The Effects of the Modality of the World Trade Organization (WTO) Dispute Settlement System on the Juridical Organization of the Construction Contract relevant to the Industrial Production Unities

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FIRST PART

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Section II: Settlement system.

1.2.1. The general overview of the settlement system. The issue of dispute settlement was briefly analyzed in the previous section of the current study. Thus, dispute settlement was delineated as one of the core functions of the World Trade Organization (WTO). In the context of the present research, it should be reminded that the issue of dispute settlement is reflected in the problem statement, which is followed throughout the entire dissertation with the purpose to be verified.

To proceed further, the previous discussion revealed that dispute settlement is a very significant domain of the multilateral trading system. The foregoing discussion regarded dispute settlement primarily as a process. Nevertheless, the present section focuses on it as a system rather than a process. From the logical point of view, a system means a combination of interrelated structural elements that exist because of the connection between each other, whereas the term ‘process’ implies a sequence of correlated steps. Hence, it follows that the concept of ‘process’ reveals itself in dynamics, whereas a system manifests itself in statics.

In view of the above, it should be clarified that the approach to dispute settlement as a system will undoubtedly augment the findings already achieved concerning the one as a process.

When the preliminary issues have been clarified, it is prudently to focus on the WTO’s dispute settlement system. To start with, its system is considered to be very efficient and important. The importance of it lies in its effective structure and functioning. According to Article 3.2 of the Dispute Settlement Understanding, the dispute settlement system of the WTO is a core component in providing safety and predictability of the multilateral system of

trade.[1] Moreover, by signing the Agreement establishing the World Trade Organization, member-states have recognized that the adopted system of dispute settlement will assist in the process of preserving the entitlements and commitments of members under the international trade agreements.

However, according to the World Trade Organization, even the best international agreement loses its value and regulative force, if its obligations cannot be properly enforced, in case when one of the parties fails to comply with such duties.[2] The previously mentioned position of the World Trade Organization leads to the inference that an effective system of dispute settlement enhances the practical value of the obligations incumbent on the signatories of an international agreement.

In addition, the justification of the WTO gives reasonable grounds to claim that the dispute settlement system is a system of enforcement, because the employment of the dispute settlement mechanism may be juxtaposed with the enforcement of contractual obligations.

To continue, the World Trade Organization (OMC) reinforces the practical value of its dispute settlement system by asserting that the current system has been adopted during the Uruguay Round of Multilateral Trade Negotiations.[3] In other words, all member-states have agreed to comply with the provisions of the settlement system at the same moment, when the Agreement establishing the World Trade Organization was signed. That is, the establishment of the World Trade Organization coincides with the adoption of the dispute settlement system. In addition, a mental note should be made that the settlement system, which is capable to provide a timely and structured resolution of disputes, helps to prevent harmful effects of unsettled international trade conflicts.

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[1] Accord Du Cycle D'Uruguay, 'Memorandum d'Accord sur les Regles et Procedures Regissant le Reglement des Differends', article 3.2. Retrieved http://www.wto.org/french/docs_f/legal_f/28-dsu_f.htm#3

[2] Module De Formation Au Systeme De Reglement Des Differends: Chapter 1 'Introduction au systeme de reglement des differends de l'OMC, s 1.1. Retrieved http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c1s1p1_f.htm

[3] ibid, s 1.1.

If the practical appropriateness of the WTO's dispute settlement system is taken into account, it should be purported that the first eight and a half years of the settlement system (from January 1995 to June 2003) resulted in 295 requests for consultations over that period.[4] The statistics mentioned above makes evident that the system have been frequently used and trusted since the establishment of the World Trade Organization. Moreover, statistical data evinced that in 42% of cases (in 124 disputes), a developing member-state was a complainant.[5] Furthermore, in one year, namely in 2001, developing country-members filed three quarters of the overall number of requests for consultations. This statistics means that more and more developing countries rely on the effectiveness of the WTO's dispute settlement system.

The increasing interest of developing countries aiming to solve their conflicts in the framework of the WTO's dispute settlement system may be explained by the attractiveness of the system and its furtherance in achieving individual objectives. According to the World Trade Organization, the above statistics substantiates the inference that, in general, the dispute settlement system functions successfully.[6] Feasibly, the growing faith of developing countries in the system is incited by the diligent and unprejudiced work of the panel and the Appellate Body, which serve not only to settle the issue in question, but also to clarify the parties' rights and obligations prescribed in the WTO's legal documents. For instance, Article 3.2 of the Dispute Settlement Understanding clearly articulates that, among other things, the dispute settlement system of the World Trade Organization functions to clarify the existing

[4] Module De Formation Au Systeme De Reglement Des Differends: Chapitre 12 'Evaluation du systeme de reglement des differends de l'OMC: le bilan a ce jour', s 12.1. Retrieved http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c12s1p1_f.htm
[5] ibid, s 12.1.
[6] ibid, s 12.2.

prescriptions of the treaties in conformity with the interpretation of acts and rules in public international law.[7]

After the general overview has been made, it is possible to reflect on the major disadvantages of the WTO's dispute settlement system. In this light, it is interesting to note that the World Trade Organization does not contend that its settlement system is devoid of weaknesses. As a matter of fact, the system does manifest limitations and drawbacks. Thus, full dispute settlement is a considerably durable process, within which the complainant may suffer substantial economic losses.[8]

To elaborate further, the system offers no 'interim relief', or, in other words, provisional measures, which may protect economic or trade interests of the successful complainant in the process of dispute settlement. Moreover, the advantage in dispute settlement does not guarantee that the winning complainant will not be awarded with any reimbursement for losses inflicted during the time prescribed to the respondent to implement the ruling, or will not get any compensation from the other party for its legal expenses.[9]

In addition, it should be taken into consideration that not every member-state is capable to practically solve the problem of non-implementation by resorting to the suspension of obligations, which should be regarded as countermeasures taken by the prevailing member, or, in other words, the complainant's entitlement to impose trade sanctions on the respondent that has declined to implement the ruling.[10]

All things considered, the WTO' dispute settlement system is not as perfect as sometimes it is considered to be.

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[7] Accord Du Cycle D'Uruguay, 'Memorandum d'Accord sur les Regles et Procedures Regissant le Reglement des Differends', article 3.2. Retrieved http://www.wto.org/french/docs_f/legal_f/28-dsu_f.htm#3

[8] Module De Formation Au Systeme De Reglement Des Differends: Chapitre 12 'Evaluation du systeme de reglement des differends de l'OMC: le bilan a ce jour', s 12.3. Retrieved from http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c12s3p1_f.htm

[9] ibid, s 12.3

[10] Module De Formation Au Systeme De Reglement Des Differends: Chapitre 6 'Le processus - Etapes d'une affaire type de reglement des differends', s 6.10. Retrieved from http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c6s10p1_f.htm

1.2.2. Composition of the settlement system. When the preliminary analysis of the WTO's dispute settlement system has been made, it is possible to start the in-depth exploration of its composition. Thus, the term 'composition' implies the combination of simpler constituents into a more complex structure. In other words, the composition of the WTO's dispute settlement system means that the system consists of integral parts and elements, which conjunctively make it functional.

In its broad sense, the composition of the settlement system must be reduced to bodies and persons involved in the dispute settlement process. According to the World Trade Organization, the functioning of the dispute settlement process is only possible through the participation of the third parties and parties to a case, as well as through the operation of the panels of the Dispute Resolution Board, the WTO Secretariat, the Appellate Body, independent experts, arbitrators, and some specialized institutions.[11]

In this connection, it should be pointed out that each structural element of the settlement system plays a unique role in its operation. Hence, it follows that the malfunction of one constituent may lead to the failure of the overall system. As far as the third parties and parties are concerned, it might be appropriate to note that the only participants in the dispute settlement system are the governments of WTO's member-states, which can participate either as parties or as third parties.[12] The uniqueness of the status of member governments lies in the fact that they are the only ones, which are entitled to trigger dispute settlement proceedings in the World Trade Organization. To all intents and purposes, the Dispute Settlement Understanding refers to a member initiating a dispute as a 'complaining party' or a 'complainant', whereas the opposite party is frequently titled as a 'respondent'.

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[11] Module De Formation Au Systeme De Reglement Des Differends: Chapitre 3 'Les organes de l'OMC intervenant dans le processus de reglement des differends'. Retrieved from http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c3s1p1_f.htm

[12] Module De Formation Au Systeme De Reglement Des Differends: Chapitre 1 'Introduction au systeme de reglement des differends de l'OMC', s 1.4. Retrieved from http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c1s4p1_f.htm#parties

To elaborate further, the WTO's bodies should be regarded as another bunch of actors in the field of dispute settlement proceedings. In this light, it should be claimed that the WTO's legal documents differentiate a political institution, the Dispute Settlement Body (DSB), and independent 'quasi-juridical' establishments, such as panels, the arbitrators and Appellate Body.[13] It is interesting to notice that the WTO considers the Dispute Settlement Body (DSB) to be a political institution, rather than a juridical one. Such approach implies that the DSB is not involved in the direct settlement of disputes between the parties through the application of law. To be more precise, the DSB is authorized to establish panels, adopt panel and Appellate Body reports, monitor the implementation of rulings and recommendations, and give permission to the suspension of an obligation under the WTO's agreements.[14] In addition, it is incumbent on the Dispute Settlement Body to refer the dispute to adjudication by establishing a panel.

To continue, the WTO Secretariat, coupled with the Director-General, is another body involved in the dispute settlement process. According to the Dispute Settlement Understanding, the Director-General of the WTO may officially offer good offices, conciliation or mediation with the purpose of furthering member-states to settle a dispute.[15] In other words, the Director-General manages an alternative to adjudication ways of settling trade disputes between member-states. Besides, the administrative responsibilities of the Director-General include the appointment of arbitrators under Article 22 of the Dispute Settlement Understanding. According to the provisions of Article 6.10 and Article 22 of the DSU, the appointment of an arbitrator is an alternative to panellists. To sum up, the commitments of the Director-General are predominantly of alternative nature. That is, the

[13] Module De Formation Au Systeme De Reglement Des Differends: Chapitre 3 'Les organes de l'OMC intervenant dans le processus de reglement des differends'. Retrieved from http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c3s1p1_f.htm

[14] Accord Du Cycle D'Uruguay, 'Memorandum d'Accord sur les Regles et Procedures Regissant le Reglement des Differends', article 2.1. Retrieved http://www.wto.org/french/docs_f/legal_f/28-dsu_f.htm#3

[15] ibid, article 5.6

Director-General is empowered to offer member-states various types of alternatives in settling disputes without recourse to panels and the Appellate Body.

As far as the WTO Secretariat is concerned, it should be elucidated that it reports to the Director-General, helps members settle disputes, offers special training courses, and provides complementary legal advice and assistance to developing member-states in respect of dispute settlement proceedings.[16] Additionally, the WTO Secretariat offers its assistance to parties in forming panels by proposing nominations, and assists panels once they are established.[17] Likewise, it is incumbent on the WTO's Secretariat to provide administrative furtherance for the Dispute Settlement Board.

After the political and administrative bodies of the World Trade Organization have been explored, it might be appropriate to shed some light on 'quasi-juridical' institutions, which are directly involved in the settlement of conflicts between member-states. Thus, panels should be taken into consideration as quasi-juridical bodies, which are responsible for the adjudication of disputes between members in the first instance.[18] As a rule, WTO's panels are composed of three, and sometimes five, specialists nominated on an 'ad hoc' basis.

In view of the above, it should be construed that a WTO's panel is similar to an arbitration tribunal. Nevertheless, WTO's panels are established on an 'ad hoc' basis. In the context of arbitration, the 'ad hoc' principle means that a tribunal is formed exclusively for the settlement of one case. The same principle applies to WTO's panels. According to the Dispute Settlement System Training Module, a panel established by the Dispute Settlement

[16] Module De Formation Au Systeme De Reglement Des Differends: Chapitre 3 'Les organes de l'OMC intervenant dans le processus de reglement des differends', article 3.2. Retrieved from http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c3s1p1_f.htm

[17] Accord Du Cycle D'Uruguay, 'Memorandum d'Accord sur les Regles et Procedures Regissant le Reglement des Differends', article 27.1. Retrieved http://www.wto.org/french/docs_f/legal_f/28-dsu_f.htm#3

[18] Module De Formation Au Systeme De Reglement Des Differends: Chapitre 3 'Les organes de l'OMC intervenant dans le processus de reglement des differends', article 3.3. Retrieved from http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c3s1p1_f.htm

Body must be composed, because neither permanent panels, nor permanent panellists function in the framework of the World Trade Organization.[19]

In contrast to panels, the Appellate Body is a permanent institution of seven members authorized to review the legal facets of reports issued by panels.[20] To put it briefly, the Appellate Body is considered to be the final stage in the adjudicatory part of the dispute settlement system. The significance of it lies in its innovative nature. The previous dispute settlement system under GATT 1947 had no stage of appeal. Therefore, the introduction of the adjudicatory institution mentioned above should be recognized as one of the major novelties of the Uruguay Round of Multilateral Trade Negotiations. In the context of its functionality, it should be purported that the Appellate Body reviews disputed legal issues, and may uphold, reverse, or alter the panel's ruling.[21] In the augmentation of the Appellate Body's functionality, there exists the Appellate Body Secretariat. The major obligations of the Secretariat consist in the provision of legal assistance and administrative support to the Appellate Body in order to ensure its independence.

In addition to panels and the Appellate Body, arbitrators may be involved in dispute settlement proceedings to adjudicate specific questions. Arbitrators function either as individuals or as groups. They may be helpful in situations, when the panel is not established, or when a party subject to retaliation may additionally request arbitration, if it objects to the rate or the essence of the suspension of the obligation proposed.[22]

Apart from the above, it should be claimed that another group of supplementary actors in the domain of the WTO's dispute settlement is represented by experts. They are frequently

[19] Module De Formation Au Systeme De Reglement Des Differends: Chapitre 6 'Le processus - Etapes d'une affaire type de reglement des differends', article 6.3. Retrieved from http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c6s3p2_f.htm
[20] Module De Formation Au Systeme De Reglement Des Differends: Chapitre 3 'Les organes de l'OMC intervenant dans le processus de reglement des differends', article 3.4. Retrieved from http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c3s1p1_f.htm
[21] Accord Du Cycle D'Uruguay, 'Memorandum d'Accord sur les Regles et Procedures Regissant le Reglement des Differends', article 17.13. Retrieved from http://www.wto.org/french/docs_f/legal_f/28-dsu_f.htm#3
[22] ibid, article 22.6

involved in proceedings, which deal with complex factual questions of technical or scientific nature, and require special knowledge and skills.

When all things are considered, it should be summarized that the WTO's dispute settlement system is composed of various bodies, which conjunctively guarantee its intactness and integrity.

1.2.3. Functioning of the settlement system in theory. After the constituents of the WTO's dispute settlement system have been examined, it is the right time to explore functioning capabilities of the system in practice. To all intents and purposes, the actors and bodies of the WTO's dispute settlement system determine its dynamics. From the previous discussion, it is possible to grasp that the settlement system operates at a number of reciprocal stages. In other words, there are different stages of reviewing a dispute. Nonetheless, at all stages of dispute settlement, the World Trade Organization encourages all countries to consult each other in order to avoid the adjudication.[23] Therefore, it is possible to discern the stage of adjudicative dispute settlement from the stages of dispute settlement 'out of court'.

The premises mentioned above lead to the inference that the functional capability of the WTO's dispute settlement system is twofold: adjudicative and non-adjudicative. In this light, it should be emphasized that the adjudicative nature of the system manifests itself particularly at the stage of the panel process.

As far as the panel process is concerned, it needs to be clarified that the process also consists of several interrelated stages. It is relevant to start the analysis of the process from the stage of consultation. It is comprehensively regulated in Article 4 of the Dispute Settlement Understanding. According to the DSU, the parties may enter into the stage of consultation, if a request for consultations is made in accordance with a specific agreement.[24]

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[23] Comprendre l'OMC: Reglement Des Differends 'La procedure de groupe special'. Retrieved from http://www.wto.org/french/thewto_f/whatis_f/tif_f/disp2_f.htm

[24] Accord Du Cycle D'Uruguay, 'Memorandum d'Accord sur les Regles et Procedures Regissant le Reglement des Differends', article 4.3. Retrieved from http://www.wto.org/french/docs_f/legal_f/28-dsu_f.htm#3

The member submitting the request must reply to it within 10 days after the date of receipt. Furthermore, it is incumbent on member-states to enter into consultations in accordance with the legal principle of good faith. During the consultations, the parties lay special emphasis upon specific problems, which concern the interest of developing member-states. According to the World Trade Organization, the stage of consultation may last for 60 days.

To elaborate further, the complaining party may request the Dispute Settlement Body to establish a panel. According to the provisions of the Dispute Settlement Understanding, the request for establishing a panel must be submitted in a written form.[25] Taking into consideration the aforementioned stage, it should be purported that the establishment of panels follows the stage of consultation. Therefore, in requesting the establishment of a panel, the complaining party must inform the Dispute Settlement Body whether consultations have taken place. Besides, the Dispute Settlement Understanding requires from the complainant to outline the legal basis of the disputed problem, as well as to identify the pertinent measures at issue.[26]

The next stages of the functioning of the dispute settlement system should be regarded as terms of reference and the composition of a panel. At these stages, preparatory procedures, such as the determination of terms of reference and the composition of a panel, occur. These procedures must be finished in 20 days according to the prescriptions of the Dispute Settlement Understanding.

After the preliminary procedures have take place, the dispute comes to the stage of panel examination. As the case may be, the stage of panel examination is regulated by Article 20 and Article 12 of the Dispute Settlement Understanding. To put it briefly, the stage normally incorporates two meetings with the parties to the dispute and one meeting with third parties.

[25] ibid, article 6.2.
[26] ibid, article 6.2.

After the procedures of panel examination, the interim review stage takes place. In a broad sense, it may be characterised as a period in dispute settlement proceedings, within which the panel is obliged to formulate a descriptive part of its draft report.[27] In view of the above, it should be construed that the descriptive part of the panel's report includes sections with facts and pertinent arguments. The significance of this stage lies in the possibility of a party to bring a written request for the panel to revise precise facets of the interim report, if certain mistakes and inconsistencies are found. Thus, the entitlement to request the panel to review the report helps to ensure its preciseness before the issuance of the final version.

At the next stage, the final report of the panel is drafted. In case of urgency, it must be issued within three months from the composition of the panel. Otherwise, the final report must be issued within six months from the establishment of the panel.[28] As an exception, it may be written within nine months, if the reasons for the delay are explained to the Dispute Settlement Body.

The next stage of the dispute settlement process may be either the adoption of the panel's report by the Dispute Settlement Body or the appellate review. In the context of the aforesaid stages, it should be ascertained that the final report must be adopted at a DSB meeting within sixty days after it is circulated to members, unless a party to the conflict officially notifies the Dispute Settlement Board that it is going to appeal the report, or the DSB makes a decision by consensus not to adopt it.[29]

As far as the stage of the appellate review is concerned, it should be clarified that the permanent Appellate Body is established by the Dispute Settlement Body, and these are parties to the dispute only, not third parties, that are entitled to appeal the panel report.[30] Despite this, third parties may be provided with the opportunity to deliver speeches and make

[27] ibid, article 15.2.
[28] ibid, article 12.8.
[29] ibid, article 16.4.
[30] ibid, article 17.4.

written submissions before the Appellate Body, if expressing a substantial interest in the disputed matter, it have notified the Dispute Settlement Body beforehand. Comparing the legal status of third parties in the WTO's dispute settlement system with that in the domestic adjudicative system, it is possible to notice that the former provides third parties with less preferable legal entitlements than the latter. In most domestic legal systems, third parties are entitled to appeal decisions of courts, whereas the WTO agreements deprive them of such an important right.

Returning back to the analysis of the appellate review, it is necessary to point out that the appeal must be limited to matters of law evaluated in the panel report and legal interpretations elaborated by the panel. It means that a party to the dispute has no right to refer to new legal documents or additional legal norms, which have not been covered in the panel report. In addition, the party is entitled to substantiate its position only with legal interpretations of the panel. It means that no other legal doctrines or interpretations are taken into consideration by the Appellate Body.

Finalizing the review, it should be added that the panel process also includes post-procedural stages, such as implementation, retaliation and cross-implementation. Despite the secondary position in the ladder of the panel process, the aforementioned stages play a crucial role in the practical implementation and enforcement of the WTO's agreements in cases when the decision of the panel has been already made.

1.2.4. Functioning of the settlement system in practice (case study). The previous discussion has revealed the peculiarities of the functioning of the WTO's dispute settlement system in theory. In other words, it has been demonstrated how the constituents of the system must operate from the very beginning, when a conflicting issue arises in the framework of the WTO agreements, and to the end, when the ruling of the panel or of the Appellate Body is implemented.

The principal objective of the current section is to demonstrate the practical functioning of the WTO's dispute settlement system in reality in order to detect possible particularities and discrepancies in contrast to its theoretical functioning, which is predominantly regulated by the Dispute Settlement Understanding. Moreover, a mental note should be made concerning the fact that the following research is going to apply the qualitative research method. The appropriateness of the method is visible. It involves an in-depth examination of one or several cases for the purpose to elucidate features of a broader set of cases and to make appropriate inferences by analyzing only one pertinent case.[31]

In view of the above, it is appropriate to discuss the dispute between Venezuela and the United States. According to the World Trade Organization, in January 21, 1995, Venezuela brought a complaint to the Dispute Settlement Body that the United States was applying rules that discriminated against the imports of gasoline.[32] In addition, Venezuela requested consultations with the United States. The final report of the dispute panel with regard to the conflict was prepared just in a year later (on January 29, 1996). Later on, Brazil joined the case, lodging its personal complaint. As a matter of fact, the same dispute panel investigated both complaints. After that, the United States appealed. After a diligent investigation of the reasons for appeal, the Appellate Body finished its report, which was adopted by the Dispute Settlement Body in May 20, 1996.[33] Hence, it follows that the entire dispute settlement process lasted for one year and four months since the moment when the first complaint was brought until the moment when the report of the Appellate Body was adopted by the Dispute Settlement Body.

Notwithstanding the seriousness of the issue in question, it should be purported that the case mentioned above clearly demonstrates the durableness of the panel process in

[31] J. Gerring (2007). *Case study research: principles and practices*. Stanford University Press.
[32] Comprendre l'OMC: Reglement Des Differends 'Etude de cas: chronologie d'une affaire'. Retrieved from http://www.wto.org/french/thewto_f/whatis_f/tif_f/disp3_f.htm
[33] ibid

practice. Moreover, after the report of the Appellate Body was adopted, the United States and Venezuela started making an agreement for six and a half months on what the United States should do on the road towards the implementation of the adopted ruling.

Finally, the parties reached an agreement that the solution to the dispute would be implemented within fifteen months from the date, when the report of the Appellate Body was adopted (from May 20, 1996 to August 20, 1997).[34] Taking into account the period for the implementation of the final decision in the dispute settlement case mentioned above, it should be reckoned that the overall period of dispute settlement proceedings in the case of Venezuela coupled with Brazil, versus the United States, including the period for the implementation of the ruling, was two years and seven months.

The timeframes of dispute settlement proceedings mentioned above are outrageously long beyond controversy. This case makes evident the disparity between the functioning of the WTO's dispute settlement system in theory and practice. In this light, it is suggested to investigate the factual part of the case in order to detect other possible inconsistencies.

In the context of the case, it should be reported that the main prerequisite to the conflict stemmed from the fact that the United States employed new regulations in respect to the chemical characteristics of imported gasoline, which were more stringent than the regulations concerning domestically refined gasoline.[35] In this connection, Venezuela (and later Brazil) contended that the U.S. regulations in respect to imported gasoline were unfair due to the fact that the standards of U.S. gasoline were incongruous with the standards prescribed to imported gasoline, and, therefore, could not be justified under the exceptive provisions of the regular WTO rules referring to health and environmental conservation measures.[36]

[34] ibid
[35] ibid
[36] ibid

As a result, the dispute panel was convinced by the arguments of Venezuela and Brazil. Besides, the panel's conclusions were upheld in the Appellate Body's report. However, the latter made unsubstantial alterations regarding panel's legal interpretation.

When the factual side of the case has been depicted, it is possible to notice that the aforementioned dispute between Venezuela, Brazil and the United States should be recognized as an international trade conflict between member-states of the World Trade Organization. In addition, it was visible from the materials of the case that the dispute settlement mechanism was triggered immediately after the request for consultations had been brought. Nevertheless, in the analyzed case, the dispute settlement system of the WTO proved to be inefficient in producing a quick solution to the issue in question.

The problem of untimely settled disputes may be also exemplified by a number of cases in the domain of TRIPS. In a broad sense, the TRIPS is an international trade agreement, which regulates trade-related aspects of intellectual property rights. It should be mentioned that international trade-related conflicts in the area of intellectual property rights are becoming more prevalent in the contemporary world. In spite of the necessity to be urgent in regulating such types of disputes, the practical analysis of pertinent cases shows that WTO dispute panels tend to solve complaints in an untimely manner. The following analysis is designed to prove the aforementioned statement.

Thus, the statistics of dispute settlement cases in the area of TRIPS (of March 2011) makes evident that in the case of EC versus the United States (IP/D20WT/DS176) regarding omnibus appropriation matters, the request for consultations was brought on July 8, 1999, whereas the Appellate Body and panel's reports were adopted on February 1, 2002.[37] Similarly, in the case of the USA versus European Communities (IP/D/19WT/DS174), concerning the protection of trademarks and geographical indicators for agricultural products

[37] WTO, 'Dispute settlement cases in the area of TRIPS' as of March 2011. Retrieved from http://www.wto.org/english/tratop_e/trips_e/ta_docs_e/6_tabledscases_e.pdf

and foodstuffs, the initial request for consultations was brought on June 1, 1999, whereas the panel's report was adopted by the Dispute Settlement Body on April 20, 2005.

The untimely settlement of disputes may also be grasped from the analysis of other eight cases of dispute settlement, which have taken place since 1998. Besides, it was interesting to notice that in 1996-1997, the predominant number of cases were settled within a year, or maximum two years, whereas many cases occurring in the following years were settled within three years. This statistics demonstrates the defectiveness of the WTO's dispute settlement system. Thus, the most serious vice of the system stems from the prolonged duration of proceedings.

After everything has been given due consideration, it is possible to generalize that the WTO dispute settlement system is a combination of interrelated actors and bodies, which are empowered with specific entitlements and responsibilities. In theory, the efficiency of the system depends on the precise regulation of its functions by law. The foregoing analysis has revealed that WTO's dispute settlement is appropriately regulated by the Dispute Settlement Understanding. Notwithstanding this, the conducted research has also demonstrated that the functionality of the settlement system is undermined by the prolonged duration of dispute settlement proceedings in practice. All these scientific evidence conjunctively prove that the WTO's dispute settlement system still requires improvements and amendments irrespective of its superiority over the system under GATT 1947.

Section III: Mediation.

1.3.1. The definition of mediation in international law. In a broad sense, mediation is understood as a form of alternative dispute resolution, a means of settling a dispute between two or more parties with precise effects. In international law, there are several definitions of the term. In the framework of the World Trade Organization, mediation is

understood as an alternative method of dispute settlement without recourse to panels and the Appellate Body.

Thus, Article 5 of the Dispute Settlement Understanding articulates that mediation, alongside with good offices and conciliation, is a procedure, which is undertaken voluntarily, according to the agreement of the parties to a dispute.[38] The approach of the WTO to mediation is rather simple and concrete. The WTO's Dispute Settlement Understanding offers mediation as one among three possible ways of settling international trade disputes without recourse to adjudicative dispute settlement bodies.

In this connection, the WTO emphasizes the voluntary essence of mediation and its dependence on the agreement between parties. A more comprehensive discussion of mediation in the framework of the World Trade Organization is provided in the next chapter. However, the discussion of mediation in relation to other international organizations will be given in the present section of the study.

To continue, the EU directive 2008/52/EC on certain aspects of mediation in civil and commercial matters defines mediation as a cost-effective and extra-judicial way of resolving disputes caused by civil and commercial issues through processes, specially adjusted to the needs of the parties.[39]

The definition of mediation mentioned above emphasizes several important facets of the concept. Firstly, mediation is recognized as a cost-effective way of dispute settlement. It means that the involvement of a mediator feasibly helps to economize the process making it cheaper and economically advantageous for parties.

Secondly, the above-captioned EU directive articulates that mediation is a quick way of settling disputes. As a result, it is a less prolonged process in contrast to other methods of

[38] OMC, 'Memorandum d'Accord sur les regles et procedures regissant le reglement des differends', article 5.1. Retrieved from http://www.wto.org/french/docs_f/legal_f/28-dsu.pdf
[39] Directive 2008/52/CE 'Sur certains aspects de la mediation en matiere civile et commerciale', section 6. Retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:FR:PDF

dispute settlement. Thirdly, mediation is considered by the EU as an extra-judicial resolution. This part of the definition implies that it is an exterior process, which functions outside the system of judicial proceedings. In other words, mediation should be never associated with courts of justice, because it does not belong to any stage of adjudication.

Fourthly, the text of the EU directive stresses the pertinence of mediation to disputes referring to civil and commercial matters. Taking into consideration such emphasis, it is possible to arrive at a conclusion that mediation is applicable exclusively to matters in the domain of private law. Thus, parties, which possess equal legal status and mutual rights and obligations, are more interested in mediation than those parties, which are deprived of equal stance, according to the provisions of law. However, the presupposition about the exceptional pertinence of mediation to the domain of civil and commercial law mentioned above should be verified by means of research.

Fifthly, the definition of mediation in the EU directive takes into account such a salient feature as its consistency with the needs of parties. Feasibly, this clause implies that the parties require from the mediator absolute proficiency and capability to settle the predetermined conflicting issues in a manner they expect.

In addition to the aforementioned salient features of mediation in the framework of the EU, it should be claimed that mediation must rely on a predictable legal basis, which is necessary for the settlement of disputes in the domain of civil and commercial law.[40]

Another comprehensive definition of mediation may be retrieved from the materials published on the official web-site of the World Intellectual Property Organization (WIPO). To put it briefly, the WIPO has its Arbitration and Mediation Centre established in 1994 in order to offer an alternative dispute resolution (ADR) opportunities, particularly arbitration

[40] ibid, section 7

and mediation, for the settlement of international commercial disputes between private parties.[41]

According to the WIPO Arbitration and Mediation Centre, mediation is a non-binding, relatively unstructured and informal procedure, whereby parties make free decisions on whether to continue the participation in mediation, or to accept its outcomes.[42] The WIPO's determination of mediation substantially extends the definition adopted in the EU directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. First and foremost, it should be construed that the WIPO Arbitration and Mediation Centre considers mediation as a non-binding procedure. This means that parties to mediation are not obliged to move through the mediation process to the end. As a matter of fact, the parties may visit the first meeting of mediation and discontinue their participation in it because of their will. It is apparent that they control the process of mediation themselves. The parties designate the course of mediation and its consequences. In addition, the continuance of mediation depends on their individual will.

Besides, the WIPO Arbitration and Mediation Centre makes evident that the non-binding nature of mediation prevents the mediator from imposing a decision on the parties.[43] In other words, the parties must voluntarily agree to accept the decision. Hence, it follows that the role of mediation is not analogous to that of a judge. It is obvious that the mediator is not a decision-maker. According to the WIPO Arbitration and Mediation Centre, the principal aim of the mediator is rather to provide the parties with furtherance in attaining their own decision on the settlement of a conflict.

In view of the above, it is possible to discern two main ways, in which mediators help parties in reaching their own decision. According to the WIPO Arbitration and Mediation

[41] Le Centre d'arbitrage et de mediation de l'OMPI. Retrieved from http://www.wipo.int/amc/fr/index.html
[42] Centre d'Arbitrage et de Mediation de l'OMPI, 'Guide de la Mediation OMPI', p. 4. Retrieved from http://www.wipo.int/freepublications/fr/arbitration/449/wipo_pub_449.pdf
[43] ibid, p. 4

Centre, these two ways correspond to two models of mediation. In addition, a mental note should be made that the two models of mediation are practiced all over the world. In the first model of facilitative mediation, the mediator makes efforts to foster the communication between the parties in order to facilitate each side's apprehension of the other's point of view, position and interests with regard to the dispute.[44]

Under the second model of mediation, which is called evaluative, the mediator performs a non-binding assessment or evaluation of the conflict. This assessment or evaluation may be accepted or denied by the parties according to their free will. Therefore, it is a prerogative of the parties to decide on the key matter of mediation. Besides, the parties are entitled to choose one from the two available models of mediation.

Analyzing the definition of mediation in international law, it is prudent to emphasize the issue of confidentiality. Thus, according to the WIPO Arbitration and Mediation Centre, mediation is a confidential procedure. The requirement of confidentiality is conceived to stimulate confidence and openness in the process by convincing the parties that all admissions, proposals or suggestions for settlement will not lead to any consequences outside the mediation process.[45] The principle of this concept also means that the information revealed at the stage of mediation cannot be used in subsequent litigation or arbitration. However, there may be an exception to the aforementioned general rule.

1.3.2. Differences between mediation and conciliation. The foregoing discussion has shed some light on the nature of mediation. It has been revealed that this is an alternative way of dispute settlement without recourse to panels, tribunals or courts. In the present section, it is suggested to clarify the disparity between the two alternative ways of dispute settlement: mediation and conciliation.

[44] ibid, p. 5
[45] ibid, p. 5

Before making a comparative analysis of the two alternative methods of dispute settlement, it is prudent to ascertain what conciliation is. In a broad sense, as an alternative dispute resolution process, it implies an agreement between parties to use the services of a conciliator, who organizes separate meetings between them for the purpose to settle their controversies.

Thus, according to the World Trade Organization, conciliation is an alternative procedure, which is undertaken, if the parties to a dispute voluntarily agree on it.[46] However, the WTO does not provide any comprehensive definition of conciliation.

Notwithstanding this, conciliation, as well as mediation, is widely recognized as an effective non-binding method of dispute settlement. Both methods involve a third (neutral) party to assist the parties to a dispute in resolving their controversies. However, it is irrelevant to juxtapose mediation with conciliation. Indira Carr and Peter Stone indicate that although the terms 'mediation' and 'conciliation' are used interchangeably, there is a presupposition that 'in mediation the third party plays an evaluative role (that is, by expressing his opinion), whereas in conciliation the role is a facilitative one (that is, the third party does not advise parties of his own opinion).'[47]

Carr and Stone ground their apprehension of conciliation on the study of the International Labour Organization (hereinafter referred to as the ILO) on conciliation and the arbitration procedure. Despite this fact, Carr and Stone's differentiation between mediation and conciliation contradicts to the definition of the former given by the WIPO Arbitration and Mediation Centre. In the previous section, it has been detected that the WIPO Centre discerns two types of mediation: facilitative and evaluative. Therefore, the jurisprudence of the WIPO does not recognize that the facilitative role of a third party means that the procedure is conciliation.

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[46] OMC, 'Memorandum d'Accord sur les regles et procedures regissant le reglement des differends', article 5.1. Retrieved from http://www.wto.org/french/docs_f/legal_f/28-dsu.pdf

[47] Indira Carr and Peter Stone, International Trade Law (Taylor & Francis 2009), p. 651

As far as the jurisprudence of the ILO is concerned, it should be elucidated that the International Labour Organization states that in some countries, such as Malta and Slovenia, there is no distinction between conciliation and mediation.[48] To continue, the International Labour Organization makes evident that both concepts involve the intervention of a neutral party, the role of which is to foster the communication between the parties to a dispute, without offering the already elaborated decision for settling the dispute.

Additionally, the mediator may suggest certain terms of settlement, which the parties are open to accept or dismiss. In this sense, it should be claimed that the ILO's understanding of conciliation is adopted in its main legal instrument, namely the Voluntary Conciliation and Arbitration Recommendation No. 92 of 1951. According to it, conciliation is designed to assist in the prevention and settlement of an industrial dispute between employers and workers.[49] In view of the above, conciliation is regarded by the ILO as an alternative procedure, which is used for the purpose to settle disputes, as well as to prevent possible conflicts between parties. Thus, the jurisprudence of the ILO emphasizes the preventive function of conciliation. In contrast to it, the objective to prevent possible conflict is not inherent in mediation.

Despite the popular identification of mediation with conciliation, there are some experts, who still insist on the essentiality to differentiate between two types of alternative dispute settlement. Thus, Freddie Strausser and Paul Randolph fancy that in conciliation, a neutral third party is nominated to help parties in settling conflicting issues, but it is discernable from mediation by the fact that 'the conciliator's role may be more

[48] High-Level Tripartite Seminar on the Settlement of Labour Disputes through Mediation, Conciliation, Arbitration and Labour Courts, 'Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives', p. 3. Retrieved from http://www.ilo.org/public/english/region/eurpro/geneva/download/events/cyprus2007/cyprus_dialogue.pdf

[49] Organisation Internationale du Travail, 'Recommandation (no 92) sur la conciliation et l'arbitrage volontaires, 1951', article 1.1. Retrieved from http://www.ilo.org/dyn/normlex/fr/f?p=1000:12100:0::NO::P12100_ILO_CODE:R092

'interventionist' and includes that of recommending solutions and actively narrowing the issues.'[50]

It should be construed that conciliation differs from mediation in the status of a third party. Strausser and Randolph are disposed to think that the conciliator aims either at preventing a conflict or at eliminating the existing dispute. In order to attain the objective mentioned above, the conciliator is entitled to contemplate and suggest various proposals and agreements. Contrary to the conciliator, the mediator is not allowed to make personal suggestions or advises on matters in question. Feasibly, the role of the mediator may be reduced to the role of a messenger or of an estimator, who transfers the will of the parties to a dispute.

Apart from the above, there are more discrepancies between conciliation and mediation, which may be grasped from the diligent analysis of the UNCITRAL's Conciliation Rules. In this connection, it might be appropriate to note that the UN Commission on International Trade Law (hereinafter referred to as UNCITRAL) directs and regulates international trade in cooperation with the World Trade Organization. Therefore, the analysis of the UNCITRAL Conciliation Rules is particular valuable in the framework of the present dissertation, which emphasizes the dispute settlement system of the World Trade Organization. To put it briefly, the UNCITRAL Conciliation Rules offer a comprehensive collection of procedural rules, upon which parties may agree for the exercise of conciliation proceedings emerging from the commercial relationship between them. According to the Rules, a salient feature of conciliation is its purpose to seek 'an amicable settlement' of a dispute between parties, which originates either from a contractual relationship or from other legal one.[51] In contradistinction with the definition of conciliation mentioned above,

[50] Freddie Strasser and Paul Randolph, Mediation: a psychological insight into conflict resolution (Continuum International Publishing Group 2004), p. 65

[51] 1980 - Reglement de conciliation de la CNDCI, article 1 (1). Retrieved from http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf

mediation is recognized by the World Trade Organization as an alternative dispute settlement procedure, which concerns only those disputes, which stem from the WTO agreements. It means that conciliation may be employed in a wider sphere in comparison to mediation.

In addition, the UNCITRAL Conciliation Rules accentuate the role of conciliators in proceedings. According to the Rules, the assistance of the conciliator is done in an independent and impartial manner. Besides, the Rules stipulate that the conciliator is free to choose a manner of proceedings, which he considers appropriate.[52] Obviously, he is required to take into account the wishes of parties, but the conciliator is independent in making procedural decisions.

Besides, the UNCITRAL Conciliation Rules prescribe that at any stage of conciliation proceedings, the conciliator is entitled to make a proposal for the settlement of a dispute. In mediation, the third party is entitled to choose a manner of dispute settlement proceedings, as well as to make recommendations on procedural issues. However, the mediator is not allowed to propose the settlement of the dispute.[53]

After everything has been given due consideration, it should be generalized that mediation and conciliation frequently overlap in the framework of international law. Notwithstanding this, a number of experts consider conciliation as a more independent and facilitating procedure than mediation. In mediation, the third party is purposed to lead the dispute to the most favourable consequence without offering an agreement, whereas in conciliation, it may intrude into the state of affairs by suggesting the option of settlement. Nevertheless, mediation and conciliation are neither binding nor adjudicative ways of dispute settlement.

1.3.3. Disparity between mediation and arbitration. As the foregoing discussion has suggested, mediation is a specific alternative way of dispute settlement, which must not be

[52] ibid, article 7 (3)
[53] Reglement de Mediation de l'OMPI, article 13. Retrieved from http://www.wipo.int/amc/fr/mediation/rules/index.html

associated with conciliation. The present section is designed to show a disparity between mediation and arbitration. Being two alternative ways of solving various types of disputes, mediation and arbitration are inherently different.

According to the WIPO Arbitration and Mediation Centre, the main discrepancy between the two alternative dispute settlement proceedings lies in the fact that in mediation, it is incumbent on parties to control the flow of a dispute and to make the final decision.[54] From the contrasting point of view, in arbitration, the parties to the dispute have no right to control and direct proceedings and are not entitled to draft a settlement agreement. As a matter of fact, arbitrators make decisions on rights and responsibilities directly, whereas mediators do not decide who is right or wrong in the dispute.[55]

Recently, the demand for arbitration has increased to the same degree as the demand for mediation. Arbitration is employed predominantly in the spheres of professional sports, insurance-related measures and labour disputes. A binding arbitration decision forces the parties to follow the prescriptions of arbitrators, and it is almost impossible to appeal the decision in domestic courts of justice.[56]

The fact is that in arbitration, the outcome is determined according to the applicable law, which is considered to be an objective standard. In contradiction to arbitration, in mediation, any legal consequences are given consent by the parties, or, in other words, are determined in conformity with their will.[57] The WIPO Arbitration and Mediation Centre construes that in making a decision upon an outcome, the parties to mediation are entitled to consider a larger number of standards, especially their mutual business interests.

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[54] Centre d'Arbitrage et de Mediation de l'OMPI, 'Guide de la Mediation OMPI', p. 6. Retrieved from http://www.wipo.int/freepublications/en/arbitration/449/wipo_pub_449.pdf
[55] Valerie F. Butler, Mediation: Essentials and Expectations (Dorrance Publishing Corporation 2004), p. 44
[56] ibid., p. 44
[57] Centre d'Arbitrage et de Mediation de l'OMPI, 'Guide de la Mediation OMPI', p. 6. Retrieved from http://www.wipo.int/freepublications/en/arbitration/449/wipo_pub_449.pdf

In view of the above, it should be construed that mediation is an interest-based dispute settlement procedure, whereas arbitration is a right-based one. In the context of business interests, it can be appropriate to note that the parties to mediation may also solve their disagreements by reference to their future relationship, rather than by reference to their past behaviour.[58]

Similarly, Allan Stitt is disposed to think that the core objective of mediation is a focus on the future. According to the writer, in mediation, disputants are commonly preoccupied with the question, who has acted appropriately, and who has acted inappropriately.[59] The main drawback of this retrospective approach lies in the formation of mutual beliefs that each party is right, believing that their demands are reasonable. However, it is more advantageous to focus on the future, but not on the past. Stitt states that instead of arguing about who is right and who is wrong (an argument that can rarely be resolved), parties to a dispute should better focus on what measures they need to undertake in order to settle the dispute.[60]

In a contrary manner, in arbitration, parties are required to persuade the arbitral tribunal. That is, the parties to arbitration address their arguments directly to the tribunal, but not to each other.[61] This means that in arbitration, they are not obliged to convince each other in order to find a mutually acceptable decision. The main task of the parties to arbitration consists in providing the arbitration tribunal with all sufficient evidence proving claims and allegations. In contrast to arbitration, parties to mediation are entitled to persuade each other, or to negotiate with each other, because the outcome depends on the mutual decision of the parties. According to the WIPO Arbitration and Mediation Centre, they deliver speech and

[58] ibid., p. 6
[59] Allan Stitt, Mediation: a practical guide (Routledge 2004), p. 95
[60] ibid, p. 95
[61] Centre d'Arbitrage et de Mediation de l'OMPI, 'Guide de la Mediation OMPI', p. 6. Retrieved from http://www.wipo.int/freepublications/en/arbitration/449/wipo_pub_449.pdf

adduce proofs to each other, but not to the mediator, even though the latter facilitates the communication between the parties.[62]

Aside from the above, a bunch of scholars contends that in some cases, arbitration, as an alternative dispute settlement procedure, may be used in combination with mediation. According to Elliott, there are a large number of cases, when mediation is employed in conjunction with arbitration. Thus, the parties may require mediation first, and when the procedure fails, the dispute is transferred to the arbitration tribunal. Otherwise, proceedings may start from arbitration in order to allow mediation at some point during arbitration.[63]

In view of the above, the author attempts to prove that the parties may reach outstanding outcomes, if they participate in the integrating process, which combines the particularities of mediation and arbitration. Thus, the disputant may start mediating some issues in question, while arbitrating others. Similarly, the parties to mediation may return to arbitration in order to settle unresolved questions.

Taking into consideration the aforementioned consistency between arbitration and mediation, it is possible to discern four possible ways to combine and integrate the two alternative dispute resolution procedures into one process, such as pre-arbitral mediation, post-arbitral mediation, complete integration between arbitration, mediation and other ADR procedures, and explicit integration of 'mediation windows' in the arbitral process.[64]

A mental note should be made that the most popular combination of arbitration and mediation is pre-arbitral mediation. As a matter of fact, it may take place at two independent stages of a dispute: mediation may be employed as the last possible measure taken to resolve

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[62] Centre d'Arbitrage et de Mediation de l'OMPI, 'Guide de la Mediation OMPI', p. 6. Retrieved from http://www.wipo.int/freepublications/en/arbitration/449/wipo_pub_449.pdf

[63] David C. Elliott, 'Med/Arb: fraught with danger or ripe with opportunity?', 62 (3), Journal of Chartered Inst. Arb. (1996), p. 175

[64] Christian Buhring-Uhle, Lars Kirchhoff, and Gabriele Scherer, *Arbitration and mediation in international business* (Kluwer Law International 2006), p. 251

a disagreement between the parties before a request for arbitration is brought.[65] According to the researchers, the above-mentioned situation is conceptualized by different institutions, which offer mediation and conciliation services.

Likewise, Buhring-Uhle, Kirchhoff and Scherer presume that mediation may be considered by the parties as a constituent of a multi-step alternative dispute resolution scheme, according to which it has to be employed within a predetermined period, after negotiations have attained a particular level without settling the dispute completely.[66]

In a nutshell, the undisputed benefit of pre-arbitral mediation lies in the possibility to avoid the disadvantages of arbitration proceedings. It is possible to agree with Buhring-Uhle and other academicians that the scheme of pre-arbitral mediation helps to make dispute settlement more subtle and effective. Besides, the incorporation of a multi-step alternative dispute resolution (ADR) clause into the contract between the parties has the additional benefit of guaranteeing that the disputants are not beforehand with their mutual decision to evolve the dispute into official binding proceedings. In addition, a multi-step ADR clause fosters the exploration of the roots in order to choose the proper remedy for the problem before damages augment.

After everything has been given due consideration, it should be generalized that mediation is substantially different from arbitration. The main discrepancies between the two alternative dispute settlement procedures may be specified in the following way:

1) In mediation, each party is entitled to withdraw from the procedure after the first meeting with the mediator. Contrariwise, in arbitration, a unilateral withdrawal from arbitration is prohibited, once the parties have lawfully agreed to transfer the dispute to arbitration.

[65] ibid, p. 251
[66] ibid, p. 251

2) In mediation, the role of the mediator is reduced to the role of a settlement facilitator, who must impose settlement on the parties. On the other hand, the tribunal is empowered by the parties to render an award.
3) In mediation, dispute settlement is controlled and consented by the parties in conformity with their business interests, which may be wider than their legal statuses. In contradistinction to mediation, the arbitration tribunal is authorized to address the legal positions of the parties exclusively on the basis of the applicable substantive law.
4) In mediation, every reached agreement between parties regarding the settlement of a dispute is binding between them as a matter of contract law, or, in other words, as a contractual obligation. In a contrary manner, awards of arbitration tribunals are binding on the parties, and final and enforceable on a par with decisions of domestic courts of justice.

1.3.4. Discrepancies between mediation and negotiation. According to David W. Augsburger, the role of the mediator is to negotiate, 'but to remove the psychological barriers and enable the principals to negotiate at a meaningful level.'[67] Interestingly, the author tends to juxtapose the role of the negotiator and the role of the mediator. Therefore, the main objective of the present section is to determine whether negotiation and mediation are the same phenomena.

As the case may be, negotiation, similar to mediation, conciliation, and arbitration, is generally recognized as an alternative dispute resolution procedure. In spite of this fact, there is no unilateral agreement on what should be regarded as 'negotiation'. According to I. William Zartman, the term 'negotiation' is more precise than 'diplomacy' and broader than 'bargaining', and, therefore, implies the process of fusing divergent standpoints to produce a

[67] David W. Augsburger, Conflict mediation across cultures: pathways and patterns (Westminster John Know Press 1992), p. 197

mutually acceptable agreement.[68] In other words, negotiation is a process of distinguishing and reducing alternative propositions, until a unique and generally acceptable conjunction is reached.

According to Monika Dannerer, it is possible to discern three meanings of the term. All these definitions imply that 'negotiation' always takes place between two persons or parties, who are seeking to reach an agreement on an issue in question.[69]

According to the authors, the first meaning of 'negotiation' stems from a non-linguist apprehension of this term in the context of peace negotiation, business negotiation, or wage disputes. In this sense, the concept should be comprehended as an event, or, in other words, a peculiar type of discourse, 'where negotiating about a fixed topic is the essential part.'[70]

The second definition of the term articulates that negotiation is a specific type of activity in the framework of the decision-making process. In this connection, Dannerer points out that negotiation implies a communicative attempt to adjust both potential and real discrepancies in interests between parties in order to attain mutually desirable decisions on the essential issues in question. In her second definition of 'negotiation', Monika Dannerer relies on the definition elaborated by Wagner (1995:30): "A discourse counts as a negotiation if the participants relate themselves to each other's goals and interests and to the problems of implementing their goals."[71]

Taking into consideration Wagner's definition of 'negotiation', it should be construed that the scholar does not associate the necessity to negotiate with the existence of a conflict or a disagreement. In addition, a mental note should be made that the procedure of negotiation allows shifts from negotiation itself to other forms of verbal communication, such as

[68] I. William Zartman, 'Negotiation and conflict management: essays on theory and practice (Routledge 2008), p. 14
[69] Monika Dannerer, 'Negotiation in business meeting' in Edda Weigand and Marcelo Dascal, Negotiation and power in dialog interaction (John Benjamins Publishing Company 2001), p. 91
[70] ibid, p. 91
[71] ibid, p. 92

persuasive talks and talks on cooperation or on coordination. This means that the nature of negotiation is manifold.

Elaborating on the research, it should be clarified that the third meaning of 'negotiation' may be reduced to interaction. According to Monika Dannerer, each type of verbal communication may include a negotiation about interactional issues, such as topic selection, floor access, etc.[72]

After the three main definitions of 'negotiation' have been interpreted, it is possible to compare and contrast negotiation and mediation as two types of alternative dispute resolution procedures. First and foremost, it should be ascertained that mediation and negotiation have much in common. According to Bruce Fraser, mediation is a form of negotiation, in which two or more disputing parties take part in a negotiation with the involvement of a neutral third party, namely a mediator, who facilitates the effort to reach a settlement.[73]

In this light, negotiation resembles mediation in the meeting of the parties, who wish to settle their disagreements. However, in contrast to negotiation, mediation always requires the presence of a neutral third party, a mediator, who assists parties to a dispute in arriving at a mutually accepted agreement.

Besides, it is possible to concede that mediation, as well as negotiation, is not a purpose for all sorts of disputes. Notwithstanding this, both negotiation and mediation are present in everybody's life, 'ranging from the informal to formal process, the trivial to the critical dispute.'[74] As far as the two types of alternative dispute resolution are concerned, it should be ascertained that mediation is different from negotiation in the fact that the mediator usually controls the agenda, interaction, and the flow of information, which is transferred through the mediator, rather than directly from one party to the other.

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[72] ibid, p. 92
[73] Bruce Fraser, 'The mediator as power broker' in Edda Weigand and Marcelo Dascal, Negotiation and power in dialog interaction (John Benjamins Publishing Company 2001), p. 23
[74] ibid, p. 23

In addition to the difference mentioned above, mediation is conducted in accordance with a predetermined set of procedural rules, usually imposed on the participators in mediation. These rules may stipulate that the parties will behave themselves in a certain manner, for instance, they will refrain from interrupting the other party, abstain from insulting, harsh, angry or threatening statements, etc.[75]

Furthermore, mediation is performed in conformity with the mediation session rules and rules of confidentiality, according to which the mediator pledges not to disclose the information transferred at the stage of mediation. Contrariwise, the procedure of negotiation is not regulated to the same extent as mediation. The parties are entitled to develop conditions of negotiation. Otherwise, it may occur without any specifically elaborated rules.

Suffice it to say that negotiation and mediation are not the same procedures of alternative dispute resolution. As the foregoing discussion suggests, negotiation takes place between two or more parties without the mandatory participation of a neutral third party. In addition, it does not necessarily require the existence of a dispute or conflict between parties. In contradistinction to parties to a dispute in reaching a mutually accepted agreement, mediation is always connected with the settlement of a dispute between parties.

Chapter II: Mediation

Section I: General survey of mediation.

2.1.1. Origin and history. According to Klaus Peter Berger, mediation as an alternative dispute resolution scheme, which should be recommended for two main reasons. Firstly, it helps to avoid costs, risks, time and the general 'harassment factor' of international arbitration. Secondly, mediation prevents a dispute from turning into 'a legalistic battle.'[76] It means that the use of mediation helps to mitigate the conflict rather than escalate. The

[75] ibid, p. 23
[76] Klaus Peter Berger, Private dispute resolution in international business: negotiation, mediation, arbitration (Kluwer Law International 2006), p. 119

employment of mediation provides the parties with an opportunity to restructure (transmute) a business relationship between them.

According to Klaus Peter Berger, the aforementioned properties of mediation must be taken into consideration in the definition of the mediation process. In this light, it may be defined as the intervention of a neutral third party, who is not entitled to make an authoritative decision with regard to the dispute, but has to assist the parties in voluntarily reaching a mutually desired settlement of the issue in question.[77]

The definition mentioned above discloses the most common characteristics of the procedure. These features are predetermined by a long history of the phenomenon of mediation dating back to the beginning of mankind. Thus, according to Rau, Sherman, and Peppet, mediation probably precedes in time the official formation and enforcement of law, because people in a social state seem to possess a natural instinct to look for furtherance and assistance of others in solving controversies between individuals.[78] Moreover, the researchers are disposed to think that formal legal institutions originate from informal endeavours of family members, friends and neighbours to mediate between disputants.

Thus, David Spencer and Michael Brogan contend that there is sufficient evidence to claim that the phenomenon of mediation is enrooted in many traditional societies, notwithstanding the lack of formal legal institutions there. According to the authors, many uncivilized societies had well-structured systems for administering disputes within clans, tribes, families or villages.[79]

Taking into account the apparent preference given to mediation in those societies, it should be construed that the communal nature of traditional societies, in conjunction with strong societal norms, such as cultural traditions and religious beliefs, stimulated the augmentation of processes, in which third parties with a high social position assisted

[77] Moore, The mediation process, 15; Brown and Marriott, ADR Principles and Practice, No. 7-001.
[78] Rau, Sherman, Peppet, Processes of Dispute Resolution, 327
[79] David Spencer and Michael Brogan, Mediation law and practice (Cambridge University Press 2007), p. 23

disputants in settling a problem. In addition, it is possible to notice that economic systems based on mutual dependence have also facilitated the development of mediation in early pre-civilized societies.

To proceed further, Spencer and Brogan stated that the processes mentioned above did not only foster the settlement of disputes in traditional societies, but also strengthened social values and social integrity by maintaining the equilibrium of the social system.[80] The collapse of traditional societies clarified that the discussed processes suffered from the deficiency of a supplementary social infrastructure. Thus, the establishment of the formal institutions of law and state, coupled with the processes of modernisation, buried the primeval incentives to mediation.

Interestingly, the aboriginal communities of Australia have employed consensual methods of solving disputes for many thousands years, irrespective of the fact that the traditional conceptualization of mediation is predominantly ascribed to the Westerners. According to Spencer and Brogan, the aboriginal processes of mediation were grounded both on the system of kinship and on a widely-recognized network of entitlements and commitments.[81] The main objective of the system consisted in the restoration of social balance inside the community.

In contradistinction to later western mediation incentives, the dispute resolution mechanism of the first Australians was predetermined by profound cultural imperatives. Some scholars explicate that the aboriginal people of Australia mediated for the purpose to metamorphose and heal the relationship between parties and their spirit. It was not merely a reciprocal obligation to respect the conditions of an agreement in the future. In other words, this type of mediation was purposed to empower the community rather than disputing individuals.

[80] David Spencer and Michael Brogan, Mediation law and practice (Cambridge University Press 2007), p. 23
[81] David Spencer and Michael Brogan, Mediation law and practice (Cambridge University Press 2007), p. 24

In addition to the above discussion of the origin of mediation, the representatives of the classical Chinese theory suggest that mediation is a more sophisticated way of recourse to legal norms for the resolution of conflicts. Furthermore, it might be appropriate to note that many societies ascribe special qualities of prestige and respect to those persons, who are involved in mediation as a neutral third party.

To Beger's point of view, the Chinese comprehension of mediation has emerged from the antithesis of 'li' and 'fa' as part of the Confucian philosophy, which has always allowed a party to 'save face' and take efforts in maintaining its relationship with the other party to a dispute. The notion of mediation has also been known to Assyrian merchants in Mesopotamia, as well as to private arbitrators in Ancient Greece, Rome and Medieval Europe.[82]

Nowadays, mediation is used in domestic and international business law, and labour, corporate, neighbourhood, economic, construction, insolvency, inheritance, insurance, environmental and banking law etc. However, the contemporary version of mediation has also been shaped by metamorphoses in the historical development of humankind. This may be exemplified by the development of mediation in America.

Thus, according to Spencer and Brogan, before 1960, mediation had been part of the dispute settlement system in the United States. However, this system was not very popular and widely accepted. Since the 1960s, mediation had started a period of steadfast expansion. In this period, mediation emerged as an alternative to litigation. In the 1990s, the general approach to mediation substantially changed. In that period, the enactment of important federal legislation guaranteed that it was a procedure of federal significance and not a primitive tool for the settlement of local disputes.[83]

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[82] Roebuck, Asian Dispute Review (2002), 135; Roebuck, Ancient Greek Arbitration; ROebuck, The Charitable Arbitrator: How to mediate and arbitrate in Louis XIV's France

[83] David Spencer and Michael Brogan, Mediation law and practice (Cambridge University Press 2007), p. 29

As a result, the American experience in the domain of mediation demonstrated that in a relatively short period, the role of mediation substantially transformed from local dispute resolution option to a nationwide professional mechanism alternative to domestic litigation.

In the ultimate analysis, it seems prudent to generalize that the contemporary concept of mediation, which is deeply enrooted in the history of mankind. The foregoing historical analysis has elucidated that it is a primeval phenomenon, which originates from traditional societies. In those societies, mediation helped to settle disputes between family members, as well as the representatives of a clan or a community. Therefore, it was widely used in societies, which lacked the infrastructure of legal and state institutions. This means that mediation is older in practical usage than litigation and other forms of dispute resolution. In addition, the knowledge of the historical roots of mediation helps to explain its current definitions, assisting in clarifying the appropriateness of the phenomenon.

2.1.2. Characteristics of mediation. The previous discourse has made it evident that mediation is a specialized process, whereby parties to a dispute are assisted by a neutral third party, the mediator. In addition, it has been ascertained that mediation originates in traditional societies. This means that the process is much older than other similar proceedings, such as litigation and arbitration. Besides, the historical analysis has disclosed the relationship between societal peculiarities of communities and mediation. Therefore, the main objective of the current section is to investigate the most pertinent characteristics of mediation, which help to distinguish this kind of alternative dispute resolution from other similar proceedings.

In this light, it is possible to agree with Spencer and Brogan that the key issue of mediation is a negotiation between two or more parties to a dispute facilitated by a third party.[84] Assuredly, negotiation creates a basis of mediation. As a matter of fact, the latter can

[84] David Spencer and Michael Brogan, Mediation law and practice (Cambridge University Press 2007), p. 42

function without the former irrespective of the fact that negotiation itself is an independent kind of alternative dispute resolution.

Besides, David Augsburger ascertains that the role of the mediator is to negotiate in order to eliminate psychological obstacles and enable the advantages of negotiation at the meaningful level.[85] It means that mediation is characterised as a special type of negotiation. However, the previous discussion has detected that negotiation, as a separate type of alternative dispute resolution, is discrepant from mediation itself. To put it briefly, these two concepts are not the same procedures. Negotiation takes place between two or more parties without the obligatory involvement of a neutral third party, whereas mediation requires the presence of such, namely a mediator. Moreover, negotiation is not always employed with regard to conflicting situations, whereas mediation is always used as a means of settling disputes. In view of the above, the latter should be characterized as a unique form of negotiation.

To proceed further, mediation is usually characterized as a 'without prejudice' process, whereby disputants are aided by a neutral third party to settle a conflict on the mutually acceptable terms.[86] Thus, the status of 'without prejudice' is attributed to mediation as its salient feature. In its context, the status 'without prejudice' means a special status granted to negotiations between the parties, which take efforts to resolve the dispute.

As the case stands, the doctrine of the 'without prejudice' status has evolved from the ruling in *Walker v Wilsher* (1889). In addition, the ruling was reconsidered in the case of *Rush & Tomkins v GLC* (1988). Thus, the court of appeal elaborated six principles how the doctrine of 'without prejudice' would function. These principles should be construed in the following way:

[85] David W. Augsburger, Conflict mediation across cultures: pathways and patterns (Westminster John Know Press 1992), p. 197
[86] Peter D'Ambrumenil, Mediation and Arbitration (Routledge 1997), p. 41

1) The main objective of the 'without prejudice' privilege is to authorize parties to a dispute to negotiate without the risk of their suggestions and offers being used against them in the case of unsuccessful negotiations.[87] Nonetheless, if the resolution of a dispute is achieved, the revocation of the privilege takes place. To sum up, the protection of it implies the protection from any claims, either against the other party or against someone outside it.
2) In addition, the court has confirmed that the parties are entitled to make a mutual agreement to refer to a discussion or correspondence, which take place during mediation, even if a resolution to the conflict has not been attained. This principle feasibly means that the evidence presented at the stage of mediation can be used at other proceedings by the parties irrespective of the result of mediation.
3) Furthermore, the doctrine of the 'without prejudice' privilege provides that disputants may use a particular form of words precluding reference to the correspondence, even after a settlement has been achieved. In this light, the doctrine incites the parties to the dispute to precisely designate through a special form of words, even after a settlement has been reached, that they are not about to refer to the correspondence.
4) The fourth principle proclaims that the 'without prejudice' privilege does not depend on the existence of dispute settlement proceedings.
5) After studying the document, the courts of justice can always recognize whether the privilege applies to them.
6) The solicitors of the parties to 'without prejudice' negotiations possess the same privilege as the parties.

To elaborate further, D'Ambrumenil claims that the procedure of mediation is also characterized by the professional privilege of the parties. According to the author, the

[87] Peter D'Ambrumenil, Mediation and Arbitration (Routledge 1997), p. 42

doctrine of professional privilege stipulates that the client has benefits in claiming privilege regarding communications with a legal adviser in relation to the proceedings of mediation.[88] This means that the legal adviser is prohibited from using the information received from the party contrary to the party's interests.

Elaborating on the salient features of mediation, it can be appropriate to note that parties to a dispute may agree that their dispute will be settled in a manner, to which they give preference. Furthermore, the disputants may designate a special method of solving their conflict by preventing the courts of justice from giving a ruling according to the law and the terms of the contract.

Apart from the above, one of the most important characteristics of mediation is the status of a mediator. Thus, Peter D'Ambrumenil ascertains that the appointment of a mediator provides no authority to the person, 'unlike the appointment of an arbitrator.'[89] In other words, the mediator is not authorized to impose a settlement on the parties, which will never receive any solution from him. The direct task of the mediator lies in encouragement and persuasion to make decisions. In addition, the secondary role of the mediator may be also explained by the fact that the mediator has no legal immunity. In other words, mediators may be sued for negligence or for the breach of confidence.

Additionally, most mediation rules regulate such salient feature of mediation as confidentiality. For instance, the WIPO's Mediation Rules prescribe that 'no recording of any kind shall be made of any meetings of the parties with the mediator.'[90] Moreover, the Rules clearly articulate that all participants of proceedings, including the parties, the mediator, representatives of the parties, advisers and experts, must respect the confidentiality of mediation, and have no right, unless otherwise consented by the parties, to reveal any

[88] Peter D'Ambrumenil, Mediation and Arbitration (Routledge 1997), p. 43
[89] Peter D'Ambrumenil, Mediation and Arbitration (Routledge 1997), p. 47
[90] WIPO Mediation Rules, article 14. Retrieved from http://www.wipo.int/amc/en/mediation/rules/index.html#8

information originating from mediation to any outside party.[91] In this connection, the WIPO's Mediation Rules require from the parties to sign an appropriate confidentiality undertaking prior to the participation in mediation.

In the final analysis, it should be generalized that in a broad sense, mediation is characterized as a specific form of negotiations. Nonetheless, a number of salient features help to discern differences between negotiation and mediation as two unrelated kinds of alternative dispute resolution. Besides, as a peculiar procedure, mediation is characterized by a wide range of features, such as the 'without prejudice' principle, the unauthorized and unprotected status of a mediator, a mutual decision of the parties, and the principle of confidentiality.

2.1.3. Models of mediation. In the previous sections, it has been ascertained that mediation may assist parties in achieving their mutual agreement. It corresponds to two kinds or models of mediation practiced worldwide. Thus, under the first model, namely 'facilitative mediation', the mediator takes efforts to foster communication between disputants and to aid each side in apprehending the other's point of view.[92] In addition, the role of the mediator as a facilitator lies in facilitating parties to a dispute to understand each other's position and interests in respect to the dispute.

It should be purported that the second model, 'evaluative mediation', obliges the mediator to provide a non-binding assessment or evaluation of the dispute.[93] Under the second model, evaluation or assessment may be either freely accepted or freely rejected as the settlement of the dispute by the parties. In addition, the WIPO's Mediation Rules stipulate that the parties are entitled to freely decide what model of mediation to choose.

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[91] WIPO Mediation Rules, article 15. Retrieved from http://www.wipo.int/amc/en/mediation/rules/index.html#8
[92] Centre d'Arbitrage er de Mediation de l'OMPI, 'Guide de la Mediation OMPI', p. 5. Retrieved from http://www.wipo.int/freepublications/fr/arbitration/449/wipo_pub_449.pdf
[93] Centre d'Arbitrage er de Mediation de l'OMPI, 'Guide de la Mediation OMPI', p. 5. Retrieved from http://www.wipo.int/freepublications/fr/arbitration/449/wipo_pub_449.pdf

In view of the above, it should be summarized that the WIPO Arbitration and Mediation Centre emphasizes two models of mediation. Nonetheless, some researchers in the domain of law suggest that there are more than two of them. Thus, David Spencer and Michael Brogan are disposed to think that there is a multiplicity of models of mediation. However, they are grounded on the classical model of mediation, but differ in the context of their objectives and the role of mediators.[94]

In order to grasp the peculiarities of different models, the classical type of mediation needs to be analyzed first. In this connection, it should be mentioned that this model was first practised in Australia.[95] Interestingly, it is still taught by Australian mediation training providers as a major type of mediation. The classical model of mediation comprises a number of procedural phases or stages, such as: a) the preparation for mediation; b) the opening statement of the mediator; c) the parties' opening statement; d) the identification of issues and interests; e) the identification of the common ground; f) the identification of early options for an agreement; g) separate sessions; h) the final joint meeting; and i) the preparation of the settlement or termination of mediation.[96]

The particularities of the aforementioned phases of classical mediation will be disclosed when other models are delineated. Thus, returning back to a variety of models of mediation, it should be stated that Lawrence Boulle, Professor of Law and Associate Director of the Dispute Resolution Centre of the Bond University, differentiates between four main models of mediation: settlement, facilitative, transformative and evaluative. Such classification is explained by Boulle in the following statements: 'They are referred to as paradigm models in that they are not so much discrete forms of mediation practice but rather ways of conceptualising the different tendencies in practices.'[97]

[94] David Spencer and Michael Brogan, Mediation Law and Practice (Cambridge University Press 2007), p. 100
[95] David Spencer and Michael Brogan, Mediation Law and Practice (Cambridge University Press 2007), p. 48
[96] David Spencer and Michael Brogan, Mediation Law and Practice (Cambridge University Press 2007), p. 49
[97] David Spencer and Michael Brogan, Mediation Law and Practice (Cambridge University Press 2007), p. 100

In this light, it should be construed that the researcher does not consider the four models of mediation as independent forms and alternatives to one another due to the fact that in practice, the process of mediation may incorporate salient features of two or more paradigm models. For instance, Boulle asserts that mediation may commence in the facilitative model, but later evolve into a settlement or evaluative form.

As the case stands, the four types of mediation need to be analyzed in detail. Thus, as far as the first model is concerned, it should be emphasized that settlement mediation is also known as compromise mediation. Its principal objective is to stimulate bargaining to achieve a compromise between the parties on their initial demands. Settlement mediation approaches to the dispute as to a problem, which requires analysis of the parties' self-perception of it. In other words, the main role of a third neutral party in settlement mediation is to implement all possible strategies towards making the parties reveal their standpoints with regard to the problem in order to reach a compromise in consequence. According to Spencer and Brogan, the aforementioned model of mediation is characterized by the high status of the mediator, who may be a barrister or manager.[98] In addition, in settlement mediation, the intervention of the mediator into parties' positional bargaining is limited. The main benefits of such mediation lie in simple and intelligible proceedings, and cultural acceptance. The core limitation of settlement mediation consists in the possibility of manipulation through the initial ambit claims.

To elaborate further, the facilitative model of mediation may be recognized as an interest-based form of mediation, which is directed towards the settlement of problems by means of rational-analytic procedures. In this connection, it might be appropriate to note that the core objective of facilitative mediation is to avoid various standpoints and positions by negotiating in the context of parties' underlying necessities and interests instead of their

[98] David Spencer and Michael Brogan, Mediation Law and Practice (Cambridge University Press 2007), p. 101

stringent legal rights.[99] Therefore, facilitative mediation does not refer to the dispute as a positional conflict, but evaluates all disagreements between the parties in the framework of their mutual needs and interests. In this sense, the role of the mediator may be reduced to the role of an expert in the mediation process and techniques, who may not be conscious of the subject matter of the dispute. This type of mediation is beneficial for the parties, who can make the most efficient use of controlled negotiations. However, this model of mediation may not reach the desired outcome and can be long-term.

To proceed further, the transformative model of mediation is frequently associated with therapeutic measures or reconciliation. According to Spencer and Brogan, the key objective of transformative mediation lies in involvement with the underlying causes of disagreements between the disputants and the tactics of perfecting their relationship by means of acknowledgement and authorization. To put it briefly, the main purpose of transformative mediation is to resolve a dispute between parties through transformative incentives, taking into consideration behavioural, emotional and relationship factors. In this light, there are reasonable grounds to claim that the personality of the mediator must have expertise in counselling psychology or social work in order to properly understand emotional and cognitive components of the dispute.[100] This type of mediation helps to resolve the relationship rather than just settle the dispute. Notwithstanding it, transformative mediation may be long-term and confusing.

At last, evaluative mediation is the fourth model, which combines advisory, managerial and normative features. The main objective of it is to reach a resolution of a dispute in accordance with the legal rights and entitlements of parties and 'within the anticipated range of court, tribunal or industry outcomes.'[101] Thus, evaluative mediation

[99] David Spencer and Michael Brogan, Mediation Law and Practice (Cambridge University Press 2007), p. 101
[100] David Spencer and Michael Brogan, Mediation Law and Practice (Cambridge University Press 2007), p. 101
[101] David Spencer and Michael Brogan, Mediation Law and Practice (Cambridge University Press 2007), p. 101

defines a dispute in terms of legal rights and obligations, corporate standards or community norms.

In order to fulfil the objective of evaluative mediation, the mediator is required to have expertise in substantive fields of the dispute rather than qualifications in mediation techniques. In other words, if the dispute stems from the domains of law, the mediator must be a lawyer, who has necessary expertise in those areas of law. Certainly, the evaluative model of mediation partially resembles the procedure of arbitration, in which the main objective is to settle a dispute according to legal rights, entitlements and obligations of the parties.

2.1.4. Successes and failures of mediation. After the main characteristics of mediation have been analyzed, it is possible to expound on the advantages and disadvantages of it as a form of alternative dispute resolution. Assuredly, as any other phenomenon, mediation has its strengths and weaknesses. Therefore, one of the challenges in the practical area and in the theoretical study of mediation lies in the differentiation between its benefits and shortcomings. However, some researchers are prone to believe that it is sometimes very difficult to clearly discern successes and failures of mediation.

Nevertheless, a bunch of scholars are disposed to think that the most apparent success of mediation consists in getting the disputing parties to accept mediation, ‘referred to as “getting to the table”.[102] Furthermore, the second advantage of mediation lies in the fact that the parties attain some sort of agreement as a consequence of mediation. As a matter of fact, such agreement may differ in terms of its scope from a mere cease-fire one to the general resolution of all existent disagreements and resentments.

According to the scholars, the two stages mentioned above overlap in the sense that certain factors and processes, which stimulate the parties to look for mediation, affect their

[102] Paul F. Diehl, & J. Michael Greig, International mediation (Polity 2012), p. 106

willingness to reach an agreement. In other words, circumstances, which incite the disputants to choose mediation as their preferable dispute settlement scheme simultaneously encourages them to reach an agreement in respect of the issue in dispute.

In addition, there is the third stage, at which successes and drawbacks of mediation are particularly visible. It deals with the implementation and durability of resolutions.[103] However, it must be approached only after the previous two stages are comprehensively explored.

In the context of the first stage, it should be clarified that it lies in bargaining and managing the conflict. At this stage, the success of mediation may not be directly visible. However, it provides the parties with the opportunity to reconsider their apprehension of the other side and collect new information about the prospects for the settlement of the dispute. The authors tend to believe that achieving success at the initial stage of mediation is a difficult task, because the parties to the dispute may fear that the incentive to reach peace may be perceived by the other side as a sign of weakness, which can be exploited.[104]

In addition, the preference for mediation makes it evident that the conflict between the parties is serious enough and costly. The fact that the parties refuse to directly negotiate with each other means that there are substantial grievances, which preclude the possibility of direct communication. Thus, the advantage of mediation in serious disputes rests on the role of the mediator as a neutral third party, who is capable to build a bridge between two disputants. However, the limitation of mediation is that parties rarely reach a settlement at the first stage of proceedings because of their fear to show weakness, and, on the other hand, the furtherance of a willing mediator, as well as the consent of the disputants to talk, does not automatically guarantee that a resolution will be found and peace established.

[103] Paul F. Diehl, & J. Michael Greig, International mediation (Polity 2012), p. 106
[104] Paul F. Diehl, & J. Michael Greig, International mediation (Polity 2012), p. 107

In the context of the second stage, the benefits and limitations of mediation are dependent on three factors: a) attributes of the mediator; b) characteristics of the disputants; and c) aspects of the conflict.

As far as the traits of the mediator are concerned, it is appropriate to note that a third neutral party plays a very significant role in the success and failure of mediation, because individual conflicts require specific mediators. Different mediators may produce discrepant outcomes of talks. It is possible to agree with Diehl and Greig that proficient mediators can effectively use resources and bring success to the mediation process, whereas less powerful mediators may fail. To all intents and purposes, the role of the mediator as a facilitator, conciliator and negotiator is very important. Among other things, the mediator's bias can be crucial for an agreement. Biased mediators can produce successful mediation results, because they have clear interests at stake in the conflict.

To continue, the role of the mediator at the stage of finding a settlement to the dispute is predetermined by a strategy of the mediator. In this connection, a mental note should be made that mediators apply various strategies of dispute settlement, which correspond to their perception of what the conflict requires, as well as to the awareness of available resources and professional expertise.

Thus, mediators may use the strategies of a relatively low level of intervention, according to which the role of the mediator may be substantially diminished. Similarly, mediators may consider it is wise to employ a high-intervention strategy, according to which they have to engage in a wide range of different activities. The decision of the mediator to be passive or active is frequently crucial for the whole process of mediation and, possibly, for the final settlement of the dispute.

The failure of mediation is sometimes caused by the inefficiency of the mediator, who is incapable to facilitate the settlement of the dispute. In addition, the parties to the dispute, as

well as the properties of the dispute itself, may become those factors that lead to the unsuccessful outcome of mediation. According to Diehl and Greig, the behaviour of the disputing parties frequently determines the course of mediation and predicts its outcomes.[105]

Apart from the above, the strengths and limitations of mediation may be grasped from the analysis of the dispute itself. As a matter of fact, the role of the mediator lies in getting the disputants to the table of bargaining and negotiations in order to achieve an agreement. However, the mediator is not authorized to settle the dispute himself. The parties are directly responsible for their actions and have the prerogative power to make a settlement agreement.

Thus, an appropriate behavior of the parties, as well as the reluctance to agree, will inevitably lead to the failure of mediation, which may be called a successful scheme of dispute resolution, if the parties to the dispute seriously wish to reach a mutually acceptable settlement.

To elaborate further, the characteristics of the dispute may also become a precondition to a successful or unsuccessful settlement. Assuredly, there are such disputes that will never be settled by means of mediation. Many conflicts may be resolved by using arbitration or litigation only. Besides, the duration of dispute settlement procedures may also be predefined by the features of the conflict. In this sense, Diehl and Greig correctly consider that the success of mediation may also be measured by the durability of settlements, 'or how long it lasts before it breaks down and violence is renewed.'[106]

In addition to the aforementioned statement, Kyle Beardsley asserts that the pros and cons of mediation may be particularly identified at the final stage of the process. According to the scholar, the third stage, namely the implementation of the agreement, exclusively rests on the mutual trust and respect of the opponents. Interestingly, mediator agreements often

[105] Paul F. Diehl, & J. Michael Greig, International mediation (Polity 2012), p. 132
[106] Paul F. Diehl, & J. Michael Greig, International mediation (Polity 2012), p. 147

fail, because the parties never intend to implement them, 'but desire a brethren during which they can gain strength and legitimacy.'[107]

Second Section: Mediation (in detail)

2.2.1. The initiation and preparation of stages of mediation

According to John W. Cooley, it is possible to discern three separate facets of effective exercise of the mediator function: '(1) the mediator's prehearing functions and duties; (2) the mediator's conference functions and duties; and (3) the mediator's post-conference functions and duties.'[108]

However, the procedure of mediation can not commence with the preceding agreement of the parties to settle the dispute by way of mediation. Therefore, a well-elaborated mediation agreement or clause creates the basis for mediation. A traditional future-dispute mediation clause articulates that before either party decides to sue the other, each of them must, in good faith, make attempts to resolve the dispute through the assistance of a mutually accepted neutral third party, who, in accordance with predetermined rules, has to provide a period of time, and a number of hours or days in which it is to foster the settlement.[109]

Putting it briefly, the parties' decision to settle their conflict through the assistance of mediation must be properly designated and expressed. The best way to reach the mutual decision in respect of mediation lies in the signing of the mediation agreement or any other contract which contains a mediation clause. According to John W. Cooley, the future-dispute mediation clause or a present-dispute mediation agreement may regulate the following issues: a) the role of the mediator in the dispute; b) the model of mediation (facilitative, evaluative,

[107] Kyle Beardsley, The mediation dilemma (Cornell University Press 2011), p. 168.
[108] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 157
[109] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 157

etc.); c) exchange of information; d) type of data to be provided to the mediator; e) requirement with regard to the settlement authority; f) requirement concerning participation in good faith; g) requirement of confidentiality; h) basic rules respecting caucusing; i) procedure in case of the party's withdrawal from mediation; j) procedures and requirements for paying fees and expenses.[110]

In proceeding further, in case of a conflict the disputants must decide whether the selected or appointed mediator is capable to facilitate the parties in settling the dispute. Also, the chosen mediator must perform a self-assessment to determine whether any condition exists which may create a presumption of bias or partiality. If there is a significant conflict of interests, it is prudent to change the mediator.

In some cases, the mediator may be aided by a co-mediator. In choosing the co-mediator, the mediator takes into consideration the fact that the co-mediator must be perfectly compatible with him. In other words, the co-mediator must be properly trained and experienced in mediation. Also, the co-mediator has to possess requisite individual skills such as patience, honesty, flexibility, trustworthiness, and creativity in order to be capable of satisfying the parties' practical needs for affordability and availability.[111]

Suffice it to say that in order to be effective in mediating a certain case, a mediator must possess a great deal of experience in the particular domain of substantive law. However, if the parties have agreed to the facilitative model of mediation, the mediator's expertise in the fields of law is not always necessary.

It is possible to agree with Cooley that, by a great margin, the most basic quality of a good mediator and, therefore a co-mediator is the ability to preserve neutrality. Assuredly, the co-mediator, as well as mediator, must be sensitive to the emotional needs of all disputants,

[110] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 158
[111] Ted A. Donner and Brian L. Crowe, Attorney's practice guide to negotiations (Clark Boardman Callaghan 1995), para. 22:07

such as their security, expectations of respect, equality and innumerability of other immaterial interests.

2.2.2. Pre-mediation meeting or caucus

The general efficiency of the mediation process and the ultimate quality of the mediated settlement may be augmented by scheduling pre-mediation meetings, 'or by caucusing privately with the parties and their counsel, or with counsel without their respective parties being present.'[112]

In this light, the pre-mediation meeting may be scheduled with the purpose to examine possible domains of emphasis for the incoming mediation, to determine whether there are other parties, if any, which should be invited to take part in the mediation. Also, this phase makes possible to identify what pre-mediation materials may be helpful to the mediator in the complex case. In addition, the author is disposed to think that the pre-mediation meeting helps to discuss the agenda, logistics, and format of the mediation. Besides, the pre-mediation meeting may provide the parties with the opportunity to examine the parties' views on the possibility to reach mutual-gain solutions in the dispute. The core purpose of a multi-party dispute may be the discussion of the advantages of the mediator having pre-mediation caucuses with each party. Additionally, John W. Cooley assays that a pre-mediation may be performed either in-person or via telephone. These types of pre-mediation are incited by the existence of several parties which are not eager to wait for their turns at the mediation conference.[113]

Also, the stage of pre-mediation meeting helps to consider all possible procedural alternatives which may facilitate the mediation hearing process by making it more efficient, less time-consuming and less expensive. Thus, at the early stage of the mediation process the

[112] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 161
[113] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 162

mediator may contemplate the appropriateness of videotaped or telephone input, cyber-mediation, bifurcation and phasing of the conference, consolidation of claims, or a class action procedure.

In the context of videotaped or telephone input, it should be clarified that the parties with significant material evidence which can not be present at the mediation conference may be allowed by the mediator to prepare and deliver their statements videotaped in advance and then played back at the mediation conference.[114] According to the researcher, the main disadvantage of this procedural alternative lies in the fact that the videotaped persons can not be asked. However, the disadvantage of the videotaped statements may be eliminated by way of connecting with the videotaped person via the speakerphone so that he may answer the questions of the parties to the dispute.

In like manner, the parties or other persons with full settlement authority who at the last moment are unable to be present at the mediation meeting can be allowed to participate in the conference by speakerphone.

As far as the concept of cyber-mediation is concerned, it might be appropriate to note that in case of the incapability of one or more parties to be present at a mediation meeting because of distance, this person may be permitted to participate in mediation with the assistance of the Internet.[115]

Similarly, the procedural alternatives of bifurcation and phasing may be employed in cases where liability is conceded or not seriously contested. The procedure of bifurcation requires from the mediator to fork the mediation session into two parts, whereas the phasing means the dividing of the mediation into several phases.[116] In the early part of a bifurcated

[114] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 163
[115] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 163
[116] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 163

conference, the parties can present their views in order to settle the monetary facets of the dispute, while in the second part of mediation the parties may resolve the non-monetary issues of the conflict.

As far as the procedural alternative of consolidation of claims is concerned, it should be stated that the alternative may be used in case when a party is common to separate disputes. In this connection, the mediator may contemplate consolidating the claims of mediation. The consolidation of claims may be justified under the following grounds: 1) the quality of an integrative solution may be maximized; 2) the expense to the parties may be decreased; 3) the time spent by parties in sequential, and duplicative mediations feasibly will be minimized.[117]

However, another party may have well-substantiated reasons to object to the consolidation of claims. Thus, the parties which have a minor dispute with the common party will not be prone to pay fees to observe or wait for the other parties to hammer out a settlement in case of all the disputes are going to be consolidated. Also, some conflicts with multiple complainants may involve a class action procedure.

2.2.3. The first meeting between the disputants and mediator

The previous discussions have revealed the general peculiarities of mediation as an alternative dispute resolution scheme. The present research aims at identifying the main phases of mediation in order to explore its proceedings in detail. In this connection, it should be conceded that the first stage of mediation is the mediator's opening statement. This stage becomes possible only if the parties to the dispute have made an agreement to settle their conflict by means of mediation.

According to Klaus Peter Berger, the stage of mediator's opening statement serve to create transparency for the parties with regard to the objective of the mediation, the direction

[117] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 164

and timing of the negotiations between them and the neutrality of the mediator.[118] At this stage, it is incumbent on the mediator to construe to the parties the discrepancy between 'facilitative' and 'evaluative' mediation. Thus, according to the WIPO's Arbitration and Mediation Centre, the disputants are always in control of the proceedings and have the right to choose the appropriate model of mediation.[119]

To continue, a mental note should be made that at the outset of mediation the mediator also has to inform the disputants about the salient features of the mediation and his personal vision of the tasks of a mediator in the proceedings. Furthermore, Berger assays that the parties to the dispute are also informed by the mediator about their right to withdraw from internal considerations, to declare the discontinuance of the mediation and leave the table of negotiation.

In view of the above, it should be pointed out that the stage of mediation plays the crucial rile in guaranteeing the justice of the process by requiring from the parties to 'make informed choices during the mediation.'[120] Also, Berger fancies that the first meeting between the parties is the most suitable occasion to set the tone of the negotiations. An experienced mediator is always aware of the fact that the success in the first meeting will substantially enhance the probability of success in the following meetings.

Apart from the above, in his introductory statement, the mediator must stimulate personal credibility and trust *vis-à-vis* both parties by establishing rapport between him and the disputants sitting at the table of negotiation. The process of rapport-building implies the

[118] Klaus Peter Berger, Private dispute resolution in international business: negotiation, mediation, arbitration (Kluwer Law International), p. 154
[119] Centre d'Arbitrage et de Mediation de l'OMPI, 'Guide de la Mediation'. Retrieved from http://www.wipo.int/freepublications/fr/arbitration/449/wipo_pub_449.pdf
[120] Klaus Peter Berger, Private dispute resolution in international business: negotiation, mediation, arbitration (Kluwer Law International), p. 154

freedom of communication, the level of comfort of the parties, the degree of accuracy in what is discussed and the quality of human contact.[121]

To elaborate further, at the first stage of dispute settlement resolution, the mediator is obliged to verify the parties' settlement authorities. As the case stands, the parties to the dispute may bring representatives who have different authority in respect of dispute settlement. Some of them may be authorized only to represent the party and deliver opening statement, while the others may be empowered to agree on the conditions of dispute settlement. Therefore, the professional mediator is required to verify the authority of each representative in order to prevent new disputes.

In addition to the mediator's opening statement, the parties to the dispute are also entitled to deliver their opening statements. Thus, John W. Cooley is disposed to think that the parties' opening statements provide an opportunity for the representatives of the parties to explain to the mediator and the opposing party the factual background of the dispute, as well as to express the pertinent thoughts about how the conflict should be settled.[122]

Also, at this stage, the mediator has to provide the parties with the opportunity to ask questions both about the mediation proceedings and about the preliminary issues which may be raised by the parties to the dispute. The significance of asking questions is enormous. This may foster the discussion of questions or broad subjects which do not relate to any of the theses previously approached.[123] The mediator always has to ask parties if there are any preliminary matters that the parties want to discuss.

In addition to the opportunity of asking questions, the mediator must assist the parties in initial identifying and prioritizing issues. According to John W. Cooley, more complex and

[121] Klaus Peter Berger, Private dispute resolution in international business: negotiation, mediation, arbitration (Kluwer Law International), p. 155
[122] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 195
[123] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 202

complicated cases require from the mediator to spend a substantial part of the joint session aiding the parties to determine and prioritize issues and even to elaborate and schedule the caucusing procedure.[124]

The researcher tends to believe that such need frequently arises in commercial, community, environmental, and multiple-insurer cases. The process issues which need to be identified and prioritized include the following: 'who will attend the mediation; what procedures or ground rules will be adhered to the mediation; whether caucusing will be appropriate initially because of high emotions; and the like.'[125]

After that everything has been given due consideration, it should be generalized that the first stage of mediation usually includes the following proceedings:

1) The agreement between the parties concerning their will to settle the dispute in the framework of mediation.

2) The opening statement of mediator, according to which the neutral third party clarifies the peculiarities of mediators and provides the parties to the dispute with the opportunity to choose the model of mediation.

3) The opening statements of the parties, in which the disputants explain to the parties and to the mediator their positions and expound on the factual background of the dispute.

4) The obligation of the mediator in verifying the authority to settle dispute.

5) The provision of the opportunity to ask questions about every facet of mediation and about the preliminary issues of the dispute.

6) Furtherance of the mediator in clarifying the process issues of mediation.

[124] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 202
[125] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 202

In the ultimate analysis, the first stage of mediation is the most important one because it designates the tone and that of the entire process. The more productive the first phase of mediation is, the more determined and confident other stages of mediation will be.

2.2.4. The stage of dispute settlement

In mediation, the settlement of each conflict is preceded by the examination of the issue in dispute. Thus, John W. Cooley is disposed to think that the direct procedures of mediation start at the problem clarification stage. At this stage, the first and foremost obligation of a professional mediator lies in the recognition of the disputants' purposes, plans, and motifs.

According to Cooley, it is possible to discern at least six types of goals which may be chosen by the parties within the course of mediation. They may be enumerated as follows: aggressive, cooperative, competitive, self-centred, defensive, and combinative ones.[126] However, the aforesaid goals may be altered in the process of mediation because the parties may change the tactics at any point in the mediation.

In the context of the parties' plans, Cooley suggests that each party to the dispute has to present a flexible plan of dispute settlement. This plan frequently incorporates the sequence of action. Thus, the plan of action may emphasize the following issues: a) a succinct opening statement respecting the conflict; b) a classified summary of damages; c) the summary of contested issues; d) documentary evidence; e) demonstrative evidence; f) analysis of the opposing party's position; g) the determination of the amount of the verbal participation in the session.

There is no doubt that the clear delineation of actions in the plan facilitates the clarification of the issue in dispute. Also, the depicted action may be supplemented with the description of the party's motifs and point of view. In this connection, it is possible to agree

[126] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 204

with John W. Cooley that the process of mediation always emphasizes the points of disagreement between the disputing parties. These points are approached by the parties by way of presenting arguments and underpinning them with pertinent evidence. Also, the parties to the dispute endeavour to supply the mediator with necessary information which can be applied to a reasonable and realistic resolution of the conflict.

The proper clarification of these circumstances will create the consciousness that there are several solutions to the dispute. Thus, in Cooley's opinion, many conflicting situations may provide opportunities for elaborating several creative solutions to the dispute. The proper mediation technique guarantees that the mediation session will arrive at a desirable conclusion.

At the final stage of the dispute settlement, the parties may either reach a resolution of their conflict or reach 'an impasse in their negotiations.'[127] If the parties have reached a settlement, the major role of the mediator is to congratulate them on the accomplishments. Moreover, each point of the settlement agreement must be diligently and methodically analyzed by the mediator and explained to the parties. At this stage, the objective of the mediator is to make certain that the parties clearly understand the provisions of the settlement agreement.

In case when the parties have not reached a settlement agreement, it is incumbent on the mediator to bring them back into the final joint session in order to discuss those points of agreement that the parties have agreed to. Alternatively, the mediator may suggest conducting another joint session of mediation in order to provide the parties with the second chance to arrive at a settlement agreement.[128] Besides, the parties to the dispute may be offered to continue their post-mediation negotiations via telephone or the Internet.

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[127] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 305

[128] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 305

If the parties are reluctant to participate in the next session of mediation or to settle their disagreements via telephone or the Internet, the mediator may discuss with the disputants the possibility of employing another form of alternative dispute resolution, such as arbitration. Otherwise, the mediator may assist the parties in their transition to the court adjudication if they choose to follow the traditional way of litigation.

To all intents and purposes, the failure of the parties to settle their disagreements by way of mediation does not mean that the chance to resolve the dispute has been lost forever. In this connection, there are reasonable grounds to agree with Cooley that, sometimes, the talks in relation to the dispute may be resumed, the negotiations may continue, and a resolution may be found.[129]

As the matter of fact, a great deal of mediators get the parties' consent to follow up on cases for weeks or months and frequently achieve success in the final analysis. Also, the scholar ascertains that parties may decide to bring the mediator back if the negotiations are failed. If the negotiator fails to facilitate the resolution of the dispute, then the parties may decide in favour of several alternatives, such as: a) proceeding to arbitration or some other third-party dispute settlement mechanism (conciliation, negotiation); b) transfer their dispute to a domestic court of justice; c) start direct negotiations between each other.[130]

This notwithstanding, the prolonged process of mediation may give birth to a wide range of negative consequences. To put it briefly, the disputants may experience numerous symptoms of the continuous deadlock such as feelings of anger, resentment, tension, mistrust, hostility, futility, frustration, expressions of criticism, reciprocal blame, personalization of the conflict and deepened confrontation. In view of the above, the professional mediator can provide crucial facilitation in fighting with the negative consequences of the long-term

[129] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 307
[130] Schoenfield and Schoenfield, The McGraw-Hill 36-Hour Negotiating Course 180 (McGrow-Hill 1991), pp. 180-181

proceedings. By dealing with the parties' emotions the mediator may implement a special technique. Thus, according to Cooley's point of view, mediator can help to resolve the emotional inflictions by depersonalizing the situation. Moreover, it is incumbent on the mediator to make selective disclosures of information and bargaining rather than making accusations.

In some cases, the emotional confrontation between the disputants may be eliminated if the mediator tries to redefine the issues in dispute. As the matter of fact, words play very important role in conveying the meaning. Therefore, some weakly composed sentences and phrases may deteriorate the disagreement between the parties rather than bringing the disputants to a mutual accepted resolution.[131] Thus, the professional mediator must take into consideration the individual characteristics of the disputants while rephrasing and redefining the problem statement.

In addition, the professional mediator may try to develop a proposal of settlement which will correspond with the expectations of both parties. In this sense, the parties will be capable of extending the mediator's proposal to the mutual 'win-win' settlement agreement.

Apart from the above, John W. Cooley is prone to believe that the professional mediator is able to distract the disputants from their preoccupation with the emotional constituent of the conflict by guiding their discussion with the help of rationality towards the opportunities of amending payment conditions, changing specifications, obtaining correct information, and recognizing inaccurate data.[132]

In summary, it should be pointed out that the stage of dispute settlement is the most complex and parti-coloured phase in the proceedings of mediation. At this stage, the parties

[131] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 309
[132] John W. Cooley, The mediator's handbook: advanced practice guide for civil litigation (Ntl Inst for Trial Advocacy 2006), p. 309

have either to arrive at a settlement agreement or cease their attempts to resolve the dispute by way of mediation.

2.2.5. Implementation of the settlement agreement

The previous discussions have illustrated how the process of mediation should be conducted. Nevertheless, the existence of the settlement agreement does not necessarily guarantee that the conflict between parties has been resolved completely. The role of the settlement agreement lies in the actual consent of the disputants to settle the issues in dispute in a certain way. However, the terms and conditions of the existent settlement agreement must be implemented in practice. An unimplemented agreement does not give birth to the mutually accepted outcomes.

In this connection, it should be conceded that the stage of implementation is the most important phase which is tightly related to the process of mediation. At this stage, the genuine desires and purposes of the disputants are manifested. Thus, Diehl and Greig ascertain that while the peace process substantially depends on the motivation of two parties to make peace in order to reach an agreement, 'implementation of the agreement also required substantial motivation by both sides because it lacked any enforcement mechanism or third party guarantee.'[133]

Not opposed to the peculiarities of the peace process, mediation, as an alternative dispute resolution process, does not provide enforcement mechanism for the implementation of a settlement agreement. Therefore, the parties' will and motivation should be regarded as the key impetuses of successful implementation.

In the context of peace settlement, it is possible to agree with Diehl and Greig that it is easier to get disputing sides to negotiate and arrive at a peace settlement, whereas the

[133] Paul F. Diehl and Michael Greig, International mediation (Polity 2012), p. 24

problems in implementation may lead to a reversion back to the dispute and the need to bring the disputants back to the table of negotiations.[134]

In proceeding further, Allan Stitt considers the requirement of implementation to be an apparent disadvantage of mediation as an alternative dispute resolution procedure. According to the researcher, each competitive process, including mediation, may irreparably destroy the relationship between the parties in dispute. If the relationship is damaged, the implementation of the settlement agreement may become complicated due to the fact that each side will endeavour to gain benefit over the other at the stage of implementation.[135]

The author leads to the inference that the voluntary nature of implementation is one of the most prominent disadvantages of the mediation system in general. Also, it should be presupposed that the disadvantage of implementation can be remedied only through the professional assistance of the mediator. The previous discussion has revealed that the professional mediator is capable of guiding the disputants in the process of mediation and prevent them from quarrelling.

Also, a bunch of scholars is prone to believe that mediators may be asked by the parties to remain involved at the stage of the implementation of the agreements. There is no doubt that settlement agreements are complex: they may cut across the boundaries of several jurisdictions and require additional negotiations.[136] In addition, settlement agreements may include various levels of specificity. In this light, the parties have to make a mutual decision on whether it is to retain a mediator at the stage of implementation.

To all intents and purposes, the necessity of retaining mediator at the stage of implementation is predetermined by the status of relationships between the parties. If the parties are predisposed to implement the settlement agreement in good faith, then the

[134] Paul F. Diehl and Michael Greig, International mediation (Polity 2012), p. 183
[135] Allan Stitt. Mediation: a practical guide (Routledge 2004), p. 26
[136] Karen Grover Duffy, James W. Grosch, and Paul V. Olczak. Community mediation: a practical handbook for practitioners and researchers (Guilford Press 1991), p. 325

presence of mediator is not required. Otherwise, the engagement of mediator at the stage of implementation may be helpful. According to Duffy *et al*., nothing is more frustrating for negotiators of public disputes than spending their efforts and precious time in negotiation, experiencing the satisfaction of reaching an agreement, and then watching the evaporation of their hard-earned efforts in a couple of bureaucratic decisions. [137] Therefore, mediators may help the parties to elaborate a system of supervising the implementation of agreements and a system of making amendments in case of necessity.

Suffice it to say that the lack of efficient system of monitoring provides the parties with the possibility to sabotage or encumber the process of implementation. In other words, the absence of control leads to various infringements.

In elaborating further, a mental note should be made that the problem of implementation is comprehensively approached by Anita Alibekova and Robert Carrow as well. The above-captioned researchers delineate the particularities of international mediation in conjunction with international arbitration and from the professional's perspective. According to the scholars, the criterion of enforcement is one of the core discrepancies between mediation and arbitration. Moreover, the practical applicability of enforcement in the context of the aforesaid types of alterative dispute resolution can be best tested at the stage of implementation.

That is, an arbitration award as the desirable result of arbitration is globally enforceable either under the provisions of domestic laws or under the prescriptions of the New York Convention of 1958.[138] In contradistinction with arbitration awards, the settlement agreement which is signed by the parties of mediation can be implemented purely as a

[137] Karen Grover Duffy, James W. Grosch, and Paul V. Olczak. Community mediation: a practical handbook for practitioners and researchers (Guilford Press 1991), p. 325
[138] Anita Alibekova and Robert Carrow. International arbitration and mediation - from the professional's perspective (Lulu.com 2007), p. 242

contract and, therefore, it is not in itself enforceable. The scholars tend to believe that a specific performance of the settlement agreement may be stipulated but not guaranteed.[139]

In view of the above mentioned one, the implementation of a settlement agreement is a voluntary process which is not intrinsically coercive. Thus, Alibekova and Carrow suggest that in cases where an enforceable title is more desirable, then the mediator may propose 'only go for the rather risky model of 'shortcut' arbitration.[140] This means that the parties must carefully consider the issue of enforcement at the beginning of mediation in order to avert the emergence of new disagreements and conflicts which may arise during the implementation of the settlement agreement.

Likewise, Harold Abramson assays that it is vitally essential to ensure that the settlement agreement will cover all necessary implementation details.[141] Furthermore, the author contends that the disputants assisted by the mediator should elaborate appropriate steps to ensure that the settlement agreements will be implemented. It is natural that the implementation of a settlement agreement may take place only after the parties to the dispute having put their signatures under the text of the agreement.

In a nutshell, Abramson is disposed to think that the legal adviser of a party that he dispute should be involved in the implementation of the settlement agreement by way of monitoring and even administering the actions such as the handling over of property or the making of payments.[142] Besides, the researcher expresses confidence that mediated agreements experience a high rate of compliance only if the mediators stimulate the disputing parties to shape the text of the agreement, assist them in crafting the pertinent contractual

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[139] Anita Alibekova and Robert Carrow. International arbitration and mediation - from the professional's perspective (Lulu.com 2007), p. 242
[140] Anita Alibekova and Robert Carrow. International arbitration and mediation - from the professional's perspective (Lulu.com 2007), p. 235
[141] Harold I. Abramson. Mediation representation: advocating in a problem-solving process (Ntl Inst for Trial Advocacy 2004), p. 273
[142] Harold I. Abramson. Mediation representation: advocating in a problem-solving process (Ntl Inst for Trial Advocacy 2004), p. 267

details, and nurture in them a firm and conscious commitment to follow through the implementation till the end.

Summing up, the process of implementation is the least regulated stage of mediation which requires from the parties the mutual will, motivation, and respect.

Third Section: The mediation in the world of settlement of the conflicts of the World Trade Organization (OMC)

2.3.1. General review of the mediation potentialities of the WTO's dispute settlement system

The foregoing discussions have elucidated the peculiarities of mediation as an alternative dispute resolution scheme. It has been detected that mediation is widely applied to multiplicity of disputes in different spheres of social relations such as commercial, labour, family, sport, international humanitarian, peace, educational *etc*. Also, the preliminary study has disclosed the particularities of mediation in the framework of the World Trade Organization. Therefore, the current discussion is going to extend the findings about mediation in the framework of the World Trade Organization. Moreover, it is decided to emphasize the practical side of mediation under the WTO's dispute settlement rules and regulations.

To put it briefly, the question of mediation is regulated primarily in the WTO's Dispute Settlement Understanding. According to the DSU, 'good offices, conciliation and mediation are procedures that are undertaken voluntarily if parties to the dispute so agree'.[143] In this light, it should be construed that the WTO offers the opportunity to participate in mediation conjunctively with the opportunity to choose another alternative way of settling the conflict such as good offices and conciliation. Also, it is visible from Article 5 of the DSU

[143] Accord Du Cycle D'Uruguay, 'Memorandum d'Accord sur les Regles et Procedures Regissant le Reglement des Differends', article 5.1. Retrieved from http://www.wto.org/french/docs_f/legal_f/28-dsu.pdf.

that mediation is a voluntary procedure which requires the parties' mutual agreement before it commences.

Therefore, mediation may be started only if there is a mutual agreement between the parties to settle their dispute with the assistance of a neutral third party, whereas the tribunal proceedings are always initiated if a party's complaint is filed.

In proceeding further, the Dispute Settlement Understanding prescribes that the procedures of good offices, conciliation and mediation, as well as the positions of the parties to the dispute during these proceedings must be confidential, 'and without prejudice to the rights of either party in any further proceedings under these procedures'.[144] The aforesaid formulation stresses on two important principles of mediation: a) the principle of confidentiality; b) the principle of without prejudice. These two principles of mediation under the DSU are globally accepted in other dispute settlement systems.

Thus, the term 'without prejudice' characterizes the specific position of the parties to the dispute which are facilitated by a neutral third party.[145] In its broad sense, the term 'without prejudice' means a special status granted to negotiations between the disputants which take efforts to resolve the dispute in a mutual acceptable way. The peculiarity of the status has been acknowledged in the case law. Thus, the doctrine of the 'without prejudice' process has evolved from the ruling in *Walker v Wilsher* (1889).

Subsequently, the dimensions of the doctrine were extended and interpreted in the case of *Rush & Tomkins v GLC* (1988). In the aforementioned case, the court of appeal elaborated six principles as to how the doctrine of 'without prejudice' would operate. These fundamentals of the 'without prejudice' principle were comprehensively discussed in the previous sections of the present study. In brief and to the point, the court held that the main objective of 'without prejudice' privilege lies in the authorization of the disputants to

[144] Accord Du Cycle D'Uruguay, 'Memorandum d'Accord sur les Regles et Procedures Regissant le Reglement des Differends', article 5.2. Retrieved from http://www.wto.org/french/docs_f/legal_f/28-dsu.pdf.
[145] Peter D'Ambrumenil, Mediation and Arbitration (Routledge 1997), p. 41

negotiate without the risk of their suggestions and propositions being used against them if the negotiations fail (D'Ambrumenil, 1997, p. 41).

That is, the principle of 'without prejudice' process was specifically elaborated for the protection of the parties' interests and rights. Also, this principle guarantees the protection from any claim either against the other party or against some outside the party. In this light, it is possible to presuppose that the 'without prejudice' principle is correlative with the principle of confidentiality.

Thus, the previous discussion has revealed that confidentiality is globally recognized as a salient feature of mediation. For instance, WIPO's Mediation Rules articulate that 'no recording of any kind shall be made of any meetings of the parties with the mediator'.[146] Similarly, the proceedings of mediation under the WTO's Dispute Settlement Understanding are strictly confidential, 'and do not diminish the position of either party in any following dispute settlement procedure'.[147]

Therefore, the principle of confidentiality should be understood as an undeniable requirement of mediation which is conceived to increase confidence and openness of the process by persuading the parties that all admissions, offers, and suggestions for resolution will not create any undesirable consequences outside the mediation process. Besides, the principle of confidentiality ensures that the information which is revealed at the stage of mediation can not be used in subsequent litigation and arbitration.

Elaborating on the discussion of mediation, it might be appropriate to note that mediation, as well as good offices and conciliation, may be initiated at any time by any party

[146] Reglement de Mediation de l'OMPI, article 14. Retrieved from http://www.wipo.int/amc/fr/mediation/rules/index.html#8

[147] Module De Formation Au Systeme De Reglement Des Differends: Chapitre 8, 'Le reglement des differends sans le recours aux groupes speciaus et a l'Organe d'appel'. Retrieved from http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c8s1p2_f.htm

to a dispute.[148] The aforesaid rule provides that the time of commencement and termination of mediation depends on the will of the parties to the dispute. In other words, the voluntary nature of mediation does not preclude the possibility of settling the dispute with the help of panel. Contrariwise, the WTO considers mediation to be an alternative mechanism which helps to avoid unnecessary costs of a long-term panel process.

As far as the procedural side of mediation is concerned, it should be emphasized that the Dispute Settlement Understanding prescribes that the Director-General of the World Trade Organization may offer mediation, along with conciliation or good offices, in order to assist member-states in settling their conflicts.[149] Unlike panel and Appellate Body proceedings, the process of good offices, conciliation or mediation does not lead to legal conclusions, 'but assist in reaching a mutually agreed solution'.[150]

In view of the above, the Director-General of the WTO is not entitled to settle the dispute between member-states as a mediator. However, the Director-General may involve Secretariat employees to aid the process of mediation.

From the practical point of view, it should be noted that the procedures of good offices, conciliation and mediation are not very popular among the member-states of the World Trade Organization. According to the WTO, the procedure of mediation under Article 5 of the Dispute Settlement Understanding has not so far been applied in WTO dispute settlement.[151] Thus, in one occasion, three member-states of the WTO jointly requested the Director-General to mediate. The mediator was requested to explore the extent to which a

[148] Accord Du Cycle D'Uruguay, 'Memorandum d'Accord sur les Regles et Procedures Regissant le Reglement des Differends', article 5.3. Retrieved from http://www.wto.org/french/docs_f/legal_f/28-dsu.pdf.
[149] Accord Du Cycle D'Uruguay, 'Memorandum d'Accord sur les Regles et Procedures Regissant le Reglement des Differends', article 5.6. Retrieved from http://www.wto.org/french/docs_f/legal_f/28-dsu.pdf.
[150] Module De Formation Au Systeme De Reglement Des Differends: Chapitre 8, 'Le reglement des differends sans le recours aux groupes speciaus et a l'Organe d'appel'. Retrieved from http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c8s1p2_f.htm
[151] ibid

preferential tariff treatment granted to other Members excessively damaged legitimate export interests of two of the requesting Members.[152]

In addition, the mediator was tasked to offer a solution to the dispute. The Director-General nominated a Deputy Director-General to be the mediator who was responsible for the confidentiality of the proceedings upon the completion of the procedure. This case of practical mediation in the framework of the World Trade Organization must be analyzed in detail.

2.3.2.. Case study of the mediation process between the Philippines, Thailand and the European Communities. Mediation incentives in the framework of the WTO

One of the most noticeable cases of mediation in the framework of the World Trade Organization is the case when Thailand raised the issue and challenged the EC tariff under the provisions of the Dispute Settlement Understanding (DSU).[153] In the context of the case, it should be reminded that the DSU offers three major variants for the settlement of disputes such as consultation between the involved parties, adjudication by panels and, if necessary, the Appellate Body, and implementation of the ruling.

In view of the above mentioned one, it is not always reasonable to address the emergent disagreement to the panel. Thus, the most preferable path for member-states is to settle the dispute between themselves by means of consultations.[154] In order to facilitate the consultations between the member-states the Dispute Settlement Understanding offers good offices, conciliation and mediation which may be triggered upon the request of any member if consultations do not lead to a desirable solution. Xuto ascertains that the option of mediation, as well as good offices and conciliation, serve as an intervening step in which a

[152] ibid
[153] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm
[154] Module De Formation Au Systeme De Reglement Des Differends: Chapitre 6: 'Le processus - Etapes d'une affaire type de regleemnt des differends'. Retrieved from http://www.wto.org/french/tratop_f/dispu_f/disp_settlement_cbt_f/c6s2p1_f.htm

neutral third party is involved with the purpose to assist members in the settlement of the dispute at hand, whereby panel proceedings are avoided as too cost and time-consuming stages of dispute settlement under the DSU.[155]

As far as the dispute involving Thailand and the EC is concerned, it might be appropriate to note that the events of the case went back to the conclusion of the ACP Agreement in 2000 which were subsequently followed by the WTO consultation and mediation process and adoption of the EC's new Council Regulation of the5th June of 2003.[156]

This was the first case in the history of the World Trade Organization to be resolved by way of mediation process. According to Xuto, this case should be recognized as a significant example for all member-states, illustrating that disputes may be settled in the framework of the World Trade Organization without recourse to its traditional litigation.

The prerequisites to the conflict between Thailand and the EC stem from the official formation of the WTO in 1995 and the entry into legal force of the GATT 1994 provisions which created a more favourable environment for international trade. To be more precise, one of the major principles of the WTO's legal framework is the most-favoured nation principle which stipulates that it is incumbent on all member-countries of the World Trade Organization to provide each other with the treatment as favourable as they give to any other member in the application and management of import and export duties and charges.[157]

To put it briefly, the most-favoured nation principle is conceived to eliminate the elements of preference and discrimination inside international trading relationships. Also, this

[155] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm
[156] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm
[157] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

principle stipulates that a tariff concession made to one member-country must therefore be extended rapidly and unconditionally to all other members of the World Trade Organization.[158]

The aforesaid legal basis was used by Thailand in respect of the EC's preferential tariff rates which appeared to be discriminatory for Thailand. Assuredly, this was the main legal impetuses for the triggering of mediation procedure in the framework of the WTO.

In the context of the mediation, it should be clarified that the parties to the dispute include the European Community being on the one hand and the Philippines and Thailand on the other one. A mental note should be made that the Philippines, being a fellow member of the WTO and ASEAN, joined Thailand in its tenacious endeavour to convince the other side, as well as the WTO, that preferential tariffs had been damaging their economic interests. Thus, both of the countries sought relevant compensation and redress from the European Community.

Interestingly, at the proceedings in the framework of the WTO, the negotiator role was attributed to the Thai ambassador to the World Trade Organization, who thereby worked as the official voice of Thailand.[159] From the very beginning, the tasks of every of the main actors were well described.

The major objective for the private sector was to provide industry data. The Ministry of Commerce investigated the legal and other related facets associated with the process of negotiations, while the Brussels law company provided the profound legal counsel and professional support in writing documents for official submission.[160] Nonetheless, the legal

[158] Dickson Yeboah, 'Course material for intensive course on trade negotiations skills', *WTO Principles and World Trade Negotiations,* January 2004.
[159] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm
[160] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

firm did not take actual part in the process of mediation. In this light, it is possible to notice that the cooperation between the private and public sectors was constructive and efficient. In addition, Xuto reckons that the key element of success was the preparedness of the complaining industry to augment its own defence in the following proceedings of mediation. Also, the readiness of the affected industry manifested itself both in manpower and funding.

The position of Thailand may be grasped from the concise delineation by Chanintr of the working relationship between the affected industry and the Thai government. Thus, Chanintr assays that the complaining industry entered into the process of mediation with the firm determination to find redress, being confident in its just cause, equipped with the factual instruments, and reassured by the complete aid of the government coupled with its deliberation to lead in lobbying endeavours at all levels.[161]

Assuredly, the combination of private sector's efforts and public sector's capabilities was very promising. Moreover, Chanintr remarks that the lack of the ministry legal expertise incited the complaining party to gather sufficient funds to hire a law firm in Brussels. As the matter of fact, the representatives of the Thai government directly participated in negotiations in the framework of mediation, whereas the law firm assisted the party provide pertinent factual evidence and to formulate relevant ways to react to the counter-arguments and rebuttals within the mediation and consultation process.[162]

Elaborating further, it should be emphasized that the process of mediation was not easy for Thailand and the Philippines. According to Xuto, the earliest challenge for the complaining party was to find the most suitable way to convince the European Community to launch into discussions on the issue in dispute. Thus, in March 2000, the European

[161] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

[162] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

Community filed for a waiver of its most-favoured nation obligations in respect of the ACP Agreement. When following the request until the adoption of the waiver within 18 months, Thailand had shown its concerns regarding the implementation of the ACP Agreement and the negative influences that it would make on their canned tuna exports.[163] However, the European Community gave no response to the numerous occasions of Thailand's expressed concern in respect of the Thai canned tuna exports.

The conflicting situation presented itself in the Doha Ministerial Conference. As the matter of fact, the EC-ACP Agreement could not be amended without the consensus of all WTO member-states in acknowledging the requested waiver adoption. This means that without Thailand's consent the EC's requested waiver could not be approved. On these grounds, realizing that Thailand would never concede the adoption of the waiver, the European Community is to participate in consultations with the Philippines and Thailand (the complainants) in order to investigate their discrepancies.[164]

In the final analysis, Thailand agreed to concede on the waiver on condition that their case is taken up in an appropriate forum, with the purpose of settling the interest conflict. Therefore, on the14th November 2001, the day the waiver was approved, the EC addressed a letter to the Philippines expressing its willingness to enter in the full consultations with Thailand and the Philippines. The latter articulated that the EC would like to 'examine the extent to which the legitimate interests of the Philippines and Thailand are being unduly impaired as a result of the implementation of the preferential tariff treatment for canned tuna originating in ACP countries'.[165]

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[163] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

[164] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

[165] Letter from EU Trade Commissioner Pascal Lamy to the Ministers of Commerce of Thailand and the Philippines, 14 November 2001.

This notwithstanding, the complainants were not satisfied with the promise of consultations due to the fact that they had wanted full arbitration. However, upon Thailand's insistence, the letter also contained the option of taking the matter beyond consultations. In this connection, it should be clarified that the EC's insistence on avoiding arbitration led the parties to the compromise - should consultations be unsuccessful the parties would try to settle the dispute between them by means of mediation. This will of the disputing parties was accurately expressed in the letter: 'the Community would be open to recourse to the mediation procedure as provided under Article 5 of the WTO's DSU'.[166]

In view of the above, Article 5 of the WTO's Dispute Settlement Understanding was accepted by the parties to the dispute as the basis for the settlement of the conflict of interests between them. The dispute settlement process was initiated. Afterwards, three rounds of consultations were taken place, the first in Brussels (6-7 2001), the second in Manila (29th - 30th January 2002) and the third in Bangkok (4th -5th April 2002).[167]

The main particularity of the talks between the EC and the complainants (Thailand and Philippines) is the fact that the private sector representatives were entrusted to take active part in the consultations. Usually, representatives of governments do takings during consultations. Nevertheless, in the analyzed case, the participants from the private sector were permitted to provide factual support and demonstrate their arguments with regard to the issue in dispute.

As the case stands, throughout the consultations, complainants illustrated readiness and deep commitment in reacting to the multiplicity of counterstatements and confutations

[166] Letter from EU Trade Commissioner Pascal Lamy to the Ministers of Commerce of Thailand and the Philippines, 14 November 2001.
[167] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

flowing back and forth between the parties to the dispute.[168] Nonetheless, as expected, a desirable settlement could not be reached at this stage of the process.

Taking into consideration the inability to resolve the dispute by means of consultations, the parties filed a joint formal letter to the Director-General of the World Trade Organization, requesting mediation. The letter was submitted on the 4th September 2002.[169] After all agreements in respect of the dispute settlement procedure being reached, the written submission was issued to the WTO Mediator on the 21st October 2002. Thus, according to the request for mediation, the main objective of the requested mediation process was 'to examine the extent to which the legitimate interests of Thailand and the Philippines are being unduly impaired as a result of the implementation by the European Communities of the preferential tariff treatment for canned tuna originating in ACP states'.[170]

Moreover, the above-mentioned request for mediation provided that in the case when the mediator concluded that undue impairment has actually taken place, the mediator could consider means by which the situation might be addressed.[171] In this light, it should be construed that the request for mediation empowered the mediator with the right to make appropriate considerations with regard to pertinent means by which the disclosed contravention might be addressed.

Hence, it follows that the mediation between the EC and complaining states (Thailand and the Philippines) was to be conducted in the form of evaluative mediation. As the foregoing discussion must suggest, the model of evaluative mediation emphasizes the role of the mediator as the estimator of the case who is focused on providing the disputants with an

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[168] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

[169] WTO General Council, 'Request for mediation by the Philippines, Thailand and the European Communities', WT/GC/66 (16 October 2002).

[170] WTO General Council, 'Request for mediation by the Philippines, Thailand and the European Communities', WT/GC/66 (16 October 2002).

[171] WTO General Council, 'Request for mediation by the Philippines, Thailand and the European Communities', WT/GC/66 (16 October 2002).

evaluation of their case and guiding them towards the mutually accepted settlement agreement. In this sense, the mediator-evaluator is not only responsible for the facilitation of the communications between the parties but also entitled to estimate the contents of the case in order to propose to the parties a non-binding variant of solution. All these circumstances lead to the inference that the mediation between the EC and complaining states (Thailand and Philippines) was conceived as evaluative one.

In order to elaborate on the research, it might be appropriate to note that the request for mediation delineated the failure of three rounds of consultations. In addition, in the aforesaid request, the requesting member states deemed the matter at issue not to be a 'dispute' within the terms of the Dispute Settlement understanding.[172] In spite of this, the disputing states agreed that the mediator could be guided by procedures similar to those envisaged for mediation under Article 5 of the DSU (WT/DSB/25).[173]

The aforementioned position of the parties was feasibly grounded the fact that the issue in dispute originated not from the underlying WTO agreements. Despite this fact, the WTO mediator accepted the request for mediation. While coming to the agreement of the requesting member-states, nominated Deputy Director-General Mr. Rufus H. Yerxa as mediator in the case, Mr. Rufus H. Yerxa was promised by the WTO to receive Secretariat support, as appropriate under the DSU's provisions.[174]

In continuing, it should be reiterated that the written submission to the WTO mediator was drafted in the period of exhaustive collaborations between the parties to the dispute. At the same time, the Philippines,Thailand, and the lawyers of the Brussels law firm 'held in-

[172] WTO General Council, 'Request for mediation by the Philippines, Thailand and the European Communities', WT/GC/66 (16 October 2002).
[173] WTO General Council, 'Request for mediation by the Philippines, Thailand and the European Communities', WT/GC/66 (16 October 2002).
[174] WTO General Council, 'Request for mediation by the Philippines, Thailand and the European Communities', WT/GC/66 (16 October 2002).

depth brainstorming sessions and communicated constantly by e-mail'.[175] As the result, the joint submission was for all practical purposes being completed. Therefore, at the subsequent meeting with the mediator on the 5th November of 2002, ambassadors of the WTO of each party delivered oral statements in which they delineated the core arguments and claims of all parties to the dispute. Alternatively, the mediator provided both sides with ample opportunities to refute arguments and to ask questions to each other.

As the case stands, the complaining countries (Thailand and the Philippines) alleged economic damages. Therefore, the main complainants challenge was to admit the actual and intrinsic rights and wrongs of their claims, and to persuade the mediator that the preferential tariff had considerable negative impacts on the tuna industries of Thailand and the Philippines.[176]

After that the complainants strengthened and examined data and elaborated a pertinent methodology in order to conduct precise quantitative estimations of the adverse economic impacts. In this connection, the complainants remarked that the EC market, being the largest market in the world for canned tuna, was still growing and that, 'while the ACP countries' market share experienced substantial growth in keeping with the expansion of the EC market, the volume imported from Thailand decreased by 46% between 1994 and 2000, according to Chanintr'.[177]

In view of the above, the complainants managed to demonstrate that the aforementioned decrease was caused by the lack of competitiveness in the EC region. By doing this, the complainants proved that, as exporters to other markets in North America,

[175] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm
[176] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm
[177] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

Australia and the Middle East, they experienced either stable or positive growth. This fact was substantiated with the evidence that at the above-mentioned markets Thailand experienced no lack of competitiveness. The complainants contended that if other markets had lacked competitiveness, the complainants would have experienced similar losses to those at the EC market.

To proceed further, the complainants endeavoured to convince the mediator that imports form 'non-preferred' countries other than the complainants demonstrated similar downward tendencies. These revelations could help to make the inference that the 24% import tariff so deteriorated the terms of competition between the complainants and their ACP counterparts that the products of the complainants were substantially removed form the EC market.[178]

The aforesaid conditions prevented the complainants to reach their full export potential, while the growth of their canned tuna industries was evidently menaced. Although the complaining states experienced the 24% handicap, the complainants had managed to maintain a significant EC market presence. This circumstance should be recognized as the direct testament to the competitiveness and productivity of the complaining countries' industries.[179]

To elaborate further, Xuto ascertains that the discussed case of mediation has another challenge which relates to the obligations and rights of WTO members. Also, the case challenges the possibility of keeping a balance between the 'legal' and 'political' constituents of the case. Thus, from the legal perspective, Thailand is solidly entitled to pursue the settlement of the dispute, whereas, from the political point of view, the WTO allows certain

[178] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

[179] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

forms of discriminations which are acceptable.[180] In other words, the WTO permits discrimination in favour of the poorest countries.

In this light, Thailand contended that, the justification of the preferential tariff in the 1970s as a means of aid for the least developed countries (LDCs) had no further application to the ACP countries due to the fact that in 1990s the economic situation and investment environment of these states had significantly augmented.

In this sense, Thailand had no purpose to rebut the rationale behind the conception of 'positive' discrimination, but stipulated that the WTO's principle of most-favourable treatment should not be extended to any WTO's developing member to another developing member detriment.

In continuation, when all the statements and counter-arguments had been delivered, it was the right time for the mediator to give an advice about the issue in dispute should be settled. In order to fulfil this task the mediator was required to conduct a diligent investigation of the logic and reasoning behind the allegations and claims made by both parties to the dispute which were grounded on the economic data.[181]

The advisory opinion of the mediator was formed on the 20th December, 2002. This opinion offered that 'the EC open up a new quota of 25,000 tonnes at a tariff rate of 12%, to be allocated to four beneficiaries: Thailand (for 52% or 13,000 tonnes), Philippines (36% or 9,000 tonnes)' and other countries.[182] In this connection, the mediator's opinion signified that the merits of the complainants' case had been affirmed and accepted. Thus, the complainants were satisfied with the results of the case.

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[180] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

[181] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

[182] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

However, it should be taken into consideration that the advisory opinion of the mediator is not a legal decision. The European Communities was entitled to reject the advisory opinion and to maintain the 'status quo' with regard to the imports from the complainants. Certainly, the EC had to take into account that its refusal to follow the recommendations of the mediator would incite the complaining parties to take the case to panel established in the framework of the WTO. If the case had passed to the tribunal, the dispute would have metamorphosed into a fully-scaled legal competition.

Nevertheless, the complainants' deeds at the next stage of mediation following the advisory opinion of the mediator would prove to be crucial as mediation itself. According to Chanintr, the following phase of mediation should be characterized as a period of 'quite lobbying' - in which the complaining parties were required to convince each of fifteen separate governments of the EC to support the mediator's opinion.

According to Xuto, the success of discreet lobbying was dependent upon tact and diplomacy.[183] Moreover, the stage of discreet lobbying required close cooperation between the private sector and the public one of governmental agencies. Chanintr commented that at the stage of discreet lobbying public officials and Thai ambassadors maintained a constant dialogue with their EC counterparts everywhere.[184]

Thus, of the fifteen EC members, the countries of northern Europe supported the aspirations of the complainants. On the other hand, Spain and Portugal were extremely antagonistic to the mediator's opinion. Italy and France were in between. The real turning point in the lobbying was France's support of Thailand's cause after the official visit of the

[183] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

[184] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

Thai Prime Minister to France and discussion of the issue with Jacques Chirac, the French President.[185]

In the final analysis, the success of mediation may be confirmed by the official adoption in the EU Council Regulation No. 975/2003 of 5 June 2003 the tariff-rate quota suggested by the mediator.

The aforesaid regulation has confirmed the fact that in November 2001 the European Community, the Philippines, Thailand agreed to participate in consultations to investigate to what extent the Philippine and the Thai lawful interests were being unduly damaged 'as a result of the preferential tariff treatment implementation for canned tuna originating in ACP States'.[186]

Therefore, the EU Council Regulation recognizes the fact of the dispute between the EC, Thailand, and the Philippines, and articulates that the failure to reach a mutual acceptable settlement incited the aforesaid countries to refer the matter to mediation.

Moreover, the European Community claims that the desire to settle the long-standing problem concerning the canned tuna stimulated the Community to make the decision in favour of the mediator's proposal.

In view of the above, the EU Council regulates that the tariff quota is opened annually for the first period of five years. Also, the volume of quota for the first two years was designated as follows: a) 25 000 tons from the 1st July 2003 to the 30th June 2004; b) 25 750 tons from the 1st July 2004 to the 30th June 2005.[187]

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[185] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

[186] Reglement (CE) № 975/2003 Du Consel du 5 juin 2003 'portant ouverture et mode de gestion d'un contingent tarifaire pour les importations de conserves de thon relevant des codes' NC 1604 14 11, 1604 14 18 et 1604 20 70. Retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:141:0001:0002:FR:PDF

[187] ibid, Article 2

In proceeding further, the European Commission provides that the measures necessary for the implementation of the Regulation include the adjustments and amendments to the Combined Nomenclature and the TARIC. Therefore, the case of mediation between EC, Thailand, and the Philippines should be regarded as a full-scale alternative dispute settlement process which has resulted in the mutually accepted settlement agreement.

2.3.3. Reflections on the case of mediation between the European Community, Thailand, and the Philippines

The previous section contains the comprehensive analysis of the case of mediation in the framework of the WTO. The current section is designed to investigate all advantages and disadvantages of the mediation among the European Community, Thailand, and the Philippines, particularly reflecting on the effectiveness and significance of the aforesaid case of mediation.

To start with, it should be conceded that mediation is appropriate scheme of the settlement of international disputes. Moreover, many experts are prone to believe that the case of 'canned tuna' is the noticeable precedent in the domain of WTO mediation.[188]

Thus, talking about the case of 'canned tuna', it should be pointed out that mediation manifested itself as a very suitable dispute resolution procedure in this case. The suitability of mediation for inter-governmental and inter-state conflicts may be associated with the nature of relationships between states. As the matter of fact, some inter-governmental conflicts involve both considerable risks and high stakes.[189] In such circumstances, states give preference to more discreet and diplomatic ways of solving their disagreements rather than commence fully fledged open conflicts.

In light of this, Horovitz correctly states that subtle diplomacy and low-key negotiations, either direct or indirect ones, are often practiced by the international

[188] Dan Horovitz, 'Mediation in WTO Dispute Settlement', p. 41. Retrieved from http://www.hfw.com/__data/assets/pdf_file/0004/9490/mediation_in_wto_dispute_settlement.pdf
[189] ibid, p. 43

community. The conflict among the European Community, Thailand, and the Philippines is an international dispute beyond controversy. Moreover, this dispute involves high stakes and economic risks because the industry of canned tuna is one of the most important economic developments of Thailand and the Philippines.

According to Horovitz, mediation manifests itself advantageous in international and commercial disputes because of its appeal as a scheme that offers parties absolute control over both the proceedings to which the dispute is submitted and the outcome of the process.[190]

In case of the 'canned tuned' dispute, it is possible to notice that the parties to the dispute had complete control over the proceedings of mediation. At first, they made attempts to settle the disagreement by means of consultations. In this sense, it should be reiterated that the World Trade Organization encourages all member-states to their disputes by way of consultations rather than through litigation. This means that consultations should be regarded as the most preferable method of dispute settlement in the framework of the WTO.

Nevertheless, after the three rounds of consultations, the EC, Thailand, and the Philippines failed to reach any mutual settlement decision. In view of the above, the parties were forced to choose whether to continue seeking the solution to their disagreement in the framework of the WTO's panel process or to experience an alternative non-binding dispute settlement procedure.

Due to the fact that the EC refused to participate in arbitration the complaining states (Thailand and Philippines) decided to proceed on the search for justice by way of mediation under Article 5 of the Dispute Settlement Understanding. The mediation among the EC, Thailand, and the Philippines intertwined with negotiations. As the foregoing discussions must suggest, negotiations are frequently juxtaposed with mediation. The core discrepancy

[190] Dan Horovitz, 'Mediation in WTO Dispute Settlement', p. 44. Retrieved from http://www.hfw.com/__data/assets/pdf_file/0004/9490/mediation_in_wto_dispute_settlement.pdf

between two types of alternative dispute resolution lies in the fact that the latter requires the presence of a neutral third party, whereas the former involves the direct talks between the disputants.

In the case of 'canned tuna', the dispute settlement proceedings were complex and party-coloured. The parties frequently made recourse to negotiations at the stages when the presence of the mediator was not necessary.

The negotiations between the parties as an integral part of the mediation process in the case of 'canned tuna' may be construed under a social-psychological framework for the analysis of international negotiations. Thus, according to Bercovitch, the antecedent of any negotiations is based on the personal factors such as identity of parties, attitudes between parties, cognitive differences, and personality variables.[191]

In the context of the analyzed case, it might be appropriate to note that the personal factors had played a very significant role in reaching the desirable agreement. The personal characteristics of the parties varied. Thus, the EC was represented predominantly by the governmental officials, whereas the interests of Thailand and the Philippines were advocated by the representatives from both public and private sector.

The personal disparity between the parties consists in the fact that the complaining counterparts were two South-Asian states, whereas the defendant was the European Community comprising fifteen states of Europe. There is no doubt that cognitive peculiarities and attitudes of two conflicting parties were different because of apparent geographical, economical and social disparity between them.

To elaborate further, Bercovitch contends that the antecedent of every negotiation is augmented by particular goals.[192] In this sense, it should be stated that the parties to the 'canned tuna' dispute were guided by both common goals and specific disagreements. Thus,

[191] Jaco Bercovitch, Theory and practice of international mediation: selected essays (Taylor & Francis, 2008), p. 111
[192] ibid, p. 111

the common goal of the parties to the dispute was to remain the relationship in the trade of canned tuna, whereas the chief disagreement concerned the tariff rates.

The aforementioned factors are tightly connected with concurrent factors such as situational, interactional, and role circumstances. According to the researcher, situational factors include location, physical arrangements (spatial, communication channels), open versus closed, presence of third party, presence of audience, nature of issues, number of parties, level of representatives, time element, agenda.[193]

In this sense, it should be explicated that in the case of 'canned tuna' the above-captioned situational factors played important role in facilitating the parties to reach mutually accepted settlement. Thus, the parties conducted closed communications. The negotiations between the parties were discreet and official ones. Also, the dispute settlement procedure was held with the presence of a neutral third party - the mediator. In context of the audience, it should be pointed out that the procedure of mediation was carried out in accordance with the principle of confidentiality. Thus, no audience from the outside was present at the stage of dispute settlement.

As far as the level of representatives and number of parties is concerned, it should be construed that the conflict in the case of 'canned tuna' involved the European Community as the defendant and two complaining counterparts (Thailand and the Philippines). Elaborating on the number of the parties, it might be appropriate to note that the European Communities as the defendant in the case is a composite party which consists of fifteen European states. In other words, the allegations charged against the European Community should be recognized as the allegations charged against the fifteen European states which compose the European Community.

[193] ibid, p. 111

As for the level of representatives, it should be elucidated that in the case of 'canned tuna' the parties to the dispute were represented by the state officials who played the main role in the settlement procedures. Nevertheless, the foregoing discussion has revealed that the complaining counterparts of Thailand and the Philippines were also tightly supported and assisted by the representatives of the private sector. To be more precise, the representatives of the Thai fishery and other related industries of economy were involved in mediation between the EC and complaining states (Thailand and Philippines).

In view of the above, it should be reiterated that the situational factors were influential in the case of 'canned tuna'. To proceed further, Bercovitch and other scholars are disposed to think that interactional factors should also be taken into account while analyzing the negotiations between disputants from a socio-psychological perspective. According to the author, interactional factors include communication and social influence strategies such as demands, arguments, proposals, commitments, promises, threats, and concessions.[194]

As far as the case of 'canned tuna' is concerned, it is possible to notice that interactional factors are widely represented in the case. For instance, the interactional factor of demands may be detected if the complainants' claims are analyzed. Thus, the complaining counterparts (Thailand and the Philippines) required from the European Communities to eliminate the inequity in the form of a preferential tariff granted by the EC to canned tuna producers from the African, Caribbean and Pacific states (ACP countries).[195] In this sense, Thailand and the Philippines had clear demands to the European Community.

In the context of the interactional factor of arguments, it should be ascertained that Thailand and the Philippines hired a Brussels law firm which helped them to formulate the claims and substantiated the demands with appropriate arguments, facts, and evidence. The

[194] ibid, p. 111
[195] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

core arguments of the complainants consisted in the fact that Thailand's tuna industry was always export-oriented with almost all its production intended for overseas markets.[196] Also, Thailand contended that, in contrast to the EC, the United States, Canada, and Australia did not create obstacles on the road of the export. Therefore, the EC as a big trade partner of Thailand was considered by the latter to be discriminatory in trading relations by protecting one group of developing countries in detriment to other developing countries.[197]

As the result, the mediator in the case had elaborated a proposal of dispute settlement in favour of the complaining states. Hence, it follows that the interactional factor of proposals manifested itself in the case as well. In addition to the aforementioned contemplations, it is necessary to assert that the role factors were less noticeable in the case. According to Bercovitch, role factors involve pressure towards an agreement, as well as the pressure from one's own group.[198]

As the matter of fact, the mediation between the EC and complaining countries, as well as the consultations between them, was carried out in a discreet diplomatic manner. Assuredly, Thailand and the Philippines were inclined to participate in an alternative dispute resolution scheme in order to avoid the possibility of fully fledged confrontation which could deteriorate the trading relationships with the European Community. Interestingly, the complaining countries gave priority to arbitration, possibly because of the binding nature of this procedure which could result in the legal binding award. However, according to the previous discussions, the EC refused to settle the dispute with Thailand and the Philippines by means of arbitration.

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[196] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

[197] Nilaratna Xuto. 'Faire Face Aux Defis Que Comporte La Participation A L'OMC: Etude De Cas 40: Thailand: Conciliating a dispute on Tuna Exports to the EC'. Retrieved from http://www.wto.org/french/res_f/booksp_f/casestudies_f/case40_f.htm

[198] Jaco Bercovitch, Theory and practice of international mediation: selected essays (Taylor & Francis, 2008), p. 111

Therefore, mediation was chosen by the parties as the most pertinent dispute settlement scheme which involved a neutral third party. To elaborate further, a mental note should be made that the interaction between antecedent and concurrent leads to a consequent. In other words, Bercovitch and other researchers are prone to believe that the interaction between personal factors, goal, role factors, situational factors, and interactional factors determines the outcome of negotiations.[199]

There are only two variants of the outcome of negotiations: failure and success. Pursuant to Bercovitch, the failure of negotiations manifests itself only if the negotiations are broken off or postponed. Contrariwise, the success of negotiation may be reached if: a) the settlement decision had been made on one's terms; b) a fair compromise had been reached; c) a creative solution had been found.[200]

In the case of 'canned tuna', the dispute was settled on the terms of Thailand and the Philippines. To put it briefly, the mediator elaborated the proposal of settlement decision in favour of Thailand and the Philippines. Although the mediator's advisory decision had no legal binding power, Thailand and the Philippines had managed to convince the governments of fifteen member-states of the EC to adopt the decision.

After everything has been given due consideration, it is prudently to evaluate the place of mediation in the system of the World Trade Organization. In this connection, it should be started with the statement that the popularity of the WTO dispute settlement system is not due to the DSU's ADR options. Contrariwise, the WTO's panel settlement system is widely praised for its potentiality, efficiency, novelty, and ingenuity in bringing dispute to a positive close 'in a timely and resolute fashion'.[201]

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[199] Jaco Bercovitch, Theory and practice of international mediation: selected essays (Taylor & Francis, 2008), p. 111

[200] Jaco Bercovitch, Theory and practice of international mediation: selected essays (Taylor & Francis, 2008), p. 111

[201] Dan Horovitz, 'Mediation in WTO Dispute Settlement', p. 48. Retrieved from http://www.hfw.com/__data/assets/pdf_file/0004/9490/mediation_in_wto_dispute_settlement.pdf

Nevertheless, the case of 'canned tuna' showed that the infrequent resort to mediation as an alternative instrument is especially disappointing.[202] The author is disposed to think that the precedent in 'canned tuna' case proved that mediation could produce conclusive and concrete resolutions to an actual conflict. Proceeding further, a preference for negotiated, rather than imposed solutions to parties' conflicts is evident in the WTO approach to dispute settlement. Even where panel proceedings are triggered, panel's findings and proposals may follow only if, as a preliminary condition, 'the parties to the dispute have failed to develop mutually satisfactory solution'.[203]

In this light, Horovitz is prone to believe that it is necessary to augment the strengthening of the rules by ascribing the mandatory status to measures which are currently voluntary.[204] In other words, the experts in the domain of the WTO dispute settlement procedures believe that alternative dispute resolution schemes, such as conciliation, negotiations, and mediation must be improved by changing the settlement decision into the mandatory settlement decision.

However, from the contrasting point of view, it is difficult to imagine how mediation, which requires parties' consent to participate in the process, can reasonably be metamorphosed into the mandatory process. As the matter of fact, it has long been accepted that this would not be admissible until it is going to overly prolong the process. Moreover, the practical experience demonstrates that obligatory conciliation is frequently perceived by the parties to the dispute as a simple pro forma state, before having recourse to the panel procedure.

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[202] Dan Horovitz, 'Mediation in WTO Dispute Settlement', p. 45. Retrieved from http://www.hfw.com/__data/assets/pdf_file/0004/9490/mediation_in_wto_dispute_settlement.pdf
[203] Accord du cycle d'Uruguay, 'Memorandum d'Accord sur les Regles et Procedures Regissant le Reglement des differends', Article 12.7. Retrieved from http://www.wto.org/french/docs_f/legal_f/28-dsu_f.htm
[204] 7 Communication from Paraguay in the framework of the 'negotiations on Improvement and clarifications of the Dispute Settlement Understanding', TN/DS/W/16 of 25 September 2002, p 1

This notwithstanding, mediation can constitute a structural component to be deemed in the context of every dispute that member-states contemplate or trigger by means of consultations in the meaning of DSU Article 4.[205] In the final analysis, it is possible to arrive at the conclusion that mediation has already proven to be effective dispute settlement scheme which may be chosen by member-states of the WTO upon their mutual request. Also, it is essentially to point out that the WTO must find the way to extend its DSU provisions concerning the regulation of mediation in order to provide the parties to the dispute with more comprehensive procedural rules and options.

CHAPTER III: The Construction Contract of the Industrial Production Units

First Section: Formation

3.1.1. General overview of the construction contracts

According to Brian W. Totterdill, a construction contract should be recognized as ' legally binding agreement between two Parties - the Owner, who is generally referred to as the Employer, and the Contractor'.[206] The author continues that, in accordance with the terms of a construction contract, the employer commences the project, makes consistent decisions on what he wants, provides instructions, monitors the construction, makes payment for the project and occupies the finished project. On the other side, the Contractor creates the project and gain financial compensation for his work.

In like manner, Philip Loots and Donald Charrett define a construction contract as any contract where one individual or corporation agrees for valuable consideration to perform construction works, 'which may include building or engineering works, for another'.[207] Similarly, the term 'construction contract' may be explained as a contract or other

[205] Dan Horovitz, 'Mediation in WTO Dispute Settlement', p. 49. Retrieved from http://www.hfw.com/__data/assets/pdf_file/0004/9490/mediation_in_wto_dispute_settlement.pdf
[206] Brian W. Totterdill, FIDIC Users Guide: a practical guide to the 1999 Red book (Thomas Telford 2001), p. 3
[207] Philip Loots and Donald Charrett, Practical guide to engineering and construction contracts (CCH Australia Limited, 2009), p. 23

arrangement under which one party is obliged to conduct construction works, or to provide related goods and services, for another party. In view of the above mentioned one, the construction contract not only regulates the construction works, but also deals with the provision of goods and services. However, the notion of construction works is more relevant to construction contracts. According to Loots and Charrett, the concept of construction works may be comprehensively defined as construction, repair, alteration, restoration, maintenance, demolition, extension or dismantling of structures or buildings, or any permanent or temporary land works which are performed as construction operations at any stage such as preparatory or finishing part of construction work.[208]

In other words, construction contracts may be referred to as 'building contracts' or 'engineering contracts'. Moreover, Loots and Charrett consider the term 'engineering contract' to be an agreement for engineering and construction of an industrial facility elaborated by engineers, such as oil and gas platform or a mineral processing facility.[209] In this sense, Loot and Charrett's term of 'engineering contract' coincides with the definition of a construction contract relevant to industrial production units.

In light of this, it might be appropriate to note that the construction contract regulates the relationships between the Employer and the Contractor by way of prescribing their mutual rights and duties. Thus, Totterdill emphasizes that construction contracts may consist of a bundle of documents. These documents may delineate the particularities of the work which the Contractor has offered to construct and the rewards which will be paid from the Employer to the Contractor.

Moreover, the conditions of the contract usually lay down the responsibilities and commitments of both parties. Certainly, the clear and precise expression in the construction

[208] Brian W. Totterdill, FIDIC Users Guide: a practical guide to the 1999 Red book (Thomas Telford 2001), p. 23

[209] Brian W. Totterdill, FIDIC Users Guide: a practical guide to the 1999 Red book (Thomas Telford 2001), p. 24

contract of its vital conditions may prevent the arousal of an unexpected problem or predicament and avert unnecessary delays and additional costs. All this is possible only if the contracting parties have clearly determined which of them must bear the consequences.

According to Totterdill, a traditional construction contract includes the following constituent: a) The Contractor's Tender; b) The Employer's Letter of Acceptance; c) The Contract Agreement; d) The Conditions of Contract; e) The Technical Documents.[210]

As far as the first constituent is concerned, it should be clarified that the Contractor's Tender is the offer of the Contractor to perform the work for a specific price.[211] Thus, the Employer provides the Contractor with information and documents concerning the Tender, and includes into the Tender the Contractor's offer for the rates of payment for various items of work.

In continuation, the Employer's Letter of Acceptance as the second constituent of a typical construction contract should be understood as the letter from the Employer to the Contractor in which the former accept the Contractor's offer to perform the job. It should be highlighted that the offer and acceptance form legally binding agreement on the terms which are prescribed in the letter of acceptance. As the case may be, the letter of acceptance consequently refers to the Contractor's Tender and any following agreements between the parties.

In the context of the Contract Agreement as an integral part of a typical construction contract, a mental note should be made that this constituent is the outcome of the accepted offer. In other words, the contract agreement is the formal document which acknowledges the offer and acceptance of the contractual parties. That is, the contract agreement established the reciprocal entitlements and obligations between the contractor and the employer.

[210] Brian W. Totterdill, FIDIC Users Guide: a practical guide to the 1999 Red book (Thomas Telford 2001), p. 4
[211] Brian W. Totterdill, FIDIC Users Guide: a practical guide to the 1999 Red book (Thomas Telford 2001), p. 3

Proceeding further, the conditions of contract is another essential part of a typical construction contract providing standard contractual terms which are amended with the purpose to suit the requirements of the employer for the specific project.[212] To put it briefly, the conditions of contract are the unambiguously expressed rights, commitments, deeds, and remedies of the contractual parties.

Finally, the 'technical documents' is the part of a typical construction contract which includes specifications, drawings, bills of quantities, schemes and other technical requirements of the employer for the project accompanied with the detailed calculations 'which make up the Accepted Contract Amount'.[213] It should be elucidated that the aforementioned technical documents usually comprise the integral part of the construction contract which is specified in appendices to the contract.

Taking into consideration the above-captioned constituents, it should be explicated that the core elements of construction contract originate from the international contract law. In light of this, it is possible to agree with Dennis Campbell that one of the general principles of international contract law is that the relationship between contractual parties is governed predominantly by the terms of their contract.[214]

Expatiating Campbell's principle, a mental note should be made that the emergence of standardized contract forms means that these forms are themselves the principles of international contract law. In this connection, standardized contracts in the international construction industry may also be juxtaposed with the principles of international contract law. This presupposition may be substantiated with the observations of Dennis Campbell.

Thus, pursuant to Campbell, the international construction industry has elaborated a bunch of principles applicable to its functioning. These principles are clearly prescribed in construction contracts.

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[212] Brian W. Totterdill, FIDIC Users Guide: a practical guide to the 1999 Red book (Thomas Telford 2001), p. 3
[213] Brian W. Totterdill, FIDIC Users Guide: a practical guide to the 1999 Red book (Thomas Telford 2001), p. 4
[214] Dennis Campbell, International dispute resolution, issue 2010 (Kluwer Law International 2010), p. 136

After that everything has been given due consideration, it is possible to generalize that a construction contract is a collection of documents which comprise legally binding agreement between two parties - the owner, who is generally referred to as the employer, and the contractor - according to which the employer conceives the project and makes payments for the project, and the contractor creates the project and gain financial compensation for his work.

Also, it has been ascertained that the general terms and conditions of typical construction contracts correspond with the principles of international contract law. Thus, the main constituents of a standard construction contract include the contractor's tender, the employer's letter of acceptance, the contract agreement, the conditions of contract, and the technical documents. Thus, the contractor's offer and the employer's acceptance are the main principles of international contract law in the domain of construction.

The next section is conceived to elaborate on the characteristics of construction contracts and particularities of their formation.

3.1.2. Formation of construction contracts

As the foregoing discussion must suggest, the commencement of contracts in international construction industry is regulated by the norms of international contract law. This means that the formation of construction contracts is similar to the formation of other types of international agreements. Thus, according to Brian W. Totterdill, the commencement procedure begins with the emergence of the letter of acceptance.[215]

In its broad sense, the letter of acceptance means the letter by which the employer accepts the contractor's tender offer. Therefore, the notification by the letter of acceptance constitutes the formation of the contract. In this connection, it should be pointed out that all

[215] Brian W. Totterdill, FIDIC Users Guide: a practical guide to the 1999 Red book (Thomas Telford 2001), p. 141

negotiations and consultations on obligations and insurance arrangements must have been finished before the letter of acceptance is issued.

Besides, Totterdill contends that it should be differentiated between the letter of acceptance and the letter of intent. According to the author, a letter of intent may be issued by the employer if he decides, for some reason, to show his intent to enter into a contract. In this sense, the letter of intent clearly stipulates that the employer only intends to conclude a contract in the future. Also, it is incumbent on the issue of the letter of intent to clarify in its text that this letter is not the letter of acceptance. The principal discrepancy between the letter of intent and the letter of acceptance lies in the fact that the former gives birth to no legal consequences, whereas the latter creates a contractual obligation and gives rise to a sequence of events and time periods 'which require that the Employer hand over the site and the Contractor start work on the project'.[216]

Apart from the above, the letter of acceptance adopts the employer's liability to pay the contractor for losses which have been incurred in order to comply with the letter of acceptance. Thus, the successful issuance of the letter of acceptance is connected with the date of commencement. The date of commencement should be regarded as the beginning of the 'time for completion' within which the contractor has consented to construct the works.[217]

When the commencement date has been designated, the engineer is required to calculate the calendar date at the start of the construction period. As rule, the contractor is obliged to proceed expeditiously with the works and he is not empowered to alter the works without pertinent instructions from the engineer.

When all things are considered, it is possible to arrive at the conclusion that the formation of construction contracts is a very simple procedure which requires the issuance of

[216] Brian W. Totterdill, FIDIC Users Guide: a practical guide to the 1999 Red book (Thomas Telford 2001), p. 141
[217] Brian W. Totterdill, FIDIC Users Guide: a practical guide to the 1999 Red book (Thomas Telford 2001), p. 141

the contractor's tender offer and the creation of the employer's letter of acceptance. Nevertheless, the formation of construction contracts may be complicated by different pre-contractual factors.

Thus, according to David Chappell, one can hardly imagine a more prominent cause responsible for difficulties and conflicts in construction contracts than the case when the employer is in hurry.[218] The author purports that the employer's professional advisers should assist the employer in ridding of the idea that construction can be carried out without proper preparation.

In light of this, it is necessary to reconsider the significance of the letter of intent. According to Chappell's opinion, the architect may try to overwhelm the problems of a precipitate start by forming a letter of intent.[219] For the most part, it is incumbent on the contractor to submit a tender, which will be referable to a typical form of contract, specifications and possibly bills of quantities. This letter may also be issued because of the fact that the employer cannot wait for the next several days necessary for the preparation and execution of a formal contract.

Besides, there may be other more substantial circumstances which prevent the employer from issuing the letter of acceptance. For instance, there may be a delay in obtaining funding for the whole project or probably the tender may be too high and the parties decide to negotiate on the reduction.

Thence, the idea of a letter of intent may become a simple solution to the problems associated with the acceptance of the offer. The letter of intent may inform the contractor that the employer is not capable of entering into a contract for the work, but that works can be commenced and conducted in conformity with the specification and drawings 'and if the

[218] David Chappell, Construction contracts: questions and answers (Taylor & Francis, 2010), p. 8
[219] David Chappell, Construction contracts: questions and answers (Taylor & Francis, 2010), p. 8

employer had to stop the work the contractor will be paid for what that had been carried out'.[220]

Hence, it follows that the letter of intent may be regarded by the parties as the perfect option to settle all pre-contractual problems which may emerge between them. This notwithstanding, the author assays that there are several problems connected with so-called letters of intent. First, a non-carefully prepared letter of intent may metamorphose into a binding contract for the entire work on the basis of the contractor's tender.[221]

Secondly, if the letter of intent is properly prepared, either employer or contractor may end the arrangements without notice. In this case, the work being conducted under the letter of intent may create many expenses for the employer if the contractor decides to discontinue working at this stage.

Thirdly, irrespective of the fact that the job done under the letter of intent is usually valued and paid on the same basis as the contract which has been suggested in the tender offer, there is no obligation always to follow this practice.[222] Actually, the contractor has the right to a 'quantum merit', which may be estimated in different ways.

Fourthly, sometimes the letter of intent may be drafted too carefully, so that both parties become bound by it 'until the work is completed although that was almost certainly not the intention'.[223]

In summary, it should be reiterated that the formation of construction contracts may become a complex and unpredictable process requiring from the parties complete determination and cooperation.

3.1.3. Terms and conditions of construction contracts

[220] David Chappell, Construction contracts: questions and answers (Taylor & Francis, 2010), p. 8
[221] David Chappell, Construction contracts: questions and answers (Taylor & Francis, 2010), p. 9
[222] David Chappell, Construction contracts: questions and answers (Taylor & Francis, 2010), p. 9
[223] David Chappell, Construction contracts: questions and answers (Taylor & Francis, 2010), p. 9

In the context of the structure of a construction contract, it might be appropriate to note that the most generally used conditions of contract for international construction projects are published by *Federation Internationale des Ingenieurs-Counseils (FIDIC)*, the International Federation of Consulting Engineers.[224]

Thus, the standard FIDIC contract for civil engineering construction is composed of the FIDIC 'Conditions of Contract for Works of Civil Engineering Construction', commonly known as 'The Red Book'. In 1999, these conditions were replaced by the FIDIC 'Conditions of Contract for Construction'. The FIDIC Conditions for construction contracts consist of the general conditions and the specific conditions.[225] The general conditions are conceived to be used unaltered for all construction projects, whereas the specific conditions are purposed to be incorporated for the particular project 'and include any changes or additional clauses which the employer has decided to include suiting the local and project requirements'.[226]

According to Totterdill, some owners may print their personal versions of the general conditions, which are amended in order to satisfy their own requirements. However, the author does not favour the altering of the general conditions of construction contracts. Thus, one of the benefits of using standard conditions of contract lies in the fact that most of contractors tendering for the project are familiar with the FIDIC standard conditions and are conscious of their duties and outcomes of any failure to fulfil their obligations.

As the matter of fact, any amendments or additions to the general conditions of a construction contract should be formulated in a separate document in order to draw attention of everyone to the changes. If the alterations are included in the main text of the general conditions then the changes may be overlooked and missed.

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[224] Brian W. Totterdill, FIDIC Users' Guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 4

[225] Brian W. Totterdill, FIDIC Users' Guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 4

[226] Brian W. Totterdill, FIDIC Users' Guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 4

In addition, a mental note should be made that the general conditions also include the Appendix to Contractor's Tender, which is a schedule of vital information. Thus, according to Totterdill, the general conditions which refer to the Appendix to Tender include the following sub-clauses: definition of the parties, definition of 'time for completion', definition of 'defects notification period', definition of 'section', addresses for communications, governing law, ruling language, time for access and possession of site, amount of performance security, delay damages, normal working hours, table of cost adjustment data, currencies of payment etc.[227]

In view of the above mentioned one, it should be construed that the general conditions of the Appendix to Tender predominantly delineate organizational facets of the relationship between the employer and contractor. The incorporation of the aforementioned provisions requires from the parties of a construction contract to fill the sub-clauses with pertinent data. Hence, it follows that the general conditions indicate on significant issues which must be described and adopted by the parties.

In the context of particular provisions, it should be ascertained that these provisions are specifically prepared to meet the employer's requirements for the concrete project. According to Totterdill, the particular conditions of a construction contract may be demonstrated as the sub-clauses about definition of 'tests after completion', compliance with laws, procedures for design by contractor, procedures for delivery of goods to site, security of site, period for commencement date from letter of acceptance, evaluation of contract price, insurance details, arbitration procedures *etc*.[228] In light of this, it is necessary to explicate that the particular (specific) conditions of a construction contract accentuate on more concrete and procedural issues of the contractual relationship between the owner and contractor. While the

[227] Brian W. Totterdill, FIDIC Users' Guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 11

[228] Brian W. Totterdill, FIDIC Users' Guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 12

general conditions describe the prerequisites to successful creation of the project, the particular conditions determine the procedural and material rights and obligations of the parties which are going to be realized during the execution of the contract.

Beside, the particular conditions may include the sub-clause about arbitration or about another dispute resolution mechanism. That is, the particular provisions of a construction contract are designed to regulate the relationship between the parties even after the contract having been executed or failed to be properly exercised.

Additionally, Michael D. Robinson stipulates that every construction contract have to contain provisions regarding 'force majeure'. Thus, 'force majeure' as exceptional circumstances must be properly regulated in the text of a construction contract in order to prevent possible dispute and claims in cases when the contract can not be executed. The question of 'force majeure' is also emphasized by Dennis Campbell. According to the researcher, in its broad sense, 'force majeure' events may be defined as circumstances which are beyond the control of either contracting party.[229]

In addition, the author contends that definitions for purpose of construction contracting and the consequences of 'force majeure' events can be expressed in the contracts. That is, insurable circumstances of 'force majeure' are those events which are caused by "Acts of God" or nature, allowing for an extension of time without any financial consequences to either party.[230] In other words, the happening of insurable events of 'force majeure' postpones the execution of the contract without inflicting on the contractual parties additional financial obligations. On the other hand, non-insurable events such as revolutions, wars, and economic dislocation within the country of execution are usually allotted to the employer.

[229] Dennis Campbell, International dispute resolution, issue 2010 (Kluwer Law International, 2010), p. 144
[230] Dennis Campbell, International dispute resolution, issue 2010 (Kluwer Law International, 2010), p. 144

In summary, it should be reiterated that construction contracts are international business contracts which are regulated by international contract law. In this connection, these contracts are grounded on principles of international contract law. In addition, the research has clarified that standardized terms and conditions of construction contracts are published by the International Federation of Consulting Engineers. These typical conditions may be divided into general and particular ones. The general conditions are recommended to be incorporated without being amended into every construction contract, whereas the particular conditions are designed specifically for particular types of construction contracts.

3.1.4. Peculiarities of construction contracts relevant to the industrial production units

Before expounding on the peculiarities of construction contracts relevant to the industrial production units, first and foremost, it is necessary to elucidate what the industrial production units are. In view of the abovementioned one, it is possible to define the industrial production units as the unit which is involved in the industrial manufacture of a certain type of products.

Thus, the generally accepted understanding of the industrial production unit emphasizes the following salient features of the term. Firstly, it is a unit, or, in other words, a single undivided entity. This means that industrial production units are operable independently from other units. Secondly, the industrial production unit is somehow involved in the process of industrial manufacture. That is, industrial production units produce a certain type of product which is going to be subsequently consumed. In other words, the industrial production unit may be reduced to the concepts of a plant or other production facility.

Taking into consideration the aforementioned discussions regarding the meaning of the industrial production unit, it is possible to notice that the independent functioning of the

unit is predetermined by various reciprocal factors such as the availability of investor, availability of the project site, plot, building, facilities, and other constructions.

Therefore, in order to guarantee the independent operability of the industrial production unit, such unit must be properly created. In light of this, construction contracts are conceived to facilitate the creation of various projects including industrial production units.

As far as industrial production units are concerned, it might be appropriate to note that the FIDIC documents offer the conditions of contract for plant and design-build. According to Brian W. Totterdill, the aforementioned conditions may be suitable for electrical and mechanical plant, and for creating engineering works, designed by the contractor.[231]

The construction contract concerning the construction of an industrial production unit contains the same general conditions as construction contracts regarding other projects. However, the contract, according to which the plant or other industrial facility is going to be built, may include very specific conditions as well. Thus, the construction contract of concerning the building of an industrial production unit may regulate particular issues with regard to the ownership of plant and materials.

According to Loots and Charrett's opinion, the term 'plant' should be understood as the machinery and apparatus 'which the contractor is required to provide and hand over to the employer, as specified in the contract, whereas the term equipment is used to mean the machinery and apparatus brought by the contractor onto the site to carry out the construction and afterwards removed'.[232]

The aforesaid differentiation between the concepts of plant and equipment is very important. It should be taken into account that the project which is built under the provisions of the construction contract is plant and not equipment. The fact is that the creation of an

[231] Brian W. Totterdill, FIDIC user' guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 67
[232] Philip Loots and Donald Charrett, Practical guide to engineering and construction contracts (CHH Australia, 2009), p. 147

industrial construction unit is the creation of a plant or other facility, whereas the works under the provisions of the construction contract may be conducted with the help of special equipment, machinery and apparatus which should not be regarded as the components of a plant.

In other words, it is incumbent on the parties of the construction contract clearly to determine what machinery and apparatus will be regarded as equipment which is brought by the contractor to the construction site to use in the construction of the project, and what machinery and apparatus will be recognized as a plant or other industrial facility which the contractor is required to provide and hand over to the employer.

Proceeding further, Loots and Charrett are disposed to think that the answer to the question of ownership on materials and plant consists in the law of property. As the matter of fact, materials and plant provided by the employer remain its property for the continuation of the construction contract.[233] On the other hand, materials and plant supplied by the contractor under the provisions of the construction contract and fixed in place become the property of the owner of the site by reason of becoming a 'fixture' of the land.

The ownership of unfixed plant and materials may be transferred to the employer when they are included in a certificate for payment on the grounds 'that this was the inference to be drawn from the contract'.[234]

Elaborating further, the case law provides certain interpretation of the property rights which are derived from the contractual relationships between the contractor and employer. Thus, in *Partington Advertising Co v Willing and Co*, the court specified that a contractor's equipment should be treated differently from his materials, 'since an individual item of

[233] Philip Loots and Donald Charrett, Practical guide to engineering and construction contracts (CHH Australia, 2009), p. 147
[234] Philip Loots and Donald Charrett, Practical guide to engineering and construction contracts (CHH Australia, 2009), p. 148

equipment is not fixed to the site with the intention of it remaining there permanently'.[235] In light of this, it should be clarified that the contract should articulate that the plant passes to the employer's property either when the plant is transferred to the site (in which case the contractor should have the right to payment for it), or when the contractor becomes entitled to payment for the value of the plant.

The practical application of the aforesaid rule may be exemplified by *Belgrave Nominees Pty Ltd v Barlin Scott Airconditioning (Aust) Pty Ltd* case. The case depicts the situation when the air-conditioning equipment installed by a subcontractor in a building became a fixture and part of the owner's real property. Despite the fact that the contractor who had involved the subcontractor initiated the liquidation before the plant was paid for, the subcontractor was not entitled to remove the equipment, 'and the owner was granted an injunction requiring it to be reinstated'.[236]

In the ultimate analysis, it is possible to generalize that construction contracts relevant to industrial productions units are to a great considerable extent similar to those which concern other types of projects. This notwithstanding, the contractual regulation of the construction of a plant or other industrial facility has its peculiarities and complexities. Thus, one of difficult issues in the construction of a plant is the proper regulation of the property rights on equipment, machinery, appliances and the plant itself. In order to prevent possible disputes and controversies the parties to a construction contract must clearly identify the moment when the property rights pass from one party to another. Also, the parties must specify what objects belong to the contractor and are to be removed by him, as well as what objects become the private property of the employer.

[235] Philip Loots and Donald Charrett, Practical guide to engineering and construction contracts (CHH Australia, 2009), p. 148
[236] Philip Loots and Donald Charrett, Practical guide to engineering and construction contracts (CHH Australia, 2009), p. 148

Second Section: The effect and the expiration

3.2.1. The binding effect of construction contract and its expiration

The effect of construction contracts lies in the fact that these contracts provide the parties with certain rights and obligations. In other words, the properly composed construction contract makes the binding effect on the employer and contractor.[237]Proceeding further other participants of contractual relationship between the employer and the contractor, such as the engineer, a consultant or a subcontractor may take part in the preparation, management and analysis of the claims but cannot be the major persons who makes or receives the claim.

Besides, the binding effect of the contract depends on the range of risks and responsibilities which are taken by the contractual parties. In the context of the FIDIC Conditions of Contract, it might be appropriate to note that the FIDIC form for the Contract Agreement clearly articulates that it is incumbent on the contractor to exercise and accomplish the construction works and remedy any defaults in the works.[238]

In return, the employer is responsible for the payment of the contract price to the contractor. Additionally, Clause 17 of the FIDIC Conditions refers to risks and responsibilities 'for which one Party indemnifies the other Party against losses and some additional risks for which the Employer accepts responsibility for the Cost of repairing any damages to the Work'.[239] Hence, it follows that the issues of risks and responsibilities are tightly connected with the notion of the effect. The fact is that an ineffective contract cannot establish risks and responsibilities of the parties.

[237] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 27.
[238] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 266.
[239] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 266.

Thus, the binding effect of a construction contract remains until its expiration. The most desirable outcome for the contractual parties is when the contract expires in the moment which is mutually agreed by the parties. Therefore, the construction contract normally expires at the moment expressed in the contract or after the complete fulfilment of the contractual obligations by the parties.

Apart from the above, the contract may be brought to the end upon specific circumstances. In this connection, it is reasonably to agree with Loots and Charrett that the process of bringing a contract to the end before the contract has been fully performed by one or other or both parties may be defined differently. For this purpose, the researchers offer such terms as forfeiture, renunciation, determination, rescission, termination, and repudiation.[240]

Thus, in their research the authors use the term 'termination' with the purpose to delineate the process in which a party brings the contract to the end by its own action before the contract has been completely executed. In light of this, it is possible to agree with Loots and Charrett that contracts can be terminated either under the common law or contractual provisions. In addition, a mental note should be made that in some jurisdiction contracts can be terminated under the prescriptions of statutory law.

Thus, the termination of a construction contract under the common law is possible only for significantly serious breach of contract. Besides, Loots and Charrett ascertain that, in contrast to other types of agreements, construction contracts may contain a termination clause which gives the right to the employer to eject the contractor from the site, or to deprive the contractor of the work. As the case may be, termination of the contract is always a critical remedy and must only be practiced after attending the lawyer.

3.2.2. Termination by the employer

[240] Philip Loots and Donald Charrett, Practical guide to engineering and construction contracts (CHH Australia, 2009), p. 246

In practice, it may be very difficult to recognize whether the violation of the contractual conditions is serious enough to entitle the employer to cease the contract under the prescriptions of the common law and to avoid unnecessary damage by the contractor, as opposed to permitting the contractor to go on with the construction and merely claim losses afterwards.

The termination provisions of the common law adopt the required preconditions for a contractual right of termination by the employer and may be depicted as an entitlement to visit the site and inspect the works and subsequently banish the contractor.[241] In this case, the termination clause may be regarded as an addition to the common law rights stemming from the repudiation of a contract.[242]

In view of the above, the term 'repudiation' should be construed as a common law procedure of termination regarding the situation when one party is in contravention of a principal term of a contract, 'or has shown by her/his conduct an intention not to be bound by the contract terms, and the other (innocent) party elects to accept the repudiation, thereby bringing the contract to an end'.[243]

The above-captioned definition of repudiation highlights several important issues. Firstly, repudiation being considered may take place only if one party violates a fundamental term of a construction contract. Secondly, repudiation does not protect exclusively the rights of the employer. Thirdly, repudiation is directed against that party of the contract which showed the intention not to be bound by the contractual terms. Fourthly, the innocent party personally elects to accept the repudiation. This means that the innocent party may not accept the repudiation and, therefore, the contract will not be terminated.

[241] Philip Loots and Donald Charrett, Practical guide to engineering and construction contracts (CHH Australia, 2009), p. 246
[242] Philip Loots and Donald Charrett, Practical guide to engineering and construction contracts (CHH Australia, 2009), p. 246
[243] Philip Loots and Donald Charrett, Practical guide to engineering and construction contracts (CHH Australia, 2009), p. 247

As far as termination of the contract according to contractual conditions is concerned, it should be reiterated that the parties are free personally to designate in the construction contract under which circumstances the contract may be ceased. These occurrences may include bankruptcy, insolvency, liquidation, fraud, the breach of fiduciary duties, unfair behaviour, bribery *etc*.

Also, the parties to a construction contract may determine whether the contractor may have the right to correct certain defects within a specified period of time or not. On the contrary, the parties to the contract may agree that a particular number of defaults may justify immediate termination of the contract.[244]

Apart from the above, the contractual provisions may require from the innocent party to notify the guilty party with regard to peculiar defaults. As the case stands, the existence of a default should be recognized as the necessary condition for the rightful exercise of termination. Therefore, termination will not be correctly performed if the emergence of one of the default events has not take place.

Also, the engineer is authorized to withhold payment certificates for defective work, which may be appropriate so as to possess the money in case if termination becomes inevitable. It means that the engineer is obliged to notify of default within a reasonable amount of time since the complained action has been noticed.

Elaborating on the contractual peculiarities of termination, it might be appropriate to note that a construction contract may be terminated either by the contractor or by the employer. The particularities of termination by the employer may be exemplified by the FIDIC clauses which regulate activities and duties of the contractor.

[244] Philip Loots and Donald Charrett, Practical guide to engineering and construction contracts (CHH Australia, 2009), p. 248

Thus, Clause 15 of the FIDIC Conditions of Contract is titled 'Termination by Employer'.[245] According to the clause, the matter of a breach should be regarded seriously upon the receipt by the contractor of a notice to correct. The aforesaid notice contains the engineer's penultimate warning of dissatisfaction with the contractor's works. That is, the notice to correct is a specific requirement of the engineer to the contractor to fix the failure within a predetermined reasonable time.

Thus, the engineer, requiring the contractor to eliminate the failure, imposes on the contractor certain obligations, which 'may refer to relatively minor matter or it may be an obligation which is crucial to the success of the project'.[246] Hence, it follows that this notice incites the contractor to take action towards remedying the situation. Otherwise, the employer may materialize the right to termination.

This notwithstanding, the researcher considers the notice to correct only as the initial step towards termination of the construction contract. Moreover, this step is deemed to be the starting point of one of the routes which lead to termination. Taking into consideration the aforementioned opinion of Totterdill, it is possible fancy that there are several ways of how to bring the construction contract to the end by the employer.

For clarifying, the creation of the notice to correct may also serve as the sensible supplementation to the alternative modes of termination in order to accentuate on the seriousness of the situation as apprehended by the engineer and to provide the contractor with the final warning with regard to the outcomes of failure.[247]

In case of termination by the employer, the contractor is recommended to obtain legal advice. According to the FIDIC conditions, the termination requires 14 days' notice. Thus,

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[245] Michael D. Robinson, A contractor's guide to the FIDIC conditions of contract (John Wiley & Sons, 2011), p. 134

[246] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 256

[247] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 256

the employer has the right to possess the goods, the documents of the contractor, and any item that he has paid for.[248] Despite this, the employer is not entitled to take possession of contractor's equipment and provisional plant, which needs to be extracted by the contractor from the site without delay.

In case of failure, the termination of a construction contract takes place. According to Brian W. Totterdill, the employer is entitled to bring the construction contract to the end under specific circumstances. For instance, the termination may be triggered by the employer if the contractor fails to provide performance security or to take corrective measures in accordance with the notice to correct.[249]

As continuation, the FIDIC conditions clearly express that the employer is entitled to terminate the contract if the contractor leaves the works or otherwise evidently shows that the goal to discontinue performance of his commitment under the contract. In like manner, the employer has the right to cease the contract if the contractor, without reasonable explanation, slips from the performance of the works according to Clause 8 of the FIDIC conditions.[250] The aforementioned clause regulates the actions and claims respecting commencement, delays and suspension of works.

Also, Totterdill makes evident that the employer may initiate termination of the construction contract if the contractor enters the procedure of bankruptcy or insolvency, moves into liquidation, has an administration or receiving order issued against him, 'compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors [...]'.[251]

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[248] Michael D. Robinson, A contractor's guide to the FIDIC conditions of contract (John Wiley & Sons, 2011), p. 134
[249] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 257
[250] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 257
[251] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 257

In view of the abovementioned one, the construction contract which is based on the FIDIC conditions may prescribe that a set of financial problems and effects occurring in respect of the contractor are the prerequisites to termination of the contract by the employer.

Besides, Totterdill gives prominence to such phenomenon of bribery in the domain of construction. According to the author, the employer may also bring the construction contract to the end in case when the contractor gives or offers to give, either directly or indirectly, to any individual bribe in any appearance, gift, commission, gratuity or other thing of value, 'as an inducement or reward'.[252] The scholar assays that bribe or other valuable thing may be given for doing or refraining from doing any action in association with the contract, or for demonstrating or deterring from showing favour or disfavour to any individual in relation to the construction contract.

In light of this, it should be construed that the problem of bribery is seriously approached by the composers of the FIDIC Conditions of Contract. Assuredly, the threat of bribery is always present in the situation when two parties make an agreement regarding the creation of an engineering project. This problem is more menacing in the domain of industrial production units. Taking into consideration the fact that the construction of industrial production units is a relatively long-term and expensive process, it is possible to presuppose that some forces may have desire to speed up, reduce, or foster the construction by way of bribing responsible officials. As the case stands, the FIDIC Conditions of Contract provides the employer with the opportunity to save its reputation and economical position through terminating the construction contract if the contractor finds to have participated in bribery which is connected with the construction contract.

Expatiating on the research, it might be appropriate to note that it is incumbent on the engineer to value the works as soon as possible after the termination of the construction

[252] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 257

contract. Also, the FIDIC conditions articulate that the contractor should collaborate with the engineer in fulfilling that objective in order to protect his interests.[253]

Aside from the above, the FIDIC conditions make possible to the employer to call the Advance Payment Guarantee and/or the Performance Guarantee in case if the funds appear to be insufficient after the engineer's valuation. The amount of funds in excess, if any available, is to be returned to the contractor according to the FIDIC conditions.

Also, the FIDIC conditions provide that the employer has the right to cease the contract for his own convenience.[254] In this case, payment to the contractor should be determined in conformity with Sub-Clause 19.6 of the FIDIC conditions. The aforesaid Sub-Clause regulates optional termination and release after such occurrences like 'force majeure'. In such circumstances, the contractor is required to collaborate with the engineer in order to guarantee that detailed on-site records are preserved.

Summarizing the conditions of termination by employer, it should be reiterated that the FIDIC conditions regulates this matter in Clause 15. This clause delineates the environment, in which the employer has the right to bring the contract to the end. In other words, Clause 15 of the FIDIC conditions regulates the proceedings which must be followed and the financial arrangements which must be employed.

According to Brian W. Totterdill, termination is radically serious step which undoubtedly leads to hard relationships between two contractual parties. The author claims that the termination of a construction contract should not be initiated without profound deliberate consideration and discussion of possible consequences, as well as without pertinent endeavours to overwhelm any predicament and correct the situation.[255] If the contractor

[253] Michael D. Robinson, A contractor's guide to the FIDIC conditions of contract (John Wiley & Sons, 2011), p. 134
[254] Michael D. Robinson, A contractor's guide to the FIDIC conditions of contract (John Wiley & Sons, 2011), p. 134
[255] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 256

makes objections to the termination and a dispute settler subsequently decides that the employer had the right to bring the contract to the end, then the financial outcomes to the employer would be enormous.

If the employer firmly chooses to cease the construction contract, it is vital that he proceeds through correct steps of termination. Totterdill ascertains that the governing law may also impose particular requirements in addition to those procedures which are delineated in the contract.

Also, termination of the construction contract concerns the property rights of the contractor and the employer which are specifically regulated in construction contracts relevant to industrial production units. That is, the FIDIC conditions discern the temporary plant and equipment from the stationary plant and facilities. Moreover, the conditions stipulate that the temporary plant and equipment can not be taken into possession of the employer in contrast to the stationary plant and the results of the works.

3.2.3. Termination by the contractor

The previous discussion has emphasized the peculiarities of terminating construction contract by the employer. The current subsection is conceived to explore the particularities of terminating construction contract by the contractor. In this connection, Totterdilll associates the contractor's right to suspend or terminate the contract with the payment by the employer to the contractor.

According to the researcher, payment, in conformity with the provisions of the contract, is a significant requirement of any construction contract.[256] As the matter of fact, the obligation of the employer to make payment to the contractor is clearly prescribed in the FIDIC Contract Agreement, while the procedural issues for payment are stated in Clause 14. As the general rule, the amount of payment is based on the contractor's calculations for

[256] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 262

labour and materials. Thus, Clause 16 provides the contractor with the right to diminish the level of work, suspend all work or terminate the contract if the employer fails to follow the contractual prescriptions for payment 'or to provide the information concerning his financial arrangements as required by Sub-Clause 2.4.'[257]

As far as the right of the contractor to suspend the work is concerned, it might be appropriate to note that if the engineer fails to certify or the employer fails to comply with the provisions regulating the financial arrangements and payment, the contractor is entitled to suspend the works (or reduce the rate of work) 'unless and until the Contractor has received the Payment Certificate, reasonable evidence or payment [...]'.[258]

Besides, it should be taken into consideration that the contractor has the right to suspend the contract only after giving not less than 21-day notice to the employer. However, if the contractor subsequently is given the payment certificate, proof or payment before giving a notice of termination, the contractor has to resume normal rate of work as soon as it is practically possible.

Evaluating the aforesaid provisions, it should be construed that the composers of the FIDIC Conditions of Contract endeavour to fulfil the twofold mission. Thus, on the one hand, they aim at protecting the interests of the contractor who is deprived of payment for his job, whereas, on the other hand, they guarantee that the contractor will not reduce the rate of work if there is no reasonable excuse.

Elaborating further, Totterdill fancies that in case if the contractor experiences delay and/or suffer losses because of the suspending work, the contractor is required to give notice to the engineer and should have the right to an extension of time for any such delay.[259]

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[257] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 262
[258] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 262
[259] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 263

Furthermore, the contractor may be entitled to payment of any losses plus reasonable profit, which must be included in the price of the construction contract.

As far as the notice is concerned, it should be added that a Contractor's Guide to the FIDIC Conditions of Contract regulates that if the contractor notifies the employer and then wants to withdraw the notice, the contractual parties may reach an agreement that the notice will have no effect and that the contract is not terminated in consequence.[260] If the notice becomes more effective than the aforesaid proviso it should be deemed as ineffective. Robinson claims that the contractor must obtain legal advice at all stages of the suspension and termination process.

As far as the process of termination by contractor is concerned, it is necessary to point out that the FIDIC determines several conditions according to which the contractor will be entitled to bring the contract to the end.

The first condition is connected with the situation when the contractor does not receive any acceptable evidence within 42 days after giving notice to correct that the employer has complied with his financial arrangements.[261] The second condition articulates that the contractor has the right to terminate the contract if the engineer fails, within 56 days after receiving a statement in conjunction with supporting documents to issue the appropriate Payment Certificate.

In like manner, the contractor may terminate the contract if he does not gain 'the amount due under an Interim Payment Certificate within 42 days after the expiry of the time state in Sub-Clause 14.7 [Payment]'.[262] In other words, the contractor has the right to cease

[260] Michael D. Robinson, A contractor's guide to the FIDIC conditions of contract (John Wiley & Sons, 2011), p. 83
[261] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 264
[262] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 264

the construction contract if the employer fails to make payment within the specified amount of time.

To continue, the FIDIC Conditions of Contract articulate that the bankruptcy, insolvency, or liquidation of the employer may also become the preconditions for the termination of the construction contract by the contractor. The FIDIC Conditions of Contract particularly regulate that the contractor is entitled to terminate the construction contract in case if the employer becomes bankrupt or insolvent, moves into the procedure of liquidation, has an administration or receiving order made against him, or suffers other financial unfavourable situations, or if any similar act is conducted or analogous event takes place.

In addition to the aforementioned events, the contractor may also terminate the contract in the event of a long-term 'force majeure'. Before taking action in the direction towards termination the contractor is required to guarantee that he possess the legally acceptable evidence that the employer has been unsuccessful in meeting the pertinent obligation. For instance, the failure to make payment may be easily proved by means of documentary evidence. However, for the prescription such as (d) 'the Employer substantially fails to perform his obligation under the Contract' it will be harder to provide evidence which would be satisfactory for the Dispute Adjudication Board or arbitration organ if the employer decides to dispute the termination. There is no need to elaborate on the issue of disputes because the next section is utterly dedicated to the delineation of that part.

Returning back to the question of termination by the contractor, it is prudently to expatiate on the outcomes of termination. In this sense, the FIDIC Conditions of Contract unambiguously regulate that after a notice of termination having become effective, the contractor is required to discontinue all further work, with the exception for such work as

may have been entrusted by the engineer for the protection of life or property, or for the security of the works.[263]

In order to elaborate further, the termination of the construction contract by the contractor requires from the contractor to give back contractor's documents, materials, plant and other work, for which the contractor has been paid; and abstract all other goods from the project's site, with the exception of those items which are essential for safety, and leave the site.

Assuredly, the clear determination in the construction contract of the parties' actions for the occasion when the contract is terminated helps to prevent possible conflicts and disagreements. Therefore, the contractual parties are recommended to incorporate in their contract all reciprocal steps and measures taken after the contract is terminated.

Besides, one of the most important outcomes of termination is payment. According to the FIDIC, after a notice of termination having become effective, the employer must immediately return the performance security to the contractor, pay the contractor the payment in conformity with Sub-Clause 19.6. and pay to the contractor 'the amount of any loss of profit or other loss or damage sustained by the Contractor as a result of this termination'.[264] Therefore, taking into consideration the fact that the termination by the contractor is caused by failure of the employer to fulfil his obligations, the contractor has the right to get back his performance security and receive loss of profit and other misfortunes or damages in addition to payment.

3.2.4. Optional termination

As the foregoing discussion must suggest, either the contractor or the employer may bring the construction contract to the end. Also, the previous discussions have revealed that

[263] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 265
[264] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 265

there are circumstances when the employer is specifically entitled to terminate the contract. On the other hand, there are specific conditions which empower the contractor to cease the contract. In addition, the FIDIC Conditions to Contract distinguish circumstances, according to which either the employer or contractor may optionally bring the contract to the end.

These conditions include 'force majeure' and employer's convenience. As far as the issue of 'force majeure' is concerned, it might be appropriate to note that the general particularities of 'force majeure' are regulated in Clause 19 of the FIDIC Conditions of Contract. Thus, according to the FIDIC, the parties should incorporate in their construction contract only the exceptional number of events and conditions constituting 'force majeure' in order to prevent possible conflicts and disputes. Moreover, the list of exceptional events comprising 'force majeure' facilitates the optional termination of the contract if necessary. According to Robinson, if the event or circumstance is exceptionally severe and performance of the construction is prevented for more than 84 days, 'either Party may give a notice of Termination'.[265]

In view of the above mentioned one, it should be construed that 'force majeure' is not itself the justification for any of the contractual parties to terminate the contract. As the matter of fact, a prolonged severe event of 'force majeure' may give rise to the unfavourable situations which make the construction contract unbeneficial. Also, the FIDIC Conditions regulate that, if execution of the contract becomes impossible or unlawful, then the contractor should immediately look for legal advice. In that event, either party will have the right to release from further execution of the contract.[266]

In order to proceed further, it is necessary to point out that the employer may bring the construction contract to the end according to his convenience. Michael D. Robinson

[265] Michael D. Robinson, A contractor's guide to the FIDIC Conditions of Contract (John Wiley & Sons, 2011), p. 139
[266] Michael D. Robinson, A contractor's guide to the FIDIC Conditions of Contract (John Wiley & Sons, 2011), p. 139

ascertains that the employer is entitled to terminate the contract at any time for his convenience by providing the contractor with the notice of such termination.[267] Thus, generalizing the rights of the employer to terminate the contract under the FIDIC Conditions, it is necessary to reiterate that the employer is entitled to bring the contract to the end either because of some default by the contractor or, for convenience, or if the execution of a substantial part or all of the works in progress is prevented by 'force majeure' for a continuous period of 84 days.[268]

Returning back to the employer's convenience to terminate the contract, it should be added that the notice of termination takes effect 28 days after the contractor receives it or when the employer gives back the performance security, 'whichever is the later'.[269] Also, it should be taken into consideration that the employer has no right to terminate the contract in order to complete the construction works himself or to involve other persons in the completion of the works.

Thus, upon optional termination of the construction contract, the engineer is required to determine the value of the completed work and to issue a payment certificate which will include: a) the amounts payable for any job for which a price is prescribed in the contract; b) the cost of materials and plant involved for the works which have been given to the contractor, or which the contractor is liable to accept; c) any other cost or liability which in the conditions was lost by the contractor in the expectation of completing the works; d) the cost of extraction of provisional works and contractor's equipment from the construction site and the return of these items to the contractor's work in his country or in any other

[267] Michael D. Robinson, A contractor's guide to the FIDIC Conditions of Contract (John Wiley & Sons, 2011), p. 81
[268] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 258
[269] Michael D. Robinson, A contractor's guide to the FIDIC Conditions of Contract (John Wiley & Sons, 2011), p. 81

destination at no greater cost; e) the cost of repatriation of the contractor's labour and staff employed entirely in relation to the construction works at the date of termination.[270]

Third Section: The conflicts possibilities

3.3.1. General delineation of the conflicts possibilities relevant to construction contracts

As the matter of fact, the execution of any contract may encounter certain problems and inconsistencies. Taking into consideration the fact, that a contract is always an agreement between two or among more people, it is sometimes difficult to avoid discrepancies and equally satisfy the interests of all parties at the stage of execution. Therefore, the parties are required properly to determine claims and remedies which will be employed if any conflict or disagreement emerges. In the context of construction contracts, it might be appropriate to note that the FIDIC offers a wide range of claims and dispute settlement schemes which may be incorporated in the text of a contract.

Moreover, some researchers are prone to believe that the claims and remedies are the most important sub-clauses relating to contractual issues. That is, Michael D. Robinson fancies that the contractor's representative, as well as the employer's representatives, must be aware of the significance of the claims and remedies relevant to the construction contract.[271]

In like manner, Totterdill assays that the conditions of contract provide the rights and duties of the parties to the contract, '*i.e.* the Employer and the Contractor'.[272] Other participants of the relationships in the domain of construction, such as the engineer, a consultant, or a subcontractor, may be involved in preparation, analysis or management of the claim but cannot be the major personalities who bring or receive the claim.

[270] Dennis Campbell, International dispute resolution, issue 2010 (Kluwer Law International, 2010), p. 147.
[271] Michael D. Robinson, A contractor's guide to the FIDIC Conditions of Contract (John Wiley & Sons, 2011), p. 140.
[272] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 36

As the matter of fact, some outside persons may legally claim that either the employer or the contractor has inflicted damages on them by way of negligence or failing to comply with some legal obligation. This notwithstanding, such claims will be evaluated outside the scope of the construction contract because of the fact that every construction contract regulates relationships exclusively between the contractor and the employer in relation to the construction. Any other derivative relationships may be regulated in the framework of other branches of law or in the context of other agreements.

According to Totterdill, all claims which arise under or in connection to a specific construction contract must move through the particular procedures delineated in that contract. To the author's way of thinking, the claim may be made in conformity with some requirements, such as: a) the claim may correspond with a clause which articulates that the contractor has the right to additional time or finances in specific conditions, or the employer may be entitled to claim money from the contractor; b) the claim may be brought because one party alleges that the other party has failed to realize a commitment under the contractual clause; c) the claim may be brought also because one party declares that it has the right to payment for some other reason, probably because of some legal entitlement, which takes effect irrespective of whether it is regulated in the contract.[273]

3.3.2. Contractor's claims and remedies in relation to the construction contract

Thus, each contractual party has specific claims and remedies which may be realized under certain conditions. For instance, in case of employer's failure to follow the requirements of the contract it may inflict damage on the interests of the contractor. To put it briefly, the largest number of claims is brought by the contractor and may include the claims

[273] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 36

for continuation of time for the completion of the construction works, or for the compensation of money which is expected to be spent subsequently *etc*.[274]

Expatiating on the issue of claims, a mental note should be made that all claims for the extension of time or additional money must follow the procedures of sub-Clause 20.1 of the FIDIC Conditions of Contract, if the parties to the contract decides to form their construction contract in accordance with the aforementioned conditions.

If the parties incorporate the FIDIC Conditions in their construction contract, they must be aware of the fact that the contractor is required to send notice of claims to the engineer 'no later than 28 days after the relevant event or circumstance, otherwise the Contractor will lose any entitlement'.[275] According to Totterdill, the above-mentioned requirement is very important, because a notice to the engineer is the main precondition for the successful settlement of the claim. The author points out that a notice for claims should be brought to the engineer, 'as soon as practicable, and not later than 28 days after the contractor become aware, or should become aware, of the event or circumstance'.[276] Similar to Robinson, Totterdill accentuates on the fact that the inability of the contractor to comply with the aforementioned requirements may lead to the situation when the contractor loses his entitlement to the claim. Also, the failure to follow the requirements of other FIDIC Conditions of Contract which are delineated in sub-Clause 20.1 will inevitably result in the evaluation of the claim being reduced 'if the investigation of the claim was prevented or prejudiced by this failure, under the final paragraph of sub-Clause 20.1.'[277]

[274] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 36
[275] Michael D. Robinson, A contractor's guide to the FIDIC Conditions of Contract (John Wiley & Sons, 2011), p. 140.
[276] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 38
[277] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 38

Taking into consideration the aforementioned formulation, it is necessary to construe that the contractor must stringently follow the temporal and procedural requirements in order to guarantee that the claim will be properly evaluated and examined. In other words, the failure to follow the aforesaid requirements may create the situation when the proper investigation of the claim is prevented or prejudiced.

Thereby, the FIDIC Conditions of Contract do not prescribe that the contractor is automatically entitled to bring a claim against the guilty person. The fact is that the contractor is required to notify the engineer about actual disagreements and demands before the immediate claim is made.

To be more precise, Robinson finds out that the contractor needs to depict the event or circumstance which has given rise to the claim. In that event, the FIDIC Conditions of Contract require from the contractor to provide only a brief description of the prerequisites to the claim. This also means that more detailed delineation of the events and conditions of the claim may be provided later. In other words, the FIDIC Conditions of Contract requires from the contractor only to draw attention of the engineer to particular circumstance or event which has given rise to the claim, whereas the details of the events and circumstances need to be depicted at the next stage of the proceedings.

After the notice of claims has been sent to the engineer, the engineer must guarantee that the notice of claim is sent to the right person at the correct address.[278] Moreover, the FIDIC Conditions prohibit the engineer from delegating his authority in making any determination. Despite this, there is no peculiar requirement for the engineer to react. Michael D. Robinson recommends that the contractual parties should implement a claim-numbering

[278] Michael D. Robinson, A contractor's guide to the FIDIC Conditions of Contract (John Wiley & Sons, 2011), p. 140.

system. That is, each claim must be given a brief descriptive title, 'which shall be constantly used thereafter in the heading of any correspondence or other submittals'.[279]

Thenceforth, the precise and timely collected operational data and other pertinent information are crucial for the precise evaluation of many demands, particularly those claims according to which the contractor has the right to reimburse the cost. At the next stage, sub-Clause 20.1 of the FIDIC Conditions of Contract requires from the contractor to submit his claim in detail and to supplement the claim with contemporary records.[280] From Totterdill's point of view, the aforesaid information is vital for the engineer, and any subsequent dispute settle or arbitrator, to make a precise evaluation of the claim.

In light of this, a mental note should be made that many justifiable claims have been lost, or costs have increased to totally unreasonable extent, because of the failure by the contractor to remain proper records at the time the claim occurred.[281] Furthermore, Totterdill's makes evident that unjustified claims have been successful due to the fact that the engineer failed to keep suitable records on behalf of the engineer.

As the case stands, the properly maintained records may become significant documentary evidence in case of a conflict between the contractual parties.

3.3.3. Claims by the employer

As far as the personality of the employer is concerned, it should be stated that the previous FIDIC Conditions for Contract did not prescribed procedures for claims by the employer.[282] In vain, the employer feasibly deducted any financial compensation he thought he had right to claim and the contractor was forced to bring a claim to recover the deduction.

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[279] Michael D. Robinson, A contractor's guide to the FIDIC Conditions of Contract (John Wiley & Sons, 2011), p. 140.
[280] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 38
[281] Brian W. Totterdill, FIDIC users guide: a practical guide to the 1999 Red and Yellow Books (Thomas Telford, 2006), p. 38
[282] Brian W. Totterdill, FIDIC Users' guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 31.

Such state of affairs undoubtedly created the situation full of problems and disputes, in which it was very difficult for the parties to find a relevant legal norm or a pertinent contractual clause to refer to.

However, the procedures for claims by the employer are currently articulated in sub-Clause 2.5, of the FIDIC Conditions of Contract. According to the aforementioned clause, either the employer or the engineer is required to notify the contractor about any claim, 'as soon as practicable after he became aware of the event or circumstance'.[283] In this sense, the initial procedure of notification resembles that concerning the claims of the contractor. Albeit the procedures are similar, Totterdill is prone to believe that the algorithm in the claims of the employer is less laborious than the procedures for contractor's claims.[284]

Furthermore, the FIDIC regulates that the engineer makes determination in accordance with sub-Clause 3.5 next. Subsequently, each party to the contract is entitled to refer the issue to the Dispute Adjudication Board if they disagree with the engineer's determination. The FIDIC clearly provides that if the employer is deemed himself to be entitled to any compensation under any clause of the FIDIC Conditions or, otherwise, in connection with the contract, and/or to any prolongation of the Defects Notification Period', 'then notice must be given and the sub-Clause 2.5 procedure followed'.[285]

3.3.4. Dispute settlement potentialities

If the parties to the contract cannot find any satisfactory resolution with regard to any claim, then the disagreement between them can overgrow into a dispute. In other words, the parties to the construction contract may not always settle disagreements between them without the involvement of third neutral party. Therefore, some conflicts between the

[283] Brian W. Totterdill, FIDIC Users' guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 31.
[284] Brian W. Totterdill, FIDIC Users' guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 31.
[285] Brian W. Totterdill, FIDIC Users' guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 31.

employer and contractor are resolved by means of outside institutions or persons. As far as the FIDIC Conditions of Contract are concerned, it should be ascertained that any dispute between the employer and the contractor may be settled by way of referring to the Dispute Adjudication Board (DAB).[286]

According to Totterdill, the regulation of the FIDIC's Sub-Clause 20.4 is not limited to disputes as a result of the claim being dismissed, 'but includes disputes of any kind whatsoever, in connection with or arising out of the Contract or the execution of the Works'.[287] This means, that any sort of disagreement stemming from the construction contract or in relation to the performance of construction works may be settled by means of adjudication.

Moreover, Totterdill makes evident that the Dispute Adjudication Board (DBR) elaborates the decision which must be implemented and followed. In that event, it is possible to generalize that the Dispute Adjudication Board (DAB) is the standard institution of adjudication which may be associated with dispute resolution panels.[288] The authors assay that dispute adjudication boards may be created under the aegis of different international organizations. In that event, it is possible to presuppose that dispute panels of the World Trade Organization (WTO) may also be regarded as the Dispute Adjudication Boards (DAB) in cases when the dispute arises from a construction contract or in relation to the construction works. Moreover, the author ascertains that the engineer is sometimes empowered to make a decision in the event of a conflict emerging between the employer and contractor.

[286] Brian W. Totterdill, FIDIC Users' guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 32.
[287] Brian W. Totterdill, FIDIC Users' guide: a practical guide to the 1999 Red Book (Thomas Telford, 2001), p. 32.
[288] Vivian Ramsey, & Thomas Telford Limited, Construction Law Handbook (Thomas Telford, 2007), p. 883.

This notwithstanding, the decision-making authority of the engineer can make impact on the apprehension of his or her neutrality 'if either the employer or the contractor disagrees with the engineer's decision'.[289] Also, the decision-making process itself leads to disputes.

Returning to the question of the Dispute Adjudication Board (DAB), it might be appropriate to note that the FIDIC provisions articulate that if a dispute happens during the course of the construction works, a party to the contract must refer any disagreement to a dispute adjudication board, for decision. Also, the FIDIC Conditions of Contract stipulate that the number of members of the DAB need to be either one or three, 'and must be stated in the appendix to tender'.[290]

In light of this, it should be interpreted that the FIDIC Conditions relevant to the adjudication require from the parties to the contract to choose which adjudication body will be responsible for the settlement of disputes between them. In other words, the parties, which are member states of the World Trade Organization, may decide that any dispute originating from the construction contract or relating to the construction works should be resolved in the framework of the World Trade Organization.

As the foregoing discussion must suggest, the dispute settlement system of the World Trade Organization consists of adjudication bodies, including dispute panels and the Appellate Body. Additionally, the WTO offers alternative methods of dispute resolution, such as arbitration, mediation, conciliation, and good offices. Hence, it follows that WTO's dispute panels may be recognized as dispute adjudication bodies if the conflict stems from a construction contract or relates to the construction work. However, a set of requirements must be fulfilled in order to make possible the dispute settlement under the provisions of the WTO's Dispute Settlement Understanding.

[289] Vivian Ramsey, & Thomas Telford Limited, Construction Law Handbook (Thomas Telford, 2007), p. 884.
[290] Vivian Ramsey, & Thomas Telford Limited, Construction Law Handbook (Thomas Telford, 2007), p. 884.

The first requirement lies in the fact that the parties to a construction contract must be member-states of the World Trade Organization. As the case stands, to refer to the WTO's dispute settlement system, both the employer and the contractor must be a state which participate in the WTO. Logically speaking, the WTO's dispute settlement system has been created for the benefits of its members.

The second one consists in the fact that the WTO's dispute panels may perform the function of adjudication exclusively in respect of disputes which stem from the WTO's agreements. Hence, it follows that any construction contract which is not related to any WTO agreement must not be evaluated as the basis for dispute settlement. To put it briefly, it is incumbent on the WTO's dispute panels to resolve conflicts which emerge from the implementation of WTO's agreements. That is, the WTO's panels are not empowered to settle dispute which have no relation to the World Trade Organization.

In practice, it is possible to tie construction contracts to the World Trade Organization. This linkage may be created in the framework of the GATS Agreement. The previous discussion has revealed that the World Trade Organization oversees a wide range of different agreements which have the status of international legal texts. Thus, the General Agreement on Trade in Services (GATS) is one of the major treaties of the World Trade Organization.

The principal peculiarity of the GATS lies in the fact that it covers all available services, with a negligible number of exceptions.[291] Therefore, construction and related engineering services comprise one sector of services which are covered by the GATS Agreement.[292] According to the WTO, the industry of construction comprises approximately one-tenth of the global GDP and 7 per cent of employment.

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[291] Services: Secteurs de services, Informations par secteur. Retrieved from http://www.wto.org/french/tratop_f/serv_f/serv_sectors_f.htm

[292] Services: Par secteur, Services de construction et services d'ingenierie connexes. Retrieved from http://www.wto.org/french/tratop_f/serv_f/construction_f/construction_f.htm

To put it briefly, construction and engineering services include construction works for building and civil engineering, building completion, installation and assembly work, and finishing work. Also, architectural and engineering services are categorized as part of 'professional services'.[293] In that event, construction contracts which are concluded between member-states of the WTO are regulated by the General Agreement on Trade in Services (GATS). As the matter of fact, construction works should be recognized as paid services and, therefore, GATS regulate the provision of such services.

As far as the issue of the conflicts possibilities is concerned, it might be relevant to note that some prescriptions of the GATS Agreement establish dispute settlement and enforcement procedures. Taking into consideration the fact that the GATS regulates construction services as well, it is possible to presuppose that the parties to a construction contract are entitled to relate to the GATS provisions if they decide to resolve their disputes under the WTO's dispute settlement system.

In light of this, it should be concretized that Article XXIII of the GATS Agreement stipulates that if any member-state deems that any other member-state fails to fulfil its duties or specific commitments under the GATS Agreement, it may with the purpose of achieving mutually satisfactory settlement of the dispute have recourse to the Dispute Settlement Understanding.[294] This prescription is very important for the parties of a construction contract which have certain disagreements and conflicts originating from the contract or in relation to construction works. The aforesaid article of the GATS Agreement provides the disputing parties with the entitlements to have recourse to the DSU and to have their dispute settled by a dispute panel.

[293] Services: Par secteur, Services de construction et services d'ingenierie connexes. Retrieved from http://www.wto.org/french/tratop_f/serv_f/construction_f/construction_f.htm
[294] Accord General Sur Le Commerce Des Services, Article XXIII. Retrieved from http://www.wto.org/french/docs_f/legal_f/26-gats.pdf.

Expatiating on the research, it is necessary to point out that all the disputes between the parties to the construction contract may be settled by alternative means as well. As the foregoing discussion must suggest, there are four popular alternative dispute resolution mechanisms such as arbitration, mediation, conciliation, and negotiation. There is no doubt that the parties to a construction contract may personally decide what type of alternative dispute resolution scheme to choose.

Additionally, the WTO's Dispute Settlement Understanding offers such an alternative design without recourse to dispute panels (adjudication) as good offices. In order to employ an alternative dispute resolution mechanism under the WTO's DSU, the parties to a construction contract need to refer to Article XXIII of the GATS Agreement.

Elaborating on the types of alternative dispute resolution, a mental note should be made that arbitration is one of the most popular alternative schemes in the framework of the GATS Agreement. This may be exemplified by Article XXII of the GATS Agreement. The prescriptions of the article clearly articulate that each member of the Agreement possesses an adequate opportunity for consultation, and the DSU applies t such consultations, and the Council for Trade in Services may refer specific issues in dispute to arbitration.[295] Also, the same provisions emphasize that the decision of the arbitrator is going to be final and binding on the members.

In like manner, Ramsey and Telford ascertain that arbitration and mediation are the most popular alternative dispute resolution mechanisms. According to the researchers, some conflicts may be settled by means of mediation-arbitration (sometimes abbreviated to 'med-arb').[296] The scholars are disposed to think that one of the benefits given for mediation-arbitration is that at the first stage the parties to the dispute have an opportunity to arrive at a settlement agreement by mediation but, in case of failure, the mediator is familiar with the

[295] Accord General Sur Le Commerce Des Services, Article XXII. Retrieved from http://www.wto.org/french/docs_f/legal_f/26-gats.pdf.
[296] Vivian Ramsey and Thomas Telford Limited, Construction Law Handbook (Thomas Telford, 2007), p. 887.

specificities of the conflict, and, therefore this mediator subsequently may be appointed as arbitrator that will result in saving in costs.[297]

After everything has been given due consideration, it is possible to generalize that disputes arising from construction contracts or relating to construction works may be settled in the framework of the WTO. The conducted research has reached the following findings:

- According to the FIDIC Conditions of Contract, any dispute between the employer and the contractor may be resolved by way of referring to the Dispute Adjudication Board (DAB).
- Dispute panels of the World Trade Organization (WTO) may also be regarded as the Dispute Adjudication Boards (DAB) in cases when the dispute arises from a construction contract or in relation to the construction works.
- The principal peculiarity of the GATS lies in the fact that it covers all available services, with a negligible number of exceptions. Therefore, construction and related engineering services comprises one sector of services which are covered by the GATS Agreement.
- Article XXIII of the GATS Agreement allows achieving mutually satisfactory settlement of the dispute through recourse to the Dispute Settlement Understanding.
- Alternative dispute resolution mechanisms may be used by the parties to a construction contract as well.

[297] Vivian Ramsey and Thomas Telford Limited, Construction Law Handbook (Thomas Telford, 2007), p. 886.

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