Council.

Part of the *DSU* is the creation of an AB, whose task is to inspect panel decisions.⁸⁰ The 7 AB members have to have legal and international trade expertise, as well as having no particular governmental sympathy. To reinforce the independence of the panel, the members are appointed as individuals, not as part of any WTO state member.

⁷⁸ Laitner K., and Lester S., 'WTO Dispute Settlement 1995-2002: A Statistical Analysis', 2003, *Journal of International Economic Law*, Vol.4 No.1, pp.213-230.

⁷⁹ Pauwelyn J., 'The Jurisdiction of the World Trade Organisation', 2004, *Proceedings of the 98th annual meeting of the American Society of International Law*, pp.135-138.

⁸⁰ *DSU* Art 17.

The AB gives members the opportunity to register disagreement with the application of any *GATT* principles invoked during panel proceedings.⁸¹

The parties are given the chance to test legal issues from *GATT* articles. To this end, three of the members are allocated to hear specific cases. The AB is given the power to change or overturn the legal conclusions reached by a panel report.

In general, the spirit of the *DSU* is that it covers any dispute that arises from the multilateral WTO agreements referred to collectively as ‘the covered agreements’. Additionally, Art 11 describes how (in standards of review) the panel and AB are required to objectively consider the facts of the case. One important goal of the *DSU* is to try to cancel a measure between parties which contradicts a principle used in the covered agreements. Failing that, the next preferred goal is a solution accepted by the parties.⁸² The DSB is tasked with informing the appropriate WTO Councils and Committees about progress in disputes concerning any provisions in the agreements.⁸³

⁸¹ Clendenning E.W. and Clendenning R.J., E. Wayne Clendenning and Associates Inc., ‘Analysis of International Trade Dispute Settlement Mechanisms and Implications for Canada’s Agreement on Internal Trade’, November 1997, Occasional Paper Number 19, p.13.

⁸² *DSU* Art 3.7.

⁸³ *Ibid.* Art 2.2.

Where there is a conflict between WTO agreements and specific additional rules and procedures, the latter have greater importance in the *DSU*. The *DSU* is guided by the customary rules in international law as stated by the *VCLT 1969*.⁸⁴ Significantly, in the context of the status of international law, where there is a conflict between a covered agreement and some other agreement in international law, the *DSU* Panels and the AB must give primacy to the covered agreement. This should be seen as a contradiction to the general trend over the years in the development of the WTO, whereby rules of international law have been given increasing significance.

The first step in the *DSU* is for one member to request consultations with the other member(s). The receiving member(s) is/are required to respond within 10 days, and to begin consultations in good faith within 30 days of receipt. The *DSU* enables parties to opt for good offices, conciliation or mediation, and this choice can be commenced or ended at any time.⁸⁵ Usually, this task would fall to the WTO Director General, with the assistance of a neutral third party.

⁸⁴ *Ibid.* Art 3.2.

⁸⁵ *Ibid.* Art 5.

It should be stated that the request for a panel is not the first stage, indeed 60 days must pass after the consultation request before the complaining party can request a panel (20 days in a matter of urgency). Interestingly, with the agreement of the parties, the diplomatic methods mentioned can continue despite the commencement of a panel procedure.⁸⁶

The WTO members can opt for arbitration, as a binding alternative method.⁸⁷ Then, the parties can state the matters involved and the procedures being adhered to. Following an arbitration award, the enforcement will be via the WTO. The DSB or the WTO can then impose sanctions if necessary.

The *DSU* panel must be initiated at the next DSB meeting, unless the parties explicitly decide not to use a panel.⁸⁸ The usual number of panel members is three, taken from a list held by the Secretariat. In the event that the parties cannot agree on the choice of members within 20 days, the Director General will appoint them. Nobody who is a national or member of a customs union of any of the parties can serve.⁸⁹ Usually, the parties are given 20 days from

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* Art 25.

⁸⁸ *DSU* Art 6.1.

⁸⁹ *Ibid.* Art 8.3.

panel creation to agreement on its terms of reference.⁹⁰ The reason why a panel is used is in order to complement the DSB in dispute resolution.⁹¹ The second panel is the opportunity for parties to present their rebuttals.⁹² Within 6 months, the panel must produce a draft report for the parties. A third party can be asked to submit opinions at the second meeting also.⁹³ After consultation with the parties, an interim report is produced, beyond which a final report is produced for the DSB. The DSB has 60 days to adopt this report, unless the parties oppose it, or the DSB must wait until after a party's appeal. In general, there is an emphasis on the transparency of panel proceedings, e.g. each party's responses are made available to the other parties.⁹⁴

One important point concerning the *DSU* is the perspective on developing countries, where the intention is to achieve equal treatment with developed countries.⁹⁵ The need to enable developing countries to defend their legal rights on a similar footing as other countries, e.g. by legal assistance, has been addressed in Art 27 of the *DSU*, as well as by the Advisory Center on

⁹⁰ *Ibid.* Art 7.1.

⁹¹ *Ibid.* Art 11.

⁹² *Ibid.* Appendix 3, Working Procedures, pt. 7.

⁹³ *Ibid.* Art 10.

⁹⁴ *Ibid.* Appendix 3.

⁹⁵ *Ibid.* Arts 8.10, Art 12.11.

WTO, founded in July 2001.⁹⁶ Separately, the parties' rights to confidentiality are protected by Art 14.1 on panel discussions. Also, panel discussions and documents submitted to it are to be confidential. However, a member has the right to request a party to produce a non-confidential summary of panel submissions to the public.⁹⁷

This discussion has focused on the role of the AB and panel process in the *DSU*, where the rules and procedures require active participation in consultations by the parties. Due to this, the scope for serious non-cooperation is reduced.

3.3 The rules and procedures within the ICJ

In order to be credible the ICJ needs to be sure of its jurisdiction,⁹⁸ as well as that the claim is reasonable in terms of laws and facts.⁹⁹ The mechanisms for dispute settlement within the ICJ are governed by the *ICJ Statute*,¹⁰⁰ and

⁹⁶ Petersmann, E-U., 'WTO Negotiators meet academics: the negotiations on improvements of the WTO Dispute Settlement System', 2003, *Journal of International Economic Law*, Vol.6 No.1, pp.237-250.

⁹⁷ *DSU* Appendix 3: working procedures.

⁹⁸ *Ibid.* Arts 36 and 37.

⁹⁹ *Ibid.* Art 53.

¹⁰⁰ Arts 39 to 64, *Statute of the International Court of Justice* (1945), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

the *Rules of the Court*,¹⁰¹ of which the latter have evolved more recently, partly to deal with shortcomings. At the highest level, according to Art 66 of the UN Charter, if a dispute remains unresolved for 12 months, then other procedures are to be followed.¹⁰² Since the ICJ is an organ of the UN, it is bound to follow these procedures. If the dispute involves Arts 53 or 64 (*jus cogens*), then any party can submit a written application to the ICJ. This is referred to as the voluntary jurisdiction of the Court (as opposed to its compulsory jurisdiction). The alternative, non-ICJ, way forward would be to agree to arbitration. In the ICJ, 15 judges are elected for 9 year terms.

State parties can begin a case by informing the ICJ Registrar. The Registrar will then inform all relevant parties (Art 40, *Statute*). Formally, at the United Nations, the UN Secretary General will inform the UN Members.¹⁰³ In particular, Art 38(1) lays out what law is to be referred to in deciding cases. First, some reference to historic development is made here to set the context for the preceding analysis. The *Rules of the ICJ* were instituted in 1946, but revised in 1972 and 1978.

¹⁰¹ Arts 30 to 72, *Rules of Procedure of the International Court of Justice* (1978, as amended), <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>

¹⁰² *Ibid.* Art 33.

¹⁰³ *United Nations Conference on Trade and Development*, 'Dispute Settlement', 2003, 1.2 International Court of Justice, p.17, http://www.unctad.org/en/docs/edmmisc232add19_en.pdf

Intriguingly, Art 38(2) enables the Court to give a decision *ex aequo at bono* at the parties' request ('according to justice and right'). Although it may seem to give the ICJ wide powers of interpretation, this principle has in practice enabled parties to influence proceedings by requiring the Court to follow a specific directive. Thus, one theme within the ICJ seems to be to prefer the parties to submit to it through participative choice. Additionally, Arts 79 and 80 of the 1978 *Rules* were varied in December 2000. By 2001, the ICJ had also adopted 9 Practice Directions, the intent of which was essentially to restrict the parties to stated pleadings procedures, to accelerate proceedings.¹⁰⁴ Thus, practical pressures had come to the fore.

The first step in the proceedings is an application by the claimant state party to the ICJ's Registrar. This includes a statement of the jurisdiction *presumed* by the party, and is sent to all Court members and the respondent party. As regards written pleadings, these are initially contained in the memorial, where the claimant argues legal points and states facts. The facts are accepted by the ICJ unless challenged by the respondent.¹⁰⁵ This serves to prevent a one-sided statement of events.

¹⁰⁴ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003, Ch 19, p.966.

¹⁰⁵ Collier, J. and Lowe, V., *The Settlement of Disputes in International law*, Oxford, Oxford University Press, 1999; Ch 7, p.176.

The respondent files a counter-memorial, stating merits and covering law and facts. Next, the claimant replies, following which the respondent gives a rejoinder to the reply. The next stage after written pleadings is oral pleadings, and then the consideration and finally the judgment of the Court. In the oral stage, the order of statements is a repeating sequence of claimant followed by respondent. Witnesses are allowed, but in practice oral evidence has been rare.

However in many cases, the respondent might question the Court's jurisdiction, for example. Such an objection can be made up to the deadline for the counter-memorial. In this instance, the ICJ holds a preliminary hearing. If it finds that it does not have jurisdiction, the case ends. Otherwise, the case proceeds. At the end of the hearing, the judges confer privately.¹⁰⁶ One or two of the judges then draft the judgment. This is modified, until all agreeing judges approve. According to Art 58, the judgment is stated in open court. However, judges are permitted to give dissenting judgments (Art 57). In fact, a majority decision of 8 to 7 judges is permitted.

¹⁰⁶ Art 54(3), *Statute of the International Court of Justice* (1945), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

Where there is a tie, the President's vote decides the outcome. Broadly, the *Statute* and *Rules* together invest the ICJ with a range of powers affecting rules and procedures for dispute settlement. In the proceedings, the parties can be required to summon witnesses or experts. Any other evidence regarding facts where the parties disagree can also be demanded. Specifically, Art 30(2) of the ICJ *Statute* enables the appointment of assessors to accompany court sittings, and is designed to make sure that decisions incorporate current scientific knowledge, and to eliminate technical deficiencies. Art 50 of the *Statute* allows the ICJ to commission a special inquiry (expert opinion), e.g. as demonstrated in the *Corfu Channel case*.¹⁰⁷

From Art 41 of the ICJ *Statute*, the ICJ can state provisional interim measures to protect the rights of one of the parties. This usually occurs on the request of the party. Interestingly, Art 66 of the new *Rules* allows a request for interim measures to be made at any time.

¹⁰⁷ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003, Ch 14, p.699.

Also, if new facts come to light, the ICJ can change its previous decision. In this way, the ICJ may be sending a signal to parties to maintain their confidence as the proceedings continue. As a recurrent theme, when granting such measures, the Court should establish its jurisdiction. For example, in the *Nuclear Tests* case, Judge Gros's dissenting opinion held that Art 53 applies to interim measures, so that the ICJ must decide whether it has jurisdiction first.¹⁰⁸ Art 74 of the *Rules* require that, when the Court receives a request for provisional measures, it must set a date for a hearing.¹⁰⁹

In one instance, in March 1999, the applicant requested the indication of measures without a hearing, which was accepted by the Court based on Art 75 of the *Rules*.¹¹⁰ In this case, one could argue that the Court was acting somewhat outside the principle of *audiatur et altera pars* (the doctrine that the other side should be heard also). Moreover, the ICJ can instigate broader measures than those applied for, or even reject the application. This is done via an order, which is binding. In the reasoning of Goldworthy, the purpose of interim measures of protection is to enable the ICJ to function by

¹⁰⁸ *Nuclear Tests (New Zealand v. France)*, 20/12/1974, I.C.J. Reports General list no.58.

¹⁰⁹ Rosenne S., 'Controlling interlocutory aspects of proceedings in the International Court of Justice'. 2000, *The American Journal of International Law*, Vol.94, No.2, pp.307-317.

¹¹⁰ *LaGrand (F.R.G. v. United States)*, 27/06/01, ICJ Report 466.

enabling the proceedings to continue, and moreover to prevent a final judgment from being frustrated due to any irreversible change in the parties' positions.¹¹¹

Art 79 of the *Rules* concerns preliminary objections: e.g. in a case before an international court, an objection that, if upheld, would make further proceedings impossible or unnecessary. An example is an objection to a court's jurisdiction. Presently, these need to be decided on before the Court can consider the merits of the dispute. A preliminary objection can prevent any discussion of merits, as may be warranted. This separation of the long established procedure of having a joint objections and merits stage was first brought about in 1972. One objection could be, for example, that the contentious issues are outside the domain of international law, so the parties perhaps should not waste the Court's time. Also, a third party may have the right to intervene in a case.¹¹² The ICJ must decide this on the party's request, but acceptance does not therefore make this state party a party to the dispute. If all parties agree, this may then become the case. The character of the dispute settlement may then evolve differently, or one could

¹¹¹ P.J. Goldworthy, 'International measures of protection in the International Court of Justice', 1974, *The American Journal of International Law*, Vol.68, pp.258-277.

¹¹² Art 62, *Statute of the International Court of Justice* (1945), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

argue, more correctly.

Usually, the full Court hears cases. Exceptionally, Arts 26 to 29 of the ICJ *Statute* permit the use of a chamber with fewer judges for certain types of cases, for efficiency, or for a specific case. Part of the 1972 revision to the *Rules* was a desired increase in *ad hoc* chambers.¹¹³ Two types of cases were newly catered for: firstly, special categories; and secondly, for particular disputes. On the one hand, as few as 3 or 5 judges can now hear a case. The *ad hoc* system enables any party to a difficult case to nominate their own chosen judge, normally of their own country, if there is no judge of that country on the bench.¹¹⁴ This has the effect of making the party feel more involved in stating and arguing the direction of the case. Notably, *ad hoc* judges have a fully participative status, on an equal footing with the permanent members. A maximum of 17 judges can take part.

The first case to use *ad hoc* chambers was *Gulf of Maine* (1981).¹¹⁵

¹¹³ *Ibid.* Art 31.

¹¹⁴ Schwebel, S.M., 'National Judges *Ad Hoc* of the International Court of Justice', 1999, *International and Comparative Law Quarterly*, Vol. 48, No.4, pp.889-900.

¹¹⁵ *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States of America), Judgment, 12/10/1984, I.C.J. Report 246.

The amended Rules require consultation with the parties on a chamber's composition, but the decision lies with the ICJ in secret ballot. States can appoint judges to a chamber; this has been a practical effect of the amended procedure. To the credit of this innovation, judges of a wide range of technical expertise have thus been employed. One interesting result of the use of such chambers has been the successful settlement of disputes, which had been less the case for decisions of the full ICJ.

3.4 The implementation and processes within the WTO

Significantly, there is a new appellate procedure that replaces part of the council approval processes in a panel report. Now, a WTO member is given an RPT in which to implement recommendations and rulings.¹¹⁶ If the parties cannot agree on implementation and processes within 45 days of adoption of the panel report, the original complaining party can refer to arbitration.¹¹⁷ In practice, members of the AB act as arbitrators, in a personal role. Also, it is no longer possible to block a dispute settlement panel report.

¹¹⁶ Art 21.3, *DSU*.

¹¹⁷ *Ibid.*

Now, a consensus is required to block a dispute, but not to approve one. The panel process has less power, whereas the AB is supposed to achieve more uniformity in its rulings. Moreover, the *DSU* covers the implementation (including compensation) stage, in the case where the losing party does not completely apply the requirements of the dispute recommendations. Here, the parties negotiate compensation, whilst the full implementation will be pending (Art 22.2). This is useful in that it keeps the process dynamic, as opposed to grinding to a halt.

Also newly in the *DSU*, is the separation of procedures for complaints concerning violation from those concerning non-violation. In the latter case, a country is required to negotiate and compensate to offset benefits not received. This serves to increase the fairness through participation in the process. Art 19 of the *DSU* states that a panel or the AB will recommend that a member brings a relevant measure in line with the *DSU* agreement.

It can be seen that the use of the AB, which examines and frequently corrects the reasoning of a panel, serves to increase respect for the authority in the *DSU*. Generally, there is now a presumption for a party to perform its obligations. For example, Art 22 concerns compensation and the suspension

of concessions, but clarifies that neither of these is to be preferred to full implementation. Again, this reinforces the above observation that the processes are dynamic. From AB reports, it appears that principles of international law generally apply to the WTO (and *Agreements*).

3.4.1 The reasonable period of time (RPT)

One key part of the implementation required of a WTO member is the RPT in which to comply with DSB rulings, if it cannot immediately for reasons acceptable as valid. The RPT is characterized as follows:-¹¹⁸

Either

- (i) A period agreed by the Member, provided the DSB approves; or if there is not DSB approval, then
- (ii) A period agreed by both parties, within 45 days of the adoption of the panel report, or if there is no such agreement, then
- (iii) A period arrived at by arbitration, within 90 days of report adoption.

¹¹⁸ Palmetier D. and Mavroidis P.C., *Dispute settlement in the World Trade Organisation*, Cambridge, Cambridge University Press, 2nd edn, 2004, Ch 7, p.236.

These three possibilities again make for a more fluid process than otherwise. If (i) is not accepted by the member who prevailed, then that member can prevent the consensus needed for DSB approval. A similar condition applies to (ii). It can be seen that as one goes through these options, the control of the process gradually shifts from the ‘winning’ member, to the parties, and then away from the parties. This is good in that the lesser the chance that the parties will agree, the greater the need for DSU supervision. One advantage of option (ii) is that the parties can organise the structure of the RPT between them. For example, this enabled the parties in *India – Quantitative Restrictions* to agree implementation in stages over one year.¹¹⁹

In option (ii) Art 21.3.(c) above, the parties have 45 days to reach agreement, before opting for arbitration. But if the 45 days are entirely unsuccessful, that leaves only 45 days for the entire arbitration process. As a short period, this is a weakness in the process. More generally, there have been times when 90 days have expired, and only then have the parties requested arbitration.

¹¹⁹ *Agreement under Art 21.3(b) of the DSU, India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, 17/01/00, WT/DS90/15.

Another weakness in the process appears therefore to be a lack of enforcement of timeframes. One good aspect of Art 21.3 arbitrations is the autonomy allowed to the parties to organise times and rules by agreement.

Option (iii) is now discussed. The *DSU* has stated that arbitration should last no more than 90 days, but this may be criticized as too short, and parties frequently agree to formally disregard it. As for the time permitted for implementation for an arbitration report, the *DSU* states a guideline for the arbitrator that this period should be usually within 15 months from the report adoption date.¹²⁰ This represents a weakness in that no procedural guidelines are offered as to how to depart from the usual. As an example, the Arbitrator stated in *EC - Hormones* that the correct interpretation of Art 21.3(c) is that the period should be the shortest period possible within the legal system of the Member concerned.¹²¹ A lack of clarity has meant that arbitrators have not shown consistency in what is a RPT for adoption of the report. Additionally, the party which is trying to demonstrate that particular circumstances justify a shorter or longer time has the burden of proof under Art 21.3(c). This refers to a party's duty to prove a disputed assertion or

¹²⁰ Art 21.3.(c), *DSU*.

¹²¹ *EC – Measures concerning meat and meat products (hormones), original complaint by the United States, recourse to arbitration by the European Communities under Article 22.6 of the DSU, 12/07/99, WT/DS26/ARB.*

charge. Shifting the burden of proof means transference of the duty to prove a fact from one party to the other; e.g. as the case progresses, when one side has made a prima facie showing on a point of evidence, requiring the other side to rebut it by contradictory evidence.

The Art 21.3(c) position seems logically correct. Related to this point, an arbitrator can induce a party into quicker compliance by observing its speed of implementation post-report, and taking this into account in the calculation of RPT. Thus, this is a strength in that it can produce faster compliance.

Certain key factors may determine the time permitted for implementation. These have been stated by Art 21.3(c) arbitrators as: complexity; whether legislation is needed, or will other administrative changes suffice; the degree of domestic opposition; and how relevant are any issues affecting members from developing countries (from Art 21.2). Complexity is related to legislation, in that complicated issues may necessitate legislation.

According to Van den Bossche, one of two key issues in the area of implementation and enforcement is:-

(i) Arbitration in the area of the RPT for implementation.

In the *DSU*, the arbitration period cannot exceed 90 days from adoption of reports. In terms of procedure, an Art 21.3(c) arbitration award is not adopted by the DSB. Instead, it is circulated to WTO members and posted on the WTO website.¹²²

3.4.1.1 *Canada-Pharmaceutical Patents case*

In the *Canada-Pharmaceutical Patents case*,¹²³ the arbitrator set a new precedent, according to which the longer the proposed implementation period, the greater the burden of proof on why that should be the case.¹²⁴ As mentioned by Matsushita, Schoenbaum and Mavroidis, the particular type of attendant circumstances can play a role in what is acceptable as the RPT.¹²⁵

¹²² Van den Bossche, P., *The Law and Policy of the World Trade Organisation*, Cambridge, Cambridge University Press, 2005, Ch 3, p.278.

¹²³ *Canada-Pharmaceutical Patents*, Panel Report 07/04/00, WT/DS114/R.

¹²⁴ *Canada-Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3.(c) of the DSU*, 18/08/00, WT/DS114/13.

¹²⁵ Matsushita, M., Schoenbaum, T.J., and Mavroidis, P.C., *The World Trade Organisation: Law, Practice, and Policy*, New York, Oxford University Press, 2nd edn, 2006, p.158.

One relevant issue is whether implementation should occur through administrative or legislative change, with the former usually being faster. For this case, the general area of WTO agreements is in patents. Here, WTO members are required to have patent protection for all inventions, in all technological fields.¹²⁶ One objective of the *TRIPS Agreement*¹²⁷ is to prevent differing treatment of patent protection according to which industry is affected, by focusing on international intellectual property obligations.¹²⁸ The duration of patent protection is to be at least 20 years from the application filing date.¹²⁹ Within this, certain limited exceptions are specifically relevant in this case.¹³⁰ There are three compulsory requirements to be met for Art 30. Firstly, the exception must be ‘limited’; secondly, it must not ‘unreasonably conflict with normal exploitation of the patent; and thirdly, it should not ‘unreasonably prejudice the legitimate expectations of the patent owner’. In this case, the WTO panel found that allowing stockpiling of pharmaceuticals in expectation of the expiry of the patent term was not limited since it was a ‘substantial curtailment’ of the

¹²⁶ Art 27, *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)*, Annex 1C, *Marrakesh Agreement Establishing the World Trade Organization*, 15/04/1994, http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm

¹²⁷ *Ibid.* vol. 31, 15/04/1994, 33 I.L.M. 81.

¹²⁸ Dinwoodie G.B. and Dreyfuss R., ‘Diversifying without discriminating: complying with the mandates of the *TRIPS Agreement*’, 2007, *Michigan Telecommunications and Technology Law Review* Vol. 13, pp.445-456.

¹²⁹ Art 27.1, *TRIPS Agreement*.

¹³⁰ *Ibid.* Art 30.

patent holders' rights.

In terms of *TRIPS*, the panel (considering Art 27) required exceptions to Canadian patent protection law in order to comply with Art 30 (permissible exceptions from patent protection) and Art 27 (protection against technological discrimination). Ultimately in this case, the matter proceeded to an Art 21.3 (c) arbitration due to the definition of RPT. The European Communities and Canada could not reach agreement, and the arbitrator called upon was James Bacchus. As stated in his summary, Canada believed that it would fulfill its *TRIPS* obligations by revoking the regulations (not laws) that enabled the stockpiling exception. But 'this will be a very sensitive political matter in Canada', requiring a maximum of 11 months for consultations and compliance with regulatory policy. Thus Canada proposed a RPT of 11 months from the panel report adoption date for implementation. The European Communities (EC), however, maintained that to fully implement the DSB, Canada needed to repeal Section 55.2(2) of its Patent Act (i.e. legislative, not regulatory change), which the Panel found to be inconsistent with Art 28(1) of *TRIPS*. Further, the EC considered that the repeal could be performed in a time period rather shorter than the indicative maximum period of 15 months in Art 21.3(C), *DSU*.

In terms of the means of implementation,¹³¹ the arbitrator found that Section 55.2(2) of Canada's *Patent Act* was not consistent with the requirements of Art 28.1, *TRIPS Agreement*.¹³² Consequently, the Panel required Canada to bring this section into conformity with Canada's *TRIPS* obligations. But crucially, the arbitrator was properly concerned under Art 21.3(c) with the timeframe, not the substance of the implementation which led to the arbitration. Were the latter to be the case, Art 21.5 would apply. Thus, the EC request to consider the nature of Canada's proposed implementation was rejected. As for the RPT, this must be judged solely based on Canada's proposal. Significantly, from Art 21.3, a RPT is available only if immediate implementation is impractical, *with the latter expectation being the norm*. Thus, additionally from Arts 3.3, 21.1 and 21.4 of the *DSU*, the RPT is the shortest period possible within the Member's legal system. Finally, as regards Canada's proposed timeframe of 11 months, Canada bore a greater burden of proof in demonstrating why. Since the change proposed was a regulatory one, and a simple one, Canada's timeframe was rejected as too long. Thus, the award was that the RPT was 6 months from the Panel

¹³¹ *Canada-Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(C) of the DSU*, 18/08/00, WT/DS114/13.

¹³² *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Annex 1C, Marrakesh Agreement Establishing the World Trade Organization*, 15/04/1994, http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm

Report adoption date on April 7th 2000, i.e. to end on October 7th 2000.

As a general point, before any changes can be made to the *DSU*, a full consensus is needed (WTO charter). As summarized by Jackson, the overall process can be characterized in 5 steps:-

1. Bilateral consultations between the disputing parties only.
2. Conciliation process, helped by experts, most likely from the secretariat.
3. Panel processes and AB rulings. The panel process is formally separate from the conciliation process.
4. A policy body examines the panel or AB reports, but approval is to be almost automatic.
5. Sanctions, including compensatory measures. Jackson finds that experience shows that this step is a non-essential one, but that the quality of the panel reports as seen by international community members is more significant.¹³³

From van den Bossche's analysis, the second of two key areas in implementation is:-

¹³³ Jackson, J.H., *The World Trading System*, London, MIT Press, 2nd edn, 1997, Ch 4, p.134.

(ii) Monitoring by the DSB.

The DSB monitors the implementation of all the required recommendations and rulings until it is complete. Any member can raise any implementation issue in the DSB at any time.¹³⁴ This gives the process a good degree of accountability. Beginning 6 months after establishing the RPT, implementation then joins the agenda of each DSB meeting until each issue is resolved. In this regard, it is not obvious why 6 months should first pass, and it would have been better if this period were less, whilst the implementation issues would still be fresher in the participants' minds. Not less than 10 days before each such meeting, the Member must furnish to the DSB a status report on implementation progress. This is a good aspect of procedure, since the DSB can then approach the meeting pre-informed about implementation issues that remain.

The third area is:-

(iii) 'Sequencing'.

Since the complainant and respondent may disagree on whether failure to implement has occurred, Art 21.5 of the *DSU* enables the use of a 'compliance panel', which must circulate its report within 90 days of the

¹³⁴ Art 21.6, *DSU*.

matter's referral to it. The 'problem of sequencing' refers to an inconsistency in the *DSU*, whereby there is a contradiction in the timeframes for the Art 21.5 procedure and the timeframe for the authorization for the suspension of concessions and other obligations from the DSB. The practical method adopted here has been that the parties usually agree that the procedure of WTO consistency of implementing measures is ended before an Art 22.6 authorization for retaliation measures is granted. Formally, since a March 2002 European Communities communication, but broadly since 1999, members have agreed that completing the Art 21.5 *DSU* proceeding must occur before using Art 22 *DSU*. Art 22 contains a non-compliance procedure, and covers what happens if the losing party has *neither* implemented the WTO ruling within the RPT *nor* negotiated compensation within 20 days after the end of the RPT. From Art 22.6, the DSB shall when requested, 'grant authorization to suspend concessions or other obligations within 30 days of the expiry of the RPT', unless there is an alternative consensus, or the losing party refers the requested suspension to arbitration. If arbitration proceeds, then the original panel (if possible) is to decide whether the request is 'equivalent to the level of nullification or impairment'¹³⁵ and give its decision within 60 days after

¹³⁵ *DSU*, Art 22.7.

the end of the RPT.¹³⁶ When the arbitrators give their decision, the DSB, when requested, is asked to sanction a suspension of concessions accordingly.¹³⁷

The fourth area concerns:-

(iv) Disagreements on implementation.

Art 21.5 *DSU* enables that if there is a conflict about WTO law then the issue should be resolved according to the dispute settlement procedures established in Arts 4 to 20 of the *DSU*, but especially referring back to the original panel. To avoid the AB overruling the panel as does happen, a monitoring function by the AB would certainly expedite or facilitate a more correct process, in that the latter would act as the panel's watchdog. Alternatively, the DSB could appoint a separate team to oversee and regularly report back on the deliberations of the panel.

Finally, there is:-

¹³⁶ *Ibid.* Art 22.6.

¹³⁷ *Ibid.* Art 22.7.

(v) Arbitration and suspension of concessions, or other obligations.

As we have seen, if the respondent does not implement the DSB rulings within the RPT as agreed by the parties or alternatively, as decided by an arbitrator, the complainant can request that the respondent begins negotiations to agree acceptable compensation.¹³⁸ Perhaps a better approach in terms of monitoring would be to require that steps are taken within the RPT, to avoid further delay after the request for negotiations. Perhaps the RPT could be further subdivided into manageable subperiods. The next step is that if compensation cannot be agreed within 20 days of the expiry of the RPT, the complainant can request from the DSB the suspension of applied concessions, under the WTO covered agreements.¹³⁹ Twenty days certainly seems rather brief, given the much longer periods involved in the other processes. This means that the complainant can ask for authorization to retaliate very quickly, without the compensation negotiation running a reasonable course.

¹³⁸ *DSU*, Art 22.2.

¹³⁹ *Ibid.*

Compensation and retaliation are seen as temporary measures, i.e. less preferred options to full implementation. In practice, this method has however served to accelerate implementation of requirements by members. The DSB has 30 days from the expiry of the RPT to decide on this. If the respondent disagrees with the punitive suspensions proposed, or wishes to dispute whether procedures have been correctly followed, the matter can then proceed to *arbitration* before the DSB decides.¹⁴⁰ One could argue that a more activist approach by the DSB would be more suitable, to save time, costs, and the discussion of potentially less pertinent issues.

Consider the hypothetical scenario that the original panel conducts the arbitration, or that the Director General appoints an arbitrator. Since in practice the AB has frequently overruled the line of argument taken by the panel, perhaps the former should carry it out. Of course, this raises resource allocation issues. The arbitration itself must conclude by 60 days after the end of the RPT. Perhaps 90 days would be more reasonable. One specific issue concerns appeals. In the AB Report in relation to *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen*

¹⁴⁰ *Ibid*, Art 22.6.

from India – Recourse to Article 21.5 of the DSU by India,¹⁴¹ it was held that, when there is an *unappealed* finding in a panel report that is then adopted by the DSB, that then must be taken as a final solution to the dispute in that claim, and the particular component of a measure that is the subject of the claim.¹⁴²

3.4.2 Working procedures of the Appellate Body

The AB now has two methods of resolving issues via new working procedures. These are:-

- (i) If it faces a new type of problem in a certain case, it can tackle it case-by-case by means of Rule 16(1) of its Working Procedures.
- (ii) If the problem is of a familiar type, Art 17.9 *DSU* allows it to effectively change its Working Procedure.

As of 2006, relatively few changes had occurred to AB Review.¹⁴³

¹⁴¹ *EC - Anti-dumping duties on imports of cotton-type bed linens from India (Recourse to Article 21.5 of the DSU by India)*, 23/09/2002, WT/DS141.

¹⁴² Palmetier D. and Mavroidis P.C., *Dispute settlement in the World Trade Organisation*, Cambridge, Cambridge University Press, 2nd edn, 2004, Ch 7, p.253.

¹⁴³ Working procedures for Appellate Review, 04/01/05, WT/AB/WP/5, <http://www.wto.org>

In terms of changes to AB Working Procedures, Art 17.9 *DSU* refers:-

‘working procedures shall be drawn up by the AB in consultation with the chairman of the DSB and the Director-General, and communicated to the Members for their information.’

Specifically, one important area is litigation, particularly matters concerning notices of appeal. Since these did not previously clarify what was in appeal, the AB amended rule 20(2)(d) of the Working Procedures to assist with the required format. Another important area concerns third party rights. Third party rights in the WTO dispute settlement mechanism are limited, particularly at panel stage.¹⁴⁴ In particular, Art 10.2 *DSU* allows a third party the right to be heard by the panel, and make written submissions to it.

Over time, various panels have granted additional rights to third parties. This is not good from a compliance or monitoring viewpoint, since such rights would be better overseen or at least sanctioned by a higher body, e.g. the AB. For example, in the *EC-Sugar* (2004) case,¹⁴⁵ the panel decided on 16th January 2004 to allow all third parties to attend with observer status for

¹⁴⁴ Monnier P., ‘Working Procedures: Recent changes and prospective development’, *Reform and development of the WTO dispute settlement system*, eds. Georgiev D., and van der Borgh, K., London, Cameron May, 2006; p.265.

¹⁴⁵ *EC – Export subsidies on sugar* – complaint by Australia, 15/10/2004, WT/DS265/R.

the whole first meeting, to make a written submission to the panel, and to view the submissions of the parties and other third parties at the meeting, as well as to orally state their views at a special session of the meeting. In general, one must conclude that a third party cannot predict what detailed rights it may be awarded in a case. There could additionally be a credibility problem for the panel in this regard, since the AB may find the particular third party rights inconsistent.

3.4.3 Summary of WTO implementation and processes

In the *DSU* of the WTO, the AB oversees the dispute settlement process, reviewing panel rulings and overruling or changing rationale where it finds necessary. A key characteristic of the process is its fairly dynamic and participative nature, preferring a partial resolution to no implementation whatsoever.

To focus on one aspect of the process, namely timing, the RPT represents the cornerstone. If there is an increasing degree of regulation as the period increases because of a lack of agreement on the implementation timeframe, the process can remain dynamic. Not enough time, however, is given to the arbitration option, and leaving it as a last resort does decrease efficiency due to a lack of monitoring. If a dispute goes to arbitration, under Art

21.3.(c), the burden of proof is with the party requesting a different RPT, so quicker compliance can be achieved in this way.

As seen in the *Canada-Pharmaceutical Patents* case,¹⁴⁶ the circumstances of the case can play a role in what is acceptable as the RPT, including whether implementation implies simpler administrative or more lengthy legislative changes. Another issue arising in relation to timing is that of sequencing, where an inconsistency in the rules has been resolved practically by the parties, who agree that the implementing of measures is done before an Art 22.6 authorization for retaliation measures is sought where required. One other aspect is monitoring. Implementation issues are only discussed, beginning 6 months after establishing the RPT. Had this period been less, efficiency would have been better.

¹⁴⁶ *Canada-Pharmaceutical Patents*, Panel Report 07/04/00, WT/DS114/R.

3.5 The implementation and processes within the ICJ

The exact role of the court has varied depending on the details of the case. For example, in the *Icelandic Fisheries Jurisdiction* cases,¹⁴⁷ the Court found that British and German vessels could fish in areas that Iceland claimed. Thus, the parties were to undertake negotiations in good faith so resolve their dispute concerning fishery rights in the areas. The ICJ also stated the factors which the parties were to take into account in their negotiations.

There is no stated timeframe in which to refer a dispute to the ICJ. A case can be commenced either by a single party's application, or by the parties using a special agreement.¹⁴⁸ Such notification can be made by one, more, or all of them. The Court has in practice noted facts that have been made public, mainly through the media, as long as care was employed and the reports were multisourced.¹⁴⁹ One course of action open to the Court is to require the observance of an existing agreement¹⁵⁰, or for the parties to

¹⁴⁷ *Fisheries Jurisdiction* (UK v Ice., FRG v Ice), Merits, 25/07/74, General list no.56, ICJ Report 3.

¹⁴⁸ Art 40(1), *Statute of the International Court of Justice* (1945), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

¹⁴⁹ *Nicaragua v United States (Merits)*, 27/06/1986, ICJ Report 14.

¹⁵⁰ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, (*Provisional Measures*), 15/03/1996.

comply with a given dispute settlement process.¹⁵¹

The ICJ has on a number of occasions confirmed that its judgment will be limited to upholding such submissions by the parties as can be supported by sufficient proof from pertinent facts. The burden of proof lies with the party wanting to assert some fact(s). In relation to evidence, the court's basis is that the decisions will take into account all facts or events up to the close of the oral proceedings, on the merits of the case. Broadly, the application of implementation can include an order to negotiate. Also, the parties can jointly modify the ICJ's decision.

Once written proceedings have been commenced, the President summons the parties' agents to find out the parties' views on procedural issues.¹⁵² There are 2 rounds when the case application was unilateral; or 3 if joint. According to Judge Higgins, the usual period requested by parties between each round is between six and ten months.¹⁵³

¹⁵¹ *Ibid.* The ICJ asked the parties to give every assistance to the fact finding mission initiated by the UN Secretary General, for the Bakassi Peninsula.

¹⁵² Art 31, *Rules of Procedure of the International Court of Justice* (1978, as amended), <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>

¹⁵³ Higgins, R. DBE, QC, from 'Comments on the Report of the Study Group on The International Court of Justice: Efficiency of Procedures and Working Methods', *The International Court of Justice, Process Practice and Procedure*, Bowett D.B. et al, London, B.I.I.C.L., 1997, pp.202-204.

In general, if a state party does not have a judge on the bench, it can designate an *ad hoc* judge for the case.¹⁵⁴ Such judges rank on a par with permanent judges.¹⁵⁵ A party that intends to appoint an *ad hoc* judge must inform the court as soon as possible, furnishing nomination details by 2 months before the counter-memorial submission date.¹⁵⁶ The right to file written issues usually ends when the last written pleading has been filed.¹⁵⁷ Therefore, all documents should be annexed and submitted by then. Several weeks then elapse. One of the changes applied after the report of the *Rules Committee* (1997), was the introduction by the ICJ of the practical idea that if the parties would reduce the amount contained in annexes, the court would be more understanding about allowing the late introduction of some documents.

The oral phase can be at an interlocutory stage (in the event of an initial objection to ICJ jurisdiction, or a third state's request to intervene, or an application for interim measures). As a second possibility, it can be at the merits stage, where the case is heard.

¹⁵⁴ Art 31(2), (3); *Statute of the International Court of Justice* (1945), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

¹⁵⁵ *Ibid.* Art 31(6).

¹⁵⁶ *ICJ Rules*, Art 35(1).

¹⁵⁷ *ICJ Rules*, Art 56.

Unusually, it could be after the judgment, where a party requests an interpretation or revision. Overall, there are 2 phases in the oral pleadings: the first-round exchange, then the second round (reply) stage. An interval between phases is required to enable the reply to be prepared; which is in turn normally shorter than the first round. The Rules Committee was asked to investigate how to increase the efficiency of the ICJ. The Court's decisions based on the report were announced by President Schwebel to the UN General Assembly in October 1997. One proposal adopted was to permit phases of different (consecutive) cases in appropriate preliminary and admissibility cases. Thus, when the oral phase of one case ends, the next case enters its oral phase.

Additionally, the court may hear a case in plenary, with a quorum of 9 judges, or in chambers.¹⁵⁸ The purpose of the chamber was to accelerate decisions where difficult international law issues did not arise. The ICJ *Statute* thus enables both permanent and *ad hoc* chambers, which deal with specific cases. Parties can request the ICJ to form an *ad hoc* court at any time before the written stage of proceedings.¹⁵⁹ Although the procedure for

¹⁵⁸ Arts 25, 26; *Statute of the International Court of Justice* (1945), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

¹⁵⁹ *Ibid.* Art 43(5); Art 63(1), *Rules of Procedure of the International Court of Justice* (1978, as amended), <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>

chambers is similar to that of the full court, Art 92 of the *ICJ Rules* contains specific procedures for written and oral chamber pleadings. Once the court has found out the parties' views on how to compose the chamber, it will then elect an *ad hoc* one.¹⁶⁰ Judge Shahabudeen formally criticized Rule 17, paragraph 2.¹⁶¹ His view was that if the parties are permitted a significant input into the choice of chamber members, the *Court Statute* (which should prevail over the *Rules* in the event of a conflict) is violated, and runs counter to the ICJ as a court of justice. Separately, as pointed out by Sands, Mackenzie, and Shany, unlike in the WTO, there is no AB.¹⁶²

A general area to consider is that of remedies. This particular competence of the court derives from Art 36 of the *Statute*, whereby there exists 'the jurisdiction of the Court in all legal disputes concerning...the nature and extent of the reparation to be made for the breach of an international obligation', in compulsory jurisdiction cases (paragraph 2).¹⁶³ But in other areas, for example declaratory judgments, specific performance and

¹⁶⁰ *Ibid.* Art 26(2); *ICJ Rules*, Art 17(2)-(3); 15-8; 90-3.

¹⁶¹ Dissenting Opinion to the 28th February 1990 Order of the Court. In the order in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, the court decided by a majority of 12 to 3 that the Chamber formed for the case was the right one in ruling on Nicaragua's application for permission to intervene under Art 62 of the *Statute*.

¹⁶² Sands P., Mackenzie R., and Shany Y., *Manual on International Courts and Tribunals*, West Sussex, Tottel, 2006; ch 1, p.11.

¹⁶³ Brownlie, I., 'Remedies in the International Court of Justice', *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings*, eds. Lowe V. and Fitzmaurice M., Cambridge, Grotius Publications, Cambridge University Press, 1996, Ch 30, pp.557-566.

injunctive relief, Art 36 states no guidance. A declaratory judgment, for example, is a binding adjudication that establishes the rights and other legal relations of the parties without ordering enforcement. Therefore, the ICJ has used general principles of procedural law. For example, the court has on occasion made a declaration that some specific implementation acts are required. Conversely, a declaratory judgment can have the effect of being preventive of future further wrongdoing. In this regard, the court has decided that where jurisdiction exists in a dispute on a specific issue, there is no need for a separate jurisdictional basis when addressing remedies.¹⁶⁴

Provisional measures are a specific form of remedy. Such a request can be made at any time during proceedings, in writing, and stating what measures are requested, as well as the likely consequences of not granting them.¹⁶⁵ The court can itself also decide whether or not provisional measures are appropriate.¹⁶⁶ Any such request receives priority, and precedence over all other cases.¹⁶⁷

¹⁶⁴ *LaGrand (F.R.G. v. United States)*, 27/06/01, ICJ Report 466.

¹⁶⁵ Art 73, *Rules of Procedure of the International Court of Justice* (1978, as amended), <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>

¹⁶⁶ *Ibid.* Art 75(1).

¹⁶⁷ *Ibid.* Art 74(1), (2).

Provisional measures can be granted, without the court finally deciding whether it has jurisdiction, but there needs to be a basis on which jurisdiction might exist. The point is to safeguard some rights which might exist, but would not be required after the case has been decided. Measures can also be granted where doing so, if circumstances merit, would prevent the dispute from worsening. The parties can initiate oral proceedings, and submit their observations to the court. The actual measures decided can differ from the requested ones, and any decision is open to subsequent review, if a change can be observed.¹⁶⁸ The court may choose to require information on the implementation of the measures.¹⁶⁹

3.5.1 *LaGrand and Avena cases*

From Art 36 of the Vienna Convention on Consular Relations (*VCCR 1963*), consular information, i.e. including the right to contact one's consulate, is an *individual right* of foreign nationals that exists when they are arrested or confined whilst abroad.¹⁷⁰

¹⁶⁸ *Ibid.* Arts 75(2), (3), 76.

¹⁶⁹ *Ibid.* Art 78.

¹⁷⁰ *Vienna Convention on Consular Relations, 1963 (VCCR 1963)*, http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf

According to Hoppe,¹⁷¹ In *LaGrand* and *Avena*, the ICJ ordered review and reconsideration where Art 36 rights had been infringed and the legal process had run its course.¹⁷² In the legal history of the ICJ, the *LaGrand* case¹⁷³ represents the first time that measures were explicitly stated as binding by the court, and that the United States had not complied, but it remained unclear as to whether the binding authority was the UN Charter Art 94(1), or the ICJ *Statute*, Art 41. The ICJ issued a substantial judgment in June 2001.¹⁷⁴ The Court found that the *VCCR 1963* gives rights to individuals,¹⁷⁵ i.e. not only to a country. Additionally, the US violated the *VCCR 1963* by not considering it. The ICJ analyzed the US's actions at Supreme Court, Federal (including the State Department), and state levels (Governor of Arizona).

As discussed by Addo,¹⁷⁶ a distrust in expected conformity might have been partly why the order for provisional measures took no input from parties. Also, this may explain why state discretion in implementation methods may

¹⁷¹ Hoppe C., Implementation of *LaGrand* and *Avena* in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights, *European Journal of International Law* (2007), Vol.18 No. 2.

¹⁷² *Avena and Other Mexican Nationals (Mexico v United States)*, Judgment, 31/03/2004, ICJ Report 12.

¹⁷³ *LaGrand (F.R.G. v. United States)*, 27/06/01, ICJ Report 466.

¹⁷⁴ *Vienna Convention on Consular Relations (F.R.G. v. U.S.)*, 03/03/99, ICJ Report 9.

¹⁷⁵ *VCCR 1963*.

¹⁷⁶ Addo M. K., 'Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations', 1999, *European Journal of International Law*, Vol.10 No.4, pp.713-732.

be restricted in future, for example where issues such as in *LaGrand*, the right to life in international human rights law, even at the preliminary stage, is at stake.

The *LaGrand* case concerns the execution of two German brothers in the US state of Arizona. The case was filed just a few hours before Walter LaGrand was due to be executed. From the facts of the case, in 1982, Arizona State Police arrested Karl and Walter LaGrand, after their attempted armed bank robbery in which they killed an employee and seriously wounded one other. The US authorities had not informed consular authorities about the arrests or imprisonment. In fact, German official knowledge of these issues did not occur until 1992. Germany made attempts to save their lives, but Arizona executed Karl LaGrand on February 24th 1999. Then, on March 2nd 1999, the ICJ issued a ruling *proprio motu* (of its own accord)¹⁷⁷ as a response to a request for provisional measures, for the very first time, whereby the ‘US should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision of the ICJ.’ The ICJ stated urgency as the reason for this action. The USA was, at that time, party to the Vienna Convention’s *Optional Protocol Concerning*

¹⁷⁷ From powers of the ICJ, Art 75(1).

the Compulsory Settlement of Disputes.¹⁷⁸ Art 1 of this states:-

‘disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the ICJ and may accordingly be brought before the court by an application made by any party to the dispute being a Party to the present Protocol.’

Nevertheless, Walter was executed on March 3rd, but Germany remained committed to the case. The ICJ’s judgment of June 27th 2001 stated that the USA had breached its obligations to Germany and the LaGrand brothers under the *Vienna Convention*, since it had not informed the brothers of their rights, and since their convictions and sentences had not been allowed review and reconsideration. On the part of the US, developments in this and other cases led it to formally denounce the *Optional Protocol* on March 7th 2005. The view of the US Supreme Court was that the ICJ, in its Art 36 findings, overlooked aspects of procedural rules in an adversarial court system, which in turn led to the Supreme Court’s rejection of the ICJ’s viewpoint on the *VCCR 1963*.

¹⁷⁸ *Optional Protocol concerning the Compulsory Settlement of Disputes* (1963), entered into force on 19 March 1967, http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963_disputes.pdf

For the future, unless there is a change in how parties perceive provisional measures, they will have limited effectiveness.

From Art 80, *Rules of Court*, a counter-claim can be considered by the Court, only if it falls within the court's jurisdiction, and 'is directly connected with the subject-matter of the other party's claim.'¹⁷⁹ Furthermore, there is the matter of *amicus curiae* briefs. In a contentious proceeding, any intergovernmental organisation can unilaterally file a Memorial with the ICJ Registry, in connection with any case presently before the court.

The ICJ's judgment is read as a public statement and becomes binding on the day of reading.¹⁸⁰ Since the 1976 Resolution on Practice, the following staged procedure has been instituted for elaborating a judgment:-

- (1) A meeting before oral arguments, to exchange views on written pleadings and decide which points require explanations (Art 1).
- (2) After the close of oral arguments, there is to be a period to enable the

¹⁷⁹ This Article was revised in 2000. The other party will have the right to state its views on the counter-claim, as an extra pleading, from Art 45(2), *Court Rules*.

¹⁸⁰ *ICJ Rules*, Art 94(2). Art 58, *Statute of the International Court of Justice* (1945), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

judges to study the oral arguments (Art 2).

- (3) A meeting to discuss the case (Art 3).
- (4) An additional period for each judge to prepare a written note (Art 4).
- (5) The court meets in The Hague, several weeks or months later, to discuss the judgment. Each judge gives his/her opinions, in ascending seniority order.
- (6) Formation of Drafting Committee, consisting of usually the President and 2 elected members, chosen from those who represent the 'majority opinion' (Art 6). They use a very detailed Note, contributed to by every court member.
- (7) A 3-stage process to ready the text of the Court's decision (Art 7).
- (8) The Court moves to a vote on the draft; each judge can demand a separate vote on each point (Art 8).

Where there is a motion for interpretation or revision,¹⁸¹ the decision takes the form of a judgment.¹⁸² ICJ judgments are final and binding on the parties, and not able to be appealed.¹⁸³

¹⁸¹ *ICJ Rules*, Art 98; Art 60, *Statute of the International Court of Justice*.

¹⁸² *ICJ Rules*, Art 100(2).

¹⁸³ Art 60, *Statute of the International Court of Justice*.

Let us conclude this section. The implementation means at the disposal of the ICJ potentially allow quite a lot of flexibility in the processes available to affect outcomes in cases. This could be by encouraging negotiations, making an opinionated statement, or requiring compliance with a previous order. There are written rounds followed by oral phases. In specific cases, the parties can designate *ad hoc* judges. Parties may apply to the Court for a range of remedies, of which provisional measures are one type. This particular remedy led to a restatement of the Court's power due to the impact of the *VCCR 1963*, especially in cases such as *LaGrand*.¹⁸⁴ Here, the issue of individual rights came to the fore. Finally, the ICJ's judgment is binding on parties.

3.6 Conclusion to chapter

As regards rules and procedures, first we consider the WTO. The DSB governs panel formation, and the acceptance of panel and AB reports. Appellate Review is a significant innovation in the WTO's *DSU*. It is in the remit of the DSB to implement AB rulings, and to impose sanctions on non-compliant parties.

¹⁸⁴ *LaGrand (F.R.G. v. United States)*, 27/06/01, ICJ Report 466.

The AB must investigate panel decisions, and is empowered to overturn the legal reasonings used or conclusions reached. In the DSB (*DSU* panels and the AB), interpretational priority must be given to WTO covered agreements, not international law *per se*. A panel ruling becomes *DSU* law when the DSB adopts it.

In the ICJ, the ICJ *Statute* and *Rules of the Court* govern dispute settlement rules and procedures. The basic case structure is written memorials followed by oral pleadings; consideration; then court judgment. The ICJ can be required to consider whether it has jurisdiction in the case. The final text of the judgment must be approved by all agreeing judges; a judge can express and officially document the reason for dissent; majority decisions are allowed. Provisional measures can be stated by the ICJ, from Art 41 *Court Statute*. Since the 1972 revision to the *Court Rules*, the number of cases heard by *ad hoc* chambers has increased, and assists an affected party by allowing their choice of judge to participate. Moreover, parties to the case can appoint judges, thereby expediting cases where greater technical expertise was required.

Moving to implementation and processes, a significant innovation in the

WTO is the RPT in which to implement recommendations and rulings. A sole dissenting member cannot anymore unilaterally block a panel report. The AB is more empowered to curb panel misinterpretations. Although Art 22 covers compensation and suspension of concessions, the clear preference is implementation to trade distortion. Arbitration is available to resolve RPT disputes, and any member can raise an implementation query in the DSB.

In the ICJ implementation and processes, a big difference is no stated timeframes for the processes. The burden of proof in a dispute is initially with the party that wants to assert a fact. Implementation by the ICJ can include an order to the parties to negotiate in the dispute. Joint variation of the Court's decision is also available. Since 1997, the ICJ has attempted to improve efficiency of the proceedings by co-operation with the parties. Permanent and *ad hoc* chambers are now available in cases where complex international law is not at stake. A request for provisional measure can be made at any time during the proceedings, and is then given priority, due to what might be at stake in the present or immediate future.

CHAPTER 4: A COMPARISON BETWEEN AND ANALYSIS OF THE DISPUTE SETTLEMENT PROCEDURES IN THE WTO AND THE ICJ

4.1 Introduction

In this chapter, different aspects of dispute settlement are considered under three headings, namely first jurisdiction and scope; secondly judicial aspects and burden of proof; and thirdly compliance and enforcement. In each area, the WTO processes are described and analysed first, followed by the analogous processes in the ICJ. In each area, an attempt is made to relate the international trade theory or international law theory with the empirical evidence. Wherever appropriate, actual cases are mentioned to illustrate or contradict points made. Also, wherever appropriate, references are made to treaty law, and attention is drawn to any changing trend in cases. Economic and political aspects are also considered.

4.2 WTO and ICJ: jurisdiction and scope

4.2.1 WTO

In one of its contexts, jurisdiction refers to a court's power to decide matters

resented to it and to enforce its decisions.¹⁸⁵ The WTO has broad jurisdictional scope. It is also compulsory and exclusive. In the simplest terms, the *DSU* has jurisdiction over any disputes between WTO members, that may arise under the covered agreements (Art 1.1 *DSU*).

The covered agreements appear in Appendix 1 of the *DSU*, and include the *Agreement establishing the World Trade Organisation* (WTO Agreement), *GATT 1994*, and 13 other multilateral agreements dealing with trade in goods, the *GATS* (trade in services), the *TRIPS Agreement* (intellectual property) and the *DSU* (dispute settlement). The only multilateral trade agreement that is not a covered agreement is the Trade Policy Review Mechanism, which is Annex 3 to the WTO Agreement. Measures initiated by a member's regional or local government are within the *DSU*'s jurisdiction. Any claim that does not refer to a covered agreement is outside a panel's terms of reference. In the event that two parts of the same measure are covered by more than one WTO Agreement, the panel can decide which applies.¹⁸⁶ According to Art 1.2 *DSU*, there are certain special rules and procedures which override the *DSU* where there is a difference between the

¹⁸⁵ Garner, B.A., editor-in-chief, *Black's Law Dictionary*, St. Paul, Thomson West, 8th edn, 2004, p.868.

¹⁸⁶ *EC – Measures affecting asbestos and asbestos-containing products*, 12/03/01, WT/DS135/AB/R, AB-2000-11.

two. According to the AB, the particular, additional rules and procedures of a covered agreement complement the generally applicable rules and procedures of the *DSU*.¹⁸⁷

The WTO jurisdiction is compulsory in that a member is obliged to accept it by law. Thus, membership of the WTO alone makes acceptance of jurisdiction compulsory. Despite this, a panel's jurisdiction depends upon the subject of the dispute, *ratione materiae*, and the parties to the dispute, *ratione personae*. There is no need for a separate agreement enabling it. The jurisdiction is also exclusive to the *DSU*; there is no other dispute settlement process.¹⁸⁸ In general, both panels and the AB have jurisdiction. Generally, a panel is responsible for determining its jurisdiction, and 'the scope of its terms of reference is an essential part of this determination.'¹⁸⁹ The AB has the power to consider a claim that a panel exceeded its terms of reference, even where the claim was not made in the Notice of Appeal.¹⁹⁰

¹⁸⁷ *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, 24/10/00, WT/DS156/R.

¹⁸⁸ Palmetier D. and Mavroidis P.C., *Dispute settlement in the World Trade Organisation*, Cambridge, Cambridge University Press, 2nd edn, 2004, Ch 2, p.18.

¹⁸⁹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, 22/10/01, AB-2001-4, WT/DS58/AB/RW.

¹⁹⁰ *United States – Continued Dumping and Subsidy Offset Act of 2000*, 27/01/03, WT/DS217/AB/R, WT/DS234/AB/R.

According to Oesch, WTO panels have jurisdiction to review a member's domestic law.¹⁹¹ Usually, the jurisdiction is to be abstract, i.e. without referring to application in a specific measure. The main matter for discussion is what specific jurisdiction exists. The chief provision in the *WTO Agreements* that requires members' domestic laws and their administration to conform with WTO obligations is Art XVI:4, whereby 'each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.' This is to be contrasted with the panel jurisdiction in Art 22.7 arbitration. This provision should be interpreted in the context of Art 27 of the *VCLT 1969*, according to which a party cannot invoke internal law provisions for failure to perform a treaty. Legislation, not its specific application as such, needs to be changed to conform with WTO law. As a result, a WTO member may request the constitution of a panel to review another member's domestic laws. From Art XVI:4, WTO adjudication can be applied as jurisdiction to review domestic law and its practice, to ascertain WTO conformity. Specifically, the AB confirmed that panels may hear claims directed against domestic legislation as such under Art XXIII of

¹⁹¹ Oesch, M., *Standards of Review of WTO Dispute Resolution*, Oxford, Oxford University Press, 2003, Ch 2, p.188.

GATT 1994 and the *DSU*.

Art 1.1 *DSU* constrains *DSU* scope to ‘disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1’ of the *DSU*, and disputes regarding rights and obligations under the WTO Agreement or the *DSU*. There are two types of complaint that members may bring. Firstly, violation complaints, which allege another member’s failure to fulfill obligations under a covered agreement. Secondly, non-violation complaints, according to which it is alleged that a member has applied a measure that is not necessarily in conflict with a WTO provision, but does impair or nullify some benefit that arises directly or indirectly under a covered agreement, or that curtails the achievement of an objective of a covered agreement.¹⁹² Generally, jurisdiction can arise for two reasons. The first is due to agreement provisions that specifically require action. For example, in the *TRIPS Agreement*, Art 25.1 requires members to take steps to protect new or originally created industrial designs. Thus, if a member either does nothing or passes laws that are inadequate, that is contrary to WTO provisions.

¹⁹² Art XXIII:1(b), *General Agreement on Tariffs and Trade* (1994), http://www.wto.org/english/docs_e/legal_e/legal_e.htm; Art XXIII:3, *General Agreement on Trade in Services* (1995), http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm; *DSU*, Art 26.1.

Art 6 explains the creation of dispute settlement panels, whilst Art 7 gives *the terms of reference* for the panels. WTO panel formation is a near certainty, since Arts 6.1, 16.4 and 17.14 state that a panel shall be formed and a report adopted unless the DSB decides, by consensus, not to. When a complainant refers a matter to the DSB, this becomes the subject of a panel's terms of reference. A 'matter' has 2 parts, namely:-

- (i) the governmental measure at issue, e.g. a law or regulation, and
- (ii) the legal basis in a covered agreement of the complainant's claim.

The terms of reference establish the panel's jurisdiction by accurately defining what claims are at issue in the present dispute. From Art 7, panels are to:-

'...examine, in light of the relevant provisions in (name of covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document...and to make such findings as will

assist the DSB in making recommendations or in giving rulings provided for in that/those agreements(s).’

Art 6.2 of the *DSU* requires the complaining member to identify, in its request for the establishment of a panel, the specific measures at issue. The AB has clarified that a measure can be any act of a Member, whether or not it is legally binding, including a government’s non-binding administrative guidance.¹⁹³ Art 13.1 requires a member to respond ‘promptly and fully’ to any information request. However, the AB has emphasized more strictly that members, including those party to the dispute, have a full legal obligation to provide information requested.¹⁹⁴ As an exception, according to the specific principle of due process, the AB would have ‘subject-matter jurisdiction’ to consider a new claim that arose during or after proceedings.¹⁹⁵ This occurs where the panel exercised judicial economy or did not fully address the claims.

¹⁹³ *DSU*, Art 26.1, footnote 47.

¹⁹⁴ *Canada - Measures affecting the export of Civilian Aircraft (Canada – Aircraft)*, 20/08/99, WT/DS70/AB/R.

¹⁹⁵ Mitchell A.D., ‘The legal basis for using principles in WTO disputes’, *Journal of International Economic Law*, 2007, Vol 10, No. 4, pp.795-835.

Panel or AB report adoption is a virtual certainty in the DSB, since respectively, Arts 16.2 and 17.14 require that these will be adopted, unless the DSB decides by consensus not to adopt the report. Art 17.6 restricts the AB's jurisdiction to legal issues in a panel report, as opposed to the panel's factual findings, and interpretations by a panel.¹⁹⁶ The AB can decline to consider a claim (or argument) that a member could have made at the panel stage, on the basis that it would fall outside the scope of Art 17.6.¹⁹⁷ Art 17.13 empowers the AB to uphold, amend or reverse the legal findings and conclusions of panels. However, a panel's assessment of evidence relates to facts as opposed to law, and is therefore outside the scope of appellate review.¹⁹⁸

In terms of the scope or limitations of WTO jurisdiction, there is a significant difference between a state's legislation that mandatorily challenges WTO law, and that which might do so in a given situation. The latter is not necessarily within jurisdictional scope, whereas the former is. This idea dates back to *GATT 1947*, and has been reinforced by the AB.¹⁹⁹

¹⁹⁶ *EC – Measures concerning meat and meat products (hormones)*, 16/01/98, WTDS26/AB/R, AB-1997-4.

¹⁹⁷ *Canada—Measures Affecting the Export of Civilian Aircraft (Canada—Aircraft)*, 20/08/99, WT/DS70/AB/R.

¹⁹⁸ *Australia – Measures Affecting Importation of Salmon*, 06/11/98, WT/DS18/AB/R, DSR 1998 VIII.

¹⁹⁹ *US – Anti-dumping act of 1916, complaint by the EC*, 31/03/00, WT/DS136/R.

More specifically, Art XVI:4 of the WTO Agreement requires that ‘each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.’ There is, overall, very little scope for members to challenge the *DSU*.

In practice, Art 11 *DSU* has been invoked as to the bounds of panel jurisdiction. There is an important law/facts distinction to be made in this regard. According to Oesch, there is no jurisdiction in international law to define or interpret domestic laws ‘as such.’²⁰⁰ To clarify, the international legal principle *jura novit curia* has no domestic application. This principle means that a matter is for consideration by the Court, rather than by the parties. Therefore, this particular panel jurisdiction is based on facts, not law. *DSU* Art 21.5 addresses timeframes, which can be considered in the context of limitations. Where there is a dispute regarding existence or consistency with a covered agreement of measures that were taken to comply with recommendations and legal rulings, such a dispute is decided as part of the *DSU*, with recourse to the original panel wherever possible.

²⁰⁰ Oesch, M., *Standards of Review of WTO Dispute Resolution*, Oxford, Oxford University Press, 2003, Ch 10, p.201.

The panel will in turn circulate its report within 90 days of referral to it.

In *Turkey – Textiles*, the panel was faced with determining whether some challenged measures should be viewed as on the part of Turkey, or seen as part of the customs union between Turkey and the European Communities.²⁰¹ This was approached by using customary international law rules as applied to state responsibility. The factual background is as follows. Turkey was an exporting member under an old Multifibre Agreement (MFA), and was subject to quota restraints in the main industrialized importing markets. It had no restraint of its own, and decided to impose quota restrictions against exports from developing countries commencing January 1st 1995, on the reasoning that it was compelled to do so because of its customs union agreement with the EU. India challenged, a panel held in India's favour, and Turkey appealed. The panel proceeded on the legal basis that it was empowered to decide whether a customs union complied with Art XXIV.

²⁰¹*Turkey–Restrictions on imports of textile and clothing products*, 23/10/99, WT/DS34/AB/R, AB-1999-5.

Regarding its own jurisdiction, the panel said that it could be argued that compliance of a customs union with Art XXIV falls within the AB's purview, but that the panel could adjudicate '...any matters arising from the application of these provisions relating to customs unions, free-trade areas or interim agreements leading to the formation of a customs union of free trade areas.'

The AB held as follows. Art XXIV may justify a measure that is inconsistent with certain other *GATT* provisions. However, in a case concerning a customs union, this defence is only available when two conditions are met. First, the party obtaining the benefit must show that the measure is commenced upon formation of a union that fully meets the requirements of sub-paragraph 8(a) and 5(a) of Art XXIV. Secondly, the party must show that the formation of the union would be frustrated if it were not permitted to introduce the measure. The AB criticized the panel for not addressing whether the regional arrangement between Turkey and the EC was actually a customs union according to requirements laid out in paragraphs 8(a) and 5(a) of Art XXIV. The AB ruled as follows. A system of certificates of origin would have provided an alternative until the quantitative restrictions applied by the EC are required to be terminated.

Thus, Turkey was not required to apply the quantitative restrictions to form a customs union with the EC. Therefore, Turkey did not fulfill the second of the two necessary conditions that must be fulfilled to be entitled to the benefit of defence under Art XXIV.

The next type of dispute to consider is arbitration. From Art 21.3.(c), the arbitrator's subject-matter jurisdiction is restricted to defining a reasonable period of time for compliance. Art 22.7 describes the scope of arbitral jurisdiction. In the event that the member objects to the level of suspension put forward, or objects that certain paragraph 3 principles and procedures have not been correctly followed where a complainant has requested authorization to suspend concessions or other obligations from paragraph 3(b) or (c), the matter proceeds to arbitration. The original panel will carry out this process, if the members are available, or by an arbitrator appointed by the Director General. It is to be finished within 60 days of the expiry of the RPT (scope).

One key limitation is that the arbitrator cannot examine the nature of the concessions or other obligations to be suspended.²⁰² Thus, concessions or any other obligations cannot be suspended during the process.²⁰³ The arbitrator can decide whether the principles and procedures that are applicable to suspension have been complied with. From Art 22.6, arbitrators do not have jurisdiction to decide on whether suspending WTO obligations violates intellectual property rights treaties. That is determined by the parties to the treaties.²⁰⁴ An arbitration body constituted under Art 25.2 *DSU* asserted that it could decide issues about its jurisdiction on its own.²⁰⁵ This was based on the premise that jurisdiction was contained in the Art 25.2 joint arbitration request.

4.2.2 *ICJ*

Although the ICJ derives its status from the UN Charter, that same Charter does not give it jurisdictional superiority over any other international tribunal.

²⁰² *EC - Regime for the importation, sale and distribution of bananas – recourse to arbitration by the European Communities under Article 22.6 of the DSU*, 24/03/00, WT/DS27/ARB/ECU.

²⁰³ Art 22.6 *DSU*.

²⁰⁴ *Ibid.* 152.

²⁰⁵ *United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU*, 09/11/01, WT/DS160/ARB25/1.

From Art 95:-

‘Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.’

Where the ICJ perceives several titles of jurisdiction, if these can all co-exist, the process of consideration of actual jurisdiction will be in the order: particular first, becoming more general; from narrow to wide. Once the reason is established, further consideration is not needed. Parties to the ICJ *Statute* accept the whole jurisdiction established by the UN Charter and *Court Statute*. This includes aspects of the ICJ’s jurisdiction:

- To settle disputes about its jurisdiction (Art 36(6));
- To indicate provisional measures of protection (Art 41);
- Under Art 53 if a party omits to appear or defend itself;
- In intervention matters under Arts 62 and 63;
- About requests for interpretation and revision of a judgment under Arts 60 and 61, *Statute*.

Jurisdiction means the power of the Court to do justice between the state parties, including deciding the case with final and binding force. The ways to enable the Court's jurisdiction are mainly described in Art 36 of the *Court Statute*.²⁰⁶ The ICJ has jurisdiction under Art 36(1) of the *Court Statute* to consider all cases referred to it by parties (*rationae personae*), and concerning all matters (*rationae materiae*, also referred to as subject matter jurisdiction) mentioned in the UN Charter, or in treaties or conventions in force. The analysis here will be limited to the ICJ's contentious jurisdiction delineated in its *Statute*; advisory jurisdiction is not considered.

In general, as assessed by Rosenne, the ICJ has jurisdiction when two (or more) states are parties to its *Statute* or have accepted its jurisdiction, and are or may be inferred to be under an obligation to each other, by which the case is to be decided.²⁰⁷ Fundamentally, the ICJ's jurisdiction is based on the consent of the parties. At one end of a range of ways, this can even be inferred by the parties' conduct. The consent may be expressed in a number of different ways. One is by using suitable provisions in an international

²⁰⁶ Collier, J. and Lowe, V., *The Settlement of Disputes in International law*, Oxford, Oxford University Press, 1999; Ch 7, p.133.

²⁰⁷ Rosenne, S., *The law and practice of the International Court, 1920-2005*, 4th edn, Vol.II, Jurisdiction, Leiden, Martinus Nijhoff, 2006; Ch 9, p.558.

treaty or convention (Art 36(1) and Art 37), e.g. where the treaty contains a ‘compromissory clause’ allowing for it.²⁰⁸ For example, in 2004, the ICJ decided on Mexicans on death row in the USA since both parties were parties to the protocol concerning the Compulsory Settlement of Disputes attached to the *VCCR 1963*.²⁰⁹ Another way is via special agreement (Art 36(1)). A third way, *forum prorogatum* refers to the establishment of a state’s consent to jurisdiction via acts subsequent to initiating proceedings (also from Art 36(1)).

Forum prorogatum refers to the voluntary choice of the parties. This represents a variation whereby unilateral proceedings could have been initiated. For example, in 2003 France retrospectively agreed to proceedings initiated by the Republic of Congo some months before. This also obviates the special agreement. The fourth way is jurisdiction to decide a case *ex aequo et bono* (*Statute*, Art 38(2)). The fifth way is the optional clause (misleadingly also called compulsory jurisdiction).

²⁰⁸ See also Art 38, *Court Rules*, and Art 40, *Statute of the International Court of Justice* (1945), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

²⁰⁹ *Avena and Other Mexican Nationals (Mexico v United States)*, Judgment, 31/03/04, ICJ Report 12.

To facilitate the above, there are four main types of agreement to enable referral to the ICJ. These are:-

(1) the special agreement (*compromis*);

This refers to a single case; a single instance. It originates in international arbitration, discussed elsewhere. Jurisdiction is established, and the Court is seised of the case, by the original notification of the agreement to it. The ICJ employs normal rules of interpreting treaties, especially with reference to the *VCLT 1969*, without delving into whether the parties to the dispute are parties to the *VCLT 1969*.²¹⁰

(2) a compromissory clause in a treaty or in an ancillary document to a treaty;

This may also originate in arbitration. Instances include ‘matters specially provided for,’ categorising future cases, e.g. a dispute based on the interpretation or application of the bilateral or multilateral treaty containing the clause.

²¹⁰ E.g. *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras, Nicaragua intervening)*, 11/09/1992, ICJ Reports 351, 582.

Clauses usually permit unilateral referral to the Court. The clause governs both the jurisdiction and the *seisin*. The ancillary instrument can be an optional protocol, open only to parties to the treaty.²¹¹ If the unilateral initiation of proceedings by the party applying is accepted, the clause establishes a type of compulsory jurisdiction, based on Art 36(1). In the case of a multilateral treaty, other parties can intervene, under *Statute*, Art 63. Art 36(1) and (2) jurisdictions differ in an important way. In the former, the ICJ may only apply the specific treaty in question. In the latter, jurisdiction permits or requires use of customary international law rules which exist outside any specific treaty, in the event that the treaty is outside the scope of jurisdiction in the particular case.²¹²

(3) a general treaty for the pacific settlement of disputes either between two states or for a region;

(4) a framework agreement.

²¹¹ Egs: *Optional Protocols relating to the Geneva Conventions of 1958 in the Law of the Sea* (http://www.un.org/Depts/los/settlement_of_disputes/settlement_of_disputes.htm); *the Vienna Conventions of 1961* (http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf) and *1963 on Diplomatic and Consular Relations* (http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf).

²¹² Rosenne, S., *The law and practice of the International Court, 1920-2005*, 4th edn, Vol.III - Procedure, Leiden, Martinus Nijhoff, 2006; Ch 9, p.549.

According to Rosenne, these represent variations which can overlap.²¹³

Art 35, *Statute* lays out the criteria for states to access the Court.²¹⁴

Paragraph 1 enables access by state parties to the *Statute*. Paragraph 2 is aimed at states not party to the *Statute*. The relevant conditions for access are governed by special provisions in treaties in force on the commencement date of the *Statute*, to be decided by the Security Council. The caveat is that there will be no case in which the conditions place the parties in a position of inequality before the Court. In turn, the ICJ can only consider a dispute when the parties have recognized that a dispute exists. In outline, the ICJ adjudicates cases based on international law existing on the decision date, which then remains until judgment.²¹⁵ For this, the Court must establish that the dispute is of a legal nature, by being able to be settled by the principles and rules of international law.²¹⁶ Other non-elements may also be present. The Court can consider the dispute even when other dispute resolution methods are being applied by parties.

²¹³ Rosenne, S., *The law and practice of the International Court, 1920-2005*, 4th edn, Vol.II, Jurisdiction, Leiden, Martinus Nijhoff, 2006; Ch 11, p.638.

²¹⁴ *Statute of the International Court of Justice* (1945), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

²¹⁵ E.g. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) v. Uganda, (Provisional Measures)*, Order of 10/07/2002.

²¹⁶ Art 36(2), *Statute of the International Court of Justice* (1945), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

The ICJ does not have jurisdiction to decide points not included in the parties' final submissions.

As elaborated by Rosenne, the title, source, or basis of jurisdiction is derived from a number of factors: the UN Charter, The *Court Statute* and the *Rules of Court*; and the specific instrument(s) containing the parties' agreement to submit the case to the Court.²¹⁷ Jurisdiction itself is closely associated with the idea of *seisin*, which describes the formal step by which the ICJ's jurisdiction is initially engaged.²¹⁸ The ICJ may be unable to exercise its jurisdiction if the seising was not in conformity with what the parties had agreed. The legal reason for this is as follows. Jurisdiction is determined by the particular law in operation between the parties, as opposed to the *Statute* or *Rules*. Whereas, the validity of the step that seises the Court is governed by the *Statute* and *Rules* (subject to any provisions agreed by the parties regarding how to initiate proceedings under a certain jurisdictional title.

²¹⁷ Rosenne, S., *The law and practice of the International Court, 1920-2005*, 4th edn, Vol.II, Jurisdiction, Leiden, Martinus Nijhoff, 2006; Ch 14, p.904.

²¹⁸ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003; Ch 19, p.967.

The Court's jurisdiction extends *inter alia* over the validity of the *seisin*.

This was elaborated in the *Nottebohm (Preliminary Objection) case*:-

‘The Court has jurisdiction to deal with all its [the claim's] aspects, whether they relate to jurisdiction, to admissibility or to the merits.’²¹⁹

Moreover, the Court must itself decide whether it has jurisdiction; ‘it is a legal question, in view of relevant facts.’²²⁰ Art 36(6) *Statute* gives the ICJ competence to do this, in the event of a disagreement. Partial removal of jurisdiction is possible in this instance, but not entire. For example, in the *Nicaragua case*, brought by Nicaragua against the USA in 1984, the ICJ conceded the US argument that a reservation covering multilateral treaties applied, but that it still had jurisdiction based on customary international law.²²¹ It would however be outside its scope for the Court to consider a state party's political motivation. Thus, the scope of jurisdiction may be intentionally limited in this type of instance by a reservation to a treaty, for example.

²¹⁹ *Nottebohm case (Liechtenstein v Guatemala)* (Preliminary objections); judgment; 18/11/53; general list no. 18.

²²⁰ E.g. *Fisheries Jurisdiction (Spain v Canada)*, 04/12/98, General List no. 96.

²²¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, 26/11/84, ICJ Report 392.

Also, where jurisdiction exists in a dispute, there is no separate jurisdictional basis required to consider remedies.²²²

The traditional way to challenge jurisdiction is by raising one or more preliminary objections, which are now covered in depth in Art 79, *Rules of Court*. These require a decision before the ICJ can consider the merits of the dispute. Preliminary objections are only relevant where one state has accepted the Court's optional jurisdiction, and brings a dispute against another party on the basis of the respondent's Art 36(2) declaration. Where the ICJ's jurisdiction is challenged on more than ground, it can decide to base its decision to decline jurisdiction on the ground which it judges is more direct and conclusive.²²³

Art 36(2), *ICJ Statute* - 'the optional clause,' has significantly increased the ICJ's jurisdiction. From the clause, specifically:-

²²² *LaGrand (F.R.G. v. United States)*, 27/06/01, ICJ Report 466.

²²³ *Certain Norwegian Loans (France v Norway)*, 06/07/57, ICJ Communiqués 57/16.

‘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.’

According to Shaw, this provision’s intention was to increase jurisdiction by more states gradually accepting it.²²⁴ Declarations based on Art 36(2) are normally conditional, and depend on reciprocity to function. The declarations will therefore need to agree. Where conflict exists in the declarations, the jurisdiction will exist based on the common ground declared.²²⁵

²²⁴ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003, Ch 19, p.979.

²²⁵ *Certain Norwegian Loans (France v Norway)*, 06/07/57, ICJ Communiqués 57/16.

In practice, most optional clause declarations by states have so many reservations that in practice, this method of seising the Court has been rather infrequent, partly because one party can challenge the jurisdiction based on the applicability of its own reservation. Compulsory jurisdiction (optional clause jurisdiction) is covered in Art 36(2) and (5). This is a special form of conventional jurisdiction (treaty jurisdiction), which is based upon stated, written agreement of the state parties. In Art 36(2) declarations, time limits placed on jurisdiction *rationae materiae* have been significant. Typically, for a dispute to be within scope, the Court must establish the significance of the exclusion date of the exclusion clause. If both parties' declarations contain a limitation *ratione temporis* (conditional on a reference to time), the later of the two dates defines the scope in the case.

Separately, consent can also be given after a dispute arises via a special agreement between the parties.²²⁶ This is the most common way of agreeing to the ICJ's jurisdiction after a dispute has arisen.

²²⁶ Merrills, J.G., *International Dispute Settlement*, 4th edn, New York, Cambridge University Press, 2005; Ch 8, p.127.

This is similar to an arbitral *compromis* because it allows the parties to delineate the issues within the dispute, and to state the basis on which the Court should decide (subject to the *Statute*). This imparts a high degree of flexibility in scope, as seen for example following a special agreement between Indonesia and Malaysia in 2002.²²⁷

The issue of timeframes is very important. The ICJ may be required to assess preliminary objections regarding its jurisdiction. This occurs before consideration of the merits.²²⁸ Preliminary objections must be made within three months of the applicant state's Memorial. Objections to jurisdiction must be decided at the preliminary stage. Of course, during the course of proceedings, it can also be very important to gather facts as carefully as possible. In the earlier (related) admissibility and jurisdiction case, the ICJ found at the provisional measures stage that, *prima facie*, it has jurisdiction based on Art IX of the *Genocide Convention*.²²⁹ Bosnia reserved the right to add to its submissions to invoke other jurisdictional titles.

²²⁷ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, Merits, 17/12/02, ICJ Report 625.

²²⁸ Art 79, *Statute of the International Court of Justice*.

²²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Admissibility and Jurisdiction, Judgment of 11/07/96, ICJ Report 595.

The ICJ made several references to the intent of the Convention, including that its intent was to create a universal regime. But according to Gray, the ICJ was ambiguous about the scope of the relevant compromissory clause, i.e. Art IX.²³⁰

In the earlier case, the first set of preliminary objections were about the ICJ's jurisdiction *rationae personae*, i.e., whether Bosnia had the entitlement to bring a claim. Yugoslavia contested Bosnia's claim to statehood, and claimed it had violated the right to self determination of ethnic groups in Bosnia. The ICJ did not focus on these aspects. It took the view that, since Art IX enabled the *Genocide Convention* for any UN member, Bosnia became a state party from the time of admission to the UN. The terms of accession or independence were not relevant.

The next relevant issue was that of jurisdiction *rationae temporis*. Yugoslavia argued that if the *Genocide Convention* was not operative between the parties until the *Dayton Agreement*, it could not have prior effect, so Bosnia could not bring claims for events prior to December

²³⁰ Gray C., 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Admissibility and Jurisdiction', 1997, *International and Comparative Law Quarterly*, Vol.46, No. 3, pp.688-693.

1995.²³¹ The Court said in response that it had jurisdiction, since the *Genocide Convention* and Art IX had no clause to limit scope *rationae temporis*. The greatest challenge was over jurisdiction *rationae materiae*, i.e. did a dispute exist under Art IX?²³² Yugoslavia responded to Bosnia's contention that Yugoslavia had breached the Convention by stating that the claim was outside the scope of Art IX, as follows. The struggle was a civil war, over which it had no jurisdiction at the time. Therefore, it had no responsibility for events in Bosnia. The ICJ responded that the Convention was applicable in any conflict; so the obligations of prevention and punishment on states existed irrespective of territorial sovereignty.

There was ambiguity in the drafting of Art IX. Whether Yugoslavia had participated must wait until the merits stage. The ICJ made the following specific statement:-

²³¹ Preliminary objection 7.

²³² Preliminary objections 1 and 5.

‘It was apparent that the parties differed with respect to the facts of the case, their imputability and the applicability to them of the *Genocide Convention*; moreover they were in disagreement with respect to the meaning and scope of several provisions including Art IX. Therefore there was a dispute under Art IX.’

Where there are political issues at stake, the world’s eyes watch more closely. Also, a number of legal and other aspects can be brought into play, as underlying themes as well as in discoveries or arguments as the case unfolds. This has clearly been true in the Hague International Tribunals case on the *Application on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*.²³³ Overall, this was the first case in which the ICJ’s jurisdiction was seized by a state alleging that another state had violated its commitments under the *Genocide Convention*. The ICJ’s eventual judgment was made public on February 26th 2007. Other dispute settlement processes had been in play, for example diplomatic negotiations. The scope of subject matter jurisdiction was substantial.

²³³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, order of 13/9/1993, ICJ Report no.325.

4.2.3 General jurisdiction conclusion

The *DSU* of the WTO has very broad jurisdictional scope, which is compulsory, exclusive, and derives from membership. It mainly regulates the WTO covered agreements. The initial panel must circulate its report within 90 days of the dispute's referral. Art 17.13 enables the AB to uphold, amend or reverse the panel's legal reasoning. Unlike in ICJ disputes, parties cannot in any way 'opt in' to the *DSU*. In the WTO, the usual procedure is for a member to bring a complaint; in the ICJ, this is only one possibility.

The South Centre asserts that the *DSU* panels and AB have more authority than other WTO bodies.²³⁴ Consequently, there is a lack of higher checks on adopted reports. For this, one might suggest more external surveillance panels, or AB appointment criteria.

The ICJ's power to be seized of a case comes from the *UN Charter*, the *Court Statute*, the *Rules of Court* (amended in 1978), and the instrument containing the parties' submission. Unlike in the WTO, ICJ jurisdiction requires consensus from the parties, in one of a number of ways. These

²³⁴ South Centre Trade Analysis, 'The WTO dispute settlement system: issues to consider in the DSU negotiations', 2005, SC/TADP/TA/DS/1, <http://www.southcentre.org>

incorporate reference to international law, including specific customary law, or treaties and conventions, including the *VCLT 1969*. Parties can submit to jurisdiction explicitly, or implicitly, via actions retrospectively agreeing to the other party's submission. To establish jurisdiction, the ICJ must be seised according to defined criteria which it assesses. It can state reasons why it opted to decline jurisdiction. Whether or not the states are parties to the Court, access will only be granted on equal terms. Jurisdiction only extends to points in the parties submissions. Art 36(2), *ICJ Statute*, contains the optional clause, which expanded jurisdiction by giving the ICJ a wider scope in terms of treaties, international law, and facts in relation to international obligations. This, for example, has enabled jurisdiction to be not necessarily confined to a territorial basis.

Also to be considered are specific rules governing jurisdiction. For example, where the issue is *rationae temporis*, whereby the parties declare jurisdiction based on their preferred timeframes, the later of the two dates is defining.

4.3 Judicial aspects of dispute settlement and burden of proof

4.3.1 WTO

From a practical viewpoint in terms of the consistency of judgments, M. Matsushita, a former AB member, has stressed that panels and the AB decide cases significantly on *precedents*. This is despite there being no stated doctrine of ‘*stare decisis*.’²³⁵ This is the principle that a court should follow its own precedents, as well as those of other courts of the same or greater authority. However, panels are not formally bound by previous AB decisions, as stated by the panel in *India – Patents (EC)*.²³⁶ Matsushita, Schoenbaum and Mavroidis²³⁷ study Higgins’s approach to international law.²³⁸ According to Higgins, WTO law can be fully described by the *WTO Agreement*. This refers to all primary WTO law, i.e., including all the specialized agreements annexed to the *Agreement establishing the WTO*, as signed in Marrakesh in April 1994.

²³⁵ Matsushita M., 5 selected *GATT/WTO Panel Reports: Summaries and Commentaries* ix, 1999, *Fair Trade Center*, Tokyo.

²³⁶ *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 24/08/98, WT/DS79/R.

²³⁷ Matsushita, M., Schoenbaum, T.J., and Mavroidis, P.C., *The World Trade Organisation: Law, Practice, and Policy*, 2nd edn, New York, Oxford University Press, 2006, ch 2, p.37.

²³⁸ Higgins, R., *Problems and Process: International Law and how we use it*, Oxford, Oxford University Press, 1994; Ch 1, p.2.

In a general sense, it seems that any WTO adjudicating body cannot choose a legal interpretation. Instead, it is bound to interpret the WTO covered agreements in terms of Art 3.2 *DSU*:-

...`to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.’

Moreover, the WTO Agreement refers to two different sources of law, namely the covered agreements, and international agreements that are reflected in the covered agreements. In terms of the latter, Art 16(1) of the *WTO Agreement* refers: the WTO should be guided by decisions, procedures, and customary practice followed by the Contracting Parties to *GATT 1947*. Van den Bossche, though, takes a broader definition of sources.²³⁹

²³⁹ Van den Bossche P., *The Law and Policy of the World Trade Organisation*, Cambridge, Cambridge University Press, 2005; Ch 1, p.44.

In addition to the *Marrakesh Agreement* (which contains several annexes, including e.g. annex 2: understanding on rules and procedures governing the settlement of disputes), he identifies WTO dispute settlement reports, acts of WTO bodies, agreements finalised within the WTO, customary international law, general legal principles, other international agreements, the subsequent practice of members, teachings of the best qualified publicists, and, for greater historic context, negotiating history.

We should also mention the 27 Ministerial Decisions and Declarations, which with the WTO Agreement constitute the *Final Act adopted at Marrakesh at the end of the Uruguay Round of negotiations* (April 1994).²⁴⁰

From the above, WTO dispute settlement reports consist of panel and AB reports. In theory, adopted reports only bind the parties in the dispute at hand.

²⁴⁰ *Final Act of the 1986–1994 Uruguay Round of trade negotiations*, http://www.wto.org/english/docs_e/legal_e/final_e.htm

But in *Japan – Alcoholic Beverages II*,²⁴¹ the AB gave weight to legal precedent in previous *GATT* panel reports, since they were thought to have created legitimate expectations among WTO members, something that might be called ‘recent customary WTO law.’ In practice, AB rulings are so important that panels usually follow them, as does the AB itself.

As pointed out by Jackson, the WTO Agreements need to be analysed in terms of the general principles of international law for interpreting treaties.²⁴² In this area, the most relevant is widely thought to be Art 31 of the *VCLT 1969*. For example, Art 31.3 states that an adjudicating body must take subsequent practice into consideration. Where a state member has not ratified the *Vienna Convention*, e.g. the USA, it would not apply. However, subsequent practice is categorized as an interpretative element (not as a source of law), so it can carry legal force.

As referred to above, another very important area in judicial terms for the WTO is customary international law. The AB has decided that this refers to the rules in the *VCLT 1969*.

²⁴¹ *Japan – Taxes on Alcoholic Beverages II*, 04/10/96, WT/DS8/AB/R, AB-1996-2.

²⁴² Jackson, J.H., *The World Trading System*, London, MIT Press 1997, 2nd edn, Ch 4, p.120.

For example, from Art 31.2, any relevant rules of law applicable to relations between the parties should also be taken into account in treaty interpretation.²⁴³ As stated in *Korea - Measures Affecting Government Procurement*,²⁴⁴ ... 'customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.' Also, as stated by the AB in *Japan – Alcoholic Beverages II*:-

'There can be no doubt that Art 32 of the Vienna Convention, dealing with the role of supplementary means of interpretation, has also attained the same status [of a rule of customary international law]. Thus, subsequent practice in terms of interpretation can imply that a rule can gain customary law status.'

In terms of the factual sources of WTO law, and specifically at the basic level of international legal rights, Art 6 DSU recognizes the right to a panel, and subsequent access to a standing AB comprised of independent judges, which from Art 17 will hear and decide on appeals from panel cases within 2 to 3 months. Some basic rules in WTO law should be elucidated. As described by Van den Bossche, dispute settlement is one of 6 main areas of

²⁴³ *Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations*, UN GAOR, Art 31(2), UN Doc A/CONF.129/15 (VCLT 1969).

²⁴⁴ *Korea – Measures affecting government procurement*, 01/05/00, WT/DS163/R.

WTO law.²⁴⁵ The most important of the principles of non-discrimination is the most-favoured nation (MFN) treatment obligation. In a nutshell, if a member permits some special treatment to one country, it must permit the same to all other WTO members. Another principle is the national treatment obligation, according to which a member may not discriminate against another country's products, services or suppliers of services.

There is a judicial preference for members to actually perform obligations in the *DSU*. For example, Art 22 concerns compensation and suspension of concessions, and makes it clear that 'neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a resolution.' Geping distinguishes two branches of theorists in this area.²⁴⁶ The first are the 'self-contained regime proponents,' who believe primarily that the DSB will follow the covered agreements, especially as stated by Art 7 *DSU*. However, inconsistent panel practice implied an opposing theory; that of 'incorporation.' Here, the main thesis is that some clauses in the covered agreements and the *DSU*, point to the need to apply some non-WTO agreements to dispute settlement. Examples are

²⁴⁵ Van den Bossche, P., *The Law and Policy of the World Trade Organisation*, Cambridge, Cambridge University Press, 2005; Ch1, p.35.

²⁴⁶ Geping, R., 'The law applied by world trade organisation panels', 2003, *International and Comparative Law Journal*, 2003, Vol. 17 No.1, pp.125-137.

the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, which in turn refers to some important international conventions including the Paris, Berne and Rome conventions; and the *Treaty on Intellectual Property in Respect of Integrated Circuits*.²⁴⁷ However, it should be realized that the WTO treaty, general international law, and other non-WTO treaties contain conflict rules. For instance, if there were to be a conflict between the WTO Agreement and one of the multilateral trade agreements, e.g. *GATT*, *GATS*, *TRIPS*, or *DSU*, it must be resolved in favour of the WTO Agreement. This point is emphasised by Pauwelyn.²⁴⁸

Surprisingly, there are no rules for burden of proof stated in the *DSU*. Pauwelyn considers the concept, and finds that it is limited to factual issues.²⁴⁹ The legal principle *jura novit curia* has been thought to be applicable, namely that the international tribunal would not be restricted, e.g. in *US – Wool Shirts and Blouses*, from which we can conclude the general rule that in dispute settlement, the burden of proof is on the party (complainant or respondent) that asserts the affirmative of a specific claim

²⁴⁷ *Treaty on Intellectual Property in Respect of Integrated Circuits* (1989), http://www.wipo.int/treaties/en/ip/washington/trtdocs_wo011.html

²⁴⁸ Pauwelyn, J., 'The role of public international law in the WTO: how far can we go?', 2001, *The American Journal of International Law*, Vol.95, No.3, pp.535-578.

²⁴⁹ Pauwelyn, J., 'Evidence, Proof and Persuasion in WTO dispute settlement: who bears the burden?', 1998, *Journal of International Economic Law*, Vol.1 No.2, pp.227-258.

or defence.²⁵⁰ Specifically, from a factual point of view, the AB has upheld the rule that the party who asserts a fact, whether it is the complainant or the respondent, must provide proof thereof. From this, for example, the party that claims a violation of a provision of the WTO Agreement (complainant) must prove that claim. Also, the party that invokes in its defence a provision that is an exception to the allegedly violated obligation (respondent) must bear the burden of proof that the conditions in the exception are met.

More specifically, Grando has differentiated two categories of provisions for burden of proof.²⁵¹ The first is those that establish an exception to a rule. The second is those that exclude the application of other provisions. In the first type, the complainant must prove that the defendant has violated a general rule. If this is established, the burden is shifted in that the defendant then has the burden of proving that it has fulfilled the requirements of the provision that establish an exception to the rule. In the second type, the complainant has the burden of proving that the defendant does not fall under the situation or has not complied with the needs of a provision that excludes the application of the general rule. Thus, the burden of proof for

²⁵⁰ *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, 25/04/97, WT/DS33/AB/R, AB-1997-1.

²⁵¹ Grando, M.T., 'Allocating the burden of proof in WTO disputes: a critical analysis', *Journal of International Economic Law*, Vol.9, No.3, pp.615-656.

an exception is on the defendant, whereas for a provision that excludes the application of another, the burden is on the complainant.

In terms advanced by Matsushita, Schoenbaum and Mavroidis, burden of proof is to do with which of the disputing parties is responsible for proving the (il)legality of the conduct being discussed.²⁵² The Panel report in *US – Section 301 Trade Act*²⁵³ described the legal position of the AB, according to Van den Bossche.²⁵⁴ From this:-

‘...both parties agreed that it is for the EC, as the complaining party, to present arguments and evidence sufficient to establish a *prima facie* case in respect of the various elements of its claims regarding the inconsistency of Sections 301-310 with US obligations under the WTO. Once the EC has done so, it is for the US to rebut that *prima facie* case. Since, in this case, both parties have submitted extensive facts and arguments in respect of the EC claims, our task will be to balance all evidence on record and decide whether the EC, as party bearing the original burden of proof, has convinced us of the validity of its claims....

²⁵² Matsushita, M., Schoenbaum, T.J., and Mavroidis, P.C., *The World Trade Organisation: Law, Practice, and Policy*, 2nd edn, New York, Oxford University Press, 2006, Ch 4, p.125.

²⁵³ *US – Section 301-310 of the Trade Act of 1974*, 25/12/99, WT/DS152/R.

²⁵⁴ Van den Bossche P., *The Law and Policy of the World Trade Organisation*, Cambridge, Cambridge University Press, 2005; Ch 3, p.211.

In case all the evidence and arguments remain in equipoise, we have to give the benefit of the doubt to the US as defending party.²⁵⁵ Thus, for the burden of proof to shift, the balances of arguments must tip in favour of the complainant. There is a separate issue, namely that of how to find the correct legal meaning of provisions in the covered agreements. The AB discussed this in detail in *EC – Tariff Preferences*:-

‘Consistent with the principle of *jura novit curia*, it is not the responsibility of the European Communities to provide ...legal interpretation to be given to a particular provision in the Enabling Clause; ...the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause.’²⁵⁶

Van den Bossche interprets this as meaning that the burden of finding how and which WTO law rule to apply is on the panel and AB.²⁵⁷ Also in *EC – Tariff Preferences*, the AB initiated the idea of legal responsibility to raise a defence in dispute settlement.

²⁵⁵ *US – Section 301-310 of the Trade Act of 1974*, 25/12/99, WT/DS152/R.

²⁵⁶ *EC – Conditions for the granting of tariff preferences to developing countries*, 07/04/04, WT/DS246/AB/R.

²⁵⁷ *Ibid.*

In relation to the specific nature of the Enabling Clause, the AB held:-

‘Although a responding party must defend the consistency of its preference scheme with the conditions of the Enabling Clause and must prove such consistency, a complaining party has to define the parameters within which the responding party must make that defence.’

Thus, the complaining party must show with which Enabling Clause provisions the scheme is inconsistent.

In terms of disputes concerning implementation, Art 21.5 reviews are now considered. As in other panel proceedings, the party that asserts a fact has the burden of proving it, and the party which asserts an affirmative defence has the burden of establishing it.

Specifically, burden of proof may be considered in the context of Art 22.6 *DSU* arbitrations. In principle, the burden of proof here is analogous to that in any other WTO proceedings.²⁵⁸ The following view was expressed by

²⁵⁸ Palmeter D. and Mavroidis P.C., *Dispute settlement in the World Trade Organisation*, Cambridge, Cambridge University Press, 2nd edn, 2004, Ch 8, p.272.

arbitrators in the report on *US – 1916 Act (EC) (Article 22.6 – US)*²⁵⁹:-

‘WTO Members, as sovereign entities, can be presumed to act in conformity with their WTO obligations. A party claiming that a Member has acted inconsistently with WTO rules bears the burden of proving that inconsistency...the same rules apply where the existence of a specific fact is alleged...it is for the party alleging the fact to prove its existence.’

4.3.2. ICJ: judicial aspects and burden of proof

Unlike the WTO, there is no AB. Broadly, the ICJ adjudicates cases on the basis of international law. This includes the application of international treaties to which the states are parties, international customary law and general legal principles²⁶⁰ According to Sands, Mackenzie and Shany, the ICJ additionally relies on judicial decisions and the output of top international jurists.²⁶¹ In the *Nottebohm (Preliminary Objection)* case, the ICJ stated that the administration of justice is governed by the *Statute* and

²⁵⁹ *United States – Anti-Dumping Act of 1916 (Original complaint by the European Communities), Recourse to arbitration by the United States under Article 22.6 of the DSU, 24/02/04, WT/DS136/ARB.*

²⁶⁰ Arts 3(1), 4(1), 13(1), *Statute of the International Court of Justice* (1945), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

²⁶¹ Sands P., Mackenzie, R., and Shany, Y., *Manual on International Courts and Tribunals*, W.Sussex, Tottel Publishing, 2006; Ch1, p.6.

Rules of Court.²⁶² According to Rosenne, the ICJ usually applies Art 31 to 33 of the *VCLT 1969* when considering the *Statute*.²⁶³ Specifically, the *Rules of Court* derive their power from Art 30 of the *Statute*. Where a matter cannot be decided based on the *Statute* or *Rules*, the ICJ retains the authority to decide the issue in conformity with the administration of international justice. Parties can agree for the ICJ to decide a case *ex aequo et bono*, i.e. on the basis of equitable considerations.²⁶⁴ The legal effects of judgments are covered in Arts 59 to 61, and Art 63(2) of the *Statute*. Specifically, Art 59 states that ‘the decision of the Court has no binding force except between the parties and in respect of that particular case.’ Art 41(1) covers provisional measures.

From a factual source viewpoint, the definition of the ‘precise nature of the claim’ is demanded by the *Rules of Court* (Art 38(2)). One important area to consider is that of remedies.

²⁶² *Nottebohm case (Liechtenstein v Guatemala), (Preliminary Objections)*; judgement; 18/11/53; general list no.18.

²⁶³ Rosenne, S., *The law and practice of the International Court, 1920-2005*, 4th edn, Vol.III - Procedure, Leiden, Martinus Nijhoff, 2006; Ch 16, p. 1028.

²⁶⁴ Art 38(2), *Statute of the International Court of Justice* (1945), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

The ICJ's power to award remedies stems from Art 36 of the *Statute*, according to which 'the jurisdiction of the Court in all legal disputes concerning ... (d) the nature and extent of the reparation to be made for the breach of an international obligation,' in cases of compulsory jurisdiction by virtue of paragraph 2. In terms of the specific case of provisional measures, they do not have the status of *res judicata*. This means that they can be rescinded or amended at any stage if a change in the situation justifies this.²⁶⁵ The case is seen as dynamic in this sense.

The ICJ's work is not always cut out. For example, Art 36 states nothing about declaratory judgments, specific performance and injunctive relief. To consider judicial scope, in the case of declaratory judgments, the Court has held that if it promulgates a rule of customary law or interprets a standing treaty, its judgment has continuing applicability. Therefore, legal continuity is implied in these two senses, beyond the present case.

²⁶⁵ Art 76(1), *General Agreement on Tariffs and Trade* (1994), http://www.wto.org/english/docs_e/legal_e/legal_e.htm

In general, the ICJ will apply the principle *actori incumbit probatori*: the party which makes a specific claim will be required to *establish the points of fact and law* on which a decision in its favour might be forthcoming. For example, in the Genocide judgment, the Court confirmed that the burden lay on Bosnia and Herzegovina to establish facts claimed by it.²⁶⁶ Additionally, in this case the Court set a high standard of proof, namely that Bosnia and Herzegovina needed to show, *beyond any doubt*, that there was a continual supply of assistance from Serbia and Montenegro. There was no legal basis for such a high standard of proof on the complainant. According to Teitelbaum, the ICJ decision not to find responsibility for genocide on the part of Serbia and Montenegro was due to its refusal to accept indirect evidence, or to draw inferences.

The Court has specifically referred to the judicial need to follow the Geneva Conventions. According to Meron, there were (in 1987) 164 states parties to the Geneva Conventions.²⁶⁷ In the *Nicaragua case*, the ICJ held that the United States could not entice people or groups involved in that conflict to

²⁶⁶ Genocide judgement, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, 26/11/84, ICJ Report 392.

²⁶⁷ Meron T., 'The Geneva Conventions as Customary Law', 1987, *American Journal of International Law*, Vol.81, No. 2, pp.348-370.

act in violation of common Art 3.²⁶⁸ Here, Meron notes that the judicial principles of good faith and *pacta sunt servanda* are historically well entrenched in international law.²⁶⁹ In the same case, and at a more general level, the Court stated that the UN Charter does not subsume or supervene on customary international law, and furthermore that 'customary international law continues to ...apply, separately from international treaty law, even where the two...have an identical content.'

In legal procedural terms, Teitelbaum likens the ICJ to a civil law setup in the context of fact-finding, whereby it can demand whatever evidence is thought to be relevant.²⁷⁰ The *Corfu Channel* case may be used as an example.²⁷¹ Here, the United Kingdom was subjected to the burden of proof because it was the plaintiff. However, in the *Minquiers and Ecrehos case* which the Court heard following a special agreement, both parties were subject to an equal burden of proof.²⁷² The ICJ was called upon 'to appraise the relative strength of the opposing claims.'

²⁶⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, 26/11/84, ICJ Report 392.

²⁶⁹ Art 26, *Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations*, UN GAOR, Art 31(2), UN Doc A/CONF.129/15 (1969).

²⁷⁰ Teitelbaum R., 'Recent Fact-Finding Developments at the International Court of Justice', 2007, *The Law and Practice of International Courts and Tribunals*, Vol.6 No.1; pp.184-207.

²⁷¹ *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment of 9/4/49, ICJ Report no.4.

²⁷² *Minquiers and Ecrehos Case (France/United Kingdom)*, 17/11/53, ICJ Report 47.

Here, there is a general point to realise about the burden of proof. It will be guided by the particular issue at hand, not by the procedural position of either party. In other words, whether a party is applicant or respondent in a case commenced by application, or in either role when the case is commenced by special agreement, is not the defining factor. This would seem to be *prima facie* reasonable.

In terms of the standard of proof, it ‘may be drawn from inferences of fact, provided they leave no room for reasonable doubt.’ The ICJ *Statute* and *Rules* do not indicate which evidence will be valued more or less highly; nor do they state what level of proof a party must meet. Instead, the Court is to apply its discretion, and weigh evidence based on the nature of the claims. This would seem to detract from the importance of judicial precedent.

In the judgment concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo) v. Uganda* (19/12/2005), the ICJ was more particular about the burden of proof for various claims made by the parties:-

‘...It (The Court) will identify the documents relied on and make its own clear assessment of their weight, reliability and value...’ Additionally, the ICJ added a ‘substitution of authority requirement’ as meaning a higher standard of proof, more than sufficient or clear and convincing, but more, as expressed by Teitelbaum, of a ‘beyond any doubt standard.’ The Court thereby set a standard of proof for an illegal occupation, that was devised by its own narrowly stated definition. Moreover, the Court has stated that it will formally take note of any refusal (to provide documentary evidence, for example).

4.3.3 Judicial aspects and burden of proof: conclusion

In summary, when considering the judicial aspects of dispute settlement, the types of issues to consider would be, for example, the interpretation of laws, what laws are being applied, the consistency of application, and the scope of applicable laws to consider. When assessing the factual aspects of dispute settlement law, the type of issue to consider would be, for instance, what the sources of law have been or continue to be.

Considering WTO law, Matsushita found that cases were decided by the AB mainly on judicial precedent in practice. Separately, other commentators

found that the WTO Agreement was the main determinant of WTO law. As regards legal interpretation of WTO agreements in general, from Art 3.2 *DSU*, the method refers to customary interpretation of international law.

Regarding ICJ disputes, international law is the basis of adjudication. This includes treaties, customary law, and general legal principles. Where the ICJ *Statute* or *Rules* are not clear, the ICJ decides the matter based on international justice. In terms of burden of proof, the party that makes a claim must prove the legal and factual points to tilt the judgment in its favour. The ICJ follows the Geneva Conventions. It can seek any evidence it requires, guided by the issues at hand.

Some authors assert that the ICJ also relies on judicial decisions and the output of top international jurists. In the *Nottebohm (Preliminary Objection)* case, the ICJ stated the importance to justice of the *Statute* and *Rules of Court*.²⁷³ The ICJ considers Arts 31 to 33 of *VCLT 1969* in relation to the *Statute*.²⁷⁴ Art 41(1) covers provisional measures.

The Court applies *actori incumbit probator*, i.e. the party which makes a

²⁷³ *Nottebohm case (Liechtenstein v Guatemala)* (Preliminary objections); judgment; 18/11/53; general list no. 18.

²⁷⁴ Rosenne, S., *The law and practice of the International Court, 1920-2005*, 4th edn, Vol.III - Procedure, Leiden, Martinus Nijhoff, 2006; Ch 16, p.1028.

specific claim will be required to establish the relevant facts and law. For legal principles, the ICJ looks to the *Geneva Convention*. Customary international law continues to be applicable. For the standard of proof, the *ICJ Statute* and *Rules* do not state which evidence will have precedent, or the level of proof a party must meet; the Court applies discretion.

4.4 Compliance and enforcement

4.4.1 WTO

Essentially, the nature of enforcement is to do with the type of complaint. Non-typical types could be classified as non-violation and situation complaints. The majority of WTO disputes, however, are associated with claims under Art XXIII:1(a) *GATT 1994*, on the postulate that a member has not fulfilled its obligations under a covered agreement.²⁷⁵ According to WTO law, any enforcing countermeasures are a temporary measure, since the *DSU* prefers specific performance of obligations.²⁷⁶ The purpose of countermeasures is to induce compliance.²⁷⁷ In practice, countermeasures have not been resorted to often.²⁷⁸

²⁷⁵ Palmetier D. and Mavroidis P.C., *Dispute settlement in the World Trade Organisation*, Cambridge, Cambridge University Press, 2nd edn, 2004, Ch 4, p.162.

²⁷⁶ Art 22.1, *DSU*.

²⁷⁷ Matsushita, M., Schoenbaum, T.J., and Mavroidis, P.C., *The World Trade Organisation: Law, Practice, and Policy*, 2nd edn, New York, Oxford University Press, 2006, Ch 5, p.143.

²⁷⁸ Bagwell K., Mavroidis P.C., and Staiger R.W., 'The case for tradable remedies in WTO dispute settlement', 2004, *World Bank Policy Research Working Paper No. 3314*.

From a timeframe viewpoint, an Art 21.5 compliance proceeding is different from an original dispute settlement proceeding in two significant ways. Firstly, an original panel has up to 6 months to issue its final report, whereas an Art 21.5 panel has in principle merely 90 days. Secondly, from Art 21.3, an original proceeding allows a reasonable period of time for implementation; not so in an Art 21.5 proceeding. Compliance should occur within a reasonable period of time, as defined by both parties or by agreement, or multilaterally, i.e. through arbitration.

If there is subsequent disagreement about whether compliance has occurred, the original parties then submit a new dispute to a compliance panel, and then to the AB. If the final judgment is that compliance has not occurred, the injured party has the right to impose countermeasures. It must submit a request for authorization to impose countermeasures, in which case it must ensure that the proposed level of countermeasures does not exceed the injury suffered (Art 22.4 *DSU*). One argument that has been advanced against the regime here is the following.²⁷⁹

²⁷⁹ Anderson K., 'Peculiarities of retaliation in WTO dispute settlement', 2002, *World Trade Review*, Vol.1, No.2, pp.123-134.

Evidence shows that WTO-incompatible trade violations that persist should be analysed in terms of the likelihood of severe punishment. Thus, if there were the possibility of a punishment some factor greater than the violation committed, the urge to escape such severity might induce far better compliance.

If the parties cannot agree on the level of proposed countermeasures, the dispute goes to an Arbitrator, usually constituted by the original panel. This panel will decide on what level of countermeasures to impose. Surprisingly, there is no stated procedure in the *DSU* to follow, in the event that, subsequently, the offending party claims to have amended its measures to comply.

The majority of WTO disputes have been violation complaints. From Art 3.8 *DSU*, infringement of obligations under any covered agreement is taken initially to amount to a case of nullification or impairment. First, there must be a WTO ruling that there has been an inconsistency (Art 3.2 *DSU*). Then, The WTO adjudicating bodies can make recommendations and suggestions. In most cases, the body recommends that the losing party amend its measures to comply, without specific instructions. WTO adjudicating

bodies can also *suggest* ways in which the member comply. Art 19.1 *DSU* reads:-

‘Where a panel or the AB concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or AB may suggest ways in which the Member concerned could implement the recommendations.’

Thus, the member has significant leeway in how to comply with a recommendation. The procedure is as follows. On recommendation by a WTO adjudicating body, the DSB will request the WTO member to bring its measures to comply with its obligations. Thus, a recommendation is the initial step intended to achieve enforcement after a ruling has been issued. A recommendation, since it is part of the *DSU*, is binding on the member.

The next area covered will be suggestions. These are not binding, but give guidance on what to do. A specific suggestion can also be requested by the aggrieved party. Panels have taken the position that they are under not legally obliged to suggest, even when requested to. In connection with export subsidies, there is a specific obligation in the *Agreement on*

Subsidies and Countervailing Measures (SCM) that they must be withdrawn as soon as possible.²⁸⁰ A suggestion will nevertheless be issued, but the period of time for implementation can vary. Specifically, the AB's report on *US-FSC (Article 21.5 – EC)*²⁸¹ clarified that the argument that citizens have a right to an orderly transition is not valid vis-à-vis the obligation to an illegal subsidy immediately.

The AB has ruled that a panel requested to decide on the consistency of a farm subsidy under the Agriculture agreement and the *SCM*, cannot adjudicate only under the former. Specifically, in *EC – Export Subsidies on Sugar*, the AB found this to be a wrong exercise of judicial economy, since the complaining party does not have the opportunity to benefit from Art 4.7 *SCM*, to request an immediate withdrawal of the relevant subsidies.²⁸²

Compliance panels assess whether compliance occurred within the RPT.

²⁸⁰ Art 4.7, *Agreement on Subsidies and Countervailing Measures*, <http://www.worldtradelaw.net/uragreements/scmagreement.pdf>

²⁸¹ *United States – Tax Treatment for “Foreign Sales Corporations”, second recourse to Article 21.5 of the DSU by the European Communities*, 19/05/05, WT/DS/108.

²⁸² *EC – Export subsidies on sugar – complaint by Australia*, 15/10/2004, WT/DS265/R.

The arbitrator took a new, more strict view of the time to comply in *Canada – Pharmaceutical Patents*.²⁸³ As immediate compliance is the ‘preferred option under Art 21.3, it is for the implementing member to bear the burden of proof in showing...if it is impracticable to comply immediately...that the duration of any proposed period of implementation, *including its supposed component steps*, constitutes a reasonable period of time. And the longer the proposed period of implementation, the greater the burden will be.’

There has arisen the issue of whether legislative action is needed by a violating member to accelerate compliance. In *Canada – Autos*, the complainant asserted that since Canada was able to act to remove a prohibited subsidy within 90 days, as required by Art 4.7 of the *SCM*, this fact impacted how long it would take Canada to implement the DSB’s recommendations and rulings.²⁸⁴ However, the arbitrator overruled this presumed specific rationale for swifter compliance as follows:-

²⁸³ *Canada-Pharmaceutical Patents*, Panel Report, 07/04/00, WT/DS114/R.

²⁸⁴ *Canada – Certain Measures Affecting the Automotive Industry*, Panel Report 11/02/00, WT/DS139R, WT/DS142/R.

‘Canada’s ability to take ‘extraordinary action’ to withdraw the export subsidy ‘without delay,’ in accordance with the provisions of Art 4.7 of the *SCM Agreement* and pursuant to the recommendation of the DSB, is not relevant for determining the RPT under Art 21.3.(c) *DSU* for implementation of the recommendations of the DSB relating to Art I:1 of the *GATT 1994* and Art III:4 of the *GATT 1994* and Art XVII of *GATS*.’

Further, the arbitrator stated that factors pertaining to a member’s domestic legal system, that were unrelated to a calculation of the shortest time possible, are not relevant to deciding the RPT under Art 21.3.(c) *DSU*. As a result, conversely no RPT lengthening to accommodate the timeframe to reform the Canadian customs regime was allowed either.

Interestingly, the arbitrator employed the concept of ‘good behaviour’ in compliance as a factor in the RPT in *US – Section 110(5) Copyright Act*:²⁸⁵

‘An implementing member must use the time after the adoption of a panel and/or AB report to begin to implement the recommendations and ruling of the DSB....’

²⁸⁵ *United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU*, 9/11/2001, WT/DS160/ARB25/1.

If it is perceived by an arbitrator that an implementing member has not adequately begun implementation after adoption so as to effect “prompt compliance”, it is to be expected that the arbitrator will take this into account in determining the reasonable period of time.’

One important WTO rationale for swift Art 21.5 compliance is the desire to reverse economic harm due to inconsistent measures. If there is no indication of implementation within the RPT, the complainant can request authorization to suspend concessions. However, there may be some implementation, and the complainant might not agree that the other party has implemented its WTO obligations sufficiently. The complainant can then request the establishment of a compliance panel.²⁸⁶ The practical expectation in the *DSU* is that where there is a disagreement on compliance, the parties must initially try to find a practical solution, to avoid a unilateral outcome.

²⁸⁶ Art 21.5, *DSU*.

Following on from the panel and AB reports in *USD – Certain Measures*²⁸⁷, the ruling was that to suspend concessions without multilaterally assessing whether compliance had occurred under Art 21.5 would be a violation of both 21.5 and Art 23.2(a) *DSU*. Also, Art 23.2(c) clarifies that suspension is to be in response to a member's failure to implement the recommendations and rulings within a RPT.

A compliance panel may be instigated under Art 21.5 *DSU*. One interesting point emerging from compliance panel rulings is that they can demarcate their own wide terms of reference, for example covering all points raised by the appealing party. This was confirmed in *Australia – Salmon (Article 21.5 – Canada)*.²⁸⁸ The compliance panel insisted that its jurisdiction was not limited by the assertion that the original panel did not address a claim. Rather, the panel said that the scope of its review was defined by Art 21.5 and the panel's specific terms of reference, which extend to the relevant provisions of covered agreements referred to in the panel establishment request. This assertion seems to limit the influence of the offending party in dictating the course of proceedings, since it would prefer a narrow scope.

²⁸⁷ *United States - Definitive Safeguard Measures on Imports of Certain Steel Products*, 10/11/2003, WT/DS/248/AB/R, AB-2003-3.

²⁸⁸ *Australia – Measures affecting importation of salmon – recourse to Article 21.5 by Canada*, 18/02/00, WT/DS18/RW.

The AB elaborated its view in its review of the panel report in this case:-

`...Art 21.5 proceedings are limited to those ‘measures taken to comply with the recommendations and rulings’ of the DSB...In principle, a measure which has been ‘taken to comply with the recommendation and rulings’ of the DSB will not be the same as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures: the original measure which gave rise to the recommendations and rulings of the DSB, and the ‘measures taken to comply’ which are – or should be – adopted to *implement* these recommendations and rulings.’

This theoretical standpoint was then elaborated:-

`...Indeed, the utility of the review envisaged under Article 21.5 *DSU* would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the “consistency with a covered agreement of the measures taken to comply”, as required by Art 21.5 of the *DSU*.’

Moreover, since the AB's report on *US – Shrimp*²⁸⁹, it appears that a Compliance Panel's mandate does not extend beyond the new measure required to comply with the AB's findings. Nevertheless, the compliance panel will assess the compatibility of the new measure with WTO treaty provisions invoked by the complaining party in the original action, or any other provisions invoked by the complainant. Still, compliance panel reports can be appealed.

In the WTO remedy arena, the right to request countermeasures emanates from Art 22.2 *DSU*. Importantly in WTO law, Art 22.1 *DSU* states that suspension of concessions or other obligations is a temporary measure until WTO compliance has been achieved. Art 22.8 is a clear statement of the position:-

²⁸⁹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, 22/10/01, AB-2001-4, WT/DS58/AB/RW.

“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 Art 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.”

Any compensation, envisaged to be non-monetary, should be in line with the covered agreements²⁹⁰, and needs to be on a most favoured nation basis,²⁹¹ since the offending party would otherwise give the appealing party an advantage relative to other members. From the appealing party’s economic angle, compensation would not negate the welfare loss, including in a particular industry, caused by the non-compliance that started the

²⁹⁰ Art 22.1, *DSU*.

²⁹¹ Art I, *General Agreement on Tariffs and Trade* (1994), http://www.wto.org/english/docs_e/legal_e/legal_e.htm

dispute. In case compensation could not be agreed (as has almost always been the case), the aggrieved party will request the right to suspend WTO concessions or other obligations.²⁹² The suspension possibilities are (i) tariff concessions or (ii) other obligations.

In respect of arbitration, the EC observed in the light of *ad hoc* solutions arrived at after *EC - Bananas III*, that it appeared that members ‘now broadly agree that completing the procedure established under Art 21.5 *DSU* is a pre-requisite for invoking the provisions of Art 22 *DSU*...’²⁹³ Art 22.7 *DSU* refers to arbitration. When the parties make a request for arbitration of the amount of the suspension of concessions, the process moves on from the appealing party’s original request to the DSB for the authorization to suspend. The DSB should be promptly informed about the results of the arbitration, but takes no independent action unless asked. The DSB will, if requested, grant authorization to suspend concessions, provided the request is in line with the arbitration decision. Broadly, Art 22 *DSU* covers the suspension of concessions or obligations.

²⁹² Art 22.2, *DSU*.

²⁹³ *EC - Regime for the importation, sale and distribution of bananas – recourse to arbitration by the European Communities under Article 22.6 of the DSU*, 24/03/00.

According to this, arbitrators may not examine the nature of the proposed suspension. They do not have the jurisdiction to decide how or whether to counterbalance between the measure proposed to implement the suspension and that which has caused the impairment. Therefore, they cannot approve specific measures adopted. Also, there is no appeal against an Art 22.6 arbitration decision. Thus, this leaves a high scope for economic distortions.

Now, some specific remarks about the procedure involved in countermeasures. Initially, the member wanting to impose countermeasures must first produce a list of concessions intended for suspension. In practice, this has (with almost no exceptions) been tariff concessions. The member must follow the procedure from Art 22.3 *DSU*, according to which it must initially seek suspension in the economic sector which corresponds to the WTO violation. To facilitate this, the multilateral trade agreements were divided into three groups within Annex I of the WTO Agreement: *GATT*, *GATS*, and *TRIPS*. If the member believes this would not be practical or effective, the next option is in another sector covered by the same agreement. If that too is not feasible, the choice can be a different sector covered by a different agreement (cross-retaliation). If this is the choice

taken, the member must justify its decision.²⁹⁴ The request must go to the relevant Councils or sectoral organisations as well as to the DSB.²⁹⁵ This scenario magnifies economic distortions because the violating industry goes unpunished, whereas another bears the burden. The parties may request arbitration if they cannot agree on the proposed type of retaliation.

As expounded by the Arbitrators in *EC – Bananas III (Article 22.6 – EC)*, the first cross-retaliation case, they need not be bound by the choice of sector arrived at, in this case by Ecuador. They retain the authority to broadly judge how the aggrieved party chose its sector, and whether it was objective in this. As explained by Palmeter and Mavroidis,²⁹⁶ this arbitration was novel in that it permitted a suspension of intellectual property rights concessions in return for a goods sector violation. Here, the arbitrators observed that distortions in third-country markets would be averted if Ecuador would suspend the rights only for supply intended for its domestic market. It is also possible to retaliate under another agreement. This is where the aggrieved member finds it impracticable or ineffective to adhere to the same agreement, and the circumstances are sufficiently serious. The

²⁹⁴ Art 22.3, *DSU*.

²⁹⁵ Art 22.3(e), *DSU*.

²⁹⁶ Palmeter D. and Mavroidis P.C., *Dispute settlement in the World Trade Organisation*, Cambridge, Cambridge University Press, 2nd edn, 2004, Ch 8, p.277.

seriousness is decided by the arbitrator.

The mechanics of countermeasures are covered in Art 22.6 *DSU*. The aggrieved party submits a list of proposed countermeasures. The offending party must then respond. In the first case, the offending party agrees. The aggrieved party must submit a request for suspension of concessions to the DSB in a timely fashion. This is a last resort measure, covered in Art 3.7 *DSU*. The four procedural possibilities envisaged are:-

- (i) a mutually acceptable solution, clearly to be preferred.
- (ii) If (i) does not materialize, the first objective is to be usually the withdrawal of the relevant measures.
- (iii) If immediate withdrawal according to (ii) is not practical, then the parties should agree compensation – to be temporary.

‘...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 the authorization by the DSB of such measures.’

If the offending party disagrees, it is then a compulsory submission to the

arbitrators, who decide the level of concessions to be suspended (retaliation). Moreover, the arbitrators may not impose a punitive level of damages as a threat or device to induce compliance (Art 22.4 *DSU*). As regards timeframes, the arbitrators have stated in *EC – Hormones (US)* (Article 22.6 – *EC*) that countermeasures should be calculated from the end of the RPT. The yardstick employed is usually the volume of lost trade.²⁹⁷ Thus, one criticism of WTO compliance procedures could be that there is no backdated remedy. Thus, a determined offending party can aggravate the loss to the AB by procrastinating in procedural methods.

In practice, the EC has significantly not complied with sanctions authorized by the DSB. In *European Communities – Measures Concerning and Meat Products (Hormones)*,²⁹⁸ the dispute panel and AB decided that the EC meat ban violated the *WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)*.²⁹⁹ The RPT of 15 months for the EC to bring its food safety measures into WTO compliance was not adhered to. The view that the sanctions regime is not tough enough prevailed in the US

²⁹⁷ *EC – Measures concerning meat and meat products (hormones), original complaint by the United States, recourse to arbitration by the European Communities under Article 22.6 of the DSU, 12/07/99, WT/DS26/ARB.*

²⁹⁸ *EC – Measures concerning meat and meat products (hormones), 16/01/98, WTDS26/AB/R, AB-1997-4.*

²⁹⁹ *Agreement on the Application of Sanitary and Phytosanitary Measures, 1994 (SPS Agreement, annex 1A of the WTO Agreement), http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm*

due to this case. The US Congress enacted the ‘carousel provision’, whereby the products targeted for sanctions were rotated every 6 months, to try to reduce EC inertia. An empirical survey by Charnovitz³⁰⁰ tentatively finds that sanctions, when used, have not been too effective. One significant shortcoming of the WTO approach has been highlighted by Bourgeois.³⁰¹ The present remedy is to retaliate by permitting a restriction on imports from the non-complying member. Instead, the offending party could compensate the aggrieved party by offsetting its violating action, e.g. by lowering duties on imports from the aggrieved party. This could perhaps be summarized by saying that two wrongs do not make a right, or more significantly as pointed out by Bronckers and van den Broek, retaliation is opposed to the WTO’s key trade precepts about liberalizing, not restricting, trade.³⁰²

³⁰⁰ Charnovitz S., ‘Rethinking WTO Sanctions’, 2001, *American Journal of International Law*, Vol.5, No.4, pp.792-832.

³⁰¹ Bourgeois J.H.J., ‘Sanctions and countermeasures: do the remedies make sense?’, *Reform and development of the WTO dispute settlement system*, eds. Georgiev D. and Van der Borgh K., London, Cannon May, 2006.

³⁰² Bronckers, M. and van den Broek N., ‘Financial compensation in the WTO: improving remedies in WTO dispute settlement’, 2005, *Journal of International Economic Law*, Vol. 8 No.1, pp.101-126.

4.4.2 ICJ

The focus turns first to compliance with decisions. The ICJ is not concerned to monitor this:-

‘...once the Court has found that a state has entered into a commitment concerning its future conduct it is not the Court’s function to contemplate that it will not comply with it.’³⁰³

The ICJ has no guidance on what to do in the event of non-compliance. However under Art 78 Court Rules, the ICJ often asks for information in connection with the enforcement of its orders. Also, Al-Qahtani points out that the ICJ can take some enforcement initiative.³⁰⁴ For example, Art 61(3) *Court Statute* enables that ‘the Court may require previous compliance with the terms of the judgment before it admits proceeding in revision.’ This is dovetailed by Art 99(5), Rules of Court 1978, whereby ‘if the Court decides to make the admission of the proceedings in revision conditional on previous compliance with the judgment, it shall make an order accordingly.’

³⁰³ *Nuclear Tests (New Zealand v. France)*, 20/12/1974, I.C.J. Reports General list no. 58.

³⁰⁴ Al-Qahtani, M., ‘The Role of the International Court of Justice in the enforcement of its Judicial Decisions’, Hague International Tribunals, 2002, *Leiden Journal of International Law*, Vol.15 No.4, pp.781-804.

The state under obligation may be termed the judgment debtor. It may decide how to fulfill the obligation; the precise facts of the case and expediency in which is a better political choice can help determine this. The state in whose favour the obligation is assessed (judgment creditor) can however challenge this. Non-compliance with an ICJ decision may be viewed as an internationally wrongful act; a breach of obligations *ex contractu*, and also of a duty required by customary international law. To induce the offending party to comply, the aggrieved party has recourse to the measures available to it, as it feels, within international law.

In terms of empirical evidence of compliance, the finding by Shaw is of only somewhat satisfactory.³⁰⁵ Various factors will impact the situation. For example, good underlying relations between the parties will increase the chances.

There is the important area of compliance with decisions of ICJ Chambers. This is discussed by Valencia-Ospina.³⁰⁶ Firstly, these judgments are binding on the parties. From Art 94 UN Charter, the parties can request the

³⁰⁵ Shaw, M. N., *International Law*, 5th edn, Cambridge, Cambridge University Press, 2003; Ch 16, p.858.

³⁰⁶ Valencia-Ospina, E., 'The use of Chambers of the International Court of Justice', 1996, *Fifty years of the International Court of Justice*, eds. Lowe, V. and Fitzmaurice, M., Cambridge, Cambridge University Press, pp.503-527.

Security Council to take measures to enforce the judgment if compliance does not occur.

Initially, the issue of enforcement is considered. Once the ICJ has given its judgment, it must be taken as final, with no recourse to appeal.³⁰⁷ Arts 2 and 94(1) of the UN Charter require member states to comply with ICJ decisions. The Security Council has the discretion to make recommendations or take other decisions, which it can do to give effect to the ICJ judgment. It can take these measures under Chapter VI of the UN Charter. Art 59 and 60 of the *ICJ Statute* confirm this obligation. There is also a general principle of international law whereby, when states have agreed to submit a dispute to an international tribunal, they agree to comply with its decision.³⁰⁸ That decision may state a need to negotiate to resolve the dispute.

Importantly, from Art 94(2), if a party does not implement an ICJ judgment, the aggrieved party may have recourse to the UN Security Council, 'which may, if it deems it necessary, make recommendations or decide upon

³⁰⁷ Art 60, *Statute of the International Court of Justice* (1945), <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

³⁰⁸ Kelsen, H., *Principles of International Law*, Tucker R.W.; New York, Holt, Rinehart and Winston, 1966, pp.557-558.

measures to give effect to the judgment.³⁰⁹ One central issue which this has raised is whether the Security Council (UNSC) must follow the ICJ decision, or does it have scope to amend it. It has not yet done the latter.

Most ICJ empirical evidence points towards a good record for compliance with final judgments. Many cases have not required compensation: for example, declaratory judgments, where enforcement has not been required. Rosenne asserts that international tribunals lack enforcement mechanisms, including the ICJ.³¹⁰ On this view, apart from an undertaking by parties to comply, enforcement itself must be political. The UN Charter is grounded in an assumption that if the reason for non-compliance is taken before the relevant political organ, that will initiate an entirely new proceeding, to be settled politically. The dichotomy between legal or political domain is perhaps too great to induce good compliance.

The enforcement of decisions of the Court regarding interim measures is historically controversial. Rosenne, for example, maintains a basic difference between compliance with incidental and interlocutory decisions;

³⁰⁹ Collier, J. and Lowe, V., *The Settlement of Disputes in International law*, Oxford, Oxford University Press, 1999; Ch 7, p.178.

³¹⁰ Rosenne, S., *The law and practice of the International Court, 1920-2005*, 4th edn, Vol.I – The Court and the United Nations, Leiden, Martinus Nijhoff, 2006; Ch 4, p.195.

and compliance with final decisions.³¹¹ The first two types are initially considered. With the exception of a decision indicating provisional measures, non-compliance does not allow the ICJ to impose sanctions *proprio motu*. In the second case, non-compliance still does not usually allow the ICJ to impose any sanctions. In general, on one hand, a line of thinking says that the terms of Art 41 in this regard, ‘the Court may indicate provisional measures which ought to be taken,’ and ‘notice of the measures suggested shall be given.’ Thus, the order in this context is not an ICJ judgment (Arts 59 and 94, *Court Statute*), implying that the parties are not bound by the order for measures. The opposite line of reasoning, as recounted by Collier and Lowe,³¹² is that Rules 73-8 of the Court Rules refer to the word ‘decision’ in this context.

It is useful to consider the *Bosnia* case in this context.³¹³ Here, the UN Security Council employed Resolution 819 to decide certain measures that omitted the word ‘genocide,’ which could in the opinion of Tanzi be taken as measures intended to reinforce the provisional measures indicated by the

³¹¹ Rosenne, S., *Ibid.* Ch 4, p.207.

³¹² Collier, J. and Lowe, V., *The Settlement of Disputes in International law*, Oxford, Oxford University Press, 1999; Ch 7, p.174.

³¹³ *Application of the convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, order of 13/09/93, ICJ Report no.325.

ICJ in its Order of 8th April 1993.³¹⁴ Interestingly, this practical assertion does not require the application of Art 94(2) in the matter of compliance with provisional measures, although that was the exclusive basis under which the Bosnian government approached the Council. Specifically, Al-Qahtani further advances the idea that since the ICJ has no executive arm, its direct enforcement powers are limited.³¹⁵

When analyzing a case in terms of provisional measures, the exact degree of compliance would need to be assessed in light of the subsequent proceedings on the merits (unless the case is discontinued). Schulte categorises cases of non-compliance with provisional measures in three ways.³¹⁶ The first type are those of defiance, where the state flatly declines to accept the decision as binding or to implement it. The second type is those cases where both parties accepted the provisional measures, but what is disputed is whether the stated commitments have been backed up by sufficient actions. Here, the Court's authority may be undermined, but has not been challenged. The third category contains only two cases as at 2004,

³¹⁴ Tanzi A., 'Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations', 1995, *European Journal of International Law*, pp.539-572.

³¹⁵ Al-Qahtani M., 'The Role of the International Court of Justice in the enforcement of its Judicial Decisions', Hague International Tribunals, 2002, *Leiden Journal of International Law*, Vol.15 No.4, pp.781-804.

³¹⁶ Schulte C., *Compliance with decisions of the International Court of Justice*, Oxford, Oxford University Press, 2004; Ch 3, p.400.

namely *Breard (VCCR 1963)*³¹⁷ and *LaGrand*.³¹⁸ Here, there was doubt as to the binding nature of provisional measures; there were also domestic structures which were seemingly at odds with the state party's (lack of) intent to comply.

The empirical evidence on compliance with provisional measures is: significantly less compliance than for judgments. In terms of institutions, some specialized international agencies' constitutions enable enforcement procedures for some types of ICJ decisions. Examples include the International Labour Association and the International Civil Aviation Convention.

By consensus, the binding force of indications of provisional measures under Art 41 was not conclusively established until *LaGrand* (see chapter 3, p.71). Here, one significant conclusion from part of the ICJ judgment hinged on the statement that the US clemency procedure could not adequately replace a review procedure that should have occurred within the judicial process, not defined independently of it as stated by the party.

³¹⁷ *Breard, Case concerning the Vienna Convention on Consular Relations (Paraguay v United States of America) (Provisional Measures)*, order of 9/4/1998.

³¹⁸ *LaGrand (F.R.G. v. United States)*, 27/06/01, ICJ Report 466.

Another aspect is raised by this case, mentioned by Schulte.³¹⁹ This is the issue of how a state is addressed by the Court, namely in its entirety. On this definition, a state cannot point to its domestic legal setup as a justification for non-compliance, as the US did in *LaGrand*.³²⁰ All actions by public officials at any level can be attributed to the state; nor can the state escape accountability by invoking its legal system. The Court examined Art 41 *Court Statute*, and noted that:-

‘Art 94 of the UN Charter does not prevent orders made under Art 41 from having binding character.’

In general, an ICJ ruling does not necessarily imply a specific compliance way. For example, in *LaGrand* compliance occurred by means of the respondent’s choice. However, factually in *LaGrand*, the means chosen were found by the Court to be inadequate. Objective circumstances or necessity may validly determine non-compliance, but not a political stance that defies international law and the ICJ’s authority.

³¹⁹ C. Schulte, *Ibid.* Ch 2, p.24.

³²⁰ *LaGrand (F.R.G. v. United States)*, 27/06/01, ICJ Report 466.

Thus, in order to conclude that non-compliance with a decision can be taken as an act of aggression, the state must be perfectly clear on what it must do to comply. Also, there is no stated timeframe for compliance in international law.

Moreover, from a UN viewpoint, the UN Charter does not permit the threat of or actual armed force to enforce compliance with an ICJ judgment, unless in conformity with the Charter. In relation to the post-adjudication phase, Art 94(2) Charter gives the aggrieved party the right to unilateral measures, before recourse to the Security Council. This right is not necessarily to the exclusion of other rights available.

The ICJ is the main legal body of the UN. There have been occasions when the Court's pronouncements have taken on a greater political significance, where the UN is separately involved. In 1992, in the aerial incident at Lockerbie in Scotland involving Libya, the UK and the USA, there was an attempt to use the ICJ proceedings to frustrate the Security Council's action under Chapter VII of the Charter. In its orders of 14th April, the Court stated that all 3 states, as members of the UN, are obliged to act on the Security Council's decisions under Art 25 UN Charter. The Court then stated that its

own proceedings were at a different stage, namely that of provisional measures. It elaborated that *prima facie*, the parties' obligation extends to the decision in resolution 748 (1992). Therefore, the rights claimed by Libya under the *Montreal Convention* (updated 1999) were overridden by any protection by the indication of provisional measures – this was due to the parties' obligations towards the UN resolution being more important than the *Montreal Convention* due to Art 103 of the *UN Charter*.³²¹ Further, the rights enjoyed by the UK/USA under resolution 748 would likely be impaired by an indication of the measures requested by Libya. The UN thereby imposed sanctions against Libya. As a general point, the ICJ has shown an aversion to get involved in the UN Security Council when the latter is actively seised by the same dispute. Conversely, the UN has overstepped very little in enforcing ICJ decisions.

4.4.3 Compliance and enforcement conclusion

In the WTO, as explained, any enforcing countermeasures are a temporary measure, since specific performance of obligations is a higher obligation. If the final judgment is that compliance has not occurred, the injured party has

³²¹ *Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal, 28 May 1999), <http://www.montrealconvention.org/>

the right to impose countermeasures. In most cases, the body recommends that the losing party amend its measures to comply, without specific instructions. If there is no indication of implementation within the RPT, the complainant can request authorization to suspend concessions. The practical expectation in the *DSU* is that where there is a disagreement on compliance, the parties must initially try to find a practical solution, to avoid a unilateral outcome.

In WTO arbitration, the DSB should be promptly informed about the results of the arbitration, but takes no independent action unless asked. The lack of specific jurisdiction on proposed countermeasures leaves a high scope for economic distortions. Thus, one criticism of WTO compliance procedures could be that there is no backdated remedy. Any past wrongs not punished weaken an already weak member – e.g. one with an undiversified economy. One broad conclusion must be that trade retaliation is opposed to the WTO's key trade precepts about liberalizing, not restricting, trade. The level of deterrence is not very high. Fairly, enforcement would be better viewed as a multilateral matter.

At the WTO institutional level, the DSB leaves compliance monitoring to

the aggrieved party; this is hardly a fair or directly credible process. Also, there could be recognition for partial compliance to date, to assist the parties in eventual reconciliation in connection with the dispute. The ICJ does not have defined direct enforcement tools. Since the ICJ has no executive arm, its direct enforcement powers are limited.³²² Non-compliance with an ICJ decision may be viewed as an internationally wrongful act; a breach of obligations *ex contractu*, and also of a duty required by customary international law. With the exception of a decision indicating provisional measures, non-compliance does not allow the ICJ to impose sanctions *proprio motu*. Historically, the binding force of indications of provisional measures under Art 41 was not conclusively established until *LaGrand*.

Unlike in WTO (trade) law, there is no stated timeframe for compliance in international law. Also, the ICJ has no punitive tools for non-compliance, unlike the WTO.

³²² Al-Qahtani, M., *Ibid.*.p.782.

CHAPTER 5: CONCLUSION

5.1 General summary

Certain 'diplomatic' methods of dispute settlement predate the WTO and the ICJ. They are non-judicial, relying largely on the parties' abilities to resolve the dispute without a formal settlement or judgment. As international law evolved, the use of these methods has declined. The diplomatic methods may be used complementarily.

Of them, negotiation is a process that is still initially favoured by the UN. A mediator can facilitate it. The particular dispute and parties will determine the best methods to employ, to avoid judicial settlement. Two methods, inquiry and fact finding, have dropped out of modern usage, but the ICJ would benefit from independent verification methods. During the twentieth century, the diplomatic methods made no reference to the parties' rights under international law, which had been developing. Generally, the more flexible a method, the more it might be adapted to the changing needs of parties over time. Across all the methods, diplomacy is perhaps the least formal, with judicial settlement being the most.

The other type of settlement is called legal settlement, based on international law. The two alternatives are arbitration (via a panel) and judicial settlement (in a court), used to achieve a binding settlement where diplomatic methods are either inappropriate or have failed.

Arbitration refers to the situation where the parties request a specially convened tribunal, since, after diplomatic methods have failed, they prefer judicial settlement. They perceive that the dispute can be resolved, in order to aim for the award of reparations/damages. A panel is usually convened. Such voluntarily demarcation of the dispute issues by the parties should increase the chance that settlement will be adhered to. It requires the parties to commence an agreed method of dispute resolution, whereas judicial settlement typically might involve referring the dispute to the ICJ (or other international court). The main outcome is usually the panel's award of damages against the offending party. It is a recognised procedure within both organisations; in the *DSU*, it would follow the WTO rules for the procedures.

Brownlie has pointed out that international law does not obligate parties to settle disputes, whereas the formal or legal procedures depend on the

parties' consent.³²³ Historically used diplomatic methods include negotiation, mediation, inquiry and conciliation. In the case of inquiry, over time the commissions moved from purely fact finding to making judicial pronouncements, reflecting the increasing influence of international law. Mediation or good offices have given prominence to third parties occupying certain offices, e.g. that of the UN Secretary General, as a conduit for dispute settlement processes. Conciliation is also less used, ceding ground to rules-based regimes such as *GATT* and the WTO. It originated from legal issues contained in treaty law, which gave rise to permanent enquiry commissions. Conciliation began out of inquiry, and incorporates inquiry and mediation.

The WTO succeeded *GATT* in 1995, and this framework is addressed by the *DSU*, which is guided by customary rules in international law (*VCLT* 1969)³²⁴.

³²³ Brownlie, I., 'Remedies in the International Court of Justice', *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings*, eds, Lowe V. and Fitzmaurice M., Cambridge, Grotius Publications, Cambridge University Press, 1996, Ch 30, pp.557-566.

³²⁴ *Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations*, UN GAOR, Art 31(2), UN Doc A/CONF.129/15 (1969).

The DSB governs panel formation and the implementation of rulings, and can impose sanctions on a party that has not followed *DSU* rulings. It also accepts panel and AB Reports. In the ICJ, the *ICJ Statute* and the *Rules of Court* are relevant. Where there is a conflict between them, the *Statute* has precedence. If the parties do not want to refer the dispute to the ICJ, they can opt for another tribunal or arbitration. The ICJ must establish its jurisdiction, as well as the reasonableness of the claim in terms of law and facts. In general, the burden of proof falls to the party which is wanting to assert a fact. The emphasis in this thesis is a comparative evaluation between the dispute settlement procedures in the WTO *DSU* and the ICJ. Certain ideas are similar between the two, and others are quite different. The conclusion aims partly to emphasize these areas.

Considering rules and procedures, in the *DSU*, Appellate Review is new and pervasive. It may counterweigh the otherwise one-sidedness in the WTO's exclusively compulsory jurisdiction, by being a higher check on panels; appeals on many reports have led to appellate review. This might not reflect well on the quality of panel reasoning, since many decisions have been amended by the AB, which has working procedures of its own. The ICJ has updated its Rules of Court, with a number of changes in 1972 and 1978. Art

41 of the ICJ *Statute* enables the Court to state interim provisional measures to protect the rights of the requesting, aggrieved party. There are written, then oral proceedings, consideration and finally judgment. The ICJ can set out the issues for parties to consider in negotiations; state what agreement (e.g. treaty between the parties) must be followed; or state that a specific dispute settlement process should be adhered to.

In the *DSU*, if the parties do not agree that implementation and processes are on track 45 days after panel report adoption, the original complainant can request arbitration. The panel decides the RPT for implementation. In recent times, if the offending party prefers longer, then the burden of proof falls on it under Art 21.3.(c), to demonstrate why. One issue under panel scrutiny is whether implementation can occur by administrative or legislative change, the latter usually taking longer. Issues such as developed or developing country may enter the calculation.

There could be active monitoring of compliance within the RPT, which might reduce the likelihood of eventual punitive measures. This panel can resort to arbitration, which must end within 90 days of original report adoption. If the offending party does not follow the rulings of the original

panel, or (by consensus since 1999) additionally, a compliance panel's rulings also have not been adhered to, or if the offending party has then failed to negotiate compensation, then under Art 22, the aggrieved party has less preferred choice of requesting authorisation to suspend trade concessions or other obligations. These are seen as temporary, since they are trade-distorting.

Regarding *DSU* implementation disputes, an Art 21.5 Compliance Panel can be requested. Here also, the party that asserts a fact has the burden of proof to prove it, and the party that asserts a defence based on an exception must establish that. There are no stated timeframes for implementation and processes within the ICJ. Whatever the reason, it might explain why dispute linger for so long. The burden of proof lies with the party which wants to assert a fact(s): the complainant. Implementation can include an order to negotiate, and the parties may jointly agree to vary the ICJ's decision. There are written, then oral phases in the proceedings.

The court can sit in chambers, to expedite the case where complex international law does not arise. Any intergovernmental organisation may file an *amicus curiae* memorial with the ICJ on an ongoing case.

The WTO's jurisdiction is compulsory and exclusive jurisdiction in trade law disputes for members. From Art 27, *VCLT 1969*, a member cannot invoke internal laws as justification for failure to perform a treaty, taken as a WTO covered agreement. This distinction caused a tension in the ICJ with the US government in the *LaGrand* and *Avena* cases, whereby the ICJ issued a future requirement by the USA to undertake changes to prevent that state passing responsibility for domestic decisions to the relevant governor in *LaGrand*.³²⁵ In the WTO, the panel will delineate its own jurisdiction, but the AB can delineate this. Also, the AB can amend its jurisdiction in the light of facts, whereas the panel's terms of reference are given. A panel's weighing of evidence is based on fact, whereas that of the AB is based on law and facts.

Jurisdiction in the ICJ is quite different. It may be mutually voluntary, or by special agreement, for example. Another tribunal might be appropriate instead. In the WTO the AB can overrule a panel on legal grounds, but there is no such process for ICJ judgments. In the *DSU Art 22* (arbitration), jurisdiction is limited to finding a RPT for compliance. The ICJ considers jurisdiction in the order: narrowest to widest, i.e. it prefers to establish

³²⁵ *Avena and Other Mexican Nationals (Mexico v United States)*, Judgment, 31/03/2004, ICJ Report 12.

jurisdiction for a lesser rather than a greater reason. Where a reservation in a treaty prevents jurisdiction, overriding customary law can provide it (e.g. the *Nicaragua case*).³²⁶ Art 36(2), *ICJ Statute* contains an optional clause which expanded jurisdiction by increasing the scope with regard to treaties, international law, and facts in relation to international obligations. Where there might be a basis for jurisdiction, Art 66 of the Rules still permit a request for provisional measures to a requesting party. The usual procedure to initiate a case in the WTO is for a member to bring a complaint, whereas there are a number of ways in which the ICJ can be seised of a dispute.

The next area is the judicial aspects of dispute settlement. *DSU*, Art 3.2 states that any WTO adjudicating body must clarify the existing provisions of the WTO agreements in line with customary rules of interpretation of public international law.

³²⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, 26/11/84, ICJ Report 392.

Authors such as Van den Bossche have taken a broad view of *DSU* sources of law, adding general legal principles (for example, good faith), other international agreements (for example a regional trading arrangement such as the *North American Free Trade Agreement (NAFTA)*),³²⁷ the subsequent practice of members, and negotiating history (including *GATT* also). Subsequent practice means interpretative element, not legal source.

In the ICJ, for interpretation it is usual to apply Arts 31 to 33 of the *VCLT 1969* in relation to the *Statute*. One ambiguity lies in where a matter cannot be decided based on the *Statute* or *Rules*, the ICJ can decide the matter ‘in terms of international justice.’ Provisional measures have no *res judicata* status, and can be rescinded or changed. The standard of proof can be drawn from inferences of fact, provided they leave no room for reasonable doubt. The Court has varied this standard over the years. The Court Rules do not state the level of proof, so the Court uses its discretion in relation to facts.

³²⁷ *North American Free Trade Agreement*, 01/01/1994, <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>

For the burden of proof, there are no stated rules in the *DSU*. The burden of proof is on the party (whether complainant or respondent) which asserts a specific claim or defence to prove it. Also, a party that invokes an exception provision in its defence must prove that the exception conditions have been met. Once any proof is made, the burden then shifts to the other party. Also, if the arguments are equally balanced, the defendant would get the benefit of the doubt, until that party conclusively shifts the burden back to the complainant (e.g. *US – Section 301 Trade Act*).³²⁸

Compliance in the *DSU* concerns essentially whether or not a member has fulfilled its obligations under the WTO agreements. Countermeasures refer to the suspension of tariff concessions, deriving from Art 22.3 of the *DSU*, whereby the aggrieved member must initially seek to suspend in the affected sector. The second choice is a different sector. The DSB may prefer temporary compensation to sanctions. The *DSU* categorises any countermeasure as temporary, because the initial violating action is to be temporary. Countermeasures are requested from Art 22.2, and are rare. They should not exceed the injury caused, and backdated ways to calculate injury have been proposed but not adopted, which remains unfair to the offended

³²⁸ *US – Section 301-310 of the Trade Act of 1974*, 25/12/99, WT/DS152/R.

party; but then sanctions hurt both parties. In the *DSU*, an Art 21.5 compliance can widen the scope to include backdated counterclaims by each party, whereas the ICJ has no compliance review tools.

An arbitration panel is resorted to if the parties cannot agree the level of countermeasures (Art 3.2 *DSU*). A recommendation by the *DSU* to the offending member is then usual. From *Canada – Pharmaceutical Patents* onwards, the arbitrator has been stricter about a shorter RPT.³²⁹ Greater sensitivity to weak institutional structures in members might assist in calculating the RPT fairly. The implementing member bears the burden of proof about why the RPT should be different.

After *EC - Bananas III*, it became practice that compliance procedures under Art 21.5 should be completed before recourse to arbitration under Art 22, over which the DSB takes no action unless requested.³³⁰ There is no appeal against an Art 22.6 arbitration decision. The compliance record for ICJ decisions is good, but the Court does not monitor compliance. There is no guidance in the event of non-compliance.

³²⁹ *Canada-Pharmaceutical Patents*, Panel Report 07/04/00, WT/DS114/R.

³³⁰ *EC - Regime for the importation, sale and distribution of bananas – recourse to arbitration by the European Communities under Article 22.6 of the DSU*, 24/03/00, WT/DS27/ARB/ECU.

However, the ICJ often requests information information about compliance under Art 78 *Court Rules*. The evidence for compliance with provisional measures (now binding) is less than for final orders. Unlike WTO trade law, international law does not contain timeframes for compliance.

Regarding enforcement mechanisms in the ICJ, the UN Security Council can make recommendations, or take other actions under Chapter VI, UN Charter. This is clarified in Arts 59 and 60 of the ICJ *Statute*. Also, from Art 94(2) UN Charter, if an offending party does not implement an ICJ ruling, the aggrieved party might recourse to the Security Council. The party can request the Security Council to take enforcement measures, absent compliance. An executive arm in the ICJ would have enabled a meaningful internal compliance function, rather than relying on the Security Council. Where the political significance of an order ICJ has been greater, the Security Council has been more willing to become involved.

5.2 Recommendations for the future

5.2.1 Rules and procedures

The ICJ is the main legal body of the UN and is therefore ultimately accountable to the UNSC, whereas the DSB of the WTO, after a case is

subjected to Appellate Review, is not externally accountable in the WTO. This makes for a lack of transparency; so the DSB's status in the WTO could be improved. Generally, WTO rulings could fall prey to legal fashions, instead of following conventions from international commercial law. Consequently, the legal arguments underpinning the AB's decisions could be made more transparent.

The ICJ is slow to make decisions and so many disputes are not referred to it, but one could argue that each dispute is adjudicated on the merits. Conversely, the WTO is based on a defined rules system. Therefore, the WTO needs a review process to scrutinise its rules in the light of specific disputes, to see whether the rules need to be updated. The ICJ has twice updated its Rules.

5.2.1.1 WTO

The AB does not actively monitor dispute settlement processes. One remedy this would be to add a monitoring committee, to increase accountability in the WTO. Another aspect of internal accountability is between member states. Until 2000 or so, countries in a dispute would privately agree on panellists. Other (affected) members should be informed,

to prevent collusive power abuses. Secondly, there should be a procedure to decide which members are directly affected. It could then be debated whether/which state parties should have a say in panel selection.

There are two institutions within the WTO for accountability. These are the Trade Policy Review Mechanism and the *DSU*, but transparency is not mentioned in the *DSU*. This has meant that such issues have been largely left to panels and the AB. This should be changed by means of amendments to the DSB; the WTO has been accused of secrecy. A committee to monitor and evaluate the WTO's policy initiatives might help. A transparency lack can be analysed in terms of fairness and/or efficiency. As a general postulate, putting equity under consideration, states with more legal resources are better positioned to develop procedures to synchronise with the demands of the DSB. In this regard, a lack of transparency will likely adversely affect developing countries over time. Basic transparency can be further assessed. Firstly, we can consider access to documents. In line with a WTO members' preference to limit the number of documents in exempt categories, the General Council adopted some de-restriction (1996). However, working documents, timetables and agendas, and Secretariat notes are restricted. Yet access to these is an important aspect of being

influencing proceedings.

One issue is the efficiency argument of making panel and AB proceedings public as they occur. The argument is as follows. Many panel decisions have been overturned by the AB, partly because panel decisions often refer to previous rulings as law, whereas each case has its distinctive characteristics. By widening public access, the panel deliberations can be criticised, and should lead to a better choice of panellists. This would free up AB panel review time. Other stakeholders in the *DSU* would benefit from public access to documents. Opening submissions to criticism would enable a more transparent legal process, and therefore fairness, since legal precedents could be debated as the case proceeds. An efficiency gain results because it would reduce appeals on legal grounds. AB rulings are deficient in that they are adopted subject to the proviso only of negative consensus. There should be a case-by-case review; the General Council and Ministerial Conference should be more activist.

A second issue is that of due process, for example the communication between WTO bodies and non-governmental organisations (NGOs), and more generally, civil society groups. Here, a basic concern is that these

groups' ability to influence proceedings is lacking. This would be assisted by real-time access. Another matter is the lack of an accepted method for verifying arguments raised in proceedings. To improve this, greater transparency could include the scrutiny of experts, and presentations by NGOs. This implies a theme of greater participation by members, or other groups.

Developing country members have complained that they are excluded from informal meetings in the WTO; also voting is avoided, and consensus used, usually via informal 'Green Room' meetings. These are dominated by the USA, EU, Japan and Canada (the Quad). States with large market shares get much more input into and influence with decisions. Less economically dominant states frequently follow leaders. Taking part remains by invitation. Most such decisions are presented at an advanced stage, with it being too late for developing countries to participate effectively.

Greater transparency can result from representation. The European Commission produced a strategy document about WTO reforms. A short term proposal was an informal group to report its findings to a plenary session, where any member could express an opinion. Another suggestion

for developing country members is a collective voice (e.g. regional), with more overall effectiveness. Developing country members need to increase permanent representation in Geneva. A tiered deadline system with close monitoring might help, due to their limited legal resources. More participation will be achieved.

Abuse of power can be curbed by increased transparency; there could be a WTO strategy committee that meets periodically to assess whether some party or parties are abusing their power in world trade.

5.2.1.2 ICJ

One proposal is that judges should not be allowed to be re-elected. So for greater accountability, they could be elected for 9 year terms, and one-third of the bench would be elected every 3 years. This change would require amendments to Art 13 *Court Statute* and Art 2.1 *Rules*. The former represents more obstacles since it has not yet been amended. Also, to safeguard the quality of their decisions, an age cap should be introduced. NGOs should be given the chance to be party to proceedings, especially in cases with multilateral impacts (jurisdiction *ratione personae*). The ICJ is the only international tribunal that does not permit them any status in

contentious cases. One rationale for this is that they have acquired a legal status in international law. For example, a state may impinge on others by its whaling activities, and Greenpeace represents the welfare of animal groups.

The ICJ has not revised its decades-old view of international participation. However, political disputes between two states can have regional political and economic impacts; consider this as evidenced by the existence of regional bodies, such as the EU, Mercosur, the Arab League, and the Organisation of Islamic Conference. There could be a major review of what type or types of entity can initiate a case. This would conform to the evolution of international law, and could happen by a change to the *Statute* (Art 53.2), allowing jurisdiction *ratione materiae*.

One lack of transparency in the ICJ's rules and procedures is a deficiency in publicly available information concerning how rules and procedures have been or are drafted by the Court. Of the *travaux preparatoires* of the Court Rules, the public only sees background notes which accompany a new version or revision to the Rules, which do not show the main issues driving changes. These should be publicly available. This would reinforce

confidence in the Court's authority, and might lead to a greater recourse to it in the event of a dispute. Improved compliance might also result, since the discord in rule interpretation is potentially reduced if the discussions surrounding rules creation are made public. This can make the Rules perceived to be more participative than dictatory.

Analogous to the *DSU* discussion, is the idea of realtime access to the ICJ's deliberations as the case proceeds, to modernise the ICJ's transparency. Also, resistance to the court's authority can be curbed by increased transparency.

Another aspect of rules and procedures for future change is that of due process. The ICJ is enabled under Art 51 *ICJ Statute* to form an investigative body for important contested data. Here, it is relevant to consider how relatively open two regimes are, and therefore what steps might be taken. Consider, for example, communication between the ICJ and NGOs.

As for appeals procedures (fairness), there could be an appeals procedure along the lines of the WTO *DSU*, i.e. within 60 days of the ICJ judgment.

This will increase the desire of parties to go the ICJ when a dispute arises.

5.2.2 Implementation and processes: general

One theme is fairness in both organisations, for example weak vs. strong countries. A strong country might implement more easily, whereas a weak one may need some types of institutional or other support. The *DSU* is considered first. From the *DSU*, the principles of good faith, due process and procedural fairness are embodied in Arts 3.10, 3.7 and 4.3.

For the ICJ, one fairness theme is whether a permanent international tribunal should be involved in any domestic laws. Should the ICJ safeguard individual human rights where a state has not followed due process? In *LaGrand*, the ICJ's indication of provisional measures was disregarded by US local and federal authorities.³³¹ To prevent such occurrences, there should be a monitoring process to check what action the state authorities are taking.

Another issue is that a strong state may not see fit to permit foreign nationals full diplomatic rights to contact their embassy: the *LaGrand*

³³¹ *LaGrand (F.R.G. v. United States)*, 27/06/01, ICJ Report 466.

brothers did not receive this benefit. Germany's only remedy was an assurance that the US would not in future fail to provide review and reconsideration. So, the ICJ could have a corrective function for fairness by standing ready to correct such abuses of international law if notified by the aggrieved party. Moreover, a number of states are not signatories to international treaties; have not accepted the ICJ'S jurisdiction; or have accepted it with reservations. Because of this, scope for violations of rights exist, e.g. of ILO conventions for immigrant workers. The Court's remit should be amended to clarify to states the necessity of respecting and protect rights such as civil, political, economic and social human rights.

In the *DSU*, evidence shows that traditional diplomatic processes have become more judicialised. Overall, many disputes could be resolved amicably and quickly by better use of these methods in early in the dispute. Art 4.3 *DSU* refers to good faith in consultations. In *Mexico - HFCS (Art 21.5)*, the AB required procedural fairness in terms via the relationship of the respondent to the complainant's right to request a compliance panel.³³²

³³² *Mexico – Anti-dumping investigation of high fructose corn syrup (HFCS) from the United States: Recourse to Article 21.5 of the DSU by the US, 22/06/01, WT/DS132/RW.*

However, there is no legal requirement to hold consultations in good faith, which should be instituted as a rule change to improve procedural fairness early in the process. For the ICJ, by contrast, there is a requirement to use all available diplomatic methods to try to resolve the dispute, and may explain why if these methods fail, both parties then go to the court. In the *DSU*, consider the criticism that management processes are not sufficiently monitored. This implies excessive familiarity between economically strong members, e.g.: more informal meetings occur. At the Seattle meeting (1999), about 60 countries, including developing ones, threatened to leave since they were not included in the ‘Green Room.’ One remedy would be to institute a management board to try to include processes for all members, including regional bodies to strengthen their identities and perception of the *DSU*. This should also speed up decision-making processes. In the ICJ, it is possible that one member is/ feels weaker than the other, and might not fully contest the case, to retain good diplomatic relations. To remedy this, the ICJ could offer good offices or some other process by which the weak member might fully state its position.

Another deficiency in the *DSU* lies in the panel system. For example, panel members have often been government representatives, not trade or legal

specialists. This has fed criticism of panel decisions, e.g. in consistency and legal judgments. Thus, it has seemed to be a closed bureaucratic system run by officials, possibly with their own political agendas. One improvement would be panel selection by the parties from a pool of trade experts. This should improve efficiency, since Appellate review will then take less time.

Additionally, a number of cases have hinged on the correct interpretation of environmental treaties or international law. *DSU* panellists have been criticised for a narrow legal interpretation. There has also been no *DSU* requirement for panellists to seek advice from experts. The ‘experts or jurists’ approach would increase transparency and improve due process, which is part of the the public perception of fairness as well. Selecting senior judges, law professors, and judges from international law rather than trade officials has though been occurring since 2000-1, and should continue. A panel should perhaps thereby develop more of the attributes of a standing body, rather than an *ad hoc* facility. Comparing with the ICJ, there the judges must have international law competence. The risk of judging issues without relevant expertise is less likely. The WTO thus needs to address public interest issues much more openly and broadly.

A fact about developing countries is their weaker financial position,

preventing them from launching many *DSU* cases. This has fairness and free trade implications. There could be an international pool of jurists, to be called on if the plaintiff (or the defendant) can show a lack of financial means. For the ICJ, sensitivity should be shown to the political setup of a weaker country.

As regards specific sanctions in the *DSU*, the suspension of concessions and other obligations has usually meant the imposition of a 100% tariff by the aggrieved party on the offending party. But this can cause a third or further party to be hurt by punitive retaliation. This contravenes the stated objective of Art 3.2, which is about ‘providing security and predictability to the multilateral trading system.’ One future suggestion is some other, less trade-distorting corrective measure. This also impacts fairness as an international social welfare. This was suggested by Australia in the Negotiations on Improvements and Clarifications of the *DSU* (July 2002), third party/other party compensation rights should also be respected. In the ICJ, the two parties usually commence a case, but the Court should likewise be proactive in deciding which other parties may be affected.

Australia also highlighted the unacceptability for third parties of no

timeframes in bilateral compensation. Countries which are part of a regional trading agreement will be more sensitive to such needs. Specific proposals to streamline the *DSU* might include:-

- 1 rules to resolve conflicts of interest;
- 2 specialise the WTO legal department;
- 3 explore improving access to the *DSU* for all members;
- 4 Define processes to ensure parties can get expert pertinent information to the panel or AB;
- 5 an open process for a recognised external organisation to provide relevant information;
- 6 Ensure that changes to timeframes are fair to disadvantaged states.

Point 6 is also applicable in the ICJ, where the judgment should include guidance on timeframes and implementation.

Now, onto the AB. Regarding developing countries, in *EC - Sardines*, it said that interpretation should guarantee fairness to developing countries, by ensuring that access to the *DSU*, where limited due to funds, should not be prejudiced in favour of industrialised members' greater skill in tilting

procedures in their favour.³³³ In the ICJ, jurisdiction derives from international law, customary law, and treaty law. Analogously, the Court could become alert as to whether strong states can influence processes unfairly.

There is a need for the ICJ to differentiate between remedies for violations of international law and the need for domestic legal or other processes to be corrected where there has been a treaty violation. Otherwise, the Court is stopping short of its obligations as an international tribunal. This can be compared with the *DSU*, where corrective action can include recommendations about domestic changes needed in order to comply.

5.2.2.1 WTO: specific recommendations

As shown, developing countries might need special attention. Specifically, the initial consultation period could be extended to 60 days, and the general consultation period limited to 30 days, to streamline the process. Art 21 (surveillance of implementation of recommendations and rulings), could be streamlined. To improve the effectiveness of 21.5, panels or the AB should make implementation suggestions under Art 19.1 more readily. Then,

³³³ *EC – Trade description of sardines*, 26/09/02, WT/DS231/AB/R, AB-2002-3.

appellate review in an Art 21.5 review is faster because the AB is revisiting the issues.

Regarding Art 21.3.(c), one proposal would be to change the *DSU*, such that the parties could negotiating on the RPT as soon as the dispute settlement report is adopted. They could ask the WTO Director General to appoint an arbitrator 30 days after report adoption, to increase efficiency and the likelihood of observing the stated 90 day deadline. Presently, the losing member only has to provide a status report regularly, from 6 months into the RPT. The reports should begin before the RPT, and the offending state be required to state an implementation tasks timetable.

A third area for reform is Art 22 *DSU*, for compensation and suspension of concessions. It would be better to calculate the nullification of impairment at the time that the RPT is set. Then, there could be a correspondence between the degree of wrongdoing and the time it might take to rectify it. The calculation of correct countermeasures should be backdated to the initial wrongdoing. This is exacerbated for developing countries, where a delayed implementation might magnify the problems of a small export product range, a few markets, or a few big trading partners. In 2003, Japan

suggested an addition to Art 22. If the complaining party finds that the offending party is not likely to implement the recommendations and rulings within the RPT, then the complaining party can request negotiations with the other party, with an intention to arrive at a mutually acceptable compensation figure. The AB should oversee this dialogue, to assess what monitoring would be required.

5.2.2.2 ICJ: specific recommendations

Provisional measures have been indicated mainly due to the urgency and risk of irreparable prejudice to the stated rights. In *LaGrand*, since a person's execution was imminent, an urgent request for a ruling was made. The Court interpreted 'examine' as 'make an order,' without giving both parties the audience of a hearing. Thus, the order excludes the principle *audiatur et altera pars* and should at least avail itself of an emergency power to do so, which could be written into the *Court Rules*.

An important issue is the current dispute might become aggravated in the future. It would be better for the Court to track the dispute in all its historic and recent context to establish the need for provisional measures, to prevent aggravation of the present dispute, e.g. by drawing in neighbouring

countries. Thus, the ICJ should state what steps need to be taken by the parties in order to prevent the dispute becoming more damaging; provisional measures can prevent the dispute becoming aggravated.

Much trade between large states is bilateral, so the consensus model in the WTO might be revised. Two state initiated cases, as in the ICJ, would be more efficient. More important than *DSU* consensus might be closer compliance monitoring. Using trade experts would help. Separately, a short term for AB members, and their desire to get reappointed, could be remedied by updating 4-year renewable terms to longer non-renewable ones.

Other aspects of a lack of dissent in the WTO are important. Firstly, precedents set by the DSB can lack credibility. In January 2003, the African Group forwarded a proposal that Arts 14.3 and 17.11 should be changed so that panellists and AB members must issue separate opinions, or joint opinions where 2 or more panellists agree. The *DSU* system of corrected panel decisions wastes time; perhaps the panel process needs to be subsumed within the AB. In the ICJ, other sides can be relevant, for example as applied to declaratory judgments where a state makes a request

to the Court based on actions of other states. The ICJ should be able to be seised by more than two parties.

5.2.3 Jurisdiction and scope

5.2.3.1 WTO

At 19(2), the *DSU* prevents the AB from varying any rights or obligations in covered agreements. Consider the *US – Shrimp case*.³³⁴ The complainants accused the AB of effectively completing the analysis; a lack of panel fact-finding; and that *amicus curiae* briefs from NGOs could not be used by a WTO member. Thailand argued that, by seeking facts, the AB had undermined the rights of WTO members to interpret WTO covered agreements, so it was a contravention of treaty, and therefore, international law. The main complainant concern was that the AB seemed more politically than legally inclined. The future implication is that the WTO Agreement cannot operate self-standing, but in conjunction with the *VCLT 1969*.

We now refer to the *Mexico – Taxes on Soft Drinks* dispute between Mexico

³³⁴ *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, 22/10/01, AB-2001-4, WT/DS58/AB/RW.

and the USA, concerning *NAFTA*.³³⁵ Mexico asserted that the panel could not decline jurisdiction under *NAFTA* rules, as the US wanted. The AB found that panels have inherent powers to decide jurisdiction, including scope. Jurisdiction in the *DSU* needs clarity regarding regional trade laws. Some process is needed; a resolution whereby the AB must show consistency if it completes the analysis. One remedy is a remand mechanism in the *DSU*, which might be initiated by the DSB, if one or more parties request it. The *DSU* might be amended for this, to rectify the procedural deficiency. Since there are no higher checks on adopted reports above the AB, an external surveillance panel could help. Also, the panel could be chosen by the ILC, for example.

If the panel should have sought more information, and the AB finds that such information would materially affect the outcome, it should then refer the matter to the Secretariat (another permanent body) for a second opinion.

The next area is the jurisdiction and scope of an Art 21.5 compliance panel. In the original panel, the scope of what claims may be raised and what count towards measures taken to comply are restricted. For compliance,

³³⁵ *Mexico – Tax Measures on soft drinks and other beverages*, 06/03/06, WTDS308/AB/R, AB-2005-10.

claims different to the original ones can be presented. However, a panel can refuse a defendant's request to restrict the terms of reference, and the plaintiff will want to broaden the scope. The issues raised are what should be the scope of a compliance appeal, and what would be the jurisdiction? For the future, the DSB should consider, on a case-by-case basis, whether the original panel would do better to have a narrow or more widely delineated scope. Also, should appellate review have greater scope in the original panel rulings, to tackle whether a compliance panel had the correct view of its jurisdiction? Again, perhaps more scope should be written into the *DSU* to allow critical appellate reviews of panels.

Generally, according to the AB, compliance panel scope will possibly have to assess the interaction between old and new specific agreements within the WTO. Unlike in many ICJ disputes, there are more dynamic factors in trade disputes, than in international law, so it might help if an original panel could have anticipated disputes/issues included in its jurisdiction.

There is evidence of a perceived need to anticipate the intended nature of compliance as falling within jurisdictional scope. Compliance panels would do better to anticipate what a member's intended corrective action is, in

order to better define rulings and reduce the likelihood of an appeal by the complainant in terms of measures taken to comply.

In *Australia – Salmon (Article 21.5 – Canada)*,³³⁶ the compliance panel stated how broad its powers to decide the scope of its jurisdiction might be: ‘...an Article 21.5 proceeding is not limited to consistency of certain measures with the DSB recommendations and rulings adopted as a result of the original dispute; nor to consistency with those covered agreements or specific provisions thereof that fell within the mandate of the original panel; nor to consistency with specific WTO provisions under which the original panel found violations. If the intention behind this provision of the *DSU* had been to limit the mandate of Article 21.5 compliance panels in any of these ways, the text would have specified such limitation.’

Perhaps to increase the predictive power for WTO members, compliance panel statements should be ratified or corrected by the AB.

³³⁶ *Australia – Measures affecting importation of salmon – recourse to Article 21.5 by Canada*, 18/02/00, WT/DS18/RW.

5.2.3.2 ICJ

Generally, since both parties usually agree to take a dispute to the Court, adjudication depends on the parties' shared goodwill. Compared to the *DSU*'s compulsory, exclusive jurisdiction, the ICJ's power could be expanded, to avoid too much reliance on the UNSC. Consider that the ICJ has relatively few states which have accepted its jurisdiction. In the ICJ, within a given dispute, if a particular area of the dispute is not included in the parties' submissions, then the ICJ has no jurisdiction on those points. In the WTO, the jurisdiction applicable in a review case can easily exceed that of the original case. This reflects that measures to comply can imply interrelated issues also. There is no such mechanism in the ICJ, and the decision cannot be appealed.

Since the ICJ's standard of review of a case is delineated by the protagonists, the jurisdiction is limited and therefore possibly short-sighted. The dispute may then recur in a modified form, or the parties might collude to resolve the preferred problems, but avoid another dispute that might involve a weaker state, to perpetuate some other dispute to their mutual advantage. The scope should be able to be determined by the Court. In the *DSU*, the AB reviews the panel's jurisdiction. There is no such review

mechanism in the ICJ, which might also explain why few states have the confidence to go to the Court. This could be changed. One thing the Court could do is to emphasise relevant points in UN Charter law on the use of force.

One specific issue about scope is when can a state commit force in self-defence. This is associated with jurisdiction, for example whether it is short, medium, or long-term. It matters whether there is a history of disputes, for example in a fisheries sea dispute. Legal scholars hold that jurisdiction might arise where the right to self-defence is triggered by an actual armed attack by one state on another; e.g. to the extent of ending an invasion. Jurisdiction can apply to whether the retaliating state can use force additionally to deter a future attack. The interaction between the UN and the ICJ could be clarified also.

One problem is that the ICJ's jurisdiction is not exclusive. States have opted out, for example via the *Optional Protocol to the VCCR 1963*.³³⁷

³³⁷ *Optional Protocol concerning the Compulsory Settlement of Disputes* (1963), entered into force on 19 March 1967, http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963_disputes.pdf

There is scope for power imbalances due to reservations, causing potential regional or other power abuses. There should be a review mechanism whereby reservations must be approved of, the UN General Assembly.

The scope of *DSU* law is economic, whereas the ICJ's potential jurisdiction in non-economic areas is in principle greater. Judge Higgins has highlighted ambiguity in this distinction; the ICJ has not always accounted for taken all aspects of international law, e.g. Art 31(3), *VCLT 1963* might refer to an economic and commercial treaty. Competing interpretations can arise, which should be remedied, probably in the *ICJ Statute*.

Significantly, constitutional amendments will be needed to formally expand the ICJ's jurisdiction: to introduce worldwide compulsory jurisdiction, the 1945 UN Charter would require changes, since the ICJ draws its legal status from that. Also, if there were more constitutionalised supervision of ICJ processes by other empowered bodies, more states would willingly subscribe to the ICJ's compulsory jurisdiction. The *ICJ Statute* could be amended to permit access by, e.g. international organisations which have a mandate to make observations about state behaviour, concerning e.g. human rights or ecological welfare. The role of the UN Secretary General could be

expanded to point a dispute towards the ICJ's jurisdiction.

Where the parties invoke different sources of law, there is a tension in interpretation; e.g. there can be a direct contradiction between treaty and customary law interpretations. Usually, the treaty has imposed a stricter code of conduct, so the Court should decide more actively what conduct is acceptable. Also, stability is a key desirable outcome, so the likely impact of different types of interpretational rules need to be taken into account.

The ICJ can use customary law to ascertain the scope of a treaty containing a compromissory clause, i.e. to resolve an ambiguity. Where international law principles are being undermined by a narrow interpretation, the Court should presume that international law takes precedence. Expanding jurisdictional scope would tend prevent the fragmenting of international law, rather than enable a compromissory clause to enable an escape.

5.2.4 Judicial aspects and burden of proof

5.2.4.1 WTO

One theme is justiciability, i.e. when can the case be declined on jurisdictional grounds? Consistency is important; it would be best tackled by the DSB. The *DSU* could be amended, to enable the DSB to refer such

cases to the General Council, to be interpreted according to Art IX:2. There is an ambiguity as to whether the AB has legal authority, or does this derive solely from precedent. This could be clarified.

One theme that should be considered is whether the *DSU* has shown too much judicial activism, i.e. whether panels and/or the AB have gone beyond the intended remits in legal interpretations. The proponents of this view believe that negotiated settlements are preferable to modern judicial settlement. On justice as fairness, one change from the *GATT* regime to the WTO is that the AB has stated that WTO bodies can draw evidence from any source, not just what the parties present. The panel may decide what weight, if any, to ascribe to external evidence, but there should be some ranking ascribed to sources, e.g. NGOs. Lesser developed countries fear losing out to developed countries, since such organisations are funded in developed countries. In *US - British Steel*, the AB accepted information from NGOs which the panel had rejected, because Art 17.9 *DSU* highlights its authority to adopt procedural rules as long as they do not conflict with those in the *DSU* or covered agreements.³³⁸

³³⁸ *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, 10/05/00, WT/DS138/AB/R.

For the future, the *DSU* should state that such sources can be taken if the acceptance criteria are made clear during the case. This will be more transparent and fairer. There should also be a fair objection procedure to amicus briefs unless the legal justification is given. Also, if party A has furnished information that bears on the case, then party B should have an equal right to present (opposing) information.

A panel has a duty to be objective (*DSU* Art 11). This should include helping to make all pertinent arguments properly addresses by the parties. In general, the timetable according to which amicus briefs were accepted during a proceeding should be public information, and be decided at the start of the case, not incidentally. This is in line with transparency and fairness.

One approach to inconsistency or judicial activism by panels is to move from *ad hoc* to permanent panellists, a suggestion similar to extending the appointment term of ICJ judges. Three aspects of *DSU* panels could be considered. These are: judicial independence, credibility, and efficiency. One important change would be to drop the requirement of panel consent. A gain should be in the quality of panel rulings, which would not be

politically pressurised to show anonymity. As regards trade law, there is clearly scope to improve the selection criteria of panellists; this step will reduce overturning by the AB, which is comprised of specialists. This would carry out full support functions such as research 'more in-house,' rather than rely on the internal diplomacy required to make requests of the Secretariat. Its nationality and geographical composition would be carefully designed.

Also, to increase the fairness in the AB, the number of members could be increased. Overall, the judicial offices that constitute the DSB could be redesigned, to give them greater judicial credibility. The term of office could be increased from 4 to possibly 6 years.

Public opinions about sanitary and phytosanitary risks have been important in the *DSU*. The types of legal issues raised are: how much does SPS jurisprudence recognise such public opinion; what is the degree of consistency between international economic law and public international law, including international human rights treaties and international environmental law? Art 5.5, *SPS* states an obligation to avoid arbitrary or unjustifiable distinctions in protection levels that Members find appropriate

in different scenarios, if the consequence is discrimination or a concealed restriction on international trade. Conversely, due to scientific uncertainty, a member should be able to retain sanitary or phytosanitary measures because its population does not want a certain risk. Public opinion can form a part of such risk assessments. In the future, to balance competing interests, panels could become involved with the scientific issues impacting a dispute. The test is, for example, to apply Art 5.6, to ascertain whether alternative measures would have been sufficient. For the long term improvement of international trade law, domestic member scientific practice and international environmental law also need to be considered in the interpretation of the *SPS Agreement*.

How the burden of proof is or might be applied is a key part of the *DSU*. One deficiency in the *DSU* is the lack of any stated rules. The jurisdiction in the *DSU* is compulsory, whereas it is frequently based on the parties' consensus in the ICJ. Thus, in the ICJ, the parties may have better prepared arguments for proof, but not so in the *DSU*. The scope for unpredictable recurrence of a related dispute is therefore more likely in the WTO, and this consumes resources.

To augment the *DSU*, more inputs could increase transparency and consistency. For example, a panel decision should tell the parties whether and what amicus briefs were considered, and what factors affected the final decision. Developing countries might then improve the standard of their submissions.

Also important is how the burden of proof is applied in a case which the *DSU* hears under a specific WTO agreement, e.g. the *SPS Agreement*. The burden of proof needs to consider complicated issues about scientific knowledge, to arrive at the correct legal answer, and when to consider that the burden of proof has shifted. This process should be clarified in the *DSU*. Scientific risk assessment becomes part of case facts, so the criteria for appointing an expert agency matter. Developing countries might need active guidance. From Art 17.6 *DSU*, in an ordinary dispute, the AB may considering only matters of law, and not facts, which only the panel can. In an SPS dispute, it is not sensible to make the same law/facts distinction, so the AB needs a different approach. This should be clarified in the *DSU*. In such specific disputes, the panel should have some scientific experts and legal interpretational experts. By taking a more systemic approach, the AB will better avoid the accusation of judicial activism.

The AB must better explain why it is or is not satisfied that the burden of proof has (not) been shifted. When in the *SPS Agreement*, a panel decides that if a measure fails to conform to an international standard, the burden of proof under Art 3.3 then shifts to the defending party. There have been cases where the AB has seemed to exercise judicial economy, by not considering different *SPS* clauses equally. Consistency needs to be improved, with a remand procedure, whereby the AB legally appraises the panel's decision.

In the future, the WTO will face evolving challenges. For example, it will need to decide whether issues such as competition are rightly viewed within the DSB's jurisdiction. The finding that the *1916 Anti-Dumping Act* was affected by Art VI *GATT* meant a significant impact on the burden of proof, whereas the USA preferred competition issues outside the WTO. The *DSU* may need revision, with some reference to treaty law.

Separately, the allocation of the burden of proof is not stated in the *DSU*. The general principle is that the burden of proof lies is on the claimant: *actori incumbit probatio* or *actori incumbit onus proband* (Art XX *GATT*). International law offers no extra guidance. More guidance should be written

into the *DSU*, since there is potential deficiency in rule completeness.

5.2.4.2 *ICJ*

It may be that Court judges often vote in political favour of their home states. It may be time for the UN to reform the institution thoroughly. Increasing tenure should reduce attachment to re-election and home-state gratification. Another aspect is how the ICJ should perceive its future role in addressing dispute aggravation or recurrence. A wider role implies taking a more proactive involvement in case jurisdiction. Practices might include regional fact-finding; revisions to outdated customary laws; and interpreting existing treaties widely. The *Court Statute* could be accordingly reviewed. One legal issue is therefore how prescriptive should the Court's be in regulating future conduct, i.e. a greater good faith principle. The other issue is how proscriptive should the Court be, in policing states' future conduct?

For the future, especially where force and loss of civilian lives are involved, it would be better to give the good faith principle a higher standing. A fairer retaliation principle should be included, where force was in response to another state or states' initial act of force. Otherwise, the victim state bears protracted losses due to political weakness. The UN Charter should clearly

demarcate the UNSC's initial jurisdiction for acts of aggression involving force, and broader legal issues arising from a 2 or multi-state conflict should be heard thoroughly by the ICJ, including damages and reparations.

The Court should avoid excessive judicial restraint or activism. Consistency surfaces in provisional measures cases involving force. Recalling the poorer compliance record for these orders, the Court should weigh the future pros and cons of not granting measures. One proposal whilst assessing measures would be for the ICJ to use observers as verification.

One problem is the standard of proof set by the Court, before the burden shifts. For example, Bosnia and Herzegovina needed to show, *beyond any doubt*, that there was a continual supply of assistance from Serbia and Montenegro to the Bosnian Serbs. Since the Court did not establish the legal basis for such a high standard of proof on the complainant, this should be changed. The complainant should be able to use recognised agencies to establish facts. A disadvantaged state should receive assistance.

The ICJ *Statute* and *Rules* do not indicate which evidence will be valued more or less highly; nor what level of proof a party must meet. Instead, the

Court apply discretion, and weighs evidence based on the nature of the claims. This needs refining, with a pecking order established for what type of proof has what status.

One empirical issue is indirect evidence. In the *Corfu Channel case*,³³⁹ the ICJ decided if a State exercises control over a territory, that ‘has a bearing upon methods of proof available to establish knowledge of that State as to events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence...’³⁴⁰ In the modern world, as media forms and speeds increase, public knowledge bears more on whether or when the ICJ will shift the burden of proof, and whether it will draw inferences in view of public knowledge. Although the *Statute* or *Rules* do not prevent secondary evidence sources from being included, the Court has been reluctant to verify such sources; this should change.

³³⁹ *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment of 9/4/49, ICJ Report no.4.

³⁴⁰ *Ibid.*

The ICJ usually moves slowly. If it took faster decisions, more parties would submit cases. Arts 79 and 80 of the *Rules of Court* were revised in 1978. The revision concerned counter-claims. Admissibility assessment should be made consistent to compensate for the lack of a compulsory hearing.

For the future, it should be possible to appeal a decision of the ICJ, for example arguing *stare decisis*, if the Court is inconsistent in following its own precedent. Instead of using discretion, it would be fairer and legally transparent to say on what principles a decision was arrived at.

5.2.5 Compliance and enforcement

5.2.5.1 WTO

Firstly, it is important to realise that compliance may be mutually exclusive. For example, in the case of retaliation, there is clearly no compliance with rescinding the measure, but there may be compliance with an agreed countermeasure, which should have an enforcement structure in place. In putting forward ideas for improvements to the *DSU*, we must consider what the ideal objective would be. Possibilities are:-

- (1) To enforce the offending member's basic reversal of the measure, i.e. how to induce compliance.
- (2) To rebalance concessions in the event of a countermeasure but no reversal of the initial measure (sanctions). Or, eventual reversal. The evidence for sanctions inducing compliance is not good. Here, developing countries are disadvantaged as offending members, since they are the usual beneficiaries of trade concessions from developed countries. The correct level of concessions for Art 22.4 arbitrators may not be easily calculated (Art 22.6). Economic experts in calculations would assist. Also, a good change would be to allow Art 22.6 decisions to be appealed to the AB, for greater consistency.
- (3) To punish the offending member, possibly by collective action by affected trade partners. A number of Art 22.6 arbitrations have opposed punishment as a rationale, citing no justification in Art 22.1, or paragraphs 4 and 7 of Art 22 for punitive countermeasures.
- (4) Other broader normative objectives.

Several developing countries proposed introducing mandatory compensation as part of the *DSU* Review. The complaining member would nominate the sectors for compensation. Alternatively, the DSB could decide this. Any compensation will need enforcement. According to the Uruguay

Round principles, compensation would be on non-discriminatory basis, as to which country to apply it to: on an MFN basis. This view is supported in the *EC - Poultry* case.³⁴¹ One type of retaliation that could assist developing countries is cross-agreement (Art 22.3, *DSU*), especially in *TRIPS*. Here, if such a country offends, then cross-retaliation, which is likely due to few *TRIPS* products originating in that country, is likely to occur in goods and services.

This will immediately affect the offending member's trade position. Effective retaliation is limited for the less economically powerful. In the future, arbitrators should better rationalise whether cross-retaliation is justified, e.g. trade distorting impacts on other members should be taken into account. Also, amicus briefs could help better assess the value of the retaliation.

The *DSU* is not clear on which of the above (1) to (4) is/are the objective(s).

³⁴¹ *EC – Measures affecting the importation of certain poultry products*, 13/07/1998, WT/DS69/AB/R, AB-1998-3.

Even allowing for resolution case-by-case, international law is not much referred to.

A greater use of retrospective remedies should increase the speed of compliance, since the greater the delay, the greater the required compliance correction would be. As a punitive measure, the future cost of noncompliance should carry an increasing economic cost. For the offending member, compliance improvements may necessitate examining the trade regime, to see what timely compliance assistance might be required.

Compensation (not usually financial) is allowed by mutual agreement within 20 days of the expiry of the RPT. It is not a legal obligation. A new procedure could be instituted, whereby compensation negotiations begin earlier, to establish the level of impairment. Trade distortions and uncooperative members would remain as issues. Another way forward is to permit compensation in addition to retaliation, helping the relevant industry or sector hurt to benefits. One indirect way of inducing compliance is via private economic players, through the offending member's trade ministry. Private sector members could work actively towards compliance.

Financial compensation should also be considered. A key rationale is to provide a financial gain for the aggrieved member's government, industry (group) or industry association. It does not harm other members. One problem is that small, developing countries may not ever expect to make a large, well-diversified developed state pay. In its favour, from public international law, an unlawful act enables two reactions:-

- (1) Compliance, an obligation for the injured state, the international community and the legal system.
- (2) Reparation as a remedy, for the damages caused to the injured state.

Financial compensation would fit with international law. It would provide redress for developing countries. Economic and fairness arguments are addressed by enabling backdating, but not the adversely impacted industry. Currently, panels or the AB have no power to award compensation, so the *DSU* would need to be amended.

The present *DSU* remedy for non-compliance where agreement could not be reached is trade sanctions, without backdating.

In international law, Art 55 of the *Draft Articles on State Responsibility* (2001)³⁴² states that countermeasures should cease as soon as the responsible state has complied. Where the action involves members of similar political and economic strength, the threat of sanctions might achieve good compliance. Where there is a significant difference, this is less likely since the stronger member can turn more economic and political screws. Additionally, there is no *DSU* recourse for a state that wishes to continue with sanctions regardless. Some tool should enable the *DSU* to take corrective action for the aggrieved party in this scenario.

An Art 22 sanction is widely used by the aggrieved party to get the offending party to comply. A problem in verifying compliance arises because post-dispute confirmation about compliance is rare. This could be changed, by introducing a compliance review. Also, in assessing sanctions, it is important to assess early, i.e. *ex ante* whether the threat has sufficient deterrent effect. The evidence seems to indicate that this is true.

³⁴² *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

One distinction to emphasise is compliance and enforcement of the initial case issues, or compliance and enforcement in the case of a non-compliance Art 21.5 panel. The basic existing process in the latter is that the complainant can request authorisation to suspend concessions immediately after the DSB has adopted a negative Art 21.5 report. Art 21.5 proceedings are broader than the original dispute. For example, in *US – Shrimp*,³⁴³ the compliance panel clarified that the new US measure was acceptable as compliance only if it was sustained in future. To improve, any member affected by the offending measure in that market could have recourse to an Art 21.5 proceeding, as a greater deterrent, by preventing the formation of a new case panel. This should improve ruling adherence by members, since there would be required to be aware of previous compliance cases.

At present, there is an ambiguity in Art 21.5 here. There is a further issue, in that an offending member may claim compliance before an Art 21.5 panel, but the offending measure with a different one.

³⁴³ *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, 22/10/01, AB-2001-4, WT/DS58/AB/RW.

One change to Art 21.5 proceedings therefore, would allow the panel to carry out a review of related measures instituted since the original proceeding.

On surveillance, Art 21.5 *DSU* does permit compliance review, and the losing party is required to produce status reports for the DSB, but it need not specify an implementation schedule. Monitoring is thus up to the complaining party. This is unfair. As suggested by Suzuki,³⁴⁴ to reduce post-RPT compliance disputes, the DSB should allocate resources to the surveillance of both parties, intending to oversee full compliance within the RPT. Developing countries would lumber excessively under the present surveillance requirement. Art 21.5 and *DSU* proceedings could be made public, to improve compliance.

Suzuki also advocates a mandatory requirement on the offending party to report the probability of non-compliance as the end of the RPT nears, so that the aggrieved party can explore alternatives. Also, as mentioned by

³⁴⁴ Suzuki Y., 'Sequencing and Compliance, Recent changes and prospective development', 2006, *Reform and development of the WTO dispute settlement system*, Georgiev D., and van der Borgh, K., London, Cameron May.

Bronckers and van den Broek,³⁴⁵ smaller and/or developing countries lack the monitoring capability of large members, and cannot effectively apply pressure, so larger members protract the dispute unfairly. Expensive WTO litigation may easily be beyond members' means. The arbitrators saw Ecuador's difficulty in achieving full suspension to retaliate against the EC's Bananas regime.³⁴⁶ Ecuador was given the right to retaliate under *TRIPS*. Due to much trade being multiparty, remedies under international law might be multilateral. So, collective countermeasures might better achieve compliance. This could also counterbalancing a powerful member or trading bloc, such as the European Union.

There is a widely held view that the *DSU* has contracted out of the general economic law on state responsibility, including the rules on compensation. This ambiguity should be resolved. Specifically, there is a contradiction of a basic law principle: *ubi ius, ibi remedium*. In other words, there is not always a remedy in WTO law, e.g. no backdated remedy, so a country can legally undertake the economically wrong cost-benefit calculation about the merits of initiating an unfair trade measure in trade law.

³⁴⁵ Bronckers, M. and van den Broek N., 'Financial compensation in the WTO: improving remedies in WTO dispute settlement', 2005, *Journal of International Economic Law*, Vol. 8 No.1, pp.101-126.

³⁴⁶ *EC – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the EC under Article 22.6 DSU*, 24/03/00, WT/DS27/ARB/ECU.

Separately, it has been argued that small developing country members are insufficiently challenged by the WTO, and are poorly incentivised for good compliance. One possibility would be to increase the power of the WTO Secretariat to enforce, by prosecuting cases. A first step would be to identify non-compliance. The next step would be how to induce (better) compliance. Some domestic institutions and processes would be targeted. Developing countries need to be more transparent about domestic enabling processes. The periodic Trade Policy Review Mechanism needs to be streamlined. This would assist with enforcement.

Finally, we discuss specific WTO Agreements. On the issue of retroactive compensation, in *Guatemala - Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*,³⁴⁷ the panel supported backdated, this time financial recompense, but stated: ...'raised important systemic issues regarding the nature of the actions necessary to implement

³⁴⁷ *Guatemala - Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, 24/10/00, WT/DS156/R.

recommendations under Art 19.1 *DSU*, issues which have not been fully explored in this dispute.’

Thus, it seems that because the *DSU* lacks formal legal capacity, it may be showing judicial economy. The Secretariat might provide the interpretation for retrospective remedies. This would involve a move towards rule oriented compliance, rather than retaliation, which has been evidenced in recent years, as well as in specific WTO Agreements. For example, in the *SCM* area, Canada suggested to the Negotiating Group on Rules on 23 March 2005, that as soon as a member initiates an antidumping or countervail measure that the *DSU* rules WTO-inconsistent, the member should be prevented from continuing with the measure. This supported Mexico's point that an illegal measure upsets the negotiated balance of concessions. Here, a regional pressure to improve compliance can be seen, which the *DSU* could respond to.

5.2.5.2 *ICJ*

There is no appellate process in the *ICJ*. Perhaps this makes the *ICJ* too cumbersome, and lacking transparency, and that detracts from its compliance potential. Some issues have parallels with the *DSU*. Two basic

types of compliance can be discerned. The first type is more enduring, compliance with existing, e.g. customary, rules in treaties. The second type refers to compliance with the orders of a authorised body, e.g. the ICJ. This latter will frequently also assess compliance with the former.

Due to difficulty in parties' interpretation, the ICJ should be extra careful to clarify judgments, by e.g. direct reference to acts to perform. Ambiguity reduces compliance quality. This is exacerbated since compliance in practice is complicated, involving various levels of governmental enforcement, with varying degrees of compliance.

Judge Oda, once of the ICJ, observed that where parties submit to the Court by special agreement for a specific dispute, compliance was forthcoming. Whereas, if states unilaterally instituted a case due to the Court's compulsory jurisdiction, the respondent typically objected, leading to non-compliance. He advocated a better desire by states to submit to the Court's jurisdiction.

One issue arises in connection with whether UNSC Art 94(2) applies to provisional measures orders of the Court. For example, the Permanent

Representative of Bosnia and Herzegovina, pursuant to Art 94(2) of the UN Charter, requested the UNSC to take immediate measures under Chapter VII, to stop the assault and enforce the provisional order of the ICJ. The UNSC adopted Resolution 819, taking note of the Order of the Court, but did not state Art 94(2) as the legal basis. It should thus be clarified whether the UNSC has enforcement authority over provisional orders of the ICJ. In other words, Chapter VII *may* be the overriding legal basis. Since *LaGrand*, we could argue that the authority exists since the provisional measure is binding in international law.³⁴⁸

Where third parties are affected by the outcome, the other states should be party to the dispute, for example send observers to make public whether the alleged non-compliance is true. The Court should be aware of (unequal) geopolitical forces, e.g. where natural resources cause states to exert undue pressure on parties. An example would be Nigeria's dispute with Cameroon over the Bakassi peninsula.³⁴⁹

³⁴⁸ *LaGrand (F.R.G. v. United States)*, 27/06/01, ICJ Report 466.

³⁴⁹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, (Provisional Measures), 15/03/1996.

The UN Charter has revision powers over ICJ judgments. Art 61 of the *Court Statute* gives the Court exclusive competence over anything ‘as to the meaning and scope of the judgment. Enforcement is best considered in the post-compliance phase, i.e. where the offending party has not carried out the required actions, and the next step is what to do, as in the WTO *DSU*. The ICJ has no remedies in the *Court Statute* for non-compliance, since the UNSC enforces. From Art 94(1) and 94(2) of the UN Charter, enforcement is a political process that falls to the UNSC, but it has chosen not to exercise its jurisdiction to enforce ICJ decisions. One problem is that any 94(2) action is discretionary, so there is no automatic enforcement power. This should be increased in future, with input from members.

Where the ICJ foresees compliance problems, it could institute a procedure that operates post-compliance. This would involve the UNSC where breaches of the peace are concerned. Thus, in the territorial Dispute *Libya/Chad*,³⁵⁰ the parties notified the Court of a special agreement.

³⁵⁰ *Libya/Chad*, 26/10/1990, ICJ Report 149.

Chad received funding for the litigation from the UN Secretary General's ICJ Trust fund. For financially weak countries, this would be a very sensible idea to induce better compliance; relevant clauses should be written into special agreements, to deter non-compliance.

As seen in *LaGrand* and also in *Avena*, a judicially activist ICJ in domestic policy can in future lead to better compliance, by streamlining its judgments in this way.³⁵¹ But then, opting out of jurisdiction should be made more difficult. Learning from *Avena*, the ICJ should clarify the legal status of its rulings in relation to states' own rules. Generally, there could be timeframes for compliance in international law. An automatic referral or escalation procedure to the UN would also help with enforcement, since the ICJ has no punitive tools for non-compliance.

³⁵¹ *Avena and Other Mexican Nationals (Mexico v United States)*, Judgment, 31/03/2004, ICJ Report 12.

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